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**MCKENZIE V. BAILLARD.**

(*Supreme Court of Colorado. May 23, 1890.*)

IRRIGATION — INJUNCTION — APPEAL — REVIEW —  
RECORD.

1. The supreme court cannot review the evidence unless the same is incorporated into the record. The stipulation of counsel that the testimony as taken by the court stenographer shall be the record in the case does not supply the place of a bill of exceptions duly authenticated and certified.

2. A plaintiff had obtained an injunction restraining defendant from constructing an irrigating ditch through the land of the former. On final hearing the injunction was dissolved, and the cause dismissed. There was nothing in the pleadings about sluices. *Held*, that an order of court requiring defendant to build sluices for irrigating water wherever necessary was ineffectual for any purpose on account of its uncertainty.

(*Syllabus by the Court.*)

Appeal from district court, Pitkin county.

*D. H. Waite*, for appellant. *Porter Plumb*, for appellee.

**ELLIOTT, J.** The appellant, McKenzie, was plaintiff below. He brought suit in the district court against the appellee, Baillard, as defendant, alleging in his complaint that defendant unlawfully, without the consent, and contrary to the command, of plaintiff, was engaged in digging and cutting a ditch through plaintiff's land without condemnation proceedings, and without having obtained the right of way therefor. The prayer of the complaint was that defendant might be enjoined from the construction of the ditch. A temporary injunction was granted. The defendant answered, admitting the plaintiff's possession of the land described in the complaint, except as to portions covered by defendant's ditch; denied certain allegations of the complaint; and, for a further defense, averred that defendant was the owner of lands adjoining said lands of plaintiff; that defendant's lands required irrigation, and that said ditch was being constructed for such irrigation purposes; that for a valuable consideration plaintiff had agreed that defendant might construct such ditch for such purposes across the lands of plaintiff where it might be convenient to carry water to defendant's lands; and that, in pursuance of

such agreement, defendant was constructing the ditch as aforesaid, and had expended a large sum of money in and about said work, without objection from plaintiff, prior to the commencement of this action and the obtaining of the injunction. Defendant prayed for the dismissal of the cause, for his costs, and for such other and further relief as to the court should seem proper. The case was tried before the court without a jury. After hearing evidence on both sides, the court, upon the issues joined, found in favor of defendant, dissolved the temporary injunction, and rendered judgment in favor of defendant for costs. The record of the judgment concludes as follows: "And it is further ordered that the defendant herein be required to build sluices for irrigating water wherever necessary." The plaintiff brings this appeal, and assigns for error that the finding of the court was against the law and the evidence, and especially that the order of the court in reference to building sluices is erroneous.

The court cannot review the evidence, for the reason that the same is not incorporated into the record. The stipulation of counsel that "the complaint, affidavits, demurrer, motions, and answer, together with the testimony as taken by the court stenographer, shall be the record in the case," does not supply the place of a bill of exceptions duly authenticated and certified. This has been repeatedly decided by this court. *Molandin v. Railroad Co.*, 3 Colo. 173; *City of Denver v. Capelli*, Id. 235; *Ross v. Duggan*, 5 Colo. 85.

Appellant complains, with much reason, of the order of the court requiring defendant "to build sluices for irrigating water wherever necessary." There is nothing in the complaint relating to sluices. The answer contains nothing in reference to them, and asks for no affirmative relief, except it be by the prayer for general relief. The following passage from appellant's brief in regard to the order about necessary sluices is certainly quite pertinent: "How many are there to be? Where are they to be? When are they to be constructed? Who is to be the judge of the necessity, number, location, size, and time of construction, whether plaintiff or de-

fendant, remains undetermined; and, in these respects, a court of equity, assuming to settle a controversy between the parties, leaves plaintiff entirely at defendant's mercy." In form, the order of the court in relation to sluices would seem to be a burden imposed upon the defendant, Ballard; in effect, it is liable to be construed as a license to defendant to build sluices whenever and wherever he chooses. Considering the circumstances of the case as they appear from the record before us, we feel constrained to declare the order of the court in relation to sluices to be ineffectual for any purpose on account of its uncertainty, and that it shall not prejudice or affect the rights of the parties in any manner as an adjudication. In other respects the judgment of the district court will be affirmed; but appellant shall recover his costs in this court against appellee. Affirmed.

#### LAW V. NELSON.

(Supreme Court of Colorado. May 16, 1890.)

##### APPEAL FROM COUNTY COURT—APPEARANCE.

1. An appeal is not taken from the county to the district court by reason of the fact that it is "prayed and allowed." The appeal-bond must be filed and approved before the appeal can be considered "taken," that is, perfected; and, if this be not done on the day on which judgment is rendered, the appeal may be dismissed.

2. A motion confined to the single object of enforcing a statutory right, though not special in form, cannot be considered a waiver of such right, as by a general appearance for other purposes.

(Syllabus by the Court.)

##### Appeal from district court, Lake county.

The section of the statute referred to in the opinion is as follows: "Sec. 4. If the appeal be not taken on the same day on which the judgment is rendered, the appellant shall serve the appellee, or his attorney of record, within five days after the appeal is taken, with a notice in writing, stating that an appeal has been taken from the judgment therein specified, which notice shall be served by delivering a copy thereof to such appellee or his attorney of record. If the appellant fail to give notice of his appeal when such notice is required, the appellee may, at any time before such notice is actually served, and after the time when it should have been served, have the judgment of the county court affirmed or the appeal dismissed, at his option." Sess. Laws 1885, p. 159.

*D. E. Parks, for appellant.*

ELLIOTT, J., (after stating the facts as above.) Nelson, who was plaintiff below, brought suit against Law in the county court of Lake county. The case was tried May 13, 1886, resulting in judgment for the sum of \$50 and costs in favor of plaintiff. An appeal was prayed and allowed upon conditions, on the same day, as shown by the record, as follows: "To which order and judgment, and to the rendering thereof by the court, said parties, and each of them, by their counsel, except and pray an appeal therefrom, each of them, to the district court, which prayers are hereby granted, provided said parties file their appeal-bonds herein within ten days from

this date. Said plaintiff's bond to be in the sum of one hundred dollars, and said defendant's as fixed by law. Said bonds to be conditioned as required by law." On May 20, 1886, an appeal-bond by the defendant, Law, was filed and approved in the county court. On May 3, 1887, plaintiff's attorney filed a motion in the district court to dismiss the appeal, in the following words: "And now comes the plaintiff, by A. W. Stone, his attorney, and moves the court to dismiss the appeal in said cause on the ground that no notice, in writing, stating that an appeal had been taken from the judgment rendered in the county court of said county, has ever been served on the plaintiff or his attorney." The motion was accompanied by the attorney's affidavit to the effect that notice in writing of the appeal had not been served upon him, and that he was informed and believed that no such notice had ever been served upon plaintiff, and that plaintiff was absent from the county. This was the only showing made by either party as to the question of notice. Upon this motion and affidavit the district court dismissed the appeal. To reverse the judgment of dismissal, the defendant brings the cause to this court.

The principal question presented by the assignment of errors relates to the construction of section 4 of the act of 1885, p. 159, concerning appeals from county to district courts. Since this cause was brought to this court the question has been determined in another case. The construction given by this court may be stated thus: An appeal is not "taken" from the county court to the district court, within the meaning of the act of 1885, by reason of the fact that an appeal to the district court is "prayed and allowed" on the same day on which the judgment is rendered; but the appeal-bond must be filed and approved before the appeal can be considered taken,—that is, perfected; and, if this be not done on the day on which judgment is rendered, the notice in writing must be served, or the appeal may be dismissed. *Hunt v. Arkell*, 13 Colo. 543, 22 Pac. Rep. 826. The case of *Cates v. Mack*, 6 Colo. 401, cited by counsel for appellant, is not in point; and the decision in *Allenspach v. Wagner*, 9 Colo. 127, 10 Pac. Rep. 802, was based upon a different statute. The case of *Swenson v. Insurance Co.*, 4 Colo. 475, supports the decision of *Hunt v. Arkell* as to what is meant by an appeal being "taken."

The contention by counsel for appellant that the appeal as prayed and allowed was joint, and that, therefore, appellee is estopped from saying that he did not have notice thereof, is not tenable. Where there is only one plaintiff and one defendant, a joint appeal by such adverse parties is not, in the nature of things, contemplated by the statute; and the language of the order in this case will not bear such a construction. Notwithstanding its peculiar phraseology, the record shows that each party prayed an appeal, and that a separate appeal was allowed to each on different conditions. It was by no means certain that an appeal would be "taken" by either party simply because each party prayed

and obtained an order allowing the same. Therefore, such prayer and allowance did not dispense with the service of the written notice required by the statute.

The claim that the motion of appellee in the district court to dismiss the appeal was a general appearance, and amounted to a waiver of his right to have the appeal dismissed, is not well taken. The motion, though not special in form, was confined to the single purpose of dismissing the appeal. If the motion had been for any other purpose than the enforcement of the right given by the statute, the multitude of cases cited by counsel would be in point; but to hold that appellee waived his statutory right, when he did nothing whatever in the case but insist upon such right, is carrying the doctrine of general and special appearances beyond the limits of modern authorities. The statute says "appellee" may have the appeal dismissed under certain circumstances specified. It does not prescribe the form in which he shall seek such relief. Hence, when he files a motion confined to such single object, supported by affidavit showing the existence of the specified circumstances, in the absence of contrary evidence the relief should be granted. *Crary v. Barber*, 1 Colo. 172; *Smith v. District Court*, 4 Colo. 235; *Flake v. Carson*, 33 Ill. 518; *Miles v. Goodwin*, 35 Ill. 53; *Blackburn v. Sweet*, 38 Wis. 578. The judgment of the district court dismissing the appeal was not error, and the same is accordingly affirmed.

# *In re BREENE.*

(Supreme Court of Colorado. May 9, 1890.)

## CONSTITUTIONAL LAW—TITLES OF STATUTES.

Gen. St. Colo. § 2948, which provides that "county treasurers shall be liable to a like fine [\$1,000] for loaning out, or in any manner using, for private purposes, state or county funds in their hands, and the state treasurer shall be liable to a fine of not more than ten thousand dollars for a like misdemeanor," having been passed as a part of an act entitled "An act to provide for the assessment and collection of revenue, and to repeal certain acts in relation thereto," is void as in conflict with Const. Colo. art. 5, § 21, which provides that every act shall be void as to any subject embraced in it which shall not be expressed in its title.

Petition by Peter W. Breene for a writ of *habeas corpus*.

*S. D. Walling and C. S. Thomas*, for petitioner. *Sam. W. Jones, L. S. Dixon, and Wells, McNeal & Taylor*, for respondents.

HELM, C. J. The right to inquire by *habeas corpus* into the matters presented in this case is not seriously challenged by respondents. Therefore, though counsel for petitioner consider the question at length, jurisdiction in the premises will be assumed without discussion. The indictment under which petitioner is held in custody charges him with lending public moneys for private gain while occupying the office of state treasurer. He is not accused of otherwise misappropriating or misusing state funds, nor is any deficit or defalcation in connection therewith averred. The accusation is based upon the alleged fact that he received for his pri-

vate advantage, from the banks mentioned in the indictment, interest upon state funds deposited therein by him while, as treasurer of state, he was the constitutional custodian thereof.

The act mentioned in the indictment is not an offense at common law. The constitutional provision (section 13, art. 10) which forbids the making of profit by public officials out of public funds, and classifies the forbidden act as a felony, is conceded not to be self-executing. Therefore, statutory authority must be found to support the present proceeding against petitioner. If such authority exists, it is embodied in section 2948 of the General Statutes, which reads: "County treasurers shall be liable to a like fine [\$1,000] for loaning out, or in any manner using, for private purposes, state or county funds in their hands, and the state treasurer shall be liable to a fine of not more than ten thousand dollars for a like misdemeanor, to be prosecuted by the attorney general in the name of the state." Several serious objections are urged against the validity of the foregoing statute. One of these objections being decisive of the case, the others will not be considered. The title of the act in which the section above quoted appears is "An act to provide for the assessment and collection of revenue, and to repeal certain acts in relation thereto." It is claimed that the subject-matter of the section is not clearly expressed in this title, and therefore that the statute is in conflict with the following section of the constitution: "No bill except general appropriation bills shall be passed containing more than one subject, which shall be clearly expressed in its title; but if any subject shall be embraced in any act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed." Section 21, art. 5. Regarding this constitutional provision, we observe—*First*, that it is mandatory. Such is the view expressly declared by this court, and, with but two or three exceptions, adopted elsewhere. *Railroad Co. v. People*, 5 Colo. 40; *Wall v. Garrison*, 11 Colo. 515, 19 Pac. Rep. 469. *Second*, that it should be liberally and reasonably interpreted, so as to avert the evils against which it is aimed, and at the same time avoid unnecessarily obstructing legislation. *Clare v. People*, 9 Colo. 122, 10 Pac. Rep. 799; *Dallas v. Redman*, 10 Colo. 297, 15 Pac. Rep. 397. *Third*, that it embraces two mandates, viz.: one forbidding the union in the same legislative bill of separate and distinct subjects, and the other commanding that the subject treated in the body of the bill shall be clearly expressed in its title. Each of these mandates is designed to obviate flagrant evils connected with the adoption of laws. The former prevents joining in the same act disconnected and incongruous matters. The purpose of the latter is thus tersely and forcibly stated in *Dorsey's Appeal*, 72 Pa. St. 192: "Another purpose was to give information to the members, or others interested, by the title of the bill, of the contemplated legislation; and thereby to prevent the passage of unknown and alien subjects, which might be

colled up in the folds of the bill." The provision undoubtedly deals with legislative procedure; but obedience thereto directly results in advising the people of the contents of bills that have become laws. It is quite as important to the official or the private citizen that he have the highest facilities for knowing the existing law, as that he have opportunity to offer criticism or suggestion upon pending legislation. He should not be left to discover, "colled up in the folds" of an act apparently in no way concerning him, a provision affecting his most important interests. For instance, legislation seriously modifying the mechanic's lien or exemption laws should not be hidden under a title relating exclusively to railroads. This, the constitutional provision before us prevents. Therefore, while its primary purpose is to avoid surprise and fraud upon the legislators and people in the enactment of laws, a further important and beneficent end is attained. Nor is the constitution unreasonable in this respect, or difficult to comply with. When intelligently and carefully observed, it embarrasses proper legislation but little. The general assembly may, within reason, make the title of a bill as comprehensive as it chooses, and thus cover legislation, relating to many minor but associated matters. For example, an act entitled "An act in relation to municipal corporations" may provide for the organization, government, powers, duties, offices, and revenues of such corporations, as well as for all other matters pertaining thereto. "The generality of a title," says Judge COOLEY, "is no objection to it so long as it is not made a cover to legislation incongruous in itself, and which by no fair intendment can be considered as having a necessary or proper connection." Const. Lim. (5th Ed.) 174, 180. It is not essential that the title shall specify particularly each and every subdivision of the general subject. Such a requirement would lead to surprising and disastrous results. Many titles would not only be absurdly prolix, but the laws themselves would be endangered by virtue of the inhibition against duplicity of subjects. *Edwards v. Railroad Co.*, 13 Colo. 59, 21 Pac. Rep. 1011; *People v. Goddard*, 8 Colo. 432, 1 Pac. Rep. 301. Efforts to cover specifically in the title all subordinate matters treated of in the act have already jeopardized legislation in this state, and only by the most liberal interpretation has the court been able to save the statutes. *Canal Co. v. Bright*, 8 Colo. 141, 6 Pac. Rep. 142; *Clare v. People*, supra. But the legislature may, on the other hand, undoubtedly contract the scope of a title to the narrowest limits. When, however, in the exercise of this discretion, it sees fit to thus restrict the title, care must be taken not to transcend, in the body of the bill, the limit thus voluntarily fixed. "An act to amend section 78 of chapter c" must not amend sections of chapter c other than the one named. *People v. Fleming*, 7 Colo. 230, 3 Pac. Rep. 70. "An act to provide for the payment of county and road taxes in cash," must not authorize the purchase of outstanding warrants at the lowest price offered, and create a special fund for this

purpose. *People v. Hall*, 8 Colo. 435, 9 Pac. Rep. 34. If the title of a bill be limited to a particular subdivision of a general subject, the right to embody in the bill matters pertaining to the remaining subdivisions of such subject is relinquished. To hold otherwise would be to disobey the constitutional mandate, and invite the grave evils sought to be avoided thereby.

It will not do to say that the general subject of legislation may be gathered from the body of the act, for, to sustain the legislation at all, it must be expressed in the title. Moreover, we are bound to assume that the word "clearly" was not incorporated into the constitutional provision under consideration by mistake. It appears in but few of the corresponding provisions of other state constitutions; a fact that could hardly have been unobserved by the convention. That this word was advisedly used, and was intended to affect the manner of expressing the subject, we cannot doubt. The matter covered by legislation is to be "clearly," not "dubiously" or "obscurely," indicated by the title. Its relation to the subject must not rest upon a merely possible or doubtful inference. The connection must be so obvious as that ingenious reasoning, aided by superior rhetoric, will not be necessary to reveal it. Such connection should be within the comprehension of the ordinary intellect, as well as the trained legal mind. Nothing unreasonable in this respect is required, however, and a matter is clearly indicated by the title, when it is clearly germane to the subject mentioned therein. Had the corresponding constitutional provision in Wisconsin contained the word "clearly" we doubt if the court would have reached the conclusion expressed in *Mills v. Charleton*, 29 Wis. 400. The supreme court of that state has made, we believe, a broader application of the rule under discussion than it has received elsewhere in the Union.

Let us proceed, in the light of the foregoing suggestions, to consider briefly the legislation before us. Under a title providing "for the assessment and collection of revenue" is placed a provision making it a crime for the state treasurer to "loan out or in any manner use for private purposes" the public funds in his hands. That such uses of state funds should be forbidden, will hardly be doubted; and that disobedience of the inhibition should be severely punished is equally beyond question. But the inhibition and the punishment should not be secreted in an act whose title expresses a wholly dissimilar subject. Can it be said that the crime of receiving and retaining interest on public funds, while deposited in responsible banks for safe-keeping, with its punishment of \$10,000 fine, (if the statute covers such acts,) is clearly germane to the subject of raising revenue, either by the assessment and collection of taxes or otherwise? Had the legislature been content with the title, "An act in relation to revenue," the question before us would be relieved of the present embarrassment. Any and all provisions for raising, preserving, and disbursing public funds would be germane to the general subject thus expressed. The acts forbidden undoubtedly



relate to these funds, and the statute under consideration would, so far as the present objection is concerned, be valid. But that body saw fit, in its wisdom, to limit the bill by its title to one of the subordinate divisions of the above general subject, viz., the "raising" of revenue. The title gives no intimation that the act deals with the custody of public funds after they have reached the treasurer's hands. Proceedings relating to the preservation or disbursement of taxes are not incidents or concomitants to the assessment or collection thereof. The words "assessment" and "collection" are used alone. They have a clear and definite meaning, and by their exclusive use the ideas of "custody" and "disbursement" are rejected. With this rejection was necessarily relinquished the power to prescribe in the act regulations or inhibitions incidental to the control, preservation, or disbursement of funds in the treasury. It is a matter of vital importance that revenue, after its collection, be properly preserved and expended. But while regulations looking to these ends are connected with the general subject of revenue, they are not germane to the specific subject of raising or obtaining revenue. Again, the proscribed uses of public funds apparently reach all revenue in the treasurer's hands, whether received through the assessment and collection of taxes or from other sources; and the most imaginative mind must fail to trace any connection between the forbidden acts, in so far as they relate to the use of funds accruing from the sale of public lands, payment of fees, and the like, and the subject of assessing and collecting taxes. We say "taxes," because, while the word "revenue" is employed, the act was unquestionably designed to deal alone with revenue obtained by taxation. Further, the statute in question, together with section 13, art. 10, of the constitution above mentioned, was doubtless inspired more by considerations of public policy than the suspicion of danger to the public revenue. The treasurer's bond protects the state from pecuniary loss, and the criminal law provides a punishment for the embezzlement of public moneys. Private speculation with public funds by the officials, custodians thereof, is emphatically *contra bonos mores*. Its inevitable tendency is to corrupt political and official action, and degrade the public service. The two additional considerations last above mentioned reinforce the view that the legislation in question would not be looked for under a title confined to the assessment and collection of taxes. But few persons, however cautious, would dream of finding concealed in a bill thus christened the legislation in question. We are compelled to hold the act, in this respect, unconstitutional.

It is considered unnecessary to enter into a critical review or analysis of cases supporting the foregoing conclusions. The following is, however, a partial list of authorities, in addition to the Colorado cases already cited, that are believed to be pertinent: *Ellis v. Hutchinson*, 70 Mich. 154, 38 N. W. Rep. 14; *State v. Young*, 47 Ind. 150; *People v. Allen*, 42 N. Y. 405;

*People v. Commissioners*, 53 Barb. 70; *Dorsey's Appeal*, 72 Pa. St. 192; *City of San Antonio v. Gould*, 34 Tex. 49; *State v. Barrett*, 27 Kan. 213; *Brown v. State*, 79 Ga. 324, 4 S. E. Rep. 861; *Durkee v. City of Janesville*, 26 Wis. 697; *Cooley, Const. Lim.* (5th Ed.) 170 et seq.; *Nester v. Busch*, 64 Mich. 657, 31 N. W. Rep. 572; *Thomas v. Collins*, 58 Mich. 64, 24 N. W. Rep. 553; *Northwestern Manuf'g Co. v. Circuit Judge*, 58 Mich. 381, 25 N. W. Rep. 372; *Smith v. Auditor General*, 20 Mich. 398; *Igoe v. State*, 14 Ind. 239.

The statute under which petitioner's detention is made, being unconstitutional, the prosecution falls, and he should be set at liberty. It is accordingly so ordered. Petitioner discharged.

# STEVENSON v. PALMER et al.

(Supreme Court of Colorado. May 9, 1890.)

## ATTACHMENT—LIEN—FORTHCOMING BOND.

1. Under Gen. St. Colo. 1883, § 2015, which provides that attached property shall be released on the execution by defendant, with responsible sureties, of an undertaking conditioned to redeliver the property, or pay the amount of the judgment, if judgment be recovered by plaintiff, and the attachment be not dissolved, the lien of the attachment is not destroyed by the delivery of the property to defendant on the execution of the undertaking.

2. When attached property has been delivered to its owner on the giving of a forthcoming bond, and has then been taken on execution in a subsequent suit, the sureties on the forthcoming bond cannot maintain an action of replevin against the officer levying the execution.

## Appeal from superior court of Denver.

Upon the 1st day of August, 1887, Emma C. Whitsett brought suit in a justice's court against Frank F. Noxon, in which suit a writ of attachment was issued by the justice, and levied by appellant, as constable, upon the goods here in controversy. Soon after the levy was made, appellees herein, Peter L. Palmer, John W. Horner, Frank F. Noxon, and Dora Noxon, caused the property to be released by giving a forthcoming bond, as provided by statute, and Noxon again went into possession of the goods, when they were again levied upon by appellant under a writ of attachment issued at the suit of one P. O. Gaynor against said Noxon. In this suit a forthcoming bond was also given, signed by Frank F. Noxon, Peter L. Palmer, and E. S. Fish. In the suit instituted by Gaynor against Noxon, the plaintiff having obtained judgment in his favor, Noxon delivered the goods to the constable, Stevenson, upon the execution in this case. Thereupon appellees, who were sureties upon the forthcoming bond in the first suit, demanded the goods, and, upon the constable refusing to give them up, brought this action of replevin for their recovery, while the Whitsett suit was yet pending and undetermined. The present suit was originally commenced in a justice's court, and from thence taken by appeal to the superior court of the city of Denver. The trial in the latter court resulted in a judgment in favor of appellees for the possession of the property, and directing its return, or, in case such a return could not be had, then ap-

pellets to have and recover of and from appellant its value, which was adjudged to be \$150, and also for costs.

*W. J. Weeber*, for appellant. *P. L. Palmer*, for appellees.

**HAYT, J.** The statute under which the redelivery bonds were both given, reads as follows: "The defendant may, at any time before final judgment in the action, release all property which may have been seized by virtue of the attachment writ, by his executing an undertaking as herein-after provided. Such undertaking shall be given by the defendant to the plaintiff, be signed by two responsible sureties, each a resident of the county in which the suit is pending, and shall be to the effect that in case the plaintiff recover judgment against the defendant in the action, and the attachment is not dissolved, the defendant will deliver to the constable all property which has been seized by him by virtue of the attachment writ, or, on failure so to do, will pay to the plaintiff the full value of the property attached, not exceeding the amount of the judgment and costs recovered in the action." Gen. St. 1883, § 2015. In case of levy of the writ of attachment, unless a redelivery bond be given, the officer must retain the custody of the property awaiting the result of the attachment proceedings. This is essential, in order that the property may be under the control of the court to answer any demand which may be established against the defendant by the final judgment in the case. If the bond be given, the responsibility of the obligors is substituted for that of the officer for the property attached; the principal object of the bond being to insure the safe-keeping and faithful return of the property attached to the constable, although, in the alternative, the obligors may discharge themselves from their obligation by paying the full value of the property, not exceeding the amount of the judgment and costs in the action. Were it not for this alternative provision, there could be no question as to the continuance of the lien, although the bond be given. The sole condition would then be that the property shall be returned to the constable if plaintiff recover judgment, and the attachment be not dissolved. To hold that the property would be liable to execution under such circumstances would be to allow third parties to produce a forfeiture of the conditions of the bond; for a levy would make the performance of the conditions of the bond impossible. And the courts and law writers unite in saying that the property is not so liable. *Drake*, Attachm. § 331; *Wade*, Attachm. § 193; *Wap. Attachm.* 396, 397; *Tyler v. Safford*, 24 Kan. 580; *Roberts v. Dunn*, 71 Ill. 46; *Hagan v. Lucas*, 10 Pet. 401. "The sheriff, by intrusting the property to the defendant under such bond, does not lose his legal possession of it. The defendant holds under the sheriff, so that the *res* is still in the constructive possession of the court. The ancillary proceeding in the suit does not abate by virtue of the forthcoming bond, which would inevitably be the case were the court to lose its custody and jurisdiction of the property, and the defendant to

regain unqualified possession of it." *Wap. Attachm.* 397. But where, as with us, the statute provides that the bond is to be given to the plaintiff, and conditioned that the property shall be returned to the officer, or its value paid to the plaintiff, it must be admitted that the authorities are so conflicting as to create some doubts as to the law on the subject. Upon this question, Mr. *Waples* gives it as his opinion that property thus released may be sold by the defendant, subjected to new attachments by other creditors, or levied upon in execution, in like manner as though the attachment had been dissolved. *Id.* 401, 402. The author cites several Iowa cases, which undoubtedly support the text. See *Jones v. Peasley*, 3 G. Greene, 53; *Austin v. Blergett*, 10 Iowa, 802; *Woodward v. Adams*, 9 Iowa, 474.

*Drake*, in his work on Attachment, contents himself with quoting in a foot-note the doctrine of the leading Iowa case without comment. *Drake*, Attachm. 266. In the treatise of Mr. *Wade* in the section previously referred to, the author, in speaking of forthcoming bonds, says: "In some of the states the bonds are conditioned in the alternative, for the delivery of the chattels, or for the payment of their value or the amount of the judgment. But the alternative condition does not discharge the property from the lien." In support of this opinion, the author cites two cases: *Gray v. Perkins*, 12 Smedes & M. 622; *Gass v. Williams*, 46 Ind. 253. The section under consideration by the court in the Mississippi case provided, in substance, that attachments shall hereafter be repleviable, at any time before final judgment, on the appearance of such defendant, and his execution of a bond, with sufficient security, payable to the plaintiff, in a sum double the value of the property attached, and conditioned to have said property forthcoming to abide the order or decree of the court to which said writ of attachment shall be returnable, or, in default thereof, to pay and satisfy, to an extent not exceeding the value of said property, such order or decree of said court. And the court held that by the very terms of the condition, "to have said property forthcoming to abide the order or decree of the court," an intention to preserve the lien was manifest. So, also, in the case of *Gass v. Williams*, supra, under a statute authorizing the property to be released upon the giving of a delivery bond conditioned for its return, or, in the alternative, for the payment of its value, not exceeding the amount of the judgment and costs, the court held that the giving of a bond did not discharge the lien of the attachment, but that the custody of the defendant was thereby substituted for that of the officer, and that the property was as far from the reach of processes as it would have been in the officer's hands.

Without the alternative provision of the statute, the measure of the liability of the defendant and sureties upon the bond in case the property is not redelivered, as required by the terms of the bond, is the value of the property attached, provided the value does not exceed the amount of the judgment and costs. *Wap. Attachm.*

§§ 396, 397; Drake, *Attachm.* § 342. And such is the exact liability fixed by the terms of the act. It will be seen, therefore, that the alternative provision of the statute is but a legislative indorsement of a rule of decision previously announced by the courts. Certainly, therefore, every reason for holding that without this provision the lien is not discharged by the giving of a redelivery bond is an argument in favor of the conclusion that under such a provision the lien remains although the bond be given. The primary condition of the bond in either case is that the defendant will, on demand, redeliver the property; the liability of the sureties for the value attaching only upon his failure so to do. The purpose of having the property redelivered is that it may be subjected to the payment of the judgment; and we think it would be a fraud upon the sureties to allow it to be subjected to execution issued at the suit of other parties, and thus permit third parties to defeat a compliance with that which we have seen is the primary condition of the bond. In suits in the justice's court there is no provision of law for prorating the proceeds of the attached property, the creditor first securing a lien upon the property by attachment being entitled to sufficient of the proceeds thereof to discharge his judgment; and we think the better reason, and perhaps the weight of authority, are in support of the doctrine that the attachment lien is not discharged by giving a redelivery bond, as in this case, conditioned for the return of the property, or, in the alternative, the payment of its value.

Having determined that the lien of the attachment issued at the suit of Whitsett remained in force at the time of the levy of the execution issued in the suit, we are next to consider whether such lien entitles these plaintiffs to maintain the action of replevin against the officer for the possession of the chattels covered by the redelivery bond. The sureties upon the forthcoming bond do not claim to have any interest in the property other than the right to have it preserved so that it may be delivered upon the bond in case such delivery be required. At the time this case was tried in the court below, the suit in which the first forthcoming bond was given was still pending and undetermined. The sureties upon such bond had not, therefore, become liable for one dollar upon their obligation. The defendant may finally obtain judgment in his favor in that suit, or the attachment may be dissolved; and in either event the sureties upon the bond would be discharged from all liability. The defendant alone became entitled to the possession of the property upon the giving of the bond. Such right of possession did not extend to his sureties; and they could not, therefore, maintain this action for a return of the property. *Wells*, Repl. § 154 et seq.; *Gray v. Perkins*, 12 *Smedes & M.* 622; *Hagan v. Lucas*, supra; *Lusk v. Ramsay*, 3 *Munf.* 417. Neither is Frank F. Noxon, the defendant in the attachment suits, entitled to recover, under the evidence; it appearing that, when the second attachment writ was levied upon this property, Noxon gave a

second forthcoming bond, which he signed with Palmer and another as sureties thereon, conditioned that in case the plaintiff recover judgment against the defendant in that action, and the attachment be not dissolved, the defendant will deliver to the constable the property, or, on failure, pay its value. Thereafter the attachment was sustained, and judgment entered against the defendant Frank F. Noxon. By the terms of this bond, the officer then becomes entitled to the possession of the property, and it was accordingly surrendered to him by Noxon. Under these circumstances, neither the defendant nor the sureties upon this second bond are entitled to the possession of the property as against the officer, although he holds it subject to the lien of the first attachment. *Case v. Steele*, 34 *Kan.* 90, 8 *Pac. Rep.* 242; *Pierce v. Whiting*, 63 *Cal.* 538; *Dorr v. Clark*, 7 *Mich.* 310; *Leeper v. Hersman*, 58 *Ill.* 218; *Lusk v. Ramsay*, supra. No question as to the right of the sureties, whose names appear upon the first bond only, in a proper action to compel the officer to respect the lien of the first attachment, is presented upon this record. We think it clear that the action of replevin cannot be maintained against him, and further than this we do not feel at liberty to decide. The judgment will be reversed, and the cause remanded, with directions to the court below to dismiss the action. Reversed.

# MOFFATT v. CORNING.

(*Supreme Court of Colorado.* Dec. 24, 1889.)

## ASSIGNMENT — RIGHTS OF PARTIES — OPINION EVIDENCE.

1. An attachment creditor of a mining corporation, in pursuance of a contract with a prior judgment creditor, bought the property at a sale under another judgment. The contract provided that the attachment creditor should hold the title in his own name, and work the mine for the benefit of both. At his election, the attachment creditor might pay the claim of the judgment creditor, and thereby obtain a perfect title, or he might resell the property, and, after the payment of all claims, divide the surplus. *Held*, that an assignment of this contract by the judgment creditor, which assignment on its face purported to be as security for a debt owing to the assignee, and which was admitted by him to have been received only as collateral security, could not, at the instance of the attachment creditor, who afterwards purchased it, be declared an absolute sale of the judgment creditor's interest in the contract, though accompanied by an unconditional assignment of the judgment.

2. Though the written transfer of the contract by the assignee to the attachment creditor states that it is the intention to give the latter all the rights possessed by the assignee, yet the attachment creditor, having directed all the evidences of indebtedness to be surrendered to the assignor, (the judgment creditor,) cannot hold the contract as collateral security for the entire amount of the latter's indebtedness to the assignee, but only for the amount paid on the transfer of the contract.

3. In an action to compel the attachment creditor to account for the profits realized from the mine, he testified that it was understood between himself and the assignee that the sum paid for the transfer was likewise to be in full satisfaction of the contract, and to be an extinguishment of the judgment creditor's rights thereunder; but he admitted that he had not been informed whether or not the judgment creditor had been notified of this understanding. The judgment creditor testified

that he understood the transaction simply as a means of securing the attachment creditor for the amount paid on the transfer of the contract, and that with this understanding he had indorsed his consent on the transfer, which on its face purported to be only of the assignee's rights in the contract. Held that, as the minds of the parties had never met, the contract had not been abrogated, and that the attachment creditor was still liable to account thereunder, less the sum paid by him on its transfer.

4. Where the assignee has testified to all the facts relating to the transfer of the contract and judgment to the attachment creditor, further testimony that he considered the judgment as paid and settled on receipt of the price for the transfer is properly excluded as being simply his opinion as to the legal effect of the transaction.

Commissioners' decision. Appeal from district court, Arapahoe county.

Upon the 18th of November, 1875, appellee commenced a suit by attachment, in the district court of Boulder county, against the Nederland Mining Company. On January 18, 1876, he obtained a judgment for the sum of \$32,490 and costs. Upon the 6th of January, 1876, Jerome B. Chaffee commenced a suit by attachment against the same defendant, in the same court, for the sum of \$46,616.66. On the 7th of January, 1876, Anker and Shaffenburg commenced an attachment suit in the same court, against the same defendant, for \$13,632.55. The last-named suits were brought to the same term of court, and were pending and undetermined at the date of the making of a contract hereinafter set forth. About the same time, or prior to the bringing of the above suits, James Pepin commenced a suit against the same defendant, in the same court, for himself and others, to enforce a miner's lien against the Caribou lode, the property of the Nederland Mining Company, and upon the 21st of January, 1876, obtained a decree for \$22,772.73, wherein it was decreed that, if the defendant mining company should fail to pay the amount on or before the 21st of August ensuing, the property should be sold, and a deed executed to the purchaser. While affairs were in this condition, on the 1st of June, 1876, appellee, who obtained the judgment as stated above, and Chaffee, made and executed a contract, which, after setting out the facts above stated, proceeds: "That it is doubtful whether said company will pay any of said claims, except by process of law, out of its property; that Chaffee owns the claim of Anker and Shaffenburg, and that it is desirable for Corning and Chaffee to unite their efforts to obtain payment of their claims against said company: Therefore, the contract witnesseth, that Chaffee and Corning agreed to purchase the liens against said company, or such part as could be procured, on the best terms possible, and that when purchased they should hold such liens jointly; that Corning should not be required to advance any money on account of these purchases, but reserved the right to advance such amounts as he saw fit. Chaffee was to furnish all the money required, and the liens were to be owned by Corning and Chaffee in proportion to the amount of money advanced by each. *Second.* That, after the purchase of said liens, if the company failed to pay the amount of the decree, the prop-

erty should be sold under it, and, if no bid could be obtained sufficient to pay the liens and the claims of Chaffee and Corning, the property was to be bid in by Chaffee, and in that event Chaffee was to pay the amount of the bid, and the property was to be held by Chaffee in trust for himself and Corning, as hereinafter stated; that, if the title was acquired by any other person acting for Chaffee, the title was to be held in trust as aforesaid. The interest of the parties was to be determined as follows: Chaffee's interest was to be the amount of his claim against the company, taken at \$51,000, with interest at ten per cent. per annum from the date of this contract, added to the amount paid out by him in the purchase of said liens, with interest and costs of sale paid by him; Corning's interest was to be the amount of his judgment against the company, interest, and costs of suit, added to whatever money he should pay out to purchase said liens, with interest; that the sum total of the two claims as above made was to be taken as the unit of value of the property, and the interest of each was to be the proportion that the claims of each bore to the unit of value. *Third.* That as soon as the title could be procured to said property, as aforesaid, Chaffee was to proceed by sale, under execution or otherwise, to get title to the mill owned by said company, and was to endeavor to sell the mine for an amount sufficient to pay Corning's judgment and his own claim, and not for a less sum; that if, by the sale of said lode, enough money was not realized to pay Corning's judgment, and the property was held in trust, as hereinbefore provided, the mill property should be sold under Corning's judgment, or any other lien, and, if redeemed, the redemption money was to be divided between Corning and Chaffee in the proportion that the lode property was held; that if not redeemed, and the title vested in Chaffee, or any one for him, it was to be held in trust by Chaffee in the same proportion; that at such sale the mill property might be paid off by Chaffee, or some one for him, and such purchaser would not be required to pay the bid in cash, but the amount should be applied to Corning's judgment. *Fourth.* If the property before described shall be held in trust as aforesaid, the trustee may work and mine the said lode property, or run and use the said mill, and all profits realized therefrom shall be divided between the said Chaffee and Corning according to their respective interests in said property. But the said Corning shall not be liable for any loss sustained in working said property, or running or using said mill. Neither shall any incumbrance be placed on the said property, or any part of it, or any lien be allowed on the same. The said Chaffee may at any time, by payment to the said Corning or his legal representatives of the said judgment, interest, and costs, together with the amount he may have paid out in purchasing said miners' liens and interest thereon, discharge the said trust; and, on the payment of said sums of money as aforesaid, the said Chaffee shall hold the said property, and every part thereof, discharged of any claim of

the said Corning thereto. If the said Corning shall receive any money by the redemption of mill property, or by the payment of any money to him on his judgment out of any sums of money bid at such master's sale of said property under such miners' liens, the amount so due him as hereinbefore stated (to be determined by taking the amount of the judgment, interest, and costs, and the amount he shall pay for said miners' liens) shall be decreased by the amount so received, and his interest in said property shall be decreased in the proportion that the amount so received bears to the total amount treated as the unit of value. It is the intent of the parties hereto that the said Corning shall be paid out of the amount bid for said property, or out of the amount realized on sale of the property, if it is held in trust as before stated, the full amount of his judgment, interest, and costs, and all moneys he may have used in purchasing miners' liens, and interest thereon. *Fifth.* That in case Chaffee can sell said mine or mill, or both, he shall pay Corning the amount of his judgment, interest, and costs, and whatever moneys Corning may have advanced in the purchase of liens, with interest. *Sixth.* That Corning shall aid and assist Chaffee in every way to effect the purposes and objects of this contract. If, at the sale under the decree for a miner's lien, Chaffee shall be compelled to bid an amount greater than the amount of the lien, Corning shall not demand a distribution of the surplus without the consent of Chaffee; but, if a distribution is made, the amount allotted to Corning shall be received by him for and on account of Chaffee, and shall be paid to Chaffee. If the property be held in trust, and not sold, and Corning shall not be paid the amount due him within 90 days from date of the sale under the miners' liens, then, when Chaffee does make a sale, if the property shall be sold for more than enough to pay himself and Corning, the balance shall be divided in the proportion of their respective interests to the unit of value."

On the 19th of October, 1880, Corning instituted this suit against Chaffee, and in his complaint, after setting out the foregoing contract, alleges, in substance, that the Caribou lode, 1,400 feet in length, was sold under the decree in the Pepin suit, and bought by Chaffee for \$64,000; that on the 15th of September, 1876, a deed of it was made and delivered to Chaffee; that Chaffee entered into the possession of the mine, and worked it; that afterwards the mill-site and mill were sold at sheriff's sale, and bought by Chaffee, and he acquired title to them. It is also alleged that upon the 8th of November, 1876, Corning was indebted to the Colorado National Bank and C. B. Kountze in the sum of about \$30,000, and that to secure its payment he assigned his contract with Chaffee to Kountze by a written contract in substance as follows: Empowers Kountze "to receive all moneys due or to become due, and also to receive a deed for the interest of Corning in the property described in the contract, and also empowers Kountze, out of any moneys received on said contract, to pay himself and the Colorado National Bank the

amounts due them from Corning, or, if sufficient money be not received by Kountze to pay said amounts, he shall receive the deed for the property, and hold the same in trust for the payment of such moneys; and, in case sufficient money be not received on or before the first of September, 1877, to pay Kountze and the bank, the former is authorized to sell the property to pay himself and the bank, and the surplus, if any, to be paid to Corning." It is also alleged that on the 17th of April, 1879, Corning borrowed from Chaffee \$30,000 to pay the amount he owed the Colorado National Bank and Kountze, and made his note for the same with interest at 10 per cent. payable on demand; that Chaffee paid Kountze the amount, \$30,000, and took an assignment of the contract between Corning and Kountze, as follows: "Denver, Colorado, April 17, 1879. For and in consideration of the sum of thirty thousand dollars, I hereby, with the consent of George C. Corning, assign and transfer all my right, title, and interest in and to the annexed contract regarding the Caribou property to Jerome B. Chaffee, said contract entered into between Jerome B. Chaffee and Geo. C. Corning on the first day of June, 1876, and held by me as collateral security for indebtedness due to myself and the Colorado National Bank of Denver from said Corning, which sum of thirty thousand dollars is to be received by me in full of said indebtedness; it being the intent of this assignment to give to said Jerome B. Chaffee all the rights I have in said contract, and none other, without recourse on me in any event. C. B. KOUNTZE. I hereby consent and agree to the above assignment. GEO. C. CORNING." It is further alleged that on the 25th of April, 1879, Chaffee sold and conveyed the mine and mill property to the Caribou Consolidated Mining Company for a sum sufficient to pay all claims of himself (Chaffee) and Corning; that Chaffee still retained Corning's note for \$30,000; that he had not paid him any part of the purchase money received from the sale of the property; had not paid his judgment against the Mining Company Nederland, nor any part; and avers that there was due him \$50,000 for the judgment, and that, if there was any surplus in the hands of Chaffee after paying off the claims provided for in the contract, he was entitled to a portion of it. Prays for an accounting, and for a decree for what might be found due.

On November 17, 1880, an answer was filed by Chaffee; on November 24, 1880, a replication. Upon February 29, 1884, leave was obtained of the court, and an amended answer filed, of which only portions are necessary to be noticed. Defendant denies that he, on the 17th of April, 1879, or at any time, loaned plaintiff \$30,000 to pay the debt due from him to Kountze and the bank. Denies that he ever received a note for \$30,000 from plaintiff, or that he then held and controlled such a note. Denies that any such note was made at his request, or for his use, or was ever delivered to him, or to any one on his behalf entitled to receive the same. Avers, in effect, that he never loaned money to plaintiff to

pay Kountze and the bank; that plaintiff never paid money to Kountze and the bank. Admits, on information and belief, that on the 17th of May, 1879, plaintiff executed a note for \$30,000 and interest, and left it with some clerk or person in the First National Bank. Avers that, at the time he was in New York, knew nothing of it; never authorized any one to receive it. Avers that, by the contract of assignment from plaintiff to Kountze of April 17, 1879, Kountze became the absolute owner of plaintiff's judgment against the Mining Company Nederland, and the absolute owner of all interest plaintiff had before that time in the contract made by him with defendant of June 1, 1876, by reason of the assignment of plaintiff to him. And further avers that on the 17th of April, 1879, plaintiff was indebted to Kountze and the bank in the sum of not less than \$40,000, and that on that day defendant purchased from Kountze and the bank, for the sum of \$30,000, such indebtedness of plaintiff, with his full knowledge and consent, and that Kountze and the bank received the amount as full payment of the amount due them from plaintiff, and released and discharged him, and that such sum was a full and complete payment of the judgment of plaintiff against the Mining Company Nederland, and of all claims and dealings between plaintiff and defendant, and in full discharge of all the covenants and agreements contained in the contract of June 1, 1876, between plaintiff and defendant, and that, upon the assignment to him (Chaffee) by Kountze of the judgment and contract, he took them free from all claims and liability by reason of the former agreement. Averring, in effect, that the payment of the \$30,000 to Kountze was a settlement and payment in full of all matters between defendant and plaintiff, and that defendant was discharged of all trusts arising under the contract. Denies all indebtedness, and plaintiff's right to an accounting. On June 11, 1885, a replication was filed to the amended answer, denying all the important allegations, and specifically denying any agreement with defendant whereby the contract of June 1, 1876, should be canceled, or in any way affected, except that the sum of \$30,000 paid by defendant to Kountze should be taken as part payment by plaintiff of the amount due, and to become due, on the contract. The trial was had before the court June 11, 1885, resulting in a judgment in favor of plaintiff for \$14,570, from which this appeal was taken.

*L. C. Rockwell*, for appellant. *Teller & Orahoad*, for appellee.

*REED, C.* (after stating the facts as above.) This litigation grows out of the misunderstanding of the parties in regard to important transactions between them. After the making of the contract by appellant and appellee of June 1, 1876, on the 8th of November of the same year, appellee, being indebted to the Colorado National Bank and Charles B. Kountze in the sum of about \$30,000, assigned the contract made with appellant, and with it the appellee's judgment against the Mining Company Nederland, and all rights and equi-

ties in the contract, and transferred them to Kountze. This transaction was one entirely between Corning and Kountze, Chaffee not having been a party; and it is not shown that he had any knowledge of it, or in any way participated or was present. As far as is shown, matters remained in this condition until April, 1879, when, Chaffee being in New York, and Corning in Denver, the former entered into negotiations in New York with Augustus Kountze, who represented the Colorado Bank and C. B. Kountze, in regard to the indebtedness of Corning to them, which resulted in an arrangement whereby Kountze and the Colorado National Bank were to receive \$30,000 in full discharge of Corning's indebtedness, amounting then to something over \$40,000 and Kountze was to assign to Chaffee the same securities assigned to him by Corning. Corning's consent to the transaction was to be obtained. It appears that C. B. Kountze and Moffatt were telegraphed to secure such consent from Corning. On the 17th of April the transaction was completed. About that time the money (\$30,000) was paid, and the assignment by Kountze to Chaffee, as set out above, was executed.

The first question presented for determination is what the character of the assignment from Corning to Kountze of the 8th of November, 1876, was, and the intention of the parties, and its legal effect. It is contended in argument by appellant's counsel that it was an absolute sale and transfer of the judgment against the Mining Company Nederland, and likewise of all Corning's right, title, and interest in and to the contract between himself and Chaffee, while, on the part of Corning, it is urged that the transaction was a transfer by assignment to Kountze as collateral security of the indebtedness. The assignments were made by the execution by Corning of two different instruments contemporaneously, — one, of the judgment, absolute and unconditional in its character; the other, of the contract, in substance, as follows: That, in consideration of one dollar paid, and in further consideration of the premises to be kept and performed by Kountze, etc., Kountze is empowered—*First*, to receive all moneys due or to become due; *second*, to receive a deed of the interest of Corning in the property described in the contract, if such deed should be made; *third*, out of any moneys received on the contract, to pay himself and the Colorado National Bank the amounts due from Corning; *fourth*, if sufficient money was not received by Kountze to pay the amounts, he was to receive the deed to the property, and hold the same in trust for the payment of such money; *fifth*, if sufficient money was not received by the 1st of September, 1877, Kountze was authorized to sell the property to pay himself and the bank, and the surplus, if any, to pay to Corning. Taking the provisions and language of this assignment, unsupported by other testimony, it is apparent that it was not, nor intended to be, an absolute sale and transfer, divesting Corning of all interest in the contract with Chaffee, and substituting Kountze in his stead. Such construction, instead of being in harmony,

would directly contradict the expressed intention of the parties. Corning and Kountze were the only parties to the contract of assignment. No question arose between them as to the legal effect or the intention of the parties. It was by both, at all times, treated and regarded as a transfer and assignment as collateral security for the payment of the indebtedness, not as abrogating the contract between Corning and Chaffee by substituting Kountze in the place of Corning, but leaving the contract between them in full force. There is another view of the matter: Corning, by the contract with Chaffee and the mutual agreements and covenants, had disposed of all interest in the matters to Chaffee. Chaffee, by virtue of the contract, was the owner of the very property and rights in action that are claimed to have been transferred to Kountze. What Corning was to receive under the contract was money—nothing else—absolutely; and, under any circumstances, the amount of the judgment against the Nederland Company, and any money he might pay for the purchase of claims, with interest on the same, was to be repaid. Chaffee was to have the title to the property,—hold and work it,—and his trust might be discharged by the payments above mentioned at any time, or he might, at his own election, sell the entire property at any time for a sum sufficient to pay all claims and charges; and, if the price obtained should exceed them, then the surplus was to be divided on an agreed basis, and Corning was to receive his proportion. In any event, what Corning was to have was money from Chaffee. At the time it was claimed that Kountze bought the judgment from Corning, Corning was not the owner of it. It belonged to Chaffee. The assignment to Kountze was an idle proceeding, of no legal effect. What he did assign was by virtue of the assignment of the contract, and that was a right to take the money in accordance with the provisions of the contract, instead of Corning, when Chaffee was by its terms required to pay. Kountze was not a party to the contract of Chaffee and Corning. Chaffee was not a party to the contract between Corning and Kountze. The absolute property in the judgment was in Chaffee. Corning could not assign it, and pass a title. Neither could the contract have been assigned to Kountze by Corning, and Kountze be subrogated to his right, unless it was done by the act of Chaffee, by his joining in it. 2 Add. Cont. 839-842; 1 Pars. Cont. 220; 2 Chit. Cont. 1380, and authorities cited in note.

Upon the trial, C. B. Kountze testified, in answer to a question in regard to the judgment of Corning against the Mining Company Nederland: "We simply held it as collateral. We had not bought it. It was ours as a collateral." He further says: "Upon the 8th of November, 1876, Corning's debt to me was still unpaid. The assignment was taken only as collateral security for the debt. Corning owed myself and the bank; and on the 17th of April, 1879, we were still holding it as collateral security." Corning testified to its having been assigned to and held by

Kountze as collateral security. Corning and Kountze having been the only parties to the contract or assignment, and both agreeing as to what the transaction was, it cannot, at the instance of a third party, be declared to be an absolute sale, contrary to the intention of the parties who made it. Neither will the law warrant the court in saying it was an absolute sale by reason of the language used in the assignment of the judgment, when it is shown by the evidence of both parties that it was not their intention that it should be. The assertion of absolute ownership could only have been by Kountze. Having disclaimed it, he could not be invested with it by any act of a third party. There is a further incident that may deserve comment. If Chaffee, at the time of the transaction with Kountze in New York, regarded the transaction between Corning and C. B. Kountze as an absolute sale, which divested the former of all interest in the judgment and contract on the 8th of November, 1876, why did he, on the 17th of April, 1879, require the consent of Corning to be obtained before he would make the deed?

It is clear that by the subsequent assignment made by Kountze to Chaffee, the latter could take by the assignment no greater or better title than Kountze had held. In the assignment of Kountze to Chaffee, of April 17, 1879, of the contract between Corning and Chaffee of June 1, 1876, is the following language: "And held by him as collateral security for indebtedness due to myself, and the Colorado National Bank of Denver, from said Corning; \* \* \* it being the intent of this assignment to give to said Jerome B. Chaffee all the rights I have in said contract, and none other." Consequently, by virtue of the transaction with Kountze, aside from anything that may have occurred in connection with Corning, Chaffee, having paid and discharged the debts of Corning by compromise or composition, and succeeding to the securities, held them, by virtue of the assignment, only as collateral for the sum of money advanced. He was substituted for Kountze, and held the same collateral security for a less sum of money by reason of the advance or loan of the \$30,000. It will be observed that by the terms of the contract entered into between Chaffee and Corning, Chaffee had obligated himself to pay, in any event, the amount of Corning's judgment against the Mining Company Nederland, with the interest. It does not appear that, by the terms of the contract, stipulated events had occurred to make the money due, so that Corning could have demanded the payment. But it was optional with Chaffee at any time to relieve himself of all subsequent liability by the payment in full of that claim.

The act of Chaffee in making the payment of \$30,000 at the time can only be regarded as falling within one of the three following propositions: *First*, that it was a loan of that amount to Corning, to be subsequently settled and adjusted; *second*, that by the deal with Kountze all parties were relegated to their original *status* under the contract, with \$30,000 of



the money due Corning paid by Chaffee; or, *third*, that, by a subsequent contract made between Chaffee and Corning at the time of the payment to Kountze, the former contract was abrogated, and it was agreed that the amount paid Kountze should be accepted by Corning as payment in full under the contract and Chaffee discharged from all further liability.

The testimony is very vague and indefinite. Chaffee was in New York, dealing with a representative of Kountze, while Kountze and Corning were in Denver. It is unnecessary to say that Corning could not be bound by any understanding or agreement between Chaffee and Kountze to which he was not a party. It is evident that, in contemplation of law, there was no contract between Chaffee and Corning. At the very time of closing the transaction, each was acting on a theory of his own, and at variance with that of the other. Corning supposed it to be a loan, and it appears that C. B. Kountze so supposed it; and they thought it necessary for Corning to make a note for the amount, which he did, and delivered to some one in the First National Bank, supposed to represent Chaffee. It is in evidence that no note was required or authorized by Chaffee, and that it was never accepted or received by him, or an authorized agent in his behalf. The theory of a loan was abandoned upon the trial, and was not urged in argument, for the obvious reason that no contract for a loan was made, or could be proved. The fact was established that no person in the First National Bank was authorized to receive the note. It sufficiently appears that the officers of the bank participated to some extent in the transaction as representing Chaffee, and it appears that they had no definite knowledge of what the real character of the transaction was; but it is fair to presume that their agency or duty was such as to require them at least to inform Chaffee of the delivery of the note, and the light in which the transaction was regarded by Corning. Yet it appears that there was no effort made to inform Corning of Chaffee's view of the matter until a long time after, and no offer or attempt to return the note, and it remained in the custody of the bank to the time of the trial.

The second of the above propositions needs no discussion. It results as a conclusion of law, unless the new contract was established.

The third proposition is not without difficulty, and its solution practically disposes of the case. If a contract was made, the two parties radically disagree as to what it was. Chaffee construes it to have been such that, by payment of the \$30,000 to Kountze in the way of compromise, and the discharge of Corning from further liability, and the transfer of securities held by Kountze, he took them divested of all obligations assumed in the contract, and that the payment of the \$30,000 by him canceled his obligation to pay the judgment of Corning against the Mining Company Nederland, of \$32,490, in January, 1876, with interest to April, 1879, amounting to over \$10,000, making the aggregate debt at that time over \$42,000. Corning

asserts, in the first instance, the transaction to have been a loan of the \$30,000; when that position was found untenable, then that it was a payment on that amount on account under the contract. Without consent from Corning, Chaffee had an undoubted right to buy from Kountze the indebtedness of Corning at any agreed price, and taking by assignment any security held by Kountze, and could, upon settlement, have exacted from Corning the whole amount. To have done this, the evidence of indebtedness should have been assigned to him, as well as the securities. He would then have had the title to the indebtedness, and the same security Kountze held, unless, by the merger of the two, he was relegated to his original contract. Had it been his intention at the time to make for himself the difference of \$12,000 and over by the transaction with Kountze, this would have been the proper and rational course; but this was not done. The evidences of Corning's entire indebtedness, on the payment of the \$30,000, were canceled and delivered to Corning, evidently by the order or consent of Chaffee, while the securities held for the indebtedness by Kountze were assigned to Chaffee, and could only have been held by him legally, as security for the \$30,000 advanced, unless by special contract with Corning. Having had in the first instance, as shown, a right to elect whether he would treat the transaction as a purchase or as a loan, or an advance under the contract, he must be held to have made his election; and having made it, and it having been acted upon, it was final and conclusive. It is a primary and elementary principle that in the making of a contract the minds of the contracting parties must meet. Without this, there is no contract. As is said in 1 Chit. Cont. 11: "There must be, first, the reciprocal or mutual assent of two or more persons." In Add. Cont. 2: "Every contract includes a concurrence of intention between two parties." In McNulty v. Prentice, 25 Barb. 204, it is said: "A contract (*contrato*) is a drawing together of minds until they meet." In 1 Pars. Cont. 475, it is said: "There is no contract unless the parties thereto assent, and they must assent to the same thing in the same sense." See Hazard v. Insurance Co., 1 Sumn. 218.

In order to have abrogated or annulled the contract existing between Chaffee and Corning for the payment of the entire amount of Corning's judgment and interest, and a portion of any surplus that might remain on the sale of the property which Chaffee had obligated himself to pay absolutely, there must have been a new contract, taking the place of the old one, whereby Corning agreed to accept a less sum in full, and on the receipt of such sum release Chaffee from further liability. This would have required a proposition on the part of Chaffee to purchase, cancel, and discharge all debts and obligations of Corning's to Kountze and the Colorado National Bank, in consideration of Corning accepting the same in full satisfaction of all liability on the part of Chaffee arising or growing out of the contract, and an acceptance of the proposition by Corning.



Was there a contract of that kind, or of any kind, established by the evidence? Chaffee testified: "Augustus Kountze, of New York, agreed with me that he would take \$30,000 in full for his debt against Corning, and also in full for the contract that I had, that he had assigned. He would assign it over to me for \$30,000, but I was not exactly satisfied with taking that assignment, knowing that I had been a trustee in the matter, and for that reason I had it referred back here to Mr. Moffatt, to get Mr. Corning's consent to that assignment from Mr. Kountze to me; and, if he could get that consent, I told him, I would give him the \$30,000. I would give Kountze the \$30,000, which should pay in full the Corning debt, provided Corning would agree to it, and make no claim upon me whatever. That was Corning's debt to Kountze and the bank. The understanding between Augustus Kountze and myself was, and the agreement was, that, if that was assigned to me, that canceled my contract with Corning. That was our understanding; and I wanted Corning's assent, which was obtained here in Denver, and telegraphed me, and I paid the money." Upon cross-examination he testified: "I did not have any conversation with Corning personally about the transaction. By the Court. Mr. Chaffee, were there any other written negotiations or written instruments in reference to this transfer, other than those that have been read here to-day, which you had any knowledge of,—as your contract with Corning, his assignment to Kountze, Kountze's assignment to you; those three instruments? Answer. I think that comprised the whole, with Corning's consent that he should transfer this contract to me. Question. Other than the assignment of judgment that Mr. Rockwell has just introduced in evidence? A. I think that was all. That was all I thought I needed. Q. This consent you speak of is what is marked on that assignment of Kountze's to you? A. I presume it was. It was telegraphed to me that he had consented to have the transfer made. Q. You had no knowledge to what extent that consent of his went,—only your talk with Kountze? A. I thought I knew what it meant. Perhaps I didn't. I guess I didn't, according to your idea of it. Q. Whatever you thought was derived from your talk with Augustus Kountze, was it not? A. It was, and derived from our dispatches, letters, and documents and papers, back and forth. Q. You have never seen or heard of any other consent of Mr. Corning's, or any thing relating to this contract, except such as is indorsed on that contract? A. I don't know of anything. The original contract between myself and Corning was delivered to me by Kountze. The original contract in the assignment of the judgment was what I understood was assigned to me." Corning testified: "I understood that he [Kountze] was selling this contract, and he was delivering over the collateral of mine that he held. The payment of the \$30,000 settled between Mr. Kountze and myself, and he assigned my collateral to Mr. Chaffee in the settle-

ment. Q. And he surrendered to you everything you owed him and the Colorado National Bank? A. Yes, sir; he gave me my notes. Q. Did you not assent to this assignment upon the condition, and only upon the condition, that the bank should release you from all your obligations? When I say the bank, I mean the bank and Kountze together. A. The \$30,000 went to pay Mr. Kountze, and he assigned this to Mr. Chaffee as the collateral for the other \$30,000, and I consented. He assigned this as collateral to Mr. Chaffee, and to that I consented." This is all the testimony of any importance on the point, and it certainly is not sufficient to establish such a contract as is contended for by appellant. There is no evidence that Chaffee, or any one, informed Corning that the \$30,000 to be paid was to be in full of all claims growing out of the contract; and the only evidence that such was the understanding of Chaffee is his own, when he states that to have been the understanding or contract between him and Augustus Kountze. It is needless to say that any understanding or agreement between himself and Kountze could not affect the interest of Corning unless he was a party to them, or informed of the extent of the transaction as claimed by Chaffee. Chaffee may have supposed and intended that the fact would be communicated to Corning here, but there is no evidence that it ever was; nor can such knowledge be predicated upon his consent to the transaction. He was informed that Chaffee proposed to pay off his entire indebtedness of over \$40,000 for \$30,000, and that his notes were to be canceled and delivered to him,—a transaction clearly for his benefit; and his only care was to assure himself that he was fully released from such indebtedness. The consent obtained, and the extent of it, can only be determined by the written document upon which it was indorsed, and it cannot lawfully be extended. The paper was the assignment executed by Kountze to Chaffee, whereby, for the sum of \$30,000, he assigns and transfers all his right, title, and interest in the contract held by him as collateral security for indebtedness due himself and the Colorado National Bank, etc., upon which is indorsed: "I hereby consent and agree to the above assignment," which is signed by Corning. Comment upon the extent and intention of the consent is unnecessary. It is apparent at a glance that the consent only extended to agreeing that that document should be assigned to Chaffee, and held by him as collateral security in the same way it had been held by Kountze, for the \$30,000 paid Kountze. It has already been shown that, had the indebtedness of Corning, and the securities for it, been transferred to Chaffee, he would have been subrogated, and his relation to the indebtedness and securities would have been the same as that of Kountze. Such was not the case. The debt, which was the principal, had been canceled. Hence the two were separated. "Collateral," in its common use and acceptation, means additional, subsidiary security given to secure the principal obligation. It is a sepa-

rate obligation." It is said in *Coleb. Coll. Secur.* §2: "Such collateral security stands by the side of the principal promise as an additional or cumulative means for securing the payment of the debt." Judge REDFIELD, in a note to *Le Breton v. Peirce*, 1 Amer. Law Reg. (N. S.) 38, says: "The etymology of 'collateral security' indicates that it is something running along with, and, as it were, parallel to, something else of a similar character. It is collateral to the original indebtedness." It will be seen that by the consent of Corning, and the transfer of the collateral, it could not have been transferred as security for, and to the amount of the indebtedness formerly held by, Kountze, as that had been extinguished. Hence it was, by the acts of the parties, transferred to Chaffee, not to secure the original debt, but the new debt created from Corning to Chaffee; and that debt, as shown, unless by an agreement, could not have been greater than the advance,—\$30,000. That Chaffee expected and intended to himself receive the benefit of the transaction, and make the difference of some \$12,000, is apparent. Otherwise, no motive can be found for making the transaction. That he thought he had done so is apparent. That he did not was by reason of the error committed in dealing with Kountze instead of Corning, and also by an error regarding the law of the case, in supposing he could buy from Kountze the security, and take an absolute title divested of all equities and obligations formerly existing. It follows that no subsequent transaction relieved him from the obligation assumed in the Corning contract, and the payment of the amount of the Corning judgment and interest.

The errors assigned are practically disposed of, except the first: "That the court erred in refusing to allow defendant to prove by Kountze that the judgment of Corning against the Mining Company Nederland was part of the consideration for which defendant paid Kountze \$30,000, and that the judgment was paid off and settled by this \$30,000, and was so understood between Kountze and Chaffee at the time." The assignment embraces two propositions. In regard to the first, it may be said that Kountze was examined and testified at length in regard to what the transaction was, and of the facts within his knowledge. From the facts and documents executed by Kountze the whole matter had been explained. The defendant could not have been prejudiced by the refusal of the court. It could have been, at most, but the opinion of Kountze from the facts already before the court. The latter part was very properly excluded. It only asked for the opinion of the witness as to the legal effect of the transaction, which could only be determined by the court. The last clause, as to how it was understood between Chaffee and Kountze, was unimportant, as already shown. The pertinent inquiry was, how it was agreed and understood between Chaffee and Corning. The judgment of the district court should be affirmed.

RICHMOND and PATTISON, CC., concur.

**PER CURIAM.** For the reasons stated in the foregoing opinion, the judgment is affirmed.

Mr. Justice ELLIOTT, having tried the cause as district judge, did not participate in this decision.

#### PARROTT V. HUNGELBURGER.

(*Supreme Court of Montana.* May 14, 1890.)

#### LANDLORD AND TENANT—POSSESSION—ESTOPPEL.

Under Code Civil Proc. Mont. § 87, providing that when the relation of landlord and tenant has existed the possession of the tenant shall be deemed that of the landlord until five years after the termination of the tenancy, in the absence of fraud and mistake, a lessee, though in possession of the premises at the time of the execution of the lease, cannot controvert his lessor's title.

Appeal from district court, Deer Lodge county; STEVEN DE WOLF, Judge.

Action by George Parrott against Mary Hungelburger. Judgment was rendered for plaintiff, and defendant appealed.

*Cole & Whitehill*, for appellant. *J. S. Robinson*, for respondent.

HARWOOD, J. This is an action, in the nature of ejectment, to recover possession of a lot of land described in plaintiff's complaint, situate in the town of Anaconda, Deer Lodge county, Mont. The questions involved in this appeal were argued and submitted to the territorial supreme court at the July term, 1881, and judgment was rendered. At the time of the rendition of the judgment, however, it was suggested by counsel that appellant had died since the submission of the case, and shortly before judgment was rendered. Thereupon the court made an order setting aside the judgment rendered in the supreme court, and placed the case upon the calendar for further proceedings. An administrator of deceased having been appointed and substituted in place of appellant, the case was again submitted for decision at the present term.

The complaint avers the plaintiff's ownership and right of possession of the described premises since October 1, 1886; that defendant since said date has held and occupied said premises, and still holds and occupies the same, against the will and consent of plaintiff; and that the rents and profits have since said date, and will be while unlawfully held by defendant, of the value of \$30 per month. The defendant's answer denies the plaintiff's allegations of ownership, and his right to possession of said premises, or any part thereof, and for further defense alleges ownership thereof in herself since February 1, 1884, and possession and right of possession since that date, and specifies that on or about the — day of February, 1884, one D. M. Walsh was the owner of, and in possession of, said premises; that on or about that date said Walsh sold said premises to defendant and her husband, Joseph Hungelburger, for the sum of \$300, and delivered possession thereof to them; that defendant and her husband went into possession under said contract of purchase, and have ever since occupied, held, and possessed said premises, and

paid the taxes thereon, "and greatly increased the value of said premises, and erected thereon tenements and buildings of the value of one thousand dollars;" that plaintiff, and his grantors and predecessors in interest, well knew of defendant's ownership and occupation of said premises. And, on information and belief, defendant alleged that plaintiff was not a purchaser in good faith, for a valuable consideration, but that he and his grantors, well knowing defendant's rights in said property, procured a deed therefor from said Walsh for the purpose of setting up a fraudulent claim to said premises; that on or about December 24, 1886, in the same court where this action was pending, defendant obtained a decree of divorce from her said husband, Joseph Hungelburger, and among other things it was adjudged that this defendant have in her own right the premises described in the complaint. The plaintiff, by replication, denied that the defendant or her husband ever purchased said property from Walsh, and on information and belief denied the payment of taxes thereon by defendant, or the putting of improvements thereon of any value greater than \$400; and alleged that the only right or interest ever owned or held in said premises by defendant or her husband was a leasehold interest, and that they held the same as tenants of said Walsh and his grantors, Barker and others, and that said lease had expired by its own terms prior to the commencement of this action. Plaintiff further alleged good faith in the purchase of said property, and the payment of a valuable consideration therefor, and denied all knowledge of any claim thereto by defendant or her husband except as tenants of said Walsh and his grantors. The action was tried before the court without a jury. To support his claim of title to said land, the plaintiff introduced in evidence deeds of conveyance thereof showing a claim of title as follows: (1) A deed from J. M. Walsh to B. J. Schlessinger dated June 3, 1883, recorded June 9, 1884. (2) A deed from B. F. Schlessinger and wife to Julius J. Mack dated September 1, 1884, recorded September 5, 1884. (3) A deed from Julius J. Mack to John W. Barker dated December 29, 1884, and recorded February 2, 1885. Objection was made by defendant to the introduction of the last-mentioned deed, and, on the reception of it over such objection, he excepted, and assigns the same as error, which will be hereafter treated. (4) A deed was introduced showing a conveyance of said premises from John W. Barker, Jr., and wife to William E. Barker and Frank C. Kinney, dated February 11, 1885, recorded March 10, 1885. (5) A deed from William E. Barker, conveying one-half interest in said land to Frank C. Kinney, dated June 11, 1886, recorded June 12, 1886. (6) A deed from Frank C. Kinney, conveying said premises to the plaintiff George Parrott, dated September 7, 1886, recorded September 10, 1886. (7) A deed from Marcus Daly and wife, conveying said premises to J. M. Walsh, dated November 1, 1883. The objection made to the introduction of said deed from Julius J. Mack to John W. Barker was

made on the ground that the acknowledgment of the execution thereof was not made and executed according to the laws of Montana. When this objection was interposed, plaintiff offered to prove the signature of the grantor by George W. Stapleton. The defendant objected to such proof on the ground that said Stapleton was not the subscribing witness mentioned in said deed, and that the execution thereof must first be proved by the subscribing witness, or his absence accounted for. The court overruled the latter objection, to which ruling defendant excepted; and the testimony of Stapleton to the signature of said grantor Mack was admitted, and the deed so proved was admitted to be read in evidence, over the objection of defendant, to which exception was saved, and the action of the court therein is assigned as error.

Before considering the above assignments of error, we will examine all the evidence introduced, and see whether the defendant can be permitted to assail the plaintiff's title to said land while in possession, and as a defense to an action for recovery of possession. The defendant, to maintain her defense, testified that she was married to Joseph Hungelburger, some time in the year 1884, and some time in February of that year she was present in her husband's barber shop when D. M. Walsh and her husband had a conversation, in which Walsh proposed to sell the lot in controversy to her husband for \$800, and that Hungelburger agreed to take it, and paid Walsh \$250, at the same time taking a receipt for the payment; that defendant had said receipt in her possession for a time, but it was either "lost or stolen," and that she was unable to find it; that the receipt read as follows: "Paid \$250 on lot No. 2, block 6, Anaconda; \$50 due." This transaction was asserted by defendant as a basis of her claim to said lot, and, taken together with the decree of the court mentioned in defendant's answer, by which defendant was decreed all of Joseph Hungelburger's right in said premises, constitutes defendant's claim upon said premises. There was other evidence introduced on behalf of defendant, in respect to improvements put on said lot by Joseph Hungelburger, and in respect to said alleged sale and receipt. In the plaintiff's replication, he has controverted defendant's alleged ownership of said lot, and had alleged that defendant and her husband, Joseph, were in possession of said lot "as tenants of Walsh and his grantors, Barker and others, and that the leasehold term had expired." When defendant closed her proof, plaintiff introduced a witness, Barker, who testified that Joseph Hungelburger had paid him rent for said premises, at the rate of \$30 per month, from January, 1885, to August or September 1886, a period of more than 18 months; that on one occasion witness showed Joseph Hungelburger the deed by which said premises were conveyed to witness; that certain leases were made in writing between said Joseph Hungelburger and certain grantees of said lot in the line of deeds above set forth. These leases were proved, and introduced in evidence. The

first lease is dated January 5, 1885, and executed by John W. Barker, Jr., of the first part, and Joseph Hungenburger of the second part, which provides that said premises are "rented" unto the party of the second part from January 1, 1885, to May 1, 1885, for a certain stipulated rent, and containing a condition for the surrender of the peaceable possession of said premises to the lessor at the end of the term. The second lease introduced by plaintiff bears date May 1, 1885, and is executed by William Barker and Frank Kinney, lessors, to said Joseph Hungenburger and one William Gale, lessees. The lease provides for a term of one year, from May 1, 1885, to May 1, 1886, at the rental of \$360, payable in installments of \$30 per month in advance, with covenant to deliver up possession of said premises at the end of the term. The third lease bears date July 14, 1885, and is executed by William Barker and Frank Kinney as lessors to Joseph Hungenburger, lessee of said premises, for the term of nine months, from August 1, 1885, to May 1, 1886, at the rent of \$270, payable in items of \$30 per month in advance. This lease contains numerous conditions, among which it was provided that the lessors may enter into possession "to view and expel the lessee for non-payment of rent as aforesaid," and the further covenant "to quit and deliver up the premises to the lessors, or their agent or attorney, peaceably and quietly, at the end of the term," and "to pay the rent during the term, and also the rent, as above stated, for such further time as the lessee shall hold the same." These leases were admitted in evidence without objection. Judgment was ordered in favor of plaintiff for the recovery of possession of the premises in controversy, with judgment for damages against the defendant for rents and profits during the time of detention, amounting to \$750 and costs of suit. The defendant appealed from the judgment.

The question now arises as to whether or not the defendant, who simply occupied the position of Joseph Hungenburger in respect to the possession of said premises, may, while occupying such possession, be permitted to set up a hostile title, and controvert the title of plaintiff and his grantors, or whether the defendant is not estopped, by virtue of said leases and the relation of landlord and tenant, from denying or assailing the title of plaintiff's grantors while defendant remains in such possession. The general rule, so often asserted in adjudicated cases and by elementary writers, that, where the relation of landlord and tenant exists, the tenant is not permitted, while holding possession under that relation, to deny or attack the landlord's title, would seem to apply here, and cut off the inquiry into plaintiff's title back of Barker and Kinney, who leased to Hungenburger. The effect of this general rule would narrow the controversy in this action to inquiry into plaintiff's grant from Kinney and Barker. But there are some exceptions to the general rule,—such, for instance, as where the lessee is imposed upon, and, through deception, fraud, or duress, is induced to take a lease,—in which cases he is held not bound by the rule, and

among these exceptions, counsel for defendant insists, is included the case where a party is in possession when the lease is made, and that in such a case the lessee is still at liberty at any time, even while holding possession, to attack the landlord's title. Upon this point defendant's counsel cite *Tewksbury v. Magrath*, 83 Cal. 237, and *Franklin v. Merida*, 85 Cal. 558. These cases are certainly in point. The position taken in the first case was strongly resisted by counsel when the second case, of *Franklin v. Merida*, involving the same question, reached the supreme court. In the latter case the court again held the same doctrine in an elaborate opinion; Judge SAWYER dissenting in both cases. This exception declared by the supreme court of California, we think, is a new one, for it is scarcely met with in the numerous other authorities and cases where the general rule and its exceptions have been carefully considered. *Wood, Landl. & Ten.* § 236, p. 368, and cases there collected and cited; *Tayl. Landl. & Ten.* § 90 et seq., and cases cited; 1 *Washb. Real Prop.* (5th Ed.) 588-601, and cases cited. And, indeed, in the spirited consideration of the doctrine declared by the supreme court of California, the citation of authorities in support of it are few; and in our opinion the doctrine, if taken from the two English cases cited, must be adopted by inference, rather than taken from direct declarations involved in the decision of those cases. *Cornish v. Searrell*, 8 Barn. & C. 471; *Phillips v. Pearce*, 5 Barn. & C. 433. Mr. Washburn, in his valuable work on Real Property, in treating of this subject, refers to and criticises the doctrine held in *Tewksbury v. Magrath* and *Franklin v. Merida*, supra, in the following passage: "Where the tenant, having himself title and possession of the land, has been induced by fraud, misrepresentation, or mistake to take a lease, it seems well settled that he is not bound by the estoppel, and need not restore possession before disputing his landlord's claims. It has, however, been held, in some recent, elaborately considered cases, that a bare possession will enable him to do this, and that neither fraud nor mistake need exist. But this doctrine has been considerably limited in the court which declared it, and is not sustained by the general current of authority." 1 *Washb. Real Prop.* (5th Ed.) 599. It is also observed, in the note to the above passage, that "some of the cases cited by the court rest on quite different grounds." The cases referred to by Mr. Washburn, in which he calls attention to the fact that the "doctrine has been considerably limited in the court which declared it," are *Mason v. Wolf*, 40 Cal. 246; *Peralta v. Ginochio*, 47 Cal. 459; *Holloway v. Galliac*, Id. 474; *Association v. Willard*, 48 Cal. 614. Under the rule contended for by appellant, a party may get into possession, and, being in possession, may voluntarily, and apparently in good faith, enter into a lease, and, by the strongest and most solemn declarations, covenant to pay rent, and peaceably surrender possession at the close of the term, and at the same time be secretly holding, or claiming to hold, an adverse title, as in the case at bar, and suppress all notice of such ad-

verse claims, with intent to mislead the landlord, and so continue until a convenient time and opportunity arrives, when the evidence bearing on the controversy is lost or destroyed, or beyond the reach of his adversary, or witnesses have perished, or perhaps, in the lapse of time, a stranger has come into the title, entirely unacquainted with the facts surrounding the impending controversy, and then, when all the events advantageous to the lessee's position, and detrimental to the landlord's position, have come to pass, still holding possession, the tenant may assert his long suppressed and delayed claim to adverse title. We do not believe that we overstate the consequences which may attend this rule, for other equally unjust consequences can readily be suggested. In respect to the relation of landlord and tenant the statute of this state provides: "When the relation of landlord and tenant has existed between any persons, the possession of the tenant is deemed the possession of the landlord until the expiration of five years from the termination of the tenancy, or, where there has been no written lease, until the expiration of five years from the time of the last payment of rent, notwithstanding that such tenant may have acquired another title, or may have claimed to hold adversely to his landlord; but such presumptions cannot be made after the periods herein limited." Section 37, Code Civil Proc.

It cannot be denied that the relation of landlord and tenant existed between Joseph Hugelburger, lessee, and William Barker and Frank C. Kinney, to the end of the term, May 1, 1886, nor that defendant, who says that she held possession with her husband, and claims to have succeeded to his rights in the premises, stands in any other relation; and she says she has held the possession continuously since that time. The statute, and the rules of law applying, make the possession of the tenant the possession of the landlord; and we hold that while continuing in that possession the defendant cannot be permitted to revolt against the acknowledged landlord's title, and set up an opposition title. It follows that the assignments of error in reference to the execution and acknowledgment of said deed from Mack to J. W. Barker, Jr., is not necessarily to be considered herein, as that relates to the title of defendant's lessors; that the plaintiff, having proved a valid conveyance of said premises from said lessors to him, together with the relation of landlord and tenant existing as above set forth, is entitled to recover possession of said premises in this action.

The appellant contends that the court erred in not offsetting the value of improvements as proved by the evidence against the amount of damages adjudged for rents and profits. We think the defendant's answer is subject to criticism as having failed to fully set forth that these improvements were made in good faith, "under cover of title." In declaring title in herself the defendant did allege "that defendant, since her occupation of said premises, has paid the taxes thereon, and has greatly increased the value of said prem-

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ises, and has erected thereon tenements and buildings of the value of one thousand dollars." The replication on this point denies "that defendant put any improvements on said premises, or that her said husband put any improvements thereon, to exceed the value of \$400." The court found that "the evidence on the part of defendant also shows the erection of improvements on the lot in controversy, the value of which is variously estimated by different witnesses at from \$400 to \$1,000." Taking the pleadings together with the finding of the court, although not specific as to the exact value of the improvements, we believe the amount of \$400 should be offset against the judgment for rents and profits, and the judgment reduced by that amount, and it is here so ordered. The appellant contends that, as some witnesses estimated the improvements of the value of \$1,000 the court should have found that value. A sufficient answer to this complaint is that the record does not show that there was any request for specific findings on that or any point, nor that any motion was made to make the findings more definite. It is ordered that the judgment be modified as herein directed, and as modified the judgment of the trial court is affirmed.

BLAKE, C. J., and DE WITT, J., CONCUR.

MILBURN MANUF'G CO. v. JOHNSON *et al.*  
(*Supreme Court of Montana. May 8, 1890.*)

CHATTEL MORTGAGE—RIGHTS OF CREDITORS—AFFIDAVIT OF GOOD FAITH.

Under Comp. St. Mont. div. 5, § 1538, which provides that no chattel mortgage shall be valid, as against the rights of any other person than the parties thereto, unless the possession of the chattels is delivered to the mortgagee, or the mortgage provide that the property may remain in the possession of the mortgagor, and is accompanied by an affidavit of all the parties thereto that the same is made in good faith and is acknowledged and filed, a chattel mortgage is void as against a subsequent mortgage when the affidavit is omitted, though he had actual knowledge of the existence and good faith of the debt attempted to be secured by the prior mortgage.

Appeal from district court, Lewis and Clarke county; WILLIAM H. HUNT, Judge.

Action by the Milburn Manufacturing Company against D. M. Johnson and Robert Peltier. Judgment was rendered for defendants, and plaintiffs appealed.

*Sanders, Cullen & Shelton*, for appellant. *Casey & Smith*, for respondents.

HARWOOD, J. The sole question involved in this appeal will appear by a brief statement of facts: The defendant Johnson was indebted to the plaintiff, Milburn Manufacturing Company, in the sum of \$1,100, to secure the payment of which Johnson executed a mortgage upon a certain chattel; but the mortgage failed to conform to the requirements of the statute, in that the possession of the mortgaged chattel remained with the mortgagor, Johnson, according to a provision in the mortgage to that effect, and the mortgage was not "accompanied by an affidavit of all the parties thereto," either personally or by agent, "that the same

was made in good faith to secure the amount named therein, and without any design to hinder or delay the creditors of the mortgagor." Comp. St. div. 5, § 1538, p. 1068. The defendant Robert Peltier also became a *bona fide* creditor of Johnson; and, knowing of Johnson's *bona fide* indebtedness to Milburn Manufacturing Company, and of said defective mortgage to that company, Peltier obtained to himself a valid mortgage on the same chattel to secure his demand, conforming to all the statutory requirements, and filed the same of record second in point of time to the first-mentioned mortgage. On default of payment of said debt to Robert Peltier, he got possession of said chattel, and was about to apply the same, under the conditions of his mortgage, to the satisfaction of the debt owing to him, when the plaintiff, Milburn Manufacturing Company, brought this action to foreclose its mortgage, and recover possession of said chattel from Peltier. The trial court rendered judgment in favor of Peltier, and plaintiff appeals.

The question here involved is whether said first mortgage to Milburn Manufacturing Company is void as against Peltier, a subsequent mortgagee, by reason of the failure to accompany the first mortgage with the required affidavit, when the subsequent mortgagee had notice or knowledge of the *bona fide* character of the first debt. The learned counsel for appellant appeals to authorities which treat generally of equitable rights, and obligations arising by virtue of actual notice, to maintain the negative of the above question. But we do not think the doctrine can apply so as to control the question at issue. The statute provides that "no mortgage of goods, chattels, or personal property shall be valid, as against the rights and interests of any other person than the parties thereto, unless the possession of such goods, chattels, or personal property be delivered to and retained by the mortgagee, or the mortgage provide that the property may remain in the possession of the mortgagor, and be accompanied by an affidavit of all the parties thereto, or, in case any party is absent, an affidavit of those present, and of the agent or attorney of such absent party, that the same is made in good faith to secure the amount named therein, and without any design to hinder or delay the creditors of the mortgagor, and be acknowledged and filed as hereinafter provided." This statute, providing a method by which a creditor may acquire a special lien on the debtor's personal property while the possession remains with the debtor, is in derogation of the common law, and it must be strictly construed, under a well-established rule of construction. The same is the doctrine declared in *Leopold v. Silverman*, 7 Mont. 266, 16 Pac. Rep. 580; *Hardware Co. v. Sullivan*, 7 Mont. 307, 16 Pac. Rep. 588. All *bona fide* creditors stand on an equality before the law in respect to enforcing payment of debts, unless this equality is varied by a provision of law giving a special lien, or enabling one to acquire a special lien by complying with the provisions of law. If one attempting to create a special lien in

his favor, or to take advantage of one provided by law, fails to comply with the provisions of the law governing, then such creditor falls back into the common line occupied by other general creditors, and cannot invoke the rules or doctrine of equity to avoid this result. Such is the case with mechanics' liens, for example. Suppose one mechanic or material-man, knowing fully of the *bona fide* character of his predecessor's claim, perfects a lien which he asserts as against one filed by his predecessor after limitation had run, or without verification, or otherwise failing to comply with the statute. Is the latter, because he had knowledge of the good faith of his predecessor's claim, estopped from contesting his lien? The debtor himself could object to the lien for failure to comply with the statute provided for it, and who would know better of the *bona fide* character of the obligation? It is an arbitrary provision of law which enables one creditor, in preference to another, to take and hold a special lien on the personal property of his debtor, leaving the possession with the debtor; and that law demands a compliance with its terms. The first declaration of the statute in reference to chattel mortgages is that "no mortgage of goods, chattels, or personal property shall be valid, as against the rights and interests of any other person than the parties thereto, unless," etc. We regard this requirement of an affidavit of, or on behalf of, all the parties to a chattel mortgage as a condition going to the validity of the mortgage, which the law demands, independent of the question as to notice or knowledge of any person other than the parties that the debt intended to be secured was in fact a *bona fide* obligation. In the case of *Leopold v. Silverman*, 7 Mont. 266, 16 Pac. Rep. 580, and *Hardware Co. v. Sullivan*, 7 Mont. 307, 16 Pac. Rep. 588, and *Baker v. Power*, 7 Mont. 326, 16 Pac. Rep. 589, it has been decided by this court that the failure to comply with the provisions of the statute in making the required affidavit is fatal to the mortgage. The only distinction between those cases and the one at bar is that in the latter case there was actual knowledge on the part of the second mortgagee that the debt attempted to be secured by the first was a *bona fide* obligation. We hold that such knowledge would not change the rule laid down in those cases. *Hanes v. Tiffany*, 25 Ohio St. 549; *Belknap v. Wendell*, 31 N. H. 92; *Parker v. Morrison*, 46 N. H. 280; *Jones, Chat. Mortg.* § 36. Judgment affirmed.

BLAKE, C. J., and DE WITT, J., concur.

GAUS *et al.* v. SWITZER *et al.*

(Supreme Court of Montana. April 10, 1890.)

CORPORATION—TRUSTEES' LIABILITY—ANNUAL STATEMENT.

Under Comp. St. Mont. div. 5, § 460, which provides that the trustees of a corporation shall be liable for its debts unless, annually, within 20 days after the 1st of September, they shall file in the county clerk's office a statement of the capital stock, the amount paid up, and the existing debts of the corporation, the trustees, in the absence of a formal dissolution of the corporation, are liable for

its debts, on failure to file and publish the statement, though the corporation has been totally insolvent for some months prior to September 1st, and has transferred all its property to one of its creditors.

Appeal from district court, Lewis and Clarke county; WILLIAM H. HUNT, Judge.

Action by Louis Gaus and others against Jacob Switzer and others. Judgment was rendered for plaintiffs, and defendants appealed.

*Fletcher Maddox and Casey & Smith*, for appellants. *F. N. & S. H. McIntyre*, for respondents.

BLAKE, C. J. This appeal has been taken from the judgment of the court below, which was entered upon the pleadings. The complaint alleges, in substance, that the Helena Pressed Brick Company was a corporation, which had been organized under the laws of the territory of Montana, and had its principal place of business in Helena, and was doing business in the counties of Lewis and Clarke and Jefferson; that Switzer et al., the defendants, were at all times the trustees of the corporation, and discharged the duties of the office; that the corporation was indebted June 12 and 21, 1889, at said Helena, to various persons, in certain sums, which are enumerated, and the plaintiffs by purchase acquired these claims; that said accounts have not been paid, "and the plaintiffs further say that the said corporation, the Helena Pressed Brick Company, did not, within twenty days from the 1st day of September, 1889, make, and have not, at any time since said date, made, a report stating the amount of its capital stock and of the proportion of the same actually paid in, and the amount of the existing debts of the said company at the period last aforesaid, or at any time subsequent thereto; nor did said company cause any such report to be signed by its president, nor verified by the oath of its secretary, nor to be filed in the offices of the recorder of Lewis and Clarke and Jefferson counties, nor to be published in any newspaper printed and published in either of said counties; and the said defendants, and also said company, wholly neglected and refused, during said period of twenty days from September 1, 1889, and have ever since neglected and refused, to cause such report to be made, signed, and verified, filed, printed, and published in conformity with the provisions of section 460, p. 728, div. 5 of the Compiled Statutes of Montana territory, and they, the said company, and the said defendants, as such trustees, have at all times neglected and refused, and still do neglect and refuse, to comply with the provisions of the said statute." The answer denies "that, at the times mentioned in plaintiff's complaint, the Helena Pressed Brick Company was a corporation existing or doing business under or by virtue of the laws of Montana territory, having its principal place of business in the city of Helena, Lewis and Clarke county, Montana territory, or any other place, or that it had any place of business at all, or that it was doing business in Lewis and Clarke county and Jefferson county, or any other place."

The answer alleges "that on or about July 13, 1888, the said the Helena Pressed Brick Company was duly incorporated under the laws of Montana territory, and commenced doing business in the counties of Lewis and Clarke and Jefferson, in said territory; (2) that on or about December 14, 1888, the said corporation was solvent, and that thereafter said corporation was at no time solvent; (3) that in the month of April, Jacob Switzer, Albert Kleinschmidt, Fletcher Maddox, Frank L. Sizer, and G. V. Hallett, were trustees of said corporation; (4) that at said time, namely, in the month of April, 1889, the said the Helena Pressed Brick Company were involved in large pecuniary losses and liabilities, and were unable to pay its debts; \* \* \* that the enterprise of manufacturing brick at their yards had proved an entire and hopeless failure, and the company was at such time hopelessly insolvent; that at said time, July 15, 1889, said company executed a note and mortgage to Jacob Switzer for \$11,192.05, due by it to him. \* \* \* Its means at said date of carrying on business were exhausted, and it had turned over to said Jacob Switzer all its property and machinery, so that he might, by some possible means, work out from its property and the conducting of the same some portion of the amount due him. At this time the corporation was entirely abandoned, and all profits or losses of the company in its business was at the profit or loss of said Jacob Switzer, and no one else. That thereafter no officers or trustees of said company exercised any corporate act or function in the business of said corporation, and thereafter manifested no intention to resume business thereof, but abandoned same entirely, and said Switzer purchased all property of said company thereafter, and the same belongs to him irrevocably." The complaint was filed September 24, 1889, and prayed for judgment for said sums against the said trustees, the appellants herein. No replication was made to the answer.

The section of the statute which is referred to in the complaint is as follows: "Sec. 460. Every such company shall, annually, within twenty days from the 1st day of September, make report, which shall be published in some newspaper published in the town, city, or village, or, if there be no newspaper published in said town, city, or village, then in some newspaper published nearest the place where the business of said company is carried on, which shall state the amount of capital, and of the proportion actually paid in, and the amount of existing debts, which report shall be signed by the president and a majority of the trustees, and shall be verified by the oath of the president or secretary of said company, and filed in the office of the clerk of the county where the business of the company shall be carried on; and if any of said company shall fail to do so, all the trustees of the company shall be jointly and severally liable for all debts of the company then existing, and for all that shall be contracted before such report shall be made. No liability shall attach to any trustee or board of trustees, by virtue of the provisions of this section,



for a failure to cause to be published in a newspaper the report in this section mentioned, if, within the time herein mentioned, said trustee, or board of trustees, or company shall annually cause said report to be filed in the office of the county clerk and recorder of the county in which the business of the said company is carried on, as declared in its certificate of incorporation." Comp. St. div. 5. The complaint states facts which are sufficient to establish the obligation, under the statute, of the trustees of the Helena Pressed Brick Company to pay its indebtedness. Does the answer plead a defense which shields the appellants from this liability? The question is presented to this court for the first time, and the vast number and manifold character of the corporations within the state, and the conflict in the decisions upon some of the propositions which are relevant to the inquiry, demand a careful review of the authorities. It is the general rule that this law is penal, and must be construed strictly. *Steam-Engine Co. v. Hubbard*, 101 U. S. 191; *Chase v. Curtis*, 113 U. S. 457, 5 Sup. Ct. Rep. 554. Mr. Morawetz, in his valuable treatise on Private Corporations, considers the subject, and makes the following appropriate comments: "It is not always quite clear what the courts mean to express by saying that statutes of this character are 'penal,' and that they impose upon the directors a 'penal liability.' \* \* \* Nor is the liability of the directors under these statutes penal in the sense in which the word 'penal' is used in criminal law; it is not a penalty or fine imposed by the state for the infraction of a public law. \* \* \* The statutes imposing this liability establish a new rule of private right,—a rule which, although unknown to the common law, may be founded on sound principles of justice and expediency. The only reason why this liability is called 'penal' appears to be that it does not exist at common law, and is neither created by contract, nor given as compensation for a direct and immediate wrong done by the directors to the creditors of the company." Volume 2, (2d Ed.) § 908. Even with this understanding, "in construing penal statutes, we must not, by refining, defeat the obvious intention of the legislature." *Potter's Dwar. St.* 247. The law before us is clothed in clear and concise terms, and we think that the same end will be attained by the application of any canon of interpretation. There should be no difficulty in carrying out "the true intent and meaning of the legislative assembly." Under certain conditions the statute, in effect, declares that the trustees of the Helena Pressed Brick Company "shall be jointly and severally liable for all the debts of the company then existing, and for all that shall be contracted before such report shall be made." There are no exceptions in this clause, and there does not appear to be any obscurity in the scope of the liability of the trustees if the words "shall be understood and construed according to the approved and common usage of the language." Comp. St. div. 5, § 202. There has been no change in the board of the trustees of the Helena Pressed Brick Company since its organization.

The appellants were its officers when the debts mentioned in the pleadings were contracted, and did not publish or file the annual report in 1889, or comply in any manner with the requirements of the statute, *supra*. It was adjudged in *Steam-Engine Co. v. Hubbard*, *supra*, that the liability of the president of a corporation does not exist as to debts which were contracted before the period when he neglected or refused to make the certificate authorized by law, and remained unpaid. This deduction followed the phraseology of the statute of the state of Connecticut, which was decisive of the case, and provides that this officer shall be liable by reason of his default "for all debts of such corporation contracted during the period of such neglect or refusal." In this respect, the laws of the state of New York are like the section *supra*, and Mr. Justice CLIFFORD, in the opinion in *Steam-Engine Co. v. Hubbard*, *supra*, says: "Marked differences exist between the provisions of the New York statute and those of the state of Connecticut, the latter being much less stringent than the former. By the New York law the duty of making the annual return is required of the corporation itself, and the penalty for neglect is imposed upon the trustees who are intrusted with the management of its affairs. Consequently, it is a corporate duty, and, being such, each succeeding board is bound to perform it if it has been neglected by their predecessors. Unlike that, the duty to deposit the certificate, under the Connecticut statute, is devolved on the president and secretary in terms which show that a new president does not inherit the consequences of neglect of duty or pecuniary liability from his predecessor in office. He is made liable for his own neglect, and not for that of a prior officer, as clearly appears from the closing sentence of the penal section. In New York the trustees, upon default, are made liable for all the outstanding debts of the corporation, whenever contracted; but in Connecticut the president and secretary are liable only for debts contracted during the period of such neglect or refusal." In *Miller v. White*, 50 N. Y. 139, this statute was construed by Mr. Justice PECKHAM, who said: "It is absolute that the trustees shall be liable for all the debts of the company, if the report be not made, no matter by whose default. If one of the trustees did all in his power to have it made, yet if the president, or a sufficient number of his co-trustees to constitute a majority, declined to sign it, or if the president and secretary declined to verify it by oath, the faithful trustee seems to be absolutely liable, as well as those who refuse to do their duty." See, also, *Armstrong v. Barlow*, 63 N. Y. 62; *Knox v. Baldwin*, 80 N. Y. 610. Some expressions may be found in the cases which discuss the effect of the resignation of a trustee upon his official acts, that appear to qualify this interpretation of the statute which defines the liability for the payment of the indebtedness of the corporation. But, as we have seen, the trustees of the Helena Pressed Brick Company did not resign, and no questions of this nature arise upon this hearing. We readily accept the legal principles



which have been laid down, and hold that they reiterate the plain intent of the law regarding the responsibility of the officers of this corporation.

The main ground of the defense, which is set forth in the answer, has been the salient point of dissension. It is insisted that the Helena Pressed Brick Company, in September, 1889, had practically abandoned its functions; that its operations in manufacturing brick had resulted in financial disasters; that the business had been abandoned; that its means had been exhausted, and all the property had been delivered to Switzer in satisfaction of debts which could not be paid, and that the same belonged to him irrevocably; that since July, 1889, no officer of the corporation had discharged any duty; and that, under these circumstances, the trustees were not obliged to file or publish the annual report in 1889. The authorities of the state of New York have repeatedly asserted the soundness of this position. The leading case of *Bruce v. Platt*, 80 N. Y. 379, reviews the cases which have been decided in her courts, and demonstrates that this doctrine, which was maintained in 1822, in *Slee v. Bloom*, 19 Johns. 456, has been consistently upheld therein. The reasons which underlie these decisions are succinctly given in *Kirkland v. Kille*, 99 N. Y. 395, 2 N. E. Rep. 36, by Mr. Justice DANFORTH, who approves *Bruce v. Platt*, supra, and says: "When the condition of the company is such that the end and object for which it was formed are destroyed, and there is neither an ability nor intention on its part at any time to further prosecute its business, it is no longer required to make the report mentioned in that section. In other words, when these events happen it ceases to be a company 'carrying on business,' and the direction of the statute has no application." The liability of the appellants is a consequence of the failure or omission to discharge a trust enjoined by law. Their authority, and the formation and perpetuation of the Helena Pressed Brick Company, depend upon the statute of the state. The legislation relating to corporations contemplates that these bodies shall use and enjoy their privileges until their existence is legally terminated. They can be disincorporated by the order of the district court, upon the hearing of a petition which has been duly presented. Comp. St. div. 5, § 488. They can be dissolved by the limitation of their term in the articles of incorporation. Their franchises can be forfeited for various causes through judicial proceedings. Code Civil Proc. tit. 8, c. 5; *Territory v. Road Co.*, 2 Mont. 96. In the eyes of the statute, however, the rights of the trustees continue after these events, and they are expressly empowered "at the time of dissolution" to be the active officers of the corporation for many purposes, which are defined. Comp. St. div. 5, § 489. The acts which are specified in the answer did not dissolve the Helena Pressed Brick Company, or extinguish its charter, or remove from office the trustees. Chancellor Kent writes: "But the old and well-established principle of law remains good as a general rule, that a corporation is not

to be deemed dissolved by reason of any misuser or non-user of its franchises, until the default has been judicially ascertained and declared." 2 Kent, Comm. 312. In *De Camp v. Alward*, 52 Ind. 473, Mr. Chief Justice DOWNEY says, in the opinion: "We do not regard the act of the corporation in assigning its property to a trustee for the payment of the debts of the corporation, etc., as a surrender of its franchises as a corporation, and as working a dissolution of the corporation. A corporation may cease to do business, sell or assign its property for the payment of its debts, etc., and yet not cease to be a corporation." In *Rollins v. Clay*, 33 Me. 137, the court observes that "a corporation is not dissolved by ceasing to exercise its powers; nor because its stockholders and directors may consider it to be 'defunct.'" In *Reichwald v. Hotel Co.*, 108 Ill. 451, Mr. Justice SHELDON says, in the opinion: "The effect of this transfer of all the hotel property no doubt was to terminate the business of the corporation; but that was not the necessary effect. It is entirely clear, upon the authorities, that the disposal of all the property of a corporation has not the effect to end or dissolve the corporation." See, also, *Glass Manufactory v. Langdon*, 24 Pick. 49; *Buell v. Buckingham*, 16 Iowa, 296; *Moseby v. Burrow*, 52 Tex. 403; *Hotel Co. v. Sauer*, 65 Mo. 288; *Zinc Co. v. Franklinite Co.*, 13 N. J. Eq. 335; *Sullivan v. Mining Co.*, 39 Cal. 468. Mr. Chief Justice SHAW held, in *Coburn v. Manufacturing Co.*, 10 Gray, 243, that a corporation was not extinguished by proceedings in insolvency, and concluded with the remark that, "if the legislature had so intended, they would have so declared." This rule is applicable to the statute under investigation. It has been shown that the Helena Pressed Brick Company is a valid corporation, and in the full enjoyment of all the powers it originally possessed, notwithstanding the facts which are contained in the answer. So long as this condition is not disturbed, the trustees are entitled to control its affairs, and the appellants cannot escape the responsibility which the legislature has created for their defaults. The phrase, "where the business of the company is carried on," which forms the corner stone of the decisions of the courts of the state of New York, supra, is found in several sections of the chapter concerning corporations. The certificate of incorporation shall state "the county in which the operations of said company shall be carried on." Section 446. "Any certificate \* \* \* may designate one or more places where the company may carry on their business in the territory of Montana." Section 448. Another certificate shall be recorded in the county "wherein the business of said company is carried on." Section 459. Provision is made for the removal of the principal place of business into some other county. Section 490. In *Ex parte Schollenberger*, 96 U. S. 377, Mr. Chief Justice WAITE says: "A corporation cannot change its residence or its citizenship. It can have its legal home only at the place where it is located by or under the authority of its charter." The last sentence of this section under consideration

specifies "the county in which the business of the said company is carried on, as declared in its certificate of incorporation." This construction, which has been given by the legislature, applies to these expressions, which refer to the "legal home" of the corporation. When corporations are dissolved in any of the modes which have been pointed out, the evidence will consist of records which are open to public inspection, and no creditor or shareholder can be injured through ignorance of their financial standing. But if testimony is essential to prove abandonment, or any fact that is a matter of intention in the mind of the trustees, or any other persons, the difficulties in the path of the holders of accounts against corporations in default are increased. Proof of the neglect of the trustees to publish or file the annual reports in September can be easily overcome by the statements of the culpable parties that they had abandoned the enterprise in August of the same year. Uncertainty of this degree can be prevented by a rigid adherence to these views. The benefits of the statute regulating corporations are inseparable from the penalties which are prescribed, and all officers who undertake the performance of its obligations will be compelled to render obedience.

The judgment is affirmed, with costs.

HARWOOD and DE WITT, JJ., concur.

**STEDMAN v. SWITZER et al.**

(Supreme Court of Montana. April 10, 1890.)

Appeal from district court, Lewis and Clarke county; WILLIAM H. HUNT, Judge.

Action by John Stedman against Jacob Switzer and others. Judgment was rendered for plaintiff, and defendants appealed.

*Fletcher Maddox and Casey & Smith*, for appellants. *Wade, Toole & Wallace*, for respondent.

BLAKE, C. J. All the questions arising in this case have been passed upon in *Gaus v. Switzer*, ante, 18, (just decided,) and for the reasons therein stated it is hereby ordered that the judgment be affirmed, with costs.

HARWOOD and DE WITT, JJ., concur.

**KILBY v. BAKER.**

(Supreme Court of Montana. April 10, 1890.)

**APPEAL—WEIGHT OF EVIDENCE.**

When there is a substantial conflict in the testimony, a judgment granting a new trial on the ground of the insufficiency of the evidence will not be disturbed on appeal.

Appeal from district court, Yellowstone county; M. J. LIDDELL, Judge.

*R. T. Allen*, for appellant. *O. F. Goddard*, for respondent.

BLAKE, C. J. This action was commenced to recover damages for the malicious prosecution of Kilby by Baker. The jury returned a verdict for the plaintiff, and the court below granted the motion of Baker for a new trial. No reasons are given in the transcript for this ruling, and the grounds which appear in the notice relate chiefly to the insufficiency of the evidence. There is a substantial conflict in

the testimony of the parties, and we cannot say that there has been an abuse of judicial discretion. No questions of law for the guidance of the court at another trial have been brought to our attention, and the judgment must be affirmed, with costs. *Chauvin v. Valiton*, 7 Mont. 581, 19 Pac. Rep. 215; *Kircher v. Conrad*, 23 Pac. Rep. 74; *Landsman v. Thompson*, 22 Pac. Rep. 1148.

DE WITT, J., concurs. HARWOOD, J., being disqualified, did not sit in this case.

**WALLACE et al. v. LEWIS et al.**

(Supreme Court of Montana. April 9, 1890.)

**ATTACHMENT—DISSOLUTION—PRACTICE.**

1. Under Code Civil Proc. Mont. § 200, which provides that defendant, on whose property an attachment has been levied, may, at any time before the time for answering expires, move that the attachment be discharged, an order denying the motion, without prejudice to its renewal before another court to which the cause is removed, does not extend the time within which the motion may be made.

2. Under Code Civil Proc. Mont. § 482, providing that an application for an order is a motion, a motion cannot be made by simply filing a statement of it in writing, but the attention of the court must be called to it.

Appeal from district court, Gallatin county; FRANK HENRY, Judge.

The complaint is on a money demand, and was filed in the first district court in and for Lewis and Clarke county, November 27, 1889. Summons was issued, and served on defendant Lewis, December 2d, and on defendant Vaughn, December 12th, each in Gallatin county, in the sixth district. Writ of attachment was issued November 27th, and levied on personal property November 29th. Lewis' time to appear expired January 11, 1890, and Vaughn's on January 21st. Before those dates each appeared by demurrer. A written application to dissolve the attachment was filed by defendants on January 9th. On the same day defendants filed written demand that the venue be changed to Gallatin county, in the sixth district. The application to discharge the attachment was heard by Hon. WILLIAM H. HUNT, judge of the first district, in his court, January 15th. It was heard upon all the papers and proceedings in the case, and upon affidavits filed. The application was denied by Judge HUNT, January 15th, in the following order: "That said motion be overruled, without prejudice to defendants' renewing said motion if a change of venue shall be granted herein." On January 17th, the same judge made an order, on defendant's motion, changing the venue to Gallatin county. On March 5, 1890, before Hon. FRANK HENRY, judge of the sixth district, defendants moved to discharge the attachment. They used the same papers on the motion that had been filed and used in the first district. Since the hearing in the last-mentioned district, no papers of any description connected with the motion had been filed. On the hearing before Judge HENRY, March 5th, an order was made discharging the attachment. From this order plaintiffs appeal.

*Kinsley & Knowles and M. J. Liddell, or appellants. Luce & Luce, for respondents.*

DE WITT, J., (*after stating the facts as above.*) Section 200, Code Civil Proc., is as follows: "The defendant may also, at any time before the time for answering expires, apply on motion, upon reasonable notice to the plaintiff, to the court in which the action is brought, or the judge thereof, that the attachment be discharged on the ground that the writ was improperly issued." This statute is interpreted that the time in which the application must be made "refers to the time in which the defendant shall appear and answer the summons." *Vaughn v. Dawes*, 7 Mont. 362, 17 Pac. Rep. 114. That is, if the summons be served on defendant in a district, other than the one in which the action is brought, he must appear within 40 days. Defendant Lewis might then make the application before or on January 11th. Defendant Vaughn had until January 21st. The application was heard by Judge HUNT, January 15th. This was within the statutory time as to defendant Vaughn, whatever may have been the situation of Lewis. When Judge HUNT denied the application, "without prejudice" as to a renewal before Judge HENRY, he did not purport to extend the time in which defendants might make the application, which time was fixed by the statute, and the construction thereof in *Vaughn v. Dawes*, *supra*. The ruling simply relieved the defendants from the possibility of a charge of contempt of court in making a second application to another judge. Conceding that the effect of the words "without prejudice" was to leave the defendants as they were before the hearing before Judge HUNT, it was to preserve their privileges existing when they went into the first district court; not to enlarge them, or create new ones. See *Ford v. Doyle*, 44 Cal. 635; *Bowers v. Cherokee Bob*, 46 Cal. 285; *Kenney v. Kelleher*, 63 Cal. 443; sections 551, 552, Code Civil Proc. In this view the defendants were therefore, on January 17th, in the same position as if they had never moved for a dissolution of the attachment. We find that they take no steps whatever until the application to Judge HENRY, March 5th.

Our statute, section 482, Code Civil Proc., defines a motion as follows: "Every direction of a court or judge made or entered in writing, and not included in a judgment, is denominated an order. An application for an order is a motion." The statute of California is identical. *Prac. Act Cal. § 515*, and *Code Civil Proc. Cal. § 1003*. See, also, *Jenkins v. Frink*, 27 Cal. 339. In *People v. Ah Sam*, 41 Cal. 650, *TEMPLE, J.*, interprets the above law as follows: "A motion is properly an application for a rule or order, made *viva voce* to a court or judge. It is distinguished from the more formal applications for relief by petition or complaint. The grounds of the motion are often required to be stated in writing, and filed. In practice, the form of the application itself is often reduced to writing, and filed. But making out and filing the application it-

self is not to make the motion. If nothing more were done, it would not be error in the court to entirely ignore the proceeding. The attention of the court must be called to it. The court must be moved to grant the order." We adopt these views with the modification that we do not consider that the learned judge used the words "*viva voce*" in their exact literal signification. The application might be submitted to the court without argument or comment; but the attention of the court must be called to it in some way, by some movement of counsel. As the opinion cited says, "the grounds of the motion are often required to be stated in writing, and filed." Without express direction, such is infinitely the better practice. The motion is thus preserved in the exact form which counsel desire to give it. It is then exempt from the dangers incident to journal entries and minutes, or even the transcription by stenographers and court clerks. But the motion itself is the application to the court. "The court must be moved to grant the order;" and, when so moved, the proceeding is a motion. In this view, the defendants' motion, in the case at bar, their application to the court for the order to discharge the attachment, was not made until March 5th. The latest date within which they could move was January 21st. They were too late. This rule is particularly applicable to motions to discharge attachments. The adjudicated cases uniformly hold that such motion should be made *in limine*. Our own statute, which is chary in granting powers to a judge in chambers, gives him authority to hear and determine this motion; presumably for the reason that it is a matter demanding instant decision, and not a delay until term-time, which, under the judicial system in force in the territory when the law was enacted, might be six months distant. Large amounts of personal property may be seized on attachment, and held at a constantly accumulating expense. The right to the attachment should be determined at once. The moving party may not file his motion in writing, and wait for months before moving the court. Such practice would open the gate to abuses incalculable.

It is not required to discuss the other matters presented on the appeal. The motion to discharge, on which the order was made, and from which the appeal is taken, was not made in time, and the order is reversed, with costs.

BLAKE, C. J., and HARWOOD, J., concur.

#### STATE v. SULLIVAN.

(*Supreme Court of Montana.* April 15, 1890.)

##### CRIMINAL PRACTICE—COSTS—RES JUDICATA.

1. Under *Crim. Laws Mont. Comp. St. § 58*, which provides that an assault shall be punished by a fine of not less than \$5 and not more than \$50, when defendant has been found guilty, and has paid the fine assessed against him, he cannot be imprisoned for non-payment of the costs of the prosecution.

2. Under *Crim. Prac. Act Mont. § 223*, which provides that, "if the defendant is formally acquitted on the ground of a variance between the indictment and the proof, or upon an objection to

the form or substance of the indictment, it shall not be deemed an acquittal of the same offense," an acquittal on the ground that the indictment charged an assault on "John Moys" and the proof showed one on "John Maze" is not a bar to a subsequent prosecution for the same offense.

Appeal from district court, Deer Lodge county; D. M. DUFFKE, Judge.

W. S. Shaw, Co. Atty., and Henri J. Haskell, Atty. Gen., for the State. John F. Forbis, for respondent.

HARWOOD, J. Both parties to this action appeal. The defendant was indicted for an assault upon one John Maze, with intent to commit murder. Upon the trial the jury returned the following verdict: "We, the jury, find against the defendant on his plea of former acquittal, and that he is guilty of a simple assault, and fix his punishment at a fine of fifty dollars,"—whereupon the court pronounced judgment against the defendant that he "pay the fine of fifty dollars assessed by the jury in said above cause, and, further, that he pay the costs of this prosecution." The record shows that the defendant paid said fine of \$50 when the judgment was pronounced, but did not pay the costs of prosecution. The state, by its attorney, then moved the court for an order that defendant be committed to the county jail until said costs were paid. On the hearing of this motion, after argument of counsel for both parties, the court overruled said motion on the ground, as stated by the court "that it appears that there is no law to imprison a defendant for the non-payment of costs in such a case; and the defendant was thereupon ordered discharged." To that ruling the state excepted, and by bill of exceptions reserved the question of law involved in said ruling and the same is assigned by the state in its appeal herein as error.

We will consider this branch of the appeal first. The section of our statute defining the crime of assault, and providing the punishment therefor, (Comp. St. Crim. Laws, § 58,) is as follows: "An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another; and every person convicted thereof shall be fined in a sum not less than five nor more than fifty dollars." The defendant's counsel insists that, inasmuch as the law defining the crime of assault, and providing the punishment therefor, does not include the costs as part of the fine or punishment, the defendant cannot be lawfully imprisoned for non-payment of costs, but that such costs may be enforced as in a civil judgment, as provided by section 410, Crim. Prac. Act. After a careful review and analysis of the various provisions of the statute defining crimes and punishments, and the manner of entering and enforcing judgments for costs in criminal actions, we conclude that the point on the part of the defendant is well taken, and that the order of the court should be sustained in this particular case. We question, however, that it should be so, even in this case, and under the same statute, if the defendant had been convicted of a simple assault in a justice court, or had been convicted

in the district court on appeal from the justice court. It will be observed that the statute governing the practice in criminal cases in the justice court, and in cases appealed from that court to the district court, provides as follows, (section 508, Crim. Prac. Act.): "In all cases of conviction under the provisions of this chapter, the court shall enter his judgment for the fine and costs against the defendant, and may commit him until the judgment is satisfied, as in cases in the district court." See, also, sections 514, 515, 517, Crim. Prac. Act. These general provisions as to costs are confined to "cases of conviction under the provisions of this chapter," which applies to cases commenced in the justice court. We do not find any such general provision applying to all cases of conviction in the district court, requiring the costs to be made part of the penalty. It follows that in cases originally commenced in the district courts, where the statute does not make the costs part of the punishment for the crime of which the party is convicted, there is no provision of statute authorizing imprisonment for non-payment of costs. There is provision, however, for enforcing the judgment for costs as in civil actions. Section 410, Crim. Prac. Act. The statute frequently in defining crimes and punishments provides that persons convicted thereof shall be fined or imprisoned, or both, "with costs of prosecution," or "together with costs of prosecution," as in the cases provided for in sections 65, 147, 148, 179, 262, 265, and others of Crim. Prac. Act. In such cases, the costs are made part of the fine or punishment, to be enforced in the same manner as the fine under the provisions of section 368, Crim. Laws. In the case at bar, the crime of which defendant was convicted is not declared by statute punishable by fine and costs; hence there is no law authorizing imprisonment in that case for non-payment of costs alone.

We will now proceed to consider and determine the matter assigned as error by the defendant as appellant. It appears from the defendant's bill of exceptions that the indictment upon which defendant was convicted, as above stated, charged him with the crime of assault upon one "John Maze," with intent to commit murder. On his arraignment, the defendant entered a plea of "not guilty," and of "former acquittal of the offense charged." Upon the trial defendant offered in evidence a former indictment charging him with an assault upon one "John Moys," with intent to commit murder, and with this former indictment defendant offered in evidence the journal of the court showing the trial thereon, and that on such trial defendant, by his counsel, moved the court "to dismiss the action on account of variance between the proof and the charge in the indictment; which, being fully heard and considered by the court, was sustained, whereupon the court instructed the jury to find the defendant not guilty;" that the jury returned its verdict accordingly, and the court further ordered that the defendant be held and admitted to bail in the sum of \$1,000, to await the action of the next grand jury. The record fur-

ther shows that in connection with the evidence so offered by defendant "it was agreed between the counsel for the state and for the defendant that the offense charged in the indictment under which the defendant is now on trial and the former indictment are one and the same offense; that the defendant was acquitted on the former trial for the reason that there was a variance between the proof and the indictment, in this: that in the indictment the party injured was described as 'John Moys,' and the proof shows that the party injured was 'John Maze,' and that on account of such variance the court instructed the jury to acquit the defendant,"—which evidence and said admissions were offered "for the purpose of showing former acquittal, as set up in the defendant's plea." Objection was made by the attorney for the state to the admission of such proffered evidence, "for the reason that the same was irrelevant, immaterial, and did not show a former acquittal, and for the reason that defendant had been formerly acquitted upon a material variance between the indictment and the proof, and that the facts set forth in the proffered proof do not constitute an acquittal." The court sustained this objection, and refused to allow such proffered evidence to be submitted to the jury; to which ruling defendant, by counsel, excepted, and on this appeal assigns such ruling as error.

Counsel for defendant now insists that the misnomer in describing the person assaulted, as alleged in the first indictment, was an immaterial variance, and that, if such variance was immaterial, the acquittal on the former indictment is a bar to conviction on the indictment in this action for assault on John Maze. The statute provides, (section 223, Crim. Prac. Act:) "If the defendant is formally acquitted on the ground of a variance between the indictment and the proof, or upon an objection to the form or substance of the indictment, it shall not be deemed an acquittal of the same offense." It has been held in a great number of cases that where the evidence shows a substantial mistake or misnomer (not merely a slight variation in spelling, where the same sound is preserved) in describing or attempting to describe in the indictment the party injured, or whose property is injured or stolen, is fatal to the prosecution, and sufficient cause to discharge the prisoner on that prosecution. Modern decisions seem to be quite unanimous on this general proposition. *Lynes v. State*, 5 Port. (Ala.) 236; *Donnel v. U. S.*, 1 Morris, (Iowa,) 141; *Parchman v. State*, 2 Tex. App. 228; *Morgan v. State*, 34 Tex. 677; *People v. Allen*, 61 Cal. 140; *People v. Hughes*, 41 Cal. 234; *People v. McNealy*, 17 Cal. 333. Taking the general proposition above laid down, together with the doctrine of *idem sonans*, we have a reasonable guide by which to determine the question in the case under consideration. Moreover, we have many particular examples to which the courts have applied these general doctrines. "Modern decisions make no distinction between a misnomer of the surname and the Christian name," says Justice COLLIER in *Lynes v. State*, supra. In the case at bar

the trial court held that the difference between the two names involved a material variation, not only in the spelling of the surnames, Moys and Maze, but that these names are not alike in sound, and the variance was material. This ruling is abundantly supported by authorities, and we find no error in it. In this connection counsel for defendant cites section 189, Crim. Prac. Act, which provides as follows: "When an offense involves the commission, or an attempt to commit, a private injury, and is described with sufficient certainty in other respects to identify the act, an erroneous allegation as to the person injured or intended to be injured shall not be deemed material." An examination of the indictment in the case at bar reveals the fact that the offense is not described with sufficient certainty to identify the act, if the name of the party assaulted be disregarded or deemed immaterial. Judgment affirmed.

BLAKE, C. J., and DE WITT, J., concur.

#### SCHETTER v. SOUTHERN OR. IMP. CO.

(Supreme Court of Oregon. May 1, 1890.)

CONTRACT FOR LANDS—BONA FIDE PURCHASER—OFFICERS OF CORPORATIONS—DUTIES.

1. A person who has taken a contract in writing for lands, but who has paid nothing thereon, and has taken no deed for the same, is not a *bona fide* purchaser for value.

2. A director of a corporation who contracts with another director of the same corporation concerning the company's property, who was also business manager, with certain enumerated and limited powers, is chargeable with notice of any defect in the manager's power to make said contract.

3. A director of a corporation acts in a trust capacity towards all the stockholders of the corporation, and in respect to all of its property. A trustee cannot so deal with trust property as to make profit for himself. His duties as trustee require him to so manage and conduct this trust as to realize whatever profits may accrue in the course of the business for the benefit of the *cestui que trust*. This he could not do if he were permitted to acquire the trust property for himself.

4. The plaintiff claims to have had a contract for the purchase of certain lots, and agreed in writing to sell one of said lots to the lodge of Odd-Fellows in the town, and placed the lodge in possession, and covenanted to protect such possession. The lodge then placed on said lots lasting and valuable improvements. *Held*, that the plaintiff could not recover the value of said improvements placed on said lots by the lodge.

(Syllabus by the Court.)

Appeal from circuit court, Coos county; R. S. BEAN, Judge.

This suit comes into this court on appeal from a decree in favor of the respondent and against the appellant. The litigation commenced on the 1st day of September, 1888. On that day the defendant in this suit commenced an action of ejectment against Arago Lodge No. 28 of the Independent Order of Odd-Fellows, W. C. Phillips, Ole Evenson, and the respondent, Frederick Schetter, to recover the possession of lots 6 and 7, in block 14, in the town of Empire City, Coos county, Or. The respondent filed his answer in said action at law, and at the same time filed a cross-bill under section 381, Hill's Code, claiming

that he was entitled to relief arising out of facts requiring the interposition of a court of equity, and material for his defense. Upon the trial the court found the general equities to be with the appellant,—found it to be the owner in fee of the property in controversy, and that it was entitled to the possession of the same upon paying to the plaintiff the sum of money thereafter specified; the same being the reasonable value of the permanent improvements made upon said premises by the plaintiff, less the reasonable rental value thereof. The next paragraph of the decree is as follows: "And it is further ordered, adjudged, and decreed by the court that, within sixty days from and after the date of this decree, the defendant herein shall pay in to the clerk of this court, for the use and benefit of the plaintiff herein, the sum of nine hundred and sixty-nine dollars, less the defendant's costs and disbursements in this suit, and the costs and disbursements in said action to recover said real property, and that the same be paid to the plaintiff by the clerk on demand." Other parts of the decree provide for the defendant's being placed in possession of the property in controversy on certain conditions.

The facts upon which the plaintiff based his right to equitable relief, so far as may be necessary to a proper understanding of the question involved, may be briefly summarized from the complaint: That about November, 1883, the Southern Oregon Improvement Company was a private corporation organized under the laws of the state of Oregon, and doing business at Empire City; that the Boston Safe-Deposit & Trust Company was also a private corporation, organized under the laws of the state of Massachusetts and did business in the state of Massachusetts and in the state of Oregon; that about the month of May, 1885, the said Southern Oregon Improvement Company was the owner in fee of the two lots in controversy, and at said time the Boston Safe-Deposit & Trust Company was the owner and holder of a mortgage lien upon a large amount of real property, including the two lots in controversy, in order to secure the payment of certain mortgage bonds then and thereafter to be issued by said improvement company, not to exceed \$2,000,000. The respondent claims that in the month of May, 1885, the said improvement company sold the said lots 6 and 7 to him, and did agree to cause the same to be released from said mortgage in consideration that respondent would convey, and cause to be conveyed, to it, his own and the interest of others in certain tide-lands containing about 367.65 acres. In the year 1887 the Boston Safe-Deposit & Trust Company foreclosed said mortgage, and all of the land described in said mortgage, including the lots in controversy, was sold under said decree to William W. Crapo and William J. Rotch. But the respondent was not a party to said suit, and in December, 1887, the said Crapo & Rotch conveyed all of said property to the appellant; and it is alleged that the appellant holds the legal title to said lots for the respondent. The respondent alleges that he has been

in possession of said lots ever since May, 1885, and has placed lasting improvements thereon to the value of \$2,000; that the improvement company and each and all of its successors in interest, have neglected to convey said lots to the plaintiff, although he has frequently demanded a conveyance, and at the same time he expressed his readiness to comply with the terms of said agreement on his part, and that said trust company neglected to release its lien. This is a very brief epitome of the complaint, the material part of which is denied by the answer. It appears from the answer that the business of said improvement company was such as to authorize a minority of its directors to reside out of this state; that its board of directors consisted of seven members, three of whom resided in the state of Massachusetts, and that by its by-laws three directors constituted a quorum to do business; that its capital stock was \$4,000,000, and was mainly owned by persons residing in Massachusetts and contiguous eastern states; that each of the four directors in Oregon owned one share of said stock, and no more; that the plaintiff was a director of said improvement company from and after the 26th day of June, 1884, until said corporation ceased to do business; that in November, 1884, one Metcalf was elected a director of said corporation, and continued to act as such until November 28, 1885, at which time he ceased to be a director; that, during the time Metcalf was director, he was also general manager of its business in Coos county, Or., and that his powers were limited to certain enumerated things, and did not extend to any dealings in respect to, or include any power over, the real property of the company, yet the said respondent, with knowledge of the premises, took from said Metcalf this writing: "Empire City, Or., June 24, 1885. Sold this day to Fred Schetter, for twenty-five hundred dollars, (\$2,500,) the property lying between Getty's stable and Jarvis' saloon or corner, being 100 feet square, payable in four months, or as soon after as approved shall be tendered; and, on failure of payment, then said F. Schetter agrees to pay Southern Oregon Improvement Co. one hundred and twenty-five dollars as forfeit. (Lots 6 and 7, block 14.) W. T. METCALF, Gen. Mgr. FRED SCHETTER." That, by the rules of the company, none of its lands could be disposed of without the consent of the directors residing in Massachusetts, and all offers to purchase same were to be submitted to them, and if they approved the same the matter was brought before the board of directors, and an order made by the board directing a conveyance, but, if the Massachusetts directors did not approve the same, the matter dropped; that at no meeting of the board of directors was said matter of the sale of said lots by the company, or the purchase of the tide-lands by it, ever brought before said board. And it is alleged the lots were worth \$5,000, and the tide-lands, \$750. The facts on both sides are pleaded at very great length. Any other facts deemed of importance will be stated in the opinion.

*S. H. Hazard*, for appellant. *Wm. H. Holmes*, for respondent.

STRAHAN, J., (after stating the facts as above.) Upon the argument of this cause in this court the respondent's counsel did not claim that he had made such a case as entitled him to a specific performance of the alleged contract with Southern Oregon Improvement Company. The most that he claims is to be reimbursed for his alleged improvements. What is said in this opinion will therefore be devoted to the consideration of that subject.

In *Bright v. Boyd*, 2 Story, 607, Judge STORY laid down the rule which the plaintiff seeks to invoke in this case, and which met the approval of this court in *Hatcher v. Briggs*, 6 Or. 31. In the former case the learned justice said: "I wish, in coming to this conclusion, to be distinctly understood as affirming and maintaining the broad doctrine, as a doctrine of equity, that, so far as an innocent purchaser for a valuable consideration, without notice of any infirmity in his title, has, by his improvements and meliorations, added to the permanent value of the estate, he is entitled to a full remuneration, and that such increase of value is a lien and charge on the estate, which the absolute owner is bound to discharge, before he is to be restored to his original rights in the land." Applying the doctrine of this case, and the many subsequent cases which have followed it, to the facts of the plaintiff's case, he is entitled to no relief. In the first place, the plaintiff is not a *bona fide* purchaser for value of said lots. He has paid nothing thereon. He obtained no deed, and he is chargeable with notice of every defect in Metcalf's authority. This court has so recently and so often stated the requisites of a *bona fide* purchaser of lands, within the equity rule, that it would be simply superfluous to restate them. It suffices to say the plaintiff was not such purchaser.

If he had paid value, and taken a deed, he must fail for another reason. He was one of the directors of the Southern Oregon Improvement Company and was therefore chargeable with notice of the extent of Metcalf's powers as manager. He knew that Metcalf had no authority to sell the company's land. He knew also that, before any contract in relation to the sale of any of these lands could bind the company, it must first receive the indorsement or approval of the three non-resident directors, and this more particularly and especially when the company was dealing with one having knowledge of such regulation.

And finally, being a director of the company, he was acting in a trust capacity towards all the stockholders of the corporation, and in respect to all of its property. The rules of equity applicable to the dealings by a trustee with trust property are, therefore, to be applied to this transaction. Equity would not permit the plaintiff to deal with this property so as to make a profit for himself. His duty as trustee required him to exert his best judgment in handling this, as well as all other property of the company, so as to make

the best profit possible for the stockholders. This he could not do if he was trying to acquire the company's property for himself. One privilege which is always accorded to the *cestui que trust* in such case is to rescind the contract, in a reasonable time, by restoring what had been paid thereon. In this case, as nothing had been paid, no question as to the terms could arise.

One other objection I think equally fatal to the plaintiff's recovery: The lot upon which the improvements were placed was bargained by the plaintiffs to the Odd-Fellows lodge named as defendant in the original action, and the plaintiff covenanted with the lodge to protect its possession. The evidence shows that it was the lodge which placed the improvements on the lot for which the plaintiff seeks to recover, and not the plaintiff; and he seems to proceed on the assumption that, because he covenanted to protect the lodge's possession, therefore he has succeeded to its rights, whatever they may be, in respect to the improvements placed on the lot by it. No authority is cited to support this contention, and it is believed that none has gone so far.

I have not thought it necessary to cite authorities for what has been said in disposing of the main points in this case, for the reason the propositions stated are elementary and incontrovertible. So much of the decree appealed from as is specified in the notice of appeal must therefore be reversed, and the plaintiff's cross-bill be dismissed.

KNOFF v. PUGET SOUND CO-OP. COLONY.  
(Supreme Court of Washington. Jan. 20, 1890.)  
JUSTICES OF THE PEACE—JURISDICTION—AMENDMENT.

1. In an action against a corporation, before a justice of the peace, defendant, on showing that its chief office is in another county, is *prima facie* entitled to a dismissal of the suit, under Code Wash. T. § 1780, (justice's practice act,) providing that an action may be dismissed without prejudice where it appears that it is brought in the wrong county.

2. Under that section, an objection to the jurisdiction taken and saved at the trial is available on appeal, though defendant afterwards pleads to the merits.

3. It is not error for the district court on appeal to refuse to allow an amendment of the return in aid of the justice's jurisdiction.

Error to district court, King county.

Code Wash. T. § 1780, (justice's practice act,) provides that an action may be dismissed without prejudice to a new action "when it is objected at the trial, and appears by the evidence, that the action is brought in the wrong county; but, if the objection be taken and overruled, it shall be cause only of reversal or appeal."

*Richard Osborne* and *Reed & Clark*, for plaintiff in error. *W. S. Bush*, for defendant in error.

HOYT, J. Plaintiff filed with a justice of the peace for Seattle precinct, King county, a complaint as follows: "The plaintiff complains and alleges that the defendant now is, and was at all times herein mentioned, a corporation organized and exist-



ing under the laws of Washington Territory; (2) that on the 30th day of September, 1887, an account was stated between the plaintiff and the defendant, and on such a statement a balance of two hundred twenty-four and 95-100 dollars was found due to the plaintiff from the defendant; (3) that the defendant agreed to pay the plaintiff the said balance of two hundred twenty-four and 95-100 dollars; (4) that the defendant has not paid the said sum of money, or any part thereof, except the sum of fifty dollars paid October 3, 1887,"—concluding with a prayer for judgment; and thereupon said justice issued a notice, and delivered the same to an officer, who made a return of service thereof, which return, together with the notice, were substantially as follows: "To Puget Sound Co-operative Colony: You are hereby notified to be and appear at my office, in Seattle, King county, Washington Territory, on the 16th day of November, 1887, at the hour of 1 o'clock P. M., to answer to foregoing complaint, or judgment will be taken against you as confessed, and the prayer of the complaint granted." I hereby certify that I received the within complaint and notice this 8th day of November, A. D. 1887, and on the same day I served the same in Seattle, King county, W. T., by delivering into the hands of George Venable Smith, president of the Puget Sound Co-operative Colony, a copy certified by one to be a true and correct copy of the original complaint and notice." On the return-day of said notice the defendant appeared specially, and objected to the proceedings, and moved the court to dismiss the suit for the reason that said notice and the return thereof gave the court no jurisdiction of the defendant, and for the further reason that the action had been brought in the wrong county, and in support of the latter point filed a certified copy of its articles of incorporation, and the affidavit of its president, showing that its principal place of business was not in King county, but was in the county of Clallam. The justice denied the motion, and proceeded to trial, and rendered judgment against the defendant, which thereupon prosecuted its appeal to the district court and there renewed the motion which had been denied by the justice. The court granted said motion, and reversed the judgment of the lower court, and dismissed the suit, to which action plaintiff excepted, and assigned error thereon, and here seeks a reversal thereof.

We do not decide as to the sufficiency of the notice and return thereon, above set forth to sustain the judgment, if there had been no appearance by the corporation, for, even if it was, still the objection of the defendant, and its showing that its principal place of business was in Clallam county, established *prima facie* the fact that the suit had been brought in the wrong county; and, in the absence of any offer to amend the return of service, or make other showing to aid the jurisdiction of the justice, he should have found that the case was within the provisions of the third subdivision of section 1780 of the Code, and should have granted defendant's motion to dismiss.

Plaintiff, however, claims that, even if the above position is true, yet as the defendant, after the denial of its motion, answered the complaint, and prosecuted its appeal from a judgment on the merits, it waived said motion, and could not thereafter take advantage thereof. As to the effect of an answer on the merits upon the right to assign error upon rulings prior to such answer in an ordinary case, it is not now necessary to decide, as the plain intent of said section 1780 is to allow the defendant to take advantage on appeal of any error in overruling its objection, even after a trial upon the merits. Under the provisions of said section, the judgment of the justice, even after objection well taken, is not void, but only voidable; and, if the defendant could have no relief on appeal, it would be without remedy. The action of the justice upon the papers before him was erroneous, and it became the duty of the district court to reverse the judgment.

When the cause came on in the appellate court, plaintiff, evidently seeing the force of the defendant's position upon the record as it stood, suggested, by affidavit of the constable who made service of the process, that all of the facts connected with such service did not appear from the return thereof, and therefore moved that said constable be allowed to file an amended return. This motion was denied, and such denial is also assigned as error. We think this ruling was correct, as the transcript from the lower court could not be thus aided. It is true that courts are liberal in allowing amendments necessary to sustain judgments rendered therein, but this liberal rule does not apply to amendments in one court to proceedings had in another; and nearly or quite all of the large number of cases which the diligence of counsel for plaintiff has produced will be found to refer to the amendments of proceedings in the same court. But, if this was not so, and the rule was as contended for by plaintiff, the result in this case would be the same, for the reason that the allowance of such amendments is in the sound discretion of the court, and there is nothing in this record to satisfy us that such discretion has been abused. It follows that the district court committed no error, and that the judgment therein rendered must be affirmed, with costs.

ANDERS, C. J., and STILES, SCOTT, and DUNBAR, JJ., concur.

(1 Wash. St. 9)

KENYON V. SQUIRE.

(Supreme Court of Washington. Jan. 23, 1890.)

REMOVAL OF CAUSES—"FEDERAL QUESTION."

The question whether a patent from the United States, conveys part of the sea-shore below high-water mark in front of the land conveyed by the patent, is a "federal question," authorizing the removal of the cause from the state to the federal court.

Appeal from district court, King county. *J. Gardner Kenyon, prose. Thos. Burke and Struve, Haines & McMicken, for defendants.*

STILES, J. This was an application to transfer the cause to the United States cir-



cuit court for the district of Washington, for the alleged reason that it was a cause pending at the time when the territory of Washington became the state of Washington, and whereof the circuit court of the United States might have had jurisdiction, under the laws of the United States, at the time of the commencement of the action, had the circuit court then been in existence. Such a cause is required to be transferred, upon request, by section 28 of the enabling act. Ordinarily, the time for a party plaintiff to elect whether he will commence his action in a state court or in a federal court is at the time of the commencement, and the time for a defendant to demand a removal of the action from the state to the federal court is at the time of his appearance in the action. In such cases the complaint, in the one case, determines whether or not the federal court has jurisdiction; and in the other case the proceedings at the time of the application for removal are the basis for the allowance or denial of the application. Judging strictly in accordance with the rule stated, we doubt whether this cause would have been removed to the federal court on the application of the defendant below had Washington been a state when the action was commenced, upon the proceedings as they appear in the record to have existed at the time when the application would have had to be made. Nor do we think that the complaint presented a state of facts which would have warranted the circuit court in taking jurisdiction had the action been commenced in that court. But we have deemed it proper, under the circumstances, that we should go further than courts would ordinarily be required to go, to determine the question of removal, since the enabling act seems to intend to place parties in the position, with regard to choosing their forum, which they have had, had the circuit court been in existence at the date of the commencement of the action, or of the appearance of the defendant therein. Therefore, we have looked into the record in this case, and find that one of the matters in dispute at the hearing, and one upon which much stress was laid by one of the parties, at least, was whether a patent of the United States, which conveyed land bordering upon an arm of the sea, and which purported to convey a portion of the seashore below ordinary high-water mark in front of the land included in the patent, actually conveyed to the patentee any title to the shore below high-water mark. In our judgment, the existence of this element in the controversy would have been sufficient to raise what is denominated a "federal question," and would have given the circuit court jurisdiction, had the plaintiff shown it in his complaint, or had the defendant shown it in the proceedings to remove. It was not an element necessary to be shown by the plaintiff, at the time he commenced his action, to establish a cause of action; nor was it necessary to be shown by the defendant to meet the allegations of the plaintiff, or to assert his own right. But it could have been shown by either party, and, being shown, the circuit court would have had jurisdiction. The files, records, and proceedings in the

cause will be transferred to the United States circuit court for the district of Washington.

ANDERS, C. J., and SCOTT and HOYT, JJ., concur. DUNBAR, J., did not sit upon the hearing of the application.

(1 Wash. St. 12)

KENTON v. SQUIRE *et al.*

(*Supreme Court of Washington.* Jan., 1890.)

Appeal from district court, King county.

J. Gardner Kenyon, *pro se.* Thos. Burke and Struve, Haines & McMicken, for defendants.

STILES, J. For the reasons assigned in the case of Kenyon v. Squire, ante, 28, the files, records, and proceedings in this cause will be transferred to the United States circuit court for the district of Washington.

ANDERS, C. J., and SCOTT and HOYT, JJ., concur. DUNBAR, J., did not sit upon the hearing of the application.

(1 Wash. St. 11)

KENTON v. KNIPS *et al.*

(*Supreme Court of Washington.* Jan., 1890.)

Appeal from district court, King county.

J. Gardner Kenyon, *pro se.* Thos. Burke and C. H. Hanford, for defendants.

STILES, J. For reasons assigned in the case of Kenyon v. Squire, ante, 28, the files, records, and proceedings in this cause will be transferred to the United States circuit court for the district of Washington.

ANDERS, C. J., and SCOTT and HOYT, JJ., concur. DUNBAR, J., not sitting upon the hearing of the application.

(1 Wash. St. 16)

GOWER v. GOWER.

(*Supreme Court of Washington.* Jan. 23, 1890.)

JUDGMENT—VACATING—APPEALABLE ORDER.

An order vacating a judgment made under Code Wash. § 109, extending the time within which the court or judge may grant relief from the effects of a judgment to five months after the term, is not a final order, and not appealable.

Appeal from district court, Pierce county.

C. H. Hanford, for appellant. Campbell & Powell, Carroll & Colner, and Mitchell, Ashton & Chapman, for appellee.

ANDERS, C. J. The court below rendered an affirmative decree in this cause in favor of appellant, the defendant therein. After the term of the district court at which said decree was entered, but within five months subsequent to its adjournment, the plaintiff, appellee herein, applied to the court in the usual manner to vacate said decree, which was accordingly done. From this order of the district court, defendant appeals. Appellee moves to dismiss the appeal for the reason that the order appealed from was not a final judgment or decision, and therefore not reviewable in this court.

In the case of Lillenthal v. Wright, 23 Pac. Rep. 801, (recently decided by this court,) we held that an order of the district court vacating a judgment at the same term at which it was rendered was not subject to review in this court; and, as we are of the opinion that section 109 of the Code extends the time during which the court or judge may grant relief from the effects

of judgments for the period of five months after the adjournment of the term when rendered, the motion must be governed by that opinion, and decided accordingly. It follows, therefore, that the motion must be sustained, and the appeal dismissed, and it is so ordered.

STILES, HOYT, DUNBAR, and SCOTT, JJ., concur.

#### UNITED STATES V. SCHOW.

(Supreme Court of Utah. April 12, 1890.)

#### UNLAWFUL COHABITATION—EVIDENCE—ADMISSIONS.

On an indictment for unlawful cohabitation, defendant's deliberate admissions that he committed the offense, made out of court, and proved at the trial by two witnesses, are sufficient to sustain a verdict of guilty.

Appeal from district court, second district; before Justice ANDERSON.

Andrews P. Schow was indicted for unlawful cohabitation. He was convicted, and appeals.

Presley Denny, for appellant. C. S. Varian, for the United States.

BLACKBURN, J. The judgment in this case must be affirmed. We think the evidence fully supports the verdict of the jury, and we find no error in the instructions of the court, or in any of the proceedings in the case. The defendant was convicted alone on the proof of his admissions made out of court, and the contention of his counsel is that such proof does not justify a verdict of guilty. It is true that this character of testimony is to be taken and considered with great caution. The evidence shows that the admissions upon which conviction was had were deliberately and intelligently made, and were fully and particularly proved by two intelligent witnesses. Admissions of this character are of great weight, and most satisfactory. 1 Greenl. Ev. § 200. The judgment is affirmed.

ZANE, C. J., and HENDERSON, J., concur.

#### HARVEY V. BUNKER HILL & SULLIVAN MINING & CONCENTRATING CO.

(Supreme Court of Idaho. March 5, 1890.)

#### JUDGMENT BY CONSENT—RIGHT OF APPEAL.

Where, in a suit before a justice for \$150, being above the amount of which justices have exclusive original jurisdiction, all the allegations of the complaint were denied, but, to expedite an appeal, defendant, by agreement of both parties, consented to a "*pro forma* judgment" against him, "reserving all his rights under an appeal," this consent does not deprive him of his right to be heard in the circuit court, and his appeal was improperly dismissed.

Appeal from circuit court, Shoshone county; LOGAN, Judge.

William H. Clagett, for appellant. Charles W. O'Neill, for respondent.

SWEET, J. On March 25, 1889, plaintiff filed his complaint before J. S. LANGUISHE, a justice of the peace in and for Wardner precinct, Shoshone county, Idaho territory, in which he alleged that the de-

fendant was indebted to him in the sum of \$150 for professional services rendered at defendant's instance and request. On that day a summons was issued, and was returned on the 29th of the same month. On the 29th, also, defendant appeared and filed its answer, denying each and every allegation contained in plaintiff's complaint. At the same time defendant consented to what is termed in this written consent the entering of a *pro forma* judgment, and judgment was thereupon entered for plaintiff. The paper under which the judgment was entered is as follows: "This case having been called for trial, the defendant consents that judgment may be entered *pro forma* in favor of plaintiff and against defendant, as prayed for in the complaint herein, reserving all of its rights under an appeal from said judgment. WILLIAM H. CLAGETT, Attorney for Defendant." Immediately after the rendition of judgment, to-wit, on the said 29th day of March, 1889, defendant filed its notice of appeal, together with the undertaking thereon, and the said appeal was perfected by defendant's causing a transcript of the docket of said justice to be verified and forwarded to the clerk of the district court. The cause came on for trial in the district court, whereupon plaintiff moved that the appeal be dismissed. The motion was granted by the district court on the ground that, inasmuch as there had been no trial in the lower court upon questions of fact, and that, as no statement had been made, there was nothing to try. The court, in dismissing the case, used the following language: "As before stated, the case cannot be tried in this court for the first time. There must have been an actual trial before the justice before that can be done here. Manifestly, this case can only be affirmed or reversed by this court, or the appeal dismissed. The appeal must be dismissed, for the reason that there are no issues presented to this court which can be tried."

We do not understand why the issues were not clearly presented in the district court. The complaint was there, alleging the debt. The answer was there, denying it. The issues were as fully presented in the district court as they could be presented after a trial had in the justice's court. No trial in the justice's court would have presented the issues any differently from the manner in which they were presented at that time. We take it that this objection is not a valid one.

The next inquiry suggested is far more serious in its character. It is this: May the defendant consent to a judgment in the justice's court, and then appeal from the judgment to which he has consented? If the amount were \$100, or less, the defendant would unquestionably be bound by the judgment to which he consented, unless a new hearing were granted in the justice's court for cause shown; and we doubt if his declaration that he consented only to a *pro forma* judgment would save him. We do not think the appeal could be saved by declining to enter into a trial before the justice involving an amount confined to the original jurisdiction of the lower court. Counsel for defendant treats

his written consent to the entry of said judgment as a stipulation, and cites *Mecham v. McKay*, 37 Cal. 159, as an authority in support of his position. After stating that the court has repeatedly refused to review judgments and orders entered by consent, the court discuss the question further, and say: "We are not inclined to retract or modify this proposition, but it is to be limited to cases wherein it does not appear from the record that the consent was given only *pro forma* to facilitate the appeal, and with the understanding on both sides that the party did not thereby intend to abandon his right to be heard on the appeal in opposition to the judgment. \* \* \* If it appears from the record that it was intended by the parties to be only a *pro forma* judgment or order entered, by consent, for the mere purpose of hastening an appeal, and with no intention to waive an exception thereto, it would be a somewhat rigid rule to give the stipulation a conclusive effect not contemplated by the parties. \* \* \* The stipulation in this case, on which the order denying a new trial is entered, is not free from doubt; but, taking it altogether, and construing it as a whole, in connection with the other facts disclosed in the record, we conclude it was intended by the parties that the motion for a new trial should be denied *pro forma* only to hasten the appeal." But the plaintiff contends that this paper is in no sense a stipulation. Taken alone, it could not be considered as such. But the amount involved was and is within the original jurisdiction of the district court. Both parties were before the justice. An answer had been filed denying the indebtedness, and on the same day the notice of appeal was given, the undertaking filed, and the transcript promptly forwarded to the district court. Counsel for defendant contends that after said answer was filed it was agreed between counsel for plaintiff and defendant that this judgment should be entered, and that defendant should forthwith appeal the case. Counsel for defendant further insists that this agreement was reached between the parties by reason of the fact that it was then and there understood that neither party would accept the judgment of the justice's court as final, and that, no matter which way it might be decided, the appeal would follow; and that therefore they would save costs and trouble by simply consenting to the *pro forma* judgment, (whatever that may mean,) and the appeal should go forward. The counsel who represented plaintiff and respondent in this court did not appear in the justice's court, nor in the court below; hence makes no denial of all these assertions made by counsel for defendant, except that the paper in itself is not a stipulation, and that, therefore, the rule just quoted from *Mecham v. McKay* does not apply.

Taking all the facts together, we are inclined to believe that the agreement was fairly made. The defendant was there ready to try its case. So was the plaintiff. They agreed that the judgment rendered by the justice, no matter which way it went, would be forthwith appealed from by the losing side. There can be no question

but that defendant would have tried the case then and there had not such an understanding been arrived at. As shown by the record, also, no evidence was taken by the justice; and he gave judgment for the plaintiff without requiring a syllable of evidence, and in the face of a denial averring that defendant was not indebted to plaintiff in any sum whatever. This simply tends to show that the justice also understood the real stipulation between the parties, and that immediately upon its consummation the judgment was entered in accordance therewith. It would, of course, be an absurdity to say that the defendant intended to consent to a *bona fide* judgment, in the face of the peculiar written consent given, and in the face of the answer, filed at the same time, denying that the plaintiff was entitled to the judgment. We do not understand that the court below entertained any such view of the case. The court below simply intimated that the case should go back for trial in the justice's court. That means simply that the parties should introduce their evidence in the justice's court, and then appeal again to the district court, where they would occupy precisely the same position in which they found themselves when they were dismissed in the first instance; for even had evidence been introduced, they would still go to trial *de novo* in the district court on the pleadings as they now stand, and as they have stood from the beginning. As before stated, if it were not a case in which the jurisdiction of the district court were concurrent with the jurisdiction of the justice's court, an appeal of the kind would not be allowed, for the reason that, unless the amount exceed \$100, the intention of the statute is that the higher court shall not be burdened with the consideration of the case until, after a trial, the party appeals as prescribed by law.

Defendant cites *Brick v. Brick*, (Mich.) 31 N.W. Rep. 907. The language of the court in that case is as follows: "It appears from the printed record that the decree below was entered, by the consent of defendant, by his solicitor. Such a decree is binding upon the parties unless impeached for fraud or mistake, and no such claim is advanced on this appeal." The facts already stated show most conclusively that, to say the least, if the consent entered in the justice's court resulted in a judgment from which no appeal could be legally had, a mistake was made. This view urged by the defendant is not seriously denied. Counsel for respondent cites *Campbell v. Randolph*, 13 Ill. 314. The Illinois statute provides that "appeals from judgments of justices of the peace to the circuit court shall be granted in all cases except on judgments confessed." Rev. St. 1845, c. 59, § 58. The entry in the case discussed was as follows: "This day being set for trial, and the parties appeared, and the defendant filed his set-off. But, no proof being before the court, and the defendant by his counsel admitting the plaintiff's account, judgment is therefore rendered in favor of the plaintiff and against the defendant for the sum of \$17.20 principal and interest, and costs of suit." The court held this not to be a judgment by

confession. Under our statute a judgment by confession may be made, but section 5061 contains the following requirements: "It must be made, signed by the defendant, and verified by his oath to the following effect: (1) It must authorize the entry of judgment for a specified sum; (2) if it be for money due or to become due, it must state concisely the facts out of which it arose, and show that the sum confessed therefor is justly due or to become due; (3) if it be for the purpose of securing the plaintiff against a contingent liability, it must state concisely the facts constituting the liability, and show that the sum confessed therefor does not exceed the same." It is unnecessary to say that the judgment in this case was not, under this statute, a judgment by confession; nor was it a judgment by default, because the defendant was in court with an answer denying the allegations contained in the complaint. We think there can be no question of the agreement between the parties as to what should be done in the premises; nor do we think it possible for the judgment to stand, having been rendered, without evidence, notwithstanding defendant's answer denying the averment set forth in the complaint. *Curtis v. Superior Court*, 63 Cal. 435.

We will not pass this case without expressing our disapproval of proceeding in this manner; for it, at best, incumbers the practice with proceedings of a doubtful character, and throws into the court many perplexing questions involving both time and expense. The judgment is reversed, and a trial ordered in the district court.

BEATTY C. J., and BERRY, J., concur.

PEOPLE v. McLEAN (No. 20,629.)  
(Supreme Court of California. June 11, 1890.)  
ARSON—CORROBORATING EVIDENCE—INSTRUCTIONS.

1. A witness testified that he set fire to a house by defendant's direction, and in his presence. No probable natural cause was shown for the fire. The house stood on public land claimed by both defendant and the owner of the house, and there had been several quarrels about it, in one of which defendant was severely handled. Defendant made contradictory statements as to his whereabouts the night of the fire, and there was evidence tending to show that he tried to get his accomplice to leave the country. *Held*, the corroborating evidence was sufficient, under Pen. Code Cal. § 1111, to sustain the verdict of guilty of arson in the second degree.

2. Where a motion to strike out irrelevant evidence was temporarily denied upon the district attorney's assurance that he would produce connecting evidence, and was granted upon his failure to do so, there was no error.

3. Defendant cannot complain of an omission to caution the jury as to this proceeding, when he did not ask for such caution.

4. By Pen. Code Cal. § 1093, subd. 6, it is made illegal to charge the jury concerning matters of fact; but where the court, during the charge, addressed itself to the attorneys, and, as justifying the charge, stated that in its opinion the evidence tended to prove certain facts, there was no error.

Commissioners' decision. In bank. Appeal from superior court, Santa Clara county; F. E. SPENCER, Judge.

T. H. Laine, for appellant. *Atty. Gen. Geo. A. Johnson, D. W. Burchard, and C. L. Witten, for the People.*

HAYNE, C. The defendant was convicted of arson in the second degree, and appeals from the judgment and from an order denying a new trial.

1. It is contended that there was not sufficient evidence to support the verdict. There was, however, the direct evidence of a person who says that he set fire to the house by the direction of the defendant, and in his presence. It is urged, however, that this was the testimony of an accomplice, and that there was no sufficient corroboration. See Pen. Code, § 1111. There is no doubt that the cabin was destroyed by fire, and no probable natural cause of the fire was shown by the evidence. The question is whether the defendant had a guilty connection with it. The circumstances to corroborate the accomplice upon this question are as follows: In the first place, there was a difficulty between the defendant and the owner of the cabin, concerning the land upon which it stood. This land was public land, and each party claimed to have taken such proceedings as entitled him to it. Some angry interviews took place between them, and on one occasion the defendant was quite roughly handled by one of the workmen of the owner of the cabin. In the next place, the defendant made contradictory statements concerning his whereabouts on the night of the fire. And, finally, there is evidence tending to show that he took measures to get the accomplice to leave that part of the country, and wrote to his mother to "keep Bill out of the way for a while, till the trouble blows over," although the letter did not state what the trouble was. These circumstances constitute, in our opinion, evidence tending to show the defendant's guilty connection with the burning of the cabin, which is the material point requiring corroboration. The evidence is not strong. But, although more is required by way of corroboration than to raise a mere suspicion, (see *People v. Thompson*, 50 Cal. 480,) yet the corroborating evidence is sufficient if it of itself tends to connect the defendant with the commission of the offense, although it is slight, and entitled, when standing by itself, to but little consideration, (*People v. Melvane*, 39 Cal. 616; *People v. Clough*, 73 Cal. 351, 15 Pac. Rep. 5.) Judge SPENCER, in his opinion on the motion for new trial, gave a careful analysis of the evidence, and declared that he was "entirely satisfied with the verdict;" and we do not think that it can be disturbed upon the ground mentioned.

2. During the trial the defendant moved to strike out certain evidence. The court denied the motion upon the statement of the district attorney that he would show its relevancy by other evidence, but gave the defendant leave to renew his motion at a subsequent stage of the trial. The district attorney failed to introduce the other evidence, and the defendant renewed his motion, which was granted. It is argued that the court ought to have grant-

ed the motion in the first instance, and that, when the evidence was finally stricken out, a caution concerning it should have been given to the jury. But it is usual, and quite proper, for a court to accept the statement of a reputable counsel as to what he will show, and upon the faith of such statement to temporarily refuse to strike out evidence that has been introduced, or to admit evidence offered; and, if the defendant had desired any caution to be given to the jury, he should have asked for it. The failure of a court to charge on any point usually proceeds from inadvertence, and the law casts upon the parties the duty of calling the judge's attention to the matter by a formal request for an instruction in relation to it. *People v. Haun*, 44 Cal. 96; *People v. Rodondo*, Id. 541; *People v. Ah Wee*, 48 Cal. 237; *People v. Collins*, Id. 277; *Chamberlain v. Vance*, 51 Cal. 84; *Williams v. Insurance Co.*, 54 Cal. 449.

3. At the close of the case for the prosecution the defendant moved for a discharge upon the ground that the evidence was not sufficient to go to the jury. In ruling upon this motion the court stated certain facts which, in its opinion, the evidence tended to prove; and it is objected that this was a violation of the provision that the court shall not charge a jury with respect to matters of fact. But the language complained of was not addressed to the jury, or intended for their guidance. It was merely a statement to counsel of the reasons or grounds of the ruling. And it contained no reflection upon the defendant, or anything which was not called for by the motion made by him. Under these circumstances, we think that there was no error. *Reed v. Clark*, 47 Cal. 200. We therefore advise that the judgment and order appealed from be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

84 Cal. 81

PEOPLE v. FERRY. (No. 20,611.)

(Supreme Court of California. May 3, 1890.)

CRIMINAL LAW—REASONABLE DOUBT—INSTRUCTIONS.

1. An instruction to the jury, after defining "reasonable doubt," and declaring that their opinion of guilt of the accused must "approach absolute conviction," concluded as follows: "They [certain crimes] ought to be punished when they are proved, gentlemen, to your satisfaction; and, if not so proved, whatever suspicion there may be, he is entitled to an acquittal, unless you seriously believe him guilty." *Held*, that the language is doubtful and uncertain, and authorized the inference that the jury might convict if they believed him guilty, regardless of the proof, and that it is not in accord with Pen. Code, § 1096 and Code Civil Proc. § 2061, subd. 5, providing that the evidence shall satisfy the jury of the guilt of the defendant beyond a reasonable doubt.

2. Where the assignment of error in charging the jury differs from the charge itself, as particularly set forth in the bill of exceptions, the latter will ordinarily control.

In bank. Appeal from superior court, city and county of San Francisco; J. McSHAFTER, Judge.

v.24r.no.1—3

*John Flournoy*, for appellant. *J. D. Page*, Dist. Atty., for the People.

THORNTON, J. The defendant was accused by information of the crime of robbery, was convicted, and prosecutes this appeal to this court from the judgment and from an order denying his motion for a new trial. Several questions are made on the charge, among others this portion: "You must be satisfied beyond a reasonable doubt. What a reasonable doubt is depends upon definition. It must be such a doubt as nearly approaches conviction, —I mean, the opinion of his guilt must nearly approach what is called 'absolute conviction.' It must approach it nearly; but, if it satisfies you to that extent so that you can settle back upon the consideration of the man's guilt, and believe the guilt, and, under a rational examination of the testimony, your mind recurs back to that conclusion that he is guilty, and abides there, that is sufficient to satisfy you. It is not necessary for me to comment about the value of this testimony or that testimony, nor upon the fact that your town is infested by villains; it may be so, it may not be so, so far as we know here; nor to instruct you that this class of offenses ought to be punished. They ought to be punished when they are proven, gentlemen, to your entire satisfaction; and, if not so proved, whatever suspicion there may be, he is entitled to an acquittal, unless you seriously believe he is guilty." It is provided by section 1096 of the Penal Code that "a defendant in a criminal action is presumed to be innocent until the contrary is proved; and, in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal." By section 2061, Code Civil Proc., subd. 5, it is provided "that in civil cases the affirmative of the issue must be proved; and, when the evidence is contradictory, the decision must be made according to the preponderance of evidence; that in criminal cases guilt must be established beyond reasonable doubt."

We premise what we have to say on this assignment with the remark that we consider the sentence, "It [referring to reasonable doubt] must be such doubt as nearly approaches conviction," as withdrawn from the charge by the next sentence, which is, "I mean the opinion of his guilt must nearly approach what is called 'absolute conviction.'" The law does not justify a jury in convicting a defendant of a felony without being convinced of his guilt. There must be a conviction of guilt before there can be a conviction of defendant. It is not sufficient that it should approach conviction. There must be a conviction of guilt in the minds of the jury to justify a verdict affirming guilt. It is said in the charge it must approach "absolute conviction." Is there any difference between "conviction" and "absolute conviction?" Do they mean the same thing? The word "absolute" came originally from the Latin, and means to "loose from." Webster gives many meanings to the word, as, *inter alla*, "completed, or regarded as complete; finished; perfect; total; as absolute perfection; absolute beauty. (2)

Freed or loosed from any limitation or condition; uncontrolled; unconditional. (3) Positive; clear; certain." (6) "Unconditioned; unrelated." We think there is a difference, and that absolute conviction means conviction beyond a possibility of doubt, which the law does not require a jury to attain to render a verdict against a defendant. It is said in *People v. Padilla*, 42 Cal. 540: "The truth of any fact which is to be proven by evidence cannot be established beyond the possibility of a doubt, and yet the jury may be entirely satisfied of its truth." Certainly, if it can or cannot be established beyond the possibility of a doubt, it need not be so established in order to justify a verdict of guilty against a defendant. In this connection may be noted the remarks on the import of the word "absolute" in *People v. Davis*, 64 Cal. 440, 1 Pac. Rep. 889, in which case it was held "that absolute moral certainty was a greater degree of certainty than moral certainty." In *People v. Strong*, 30 Cal. 154, an instruction asked by defendant on the point of reasonable doubt, or one cognate, containing the words "absolute moral certainty," was said to be substantially and almost literally in the language of the books which treat of the subject, referring to *Burrill on Circumstantial Evidence*, 181, 182, and to 1 *Starkie*, Ev. 482, 483, 510. In this the court probably went too far; but, as the instruction was given at defendant's request, it furnished no ground for reversal. In *Davis' Case* it was asked by defendant, and the court held the refusal proper on the ground above stated.

There was no error, then, in the direction to the jury that their opinion must approach absolute certainty; that is, a conviction so perfect, complete, and unconditional as to exclude the possibility of a doubt. Now we cannot say but that the remainder of the charge on this point, taken together, down to and including the words "entire satisfaction," presented the law fairly to the jury. Adverting, now, to the last clause of the charge on this point, that is in these words, "and if not so proved, whatever suspicion there may be, he is entitled to an acquittal, unless you seriously believe he is guilty,"—this must be connected with what precedes it. The jury had just been told, "They [referring to the class of offenses for one of which the defendant was on trial] ought to be punished when they are proved, gentlemen, to your entire satisfaction." Then follows the last clause. The jury was told, in effect, that the guilt of the accused must be proved to your entire satisfaction, unless you seriously believe he is guilty. If this means that the jury was authorized to convict the prisoner on evidence which did not prove his guilt to their entire satisfaction, then the direction is an error. If it required more than such evidence, it is also an error. Can it be affirmed of these words that the latter portion did not require more or less than was legally requisite? The word "seriously" in its connection is at least of doubtful import. It may mean more or less evidence than that indicated by the words "proved to your entire satisfaction." Take the word "seriously" in any of the meanings attributed to it by

lexicographers, it leaves its signification in its connection here ambiguous and doubtful. See Webster's, Stormouth's, and Imperial Dictionaries. How would a jury construe these words? Could they not justly say: "If we gravely or earnestly or solemnly believe the accused guilty, we can so adjudge him, although he is not proved guilty,—although the testimony does not establish his guilt to our entire satisfaction?" The words used, in our opinion, may be justly so construed. We are therefore of opinion that the qualifying clause above cited sets forth to the jury a criterion too doubtful and uncertain for them to act on in passing on the liberty of the citizen, and not clearly conveying a meaning in accord with the rule laid down in our law, that the evidence shall satisfy the jury of the guilt of the defendant to a moral certainty, and beyond a reasonable doubt. We are satisfied that the instruction in the record thus pointed out is erroneous.

The last assignment of error relates to a portion of the charge which, though in our judgment just on the verge of error, yet should not be held erroneous. The other assignments of error are not well taken. Two sentences appear in the assignment of this error at the end of what is set forth in it, as a portion of this charge of the court, which are not a portion of the charge. The charge is given *verbatim* in an antecedent portion of the bill of exceptions. No such sentences appear in the charge as it is thus inserted. In considering the last assignment of error we do not consider these two sentences. We are not certified that the jury was directed, as stated in the sentences referred to. In fact, the proper construction of the bill of exceptions compels this course. Although assignments of error constitute a part of the bill, and the whole bill is authenticated by the signature of the judge, yet it would be unfair to hold that these words in the assignment were seen by him, when in that portion of the bill where the charge appears no such words are found. It might be expected that the judge would examine the bill to see that the charge was correctly given, and, finding it so, would conclude that the assignments of error were in accord therewith. A judge would rarely, under such circumstances, examine the assignments of error to see if they accorded with his charge. As a general rule, when the assignments of error differ from the charge as particularly set forth in a bill of exceptions, the charge as set forth should control.

For the error above pointed out the judgment is reversed, and the cause remanded, that a new trial may be had. So ordered.

WE CONCUR: BEATTY, C. J.; MCFARLAND, J.; SHARPSTEIN, J.; FOX, J.

I CONCUR in the judgment: PATERSON, J.

84 Cal. 304  
In re KEENEY. (No. 20,660.)

(Supreme Court of California. June 7, 1890.)

BURIAL PERMITS—VALIDITY OF ORDINANCE.

Order No. 2,162 of the board of supervisors of the city and county of San Francisco which de-

clares it a misdemeanor for the health officer to issue burial permits on certificates of death signed by midwives, or any others than legally qualified physicians, except in certain cases, when they may be signed by the coroner, or a physician authorized by him, is void as in conflict with the general law, (Pol. Code Cal. § 3025,) providing that the health officer may issue such permits on certificates signed by a physician, midwife, or coroner.

In bank. On application for *habeas corpus*.

*Curtis H. Lindley and Henry Elckhoff*, for petitioner. *Spencer & McEnerney*, for respondent.

Fox, J. Petitioner, who is health officer of the city and county of San Francisco, is arrested and held under a warrant issued out of the police court of said city and county, upon a complaint charging him with misdemeanor, for that he, "as such health officer, did grant and issue a permit to deposit the body of said Ah Tin in the city cemetery, in said city and county of San Francisco, and to inter said body in said city and county without requiring, receiving, or obtaining or filing, and without the issuance of, the certificate of the death of said Ah Tin, signed or issued by an attending physician or by the coroner of said city and county of San Francisco, or by a physician authorized by the coroner to grant a certificate of death, thereby violating the provisions of order No. 2,162 of the board of supervisors of the city and county of San Francisco." Order No. 2,162, referred to, is entitled as an order "regulating the granting of certificates of death, and the issuance of permits for interments." It provides that no person shall deposit in any cemetery, or inter in said city and county, any human body without first having obtained and filed with the health officer a certificate of death, signed by a legally qualified attending physician, \* \* \* nor without having obtained from said health officer a permit to deposit or inter said human body; that if there be no attending physician, or he be absent, such certificate may be issued by the coroner, or by a physician authorized by the coroner to grant such certificates; that in case of death in maternity homes, lying-in hospitals, or other similar institutions, the certificate shall be issued only by the coroner, or a physician authorized by him to grant certificates of death; that no permit to deposit or inter shall be granted or issued by the health officer until he shall have received the certificate of death required by the order; and that any violation of the provisions of the order shall constitute a misdemeanor, punishable by fine of not more than \$500, or by imprisonment not more than six months, or by both such fine and imprisonment.

On the part of the people it is claimed that the passage and enforcement of such an order is fully authorized by article 11, § 11, of the constitution, which reads: "Any county, city, town, or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws." Although "cities and counties" are not mentioned in this section, this and all other provisions of the consti-

tution, not inconsistent or prohibited to cities, are made applicable to consolidated cities and counties by section 7 of the same article.

On the part of the petitioner it is claimed that the provisions of this order are in conflict with the provisions of sections 3012, 3025, and 3084 of the Political Code, and of section 877 of the Penal Code, all of which are general laws, and that, in so far as the provisions of the order do conflict with these general laws, they are unauthorized and void. That they are unauthorized and void, if such conflict exists, cannot be doubted. All these sections of the Political Code are found in title 7 of part 3. That title is in relation to the "general police of the state." Chapter 2 of the title relates to "preservation of the public health," and article 3 of that chapter relates to "health and quarantine regulations for the city and harbor of San Francisco." This article consists of sections 3004 to and including 3035. Section 3005 provides for a board of health for the city and county of San Francisco, to consist of the mayor and of four physicians, to be appointed by the governor, to hold office for five years. Section 3007 provides for the appointment, by the board, of a health officer; and section 3008 makes him the executive officer of the health department. Section 3012 reads as follows: "The board of health have general supervision of all matters appertaining to the sanitary condition of the city and county, including the city and county hospital, the county jail, almshouse, industrial school, and all public health institutions provided by the city and county of San Francisco; and may adopt such orders and regulations, and appoint or discharge such medical attendants and employes, as to them seems best to promote the public welfare; and may appoint as many health inspectors as they deem necessary in time of epidemics." So much of section 3025 as needs to be considered here reads as follows: "No person shall deposit in any cemetery, or inter in the city and county of San Francisco, any human body, without first having obtained and filed with the health officer a certificate, signed by a physician or midwife or a coroner, setting forth, as near as possible, the name, age, color, sex, place of birth, occupation, date, locality, and the cause of death of the deceased, and obtain from such health officer a permit; nor shall any human body be removed or disinterred without the permit of the health officer or by order of the coroner." It is very clear that by this article the legislature has undertaken, as a part of the provisions of the general law "relating to the public health," and through a local department of the state government, to wit, a board of health for the city and county of San Francisco, all of the members of which, except the mayor of the city and county, are appointed by the governor, to manage and control certain—we do not say all, but certain—of the sanitary regulations of the city and county, and contiguous harbor of San Francisco; and by section 3025 has particularly undertaken to manage and control the condition and terms upon which permits



for the interment of human bodies within said city and county may be issued, and by whom. So much of section 3005 as prescribes the term of five years for the officers of the board appointed by the governor has been declared to be unconstitutional, (*People v. Perry*, 79 Cal. 105, 21 Pac. Rep. 423;) but it was expressly held that this did not affect the validity of the balance of the act.

It follows that any order or ordinance, or provision of any order or ordinance, of the municipality, which conflicts with the provisions of this general law, is prohibited and forbidden to the municipality, and is unauthorized, and void. Is there a conflict between the provisions of this order and of the general law? We think so. The order punishes the health officer as for misdemeanor if he issues a burial permit upon the certificate of any person other than a legally qualified attending physician, except that if there was no legally qualified attending physician, or if there was such, and he be absent, thus making it the duty of the health officer at his peril to ascertain and determine these facts before he can accept any other certificate, he may accept the certificate of the coroner, or of a physician authorized by the coroner in writing to grant such certificates: and with the one further exception, that if the death occur in a maternity home, lying-in hospital, or other similar institution, and no matter whether the death be of a patient or of a servant, a stranger who has happened to call, a male or a female, he must ignore even the "legally qualified attending physician," and all other persons licensed by the state to issue certificates of death, and issue his permit only on the certificate of the coroner, or of a physician authorized by that officer to issue such certificates. Section 3025 in express terms authorizes, and by necessary implication makes it his duty, to issue such permit upon the certificate of a physician, a midwife, or a coroner. He has no right, under the general law, to force a party seeking a permit to hunt up some favorite of the coroner to get such a certificate, or to refuse the certificate of a physician or a midwife, whether such physician holds the license of the coroner or not. The order, therefore, punishes him for doing what the general law not only authorizes, but requires him to do. It is no answer to this to say that the object of the order is to shut out the certificates of impostors and dishonest persons practicing as physicians and midwives. To be eligible to the place, the health officer must himself be a graduate of a medical college in good standing, residing within the limits of the city. He is the executive officer of an important department of the state government, bound to know, and in his department to execute, the law. Under the law no person is entitled to practice medicine, or to be recognized by the officers of the law as a physician, unless licensed as such by the state. It is the duty of the health officer to know, and the law presumes that he does know, and that he acts upon that knowledge, whether a person who issues a death certificate presented to him is a physician or not.

The law also recognizes the fact that there is a profession called "midwife," and imposes upon midwives certain duties, both as to deaths and to births. Pol. Code, §§ 3024, 3075. It has not only granted to them the right to issue death certificates, (section 3025,) but it compels them to report deaths to the health officer in San Francisco, (section 3024,) to keep a registry of births and deaths occurring in their practice, (section 3075,) and to report the same to the county recorder, (section 3077.) The last requirement possibly does not apply in San Francisco, where they are required to make such report to the health officer, and he to file their reports in the office of the county recorder. If ample provision is not already made to protect the public against imposters in that profession, no doubt it may be done in that as in the other. But so long as the general law recognizes it as a legitimate profession or calling, and authorizes the health officer to grant burial permits on midwives' certificates of death, he cannot be punished as for a crime for so granting them. Section 3084 of the Political Code is a part of chapter 3 of title 7, above referred to,—a different chapter from that to which the article belongs which we have been considering. That chapter relates to the "registry of births, marriages, and deaths," and generally, as to its provisions, has no application to the city and county of San Francisco. It is claimed on the part of the people that the section referred to, like the balance of the chapter, has no application to this municipality. Without finally deciding that question, for we do not deem it necessary to decide it in this case, it is sufficient to say that, if it does apply to this city and county, the order is in conflict with its provisions, equally with those of section 3025. But it is also claimed that if section 3084 does not apply to San Francisco, then there is no law for punishing the health officer for issuing a burial permit without the proper certificate; and an ordinance prescribing a punishment for that act is not unauthorized. This contention is based upon the fact that section 377 of the Penal Code, as amended in 1889, provides a punishment only for violations of the provisions of chapter 3, tit. 7, of the Political Code, and that section 3084 is the only one of the sections with which it is claimed that the order conflicts which belongs to that chapter. It is true that in amending the section, in 1889, the legislature has so changed the form of section 377 of the Penal Code as to make it apply only to violations of the provisions of chapter 3 of the title of the Political Code referred to. But we cannot concede that his change has left the state without a law for the punishment of this officer for misfeasance or malfeasance in office. Under any reasonable construction of the general law, it is his duty, before he issues his permit, to demand, receive, and file the proper certificate of death prescribed by the statute. Upon its receipt it is equally his duty to issue the permit. For a violation of his duty in either of these respects, he is liable to be proceeded against for removal from office under the proper statutes, and is punishable for misdemeanor under section



378 of the Penal Code; or, in the absence of that section, he would be equally punishable under section 176 of the same Code.

Holding, as we do, that the order, in so far as it attempts to punish the health officer for granting permits upon certificates authorized by general law, is in conflict with the general law, and void, it follows that the complaint, which is based on the order alone, fails to state facts constituting a public offense, and the prisoner must be discharged. So ordered.

We concur: MCFARLAND, J.; PATERSON, J.; SHARPSTEIN, J.; WORKS, J.

84 Cal. 112

NORRIS v. MOODY *et al.* (No. 12,400.)

(Supreme Court of California. May 12, 1890.)

EJECTMENT—GRANTS—CONDITIONS—LIMITATIONS.

1. Plaintiff in ejectment claimed under a grant from the alcalde of a pueblo, dated in 1847, and expressed to be on condition that grantees make certain improvements within a year, which were never made, nor did he ever take possession. *Held*, that under the civil law in force prior to April 13, 1850, the grant was absolutely forfeited by the non-performance of the conditions.

2. Where the land in suit was confirmed to the pueblo, by final decree, in 1866, and was then conveyed to defendant, and the action was not brought till 1885, one year after patent issued by the United States government, it is barred, under Code Civil Proc. Cal. 1873, § 818, granting five years in which to sue, whether plaintiff claims under Spanish grant or not.

In bank. Appeal from superior court, Santa Clara county; F. E. SPENCER, Judge.

A. L. Rhodes and John Reynolds, for appellants. T. H. Laine, for respondent.

Fox, J. Action in ejectment. Judgment for plaintiff, from which defendants appeal. There are two controlling points in this case, upon each of which, we think, the court below erred in its conclusion of law. The material facts, as found by the court and conceded by counsel, are these: The land in controversy is a lot in the city of San José, found and conceded to be within the exterior boundaries of the lands finally confirmed, and subsequently patented, to said city, as the successor of the pueblo of San José de Guadalupe. The lot is 50 *varas* square, known as lot 3, in block 1, range 8, and was granted by the alcalde of the pueblo, July 12, 1847, to Leo Norris, upon the express condition subsequent, stated in the grant, "that said Leo Norris will fence said lots with a redwood fence, or erect a dwelling-house thereon, on or before the expiration of twelve months from date." On the 24th of May, 1882, Leo Norris made a deed, purporting to convey the lot to William H. Norris, the present plaintiff. Neither the said Leo Norris, nor any one in his behalf, or claiming under him, ever had the actual possession of said lot, or made any improvement thereon. On the 27th of October, 1857, one Warren, claiming to be the owner of the lot, conveyed the same to Ransom G. Moody, who immediately went into possession, and thereafter continued in the open, notorious, actual, exclusive, and adverse possession of the same, claiming title thereto in fee against all the world, and on the 2d day of October, 1866, the mayor

and common council of the city of San José, being then duly authorized by law to make conveyances of lands belonging to the city, executed and delivered to said Moody a deed of "remise, release, and quit-claim," purporting to convey said lot to him in fee. Said Moody and his successors in interest have ever since continued in the actual, open, notorious, exclusive possession of the said lot as before, and of the whole thereof, claiming title thereto in fee against the whole world, and paying the taxes thereon. The present defendants are the successors in interest to the title and possession of said Moody.

There is no dispute that there was an entire failure to perform the condition subsequent, upon which the grant to Leo Norris was made. The first question is whether the breach of that condition subsequent, of itself, revested the title in the pueblo, or its successor, so as to enable it to pass title by a subsequent grant, without denouncement under the civil law, or office found under the common law. Under the common law it may be conceded, without argument, that the mere breach of the condition would not revest the title so as to authorize a subsequent grant, without office found. But this grant to Norris was made under the civil law, July 12, 1847. That civil law continued to be "the law of the case," that is, the law governing this grant and its condition, until April 13, 1850,—the date of the adoption of the common law,—almost two years and nine months after the date of the grant, and one year and nine months after the breach of the condition was complete. In the early history of this state this court had occasion several times to consider this question of the necessity of denouncement, in order to revest title and authorize a reconveyance. One of the cases in which that question was discussed was *Vanderslice v. Hanks*, 3 Cal. 27. That was a case of the grant of a rancho direct from the Mexican government to the grantee,—a natural person. There was no limitation of time within which the condition subsequent was to be performed. The court held, and very properly, that a reasonable time must be allowed; that a reasonable time would depend upon the character of the grant and of the condition, and upon all the circumstances of the case; and, applying the rule laid down by Blackstone, (2 Bl. Comm. 157,) that if the conditions after the grant became impossible by the act of God, or the act of the feoffor himself, or were contrary to the law, or repugnant to the nature of the estate, the condition was void, and the estate vested. It was further held that as in that case there had been no denouncement by the Mexican government, that before a reasonable time had elapsed within which to perform the condition, the Mexican government (the feoffor) had become embroiled in a war with the United States, resulting in the conquest of the country by the latter, rendering it no longer possible to perform the condition, the estate had vested, notwithstanding the non-performance. In the subsequent case of *Touchard v. Touchard*, 5 Cal. 307, the court, in referring to the case of *Vanderslice v. Hanks*, gave as a

further reason for the ruling in that case that by express decree of the Mexican government, denouncement was the mode of taking advantage of the non-performance of subsequent conditions in cases of grants made by the government itself. But it further held that as to grants made by municipal corporations they must be construed in the same manner as those of natural persons, and that as a private natural person can grant lands upon conditions subsequent, and upon their non-performance resume the ownership, a municipal corporation can do the same. But it is claimed by respondent, and was so held by the court below, in an opinion filed in the case, that *Touchard v. Touchard* has been overruled, and is no longer authority for any purpose. This contention is founded upon the decision in the case of *Holliday v. West*, 6 Cal. 525. That case discusses, but does not in terms, nor do we think it does in legal effect, overrule, *Touchard v. Touchard*. Referring to the last-named case the court said: "In that case a subsequent grant of a lot by a municipal corporation was held valid against an older grant on the ground of the non-performance of the conditions by the elder grantee. The only question made there in favor of the first grant was that the Mexican law, which then prevailed, required the proceeding of denouncement before there could be a legal forfeiture of the grant. But we held that that proceeding only applied to grants made by the government, and was totally inapplicable to the contracts of private individuals. A denouncement was never made by the grantor, but always by some person who desired to obtain the land for himself." The fact affirmed and emphasized in the quotation just made is important to be borne in mind in our consideration of this contention of respondent, viz., that the question now under consideration in this case was the direct and only one involved in *Touchard v. Touchard*. The court then proceeds to discuss further and anew the question considered in the former case. It says: "The respondents insist, and so it was held by the district court, that in order to invalidate the first grant there must have been a re-entry by the grantor, or some other notorious act, in order to show the intention by the grantor to forfeit the grant and resume the estate upon the ground of the non-performance of the conditions, and that the subsequent grant is no proof of such intention. This position would be unassailable if we were at liberty to apply the principles of the common law to this case, but the facts all arose before the adoption of the common law, and must be governed by the rules of the civil law." And after some discussion of the civil law it says: "We discover no rule whatever at the civil law answering to the common-law doctrine of re-entry to produce a forfeiture. It does not follow, however, that that system was destitute of principles which to an equal extent were potent to secure and enforce the rights of litigants in like cases. And so we find that instead of an unbending rule, which disregards material clashing circumstances, each case was determined according

to its own facts by those principles which every system would admit to be the immutable laws of right and wrong." Acting upon that principle of the civil law, the court proceeded to examine the case before it, and found that the lot in question had been granted in 1843 to one Bee; that he commenced in good faith to comply with the condition, a condition usual to such grants,—that of building a house within one year; (the breaking out of a revolution checked the progress of his building before it was completed;) that all during the war, and even after the conquest, the lot was recognized as Bee's lot; that in January, 1847, one Pell applied to the new alcalde for a grant of the lot, representing it as vacant, and secured a grant, but he never went into possession, and his grant was subsequently lost without having ever been recorded; that in 1849 the holders of the Bee title went into possession, when Pell undertook the recovery by suit, but was unable to do so; that in 1847 the alcalde found that he had been making mistakes in granting lots of which there were already outstanding grants, and he notified the parties in interest to appear and have their grants adjusted. Pell failed to appear, but Bee appeared, and had possession redelivered to him. Under these circumstances the court held that Bee's title had never been forfeited.

Under the course of procedure and rulings of the court in this case we fail to see how it can be held that this decision, either in terms or legal effect, overruled the case of *Touchard v. Touchard*. And yet the court did say, in *Hart v. Burnett*, 15 Cal. 599, that *Touchard v. Touchard* had been overruled in *Holliday v. West*, as to the only point really involved or decided in the case, and we are now asked to apply to that statement the doctrine of *stare decisis*. But *Hart v. Burnett* furnishes us the very best of reasons why we should not make such an application of the rule. In that case (page 598) the court says: "A decision is not even authority, except upon the point actually passed upon by the court and directly involved in the case. But even then the mere reasoning of the court is not authority. The point decided by the court, and which the reasoning illustrates and explains, constitutes a judicial precedent. The books are full of cases in which learned judges have earnestly deprecated the attempt to urge the mere *dicta*, or the arguments of judges, as authoritative expositions of the law. Chief Justice MARSHALL, in the case of *Cohens v. State*, 6 Wheat. 399, thus defines the rule: 'It is a maxim not to be disregarded that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decid-

ed, but their possible bearing on all other cases is seldom completely investigated.' Chief Justice BEST, in *Richardson v. Mellich*, 2 Bing. 248, says: 'The expressions of every judge must be taken with reference to the case on which he decides, otherwise the law will get into extreme confusion. That is what we are to look to in all cases. The manner in which he is arguing is not the thing,—it is the principle he is deciding.'

Applying the principle thus plainly stated to what is said immediately following in the same case, as to what was decided, and the effect of the decisions rendered in *Touchard v. Touchard* and *Holliday v. West*, and we find that it is "not even authority," upon the point actually passed upon by the court in either of the former cases, or directly involved therein. There were three questions involved, and necessary to be decided, in *Hart v. Burnett*: *First*. Was the city of San Francisco a pueblo, or the successor to a pueblo? *Second*. If yea, then was she possessed of a certain right or title in lands as such, within certain prescribed limits? *Third*. If both the other questions were answered in the affirmative, then were the lands in which she had such right or title by virtue of her character as a pueblo, or the successor to a pueblo, subject to seizure and sale under execution against the city? In the unsettled condition of the law at that time it was both natural and proper that the court should enter very fully into its reasons for the affirmative conclusion which it reached upon each of the first two of these questions, and the negative conclusion reached upon the last of them. The temptation was also naturally strong to enter into a general discussion of all the powers of a pueblo, or its successor, and it will be found upon examination that the court has occupied more than 50 pages in the discussion of general powers and rights of a pueblo, which were entirely unnecessary to the determination of the question of the character of its right in lands, or of whether or not they were subject to seizure and sale under execution. This was especially so of its discussion of the question of denouncement and forfeiture. It was a discussion wholly foreign to the determination of the fact that the lands held by the pueblo were held in trust, and were not, therefore, subject to seizure and sale under execution,—so foreign to it that anything which was said upon the subject is not entitled according to the rule laid down by the same court in the same case to be cited as an authority. But even according to *Hart v. Burnett* the case of *Holliday v. West*, is authority for the proposition that formal denouncement was not necessary in case of forfeiture for non-performance of condition subsequent in an alcalde grant, and also for the proposition that according to their civil law the court was to view the acts of each particular case, and from those facts determine the right, "by those principles which every system would admit to be the immutable laws of right and wrong."

In this case it is conceded that there was no attempt to perform the condition subsequent; that there was neither civil war,

insurrection, nor anything else to prevent or excuse performance; that for nearly 40 years the holder of this alcalde grant has remained silent, asserting no claim to the lot, and for 30 years of that time has seen others actually occupying the premises, improving them, building tenements upon them, (for the place has long been occupied by tenants, which implies the existence of tenements,) and he only now asserts a right after the property has been made and become of great value, and upon the assumption that the recent issue of a patent for the pueblo lands has given him a right of action to recover what in fact he had forfeited by the terms of his own title deed 40 years before. Under these circumstances, we have no hesitation in holding that under the civil law, interpreted as the courts of the country under the civil law were accustomed to interpret it, he had forfeited all right to this lot before the adoption of the common law, and neither that adoption, nor any event that has occurred since, has restored to him any right in the premises. This is decisive of this case. But there is one other ground upon which we are equally confident that the plaintiff ought not to recover. One of the defenses to the action is the statute of limitations. The patent for these pueblo lands was issued June 4, 1884. This complaint was filed May 4, 1885. The contention is that the statute of limitations did not commence to run until the patent was issued. This court has several times so held, and one of the cases in which it announced that rule was that of *Beach v. Gabriel*, 29 Cal. 580, a case involving a lot in this same pueblo. But a careful examination of the several statutes of limitation, passed at different times in this state, show that the rule should always have been subject to a certain qualification or exception. No such rule prevailed, or was authorized, under the statute of 1850. The first statute placing any such limitation upon the time when the limitation should commence to run, was that of 1855, (page 109,) which provided that action could be maintained where the title was derived from the Spanish or Mexican government, if commenced within five years from the time of final confirmation of the title by the government of the United States, or its legally constituted authorities. In 1863 this statute was again amended, (St. 1863, p. 327,) so that where the title has not been finally confirmed more than five years before the passage of the act, action might be maintained if brought within five years from that date, providing, however, that nothing therein contained should operate to enlarge or extend the time allowed by the act of which this was amendatory, where confirmation had been had before the passage of this act. "Final confirmation" was defined by the next section of this act to be the issue of the patent by the government of the United States, or the final determination of the official survey under the provisions of the act of congress to regulate the jurisdiction of the district courts of the United States in California, in regard to the survey and location of private land claims, approved June 14, 1860. This alternative clause seems to

have been generally overlooked, and not unnaturally so, since the patent would, of course, be the very highest evidence of final confirmation. The court had occasion to discuss and consider this act of 1863, in the case of the City of San José v. Trimble, 41 Cal. 536, a case brought by the city itself for the recovery by virtue of its right as a pueblo of a portion of the pueblo land within its limits. In that case the court held that under the provisions of this act, as the defendant had been five years in adverse possession, the plaintiff could not recover, and this notwithstanding the patent had not yet issued. The final decree of confirmation of the lands of this pueblo was entered June 13, 1866, and in that decree the boundaries of the lands are fixed and established, definite and certain, by monuments and courses. Not even monuments were required to be established, or any course authorized to be varied, by any subsequent survey. From this fact (and there is nothing in the record to militate against this view) it would seem that this was a final confirmation and determination of the survey of those lands. And this conclusion would account for the ruling in City of San José v. Trimble. Whether that be the reason for the ruling or not, if the decision in City of San José v. Trimble was correct, then this plaintiff's right of action was barred by the statute of limitations, even as it stood before the adoption of the Codes.

Under the Codes plaintiff's right of action is clearly barred. The Codes went into effect January 1, 1873. They do not contain, and never have contained, any provision such as that found in the former statute of limitations, giving to claimants under Spanish or Mexican grants five years after confirmation of either grant or survey, or after patent, in which to bring or maintain an action. If the statute of limitations never commenced to run against this plaintiff before, it did so commence to run when the Codes went into effect, and had run more than twice over before the commencement of this action. Judgment reversed, with directions to the court below to enter judgment on the findings in favor of defendants.

I concur: SHARPSTEIN, J.

THORNTON, J. I concur in the judgment on the ground that the cause of action is barred under the Code of Civil Procedure, which went into effect on the 1st of January, 1873.

We concur in the judgment on the ground first discussed by Mr. Justice Fox. PATERSON, J.; MCFARLAND, J.

84 Cal. 256

WORN v. FRY et al. (No. 12,703.)  
(Supreme Court of California. June 2, 1890.)  
FACTORS AND BROKERS—ACCOUNTING—EVIDENCE.

Defendants bought and sold stocks for plaintiff's testator, as brokers. It was charged that their books failed to show that they had accounted for all the shares they had purchased for and charged to him. The evidence showed that testator, though doing business in his own name, and with his individual money, had a partner who, in consideration of the "pointers" which he gave, re-

ceived half of the profits. For the purpose of closing out this partnership, testator instructed defendants to charge him and credit his partner with half of the net profits shown by testator's account. At the same time, and for the purpose of closing up the partnership account and opening an individual account, testator instructed defendants to sell certain stock; and, at the same time, he and his partner gave instructions to defendants to buy for them, respectively, one-half of said stock. Instead of executing the orders according to the terms, defendants made a certain division of the stock between testator and his partner, so as to accomplish the object intended. The stocks given to testator's partner were those which appear by the books to have been charged to testator and not accounted for. Testator thereafter continued to do business with defendants until his death, about a month later; and there was nothing to show that he was dissatisfied with the transaction. Held, that the stocks were properly accounted for to testator.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; WALTER H. LEVY, Judge.

Henry Thompson, (Ben Morgan, of counsel,) for appellant. Gunnison & Booth, (W. H. L. Barnes, of counsel,) for respondent.

GIBSON, C. This appeal comes from a judgment in favor of defendants, and an order denying a new trial, entered and made in an action to recover the value of certain shares of the capital stocks of certain mining companies, alleged to have been wrongfully converted by defendant Fry's testator and defendant Neal, while doing a partnership business as stock-brokers under the firm name of Fry, Neal & Co.

It appears from the record that, on October 1, 1878, plaintiff's testator, Bullock, who for some time prior thereto had been engaged in the business of buying and selling shares of mining stocks, began to deal with Fry, Neal & Co., stock-brokers in San Francisco. This firm, acting as his brokers, bought and sold a number of shares of mining stocks for Bullock between the above date and November 2, 1877. On the last-mentioned date Mrs. Wheeler, Bullock's mother, was, upon her own application, appointed the guardian of his person and estate, on account of his mental incapacity, Bullock having, on October 22, 1877, the date of her application, been adjudged insane, and committed to the asylum at Napa. November 9, 1877, upon an order of sale made in the guardianship proceedings, some of the shares of stock then in Fry, Neal & Co.'s hands were sold, and, on the 26th of the same month, Mrs. Wheeler was removed from the position of guardian, and on January 2, 1878, William Doolan was appointed in her stead. January 17, 1878, Bullock, on his petition to the probate court, was adjudged to be sane, and was on the same day discharged from the asylum. Two days afterwards Doolan, as his guardian, delivered to Bullock \$6,778.95, and certain mining stocks belonging to Bullock, and subsequently filed his account as guardian, and was discharged from his trust. In the latter part of January, 1878, Bullock renewed his dealings with the firm of Fry, Neal & Co., and continued to employ them as his brok-

ers until his death, in October of the same year. In April of the same year the firm, which consisted first of J. D. Fry and Charles S. Neal, was changed by the withdrawal of J. D. Fry and the substitution in his place of E. M. Fry, who, with Neal, constituted the new firm. They retained and continued the same business under the name of the old firm. October 9, 1878, Bullock died suddenly, and left a will by which he gave all his property to his mother, and nominated her as his sole executrix. She, however, renounced her right to act as such, and, on the 17th of the same month, W. W. Crane was appointed administrator with the will annexed. By the inventory and appraisal filed by him it appeared that the only shares of mining stocks belonging to Bullock's estate were 1,800 Endowment, 300 Senator, and 50 Union shares. November 5, 1878, Crane, as such administrator, obtained from Fry, Neal & Co., upon an accounting with them, a balance of about \$20,000. The only persons Crane obtained information from, concerning the mining stocks Bullock died possessed of, were the members of the firm of Fry, Neal & Co., but they were not the only persons possessed of such knowledge. Crane brought the administration of the estate to a close on June 6, 1883, when he was discharged from his trust as such administrator. Some time after the death of Bullock, and before September 1, 1879, the firm of Fry, Neal & Co., composed, as above shown, of E. M. Fry and Charles S. Neal, was dissolved, and the assets thereof divided. Thereafter, on December 29, 1882, Neal, on his own petition, was adjudged insolvent, and, on April 2d of the following year, was discharged from all his debts, except such debts as were excluded by the insolvency act of April 16, 1880. Fry died on October 20, 1884, leaving a will, whereby the defendant J. D. Fry was nominated as the executor thereof, and, as such, letters testamentary were issued to him November 24, 1884. The plaintiff, with the consent and upon the request of Bullock's mother, on the 21st of August, 1885, obtained letters *de bonis non* in the matter of Bullock's estate, upon the ground that property belonging to the estate had been discovered since the decree of final distribution had been made. On the 22d of September, 1885, the plaintiff, as such administrator, presented to J. D. Fry, the executor of the will of E. M. Fry, a claim against Fry's estate, for the value of certain mining stocks that belonged to Bullock at his death, alleged to have been wrongfully converted by the firm of Fry, Neal & Co., which claim was by J. D. Fry, as such executor, rejected, and returned to plaintiff. This claim was based upon the supposed discovery of property next referred to. Prior to November 13, 1885, Neal and Fry, upon a citation issued therefor, appeared in the matter of Bullock's estate, and were examined concerning the wrongful conversion of certain shares of mining stocks. Upon this examination it appeared that, from the time Bullock renewed his dealings with Fry, Neal & Co., until his death, this firm had, among other transactions for Bullock, purchased for

and charged to him 1,890 shares of Sierra Nevada, 700 shares of Mexican, 1,750 shares of Gould & Curry, and 180 shares of Bulwer mining stocks; and that, between the shares so purchased and charged, and those of the same shares accounted for by the firm, there were the following apparent differences, viz.: 150 shares of Sierra Nevada, 250 shares of Mexican, 615 shares of Gould & Curry, and 30 shares of Bulwer. These discrepancies form the basis of the present action.

From the evidence adduced at the trial it seems Bullock had, at some time not disclosed, formed a partnership regarding certain mining stocks with one W. J. Collins, by the terms of which the latter furnished information or "pointers," concerning the purchase and sales of certain mining stocks, and the former the capital to make the purchases, and the profits were equally divided between them; but the business was conducted in the name of Bullock alone. September 3, 1878, Bullock notified Fry, Neal & Co. of his partnership with Collins, and at the same time ordered them to sell 600 shares of Gould & Curry, 700 shares of Mexican, and 300 shares of Sierra Nevada. On the 18th of the same month he gave written instructions to the firm to charge to his account and credit to that of Collins one-half of the profits shown by his (Bullock's) account, less the amounts already paid in. And on the same day he gave an order in writing to the firm to sell for him 600 shares of Gould & Curry, 700 shares of Mexican, and 300 shares of Sierra Nevada, for the purpose, expressed in the order, of closing up the partnership account of himself and Collins, and of opening an individual account with each of them. In connection with the order, and to carry out the purpose expressed in it, Bullock and Collins gave to the firm, with the above order, their individual orders in writing to buy for them, respectively, one-half of the shares Bullock had ordered to be sold. The evidence shows that these orders were not executed according to their terms, but, instead, the object of the orders was effectuated, according to the intention of Bullock and Collins, by dividing the stock between them. In making this division Bullock was charged with the portion of each number of the shares referred to upon the stock ledger of Fry, Neal & Co., which shares they delivered to Collins. It is conceded by appellant's counsel that Collins received the shares as shown by the stock ledger, but they contend that if these several stocks had been sold in accordance with the order of Bullock, for the prices they would have respectively brought on September 18, 1878, the date they were ordered to be sold, instead of having been delivered to Collins, Bullock's estate would have received \$22,000 more than it did receive. Respecting the object of the order, Neal, the surviving member of the firm, testified "that the order was given for the purpose of dividing the account. Those papers were taken by Mr. Fry as the simplest way of taking a paper authorizing us to divide the account with Mr. Collins." In this he is corroborated by the testimony of Collins, and there is no evidence to the contrary.

According to the argument of the appellant, if the 300 shares of Sierra Nevada, bought on the 3d and 10th of September, 1878, for \$24,000, had been sold on the 18th of the same month, in accordance with Bullock's order, for \$163.50 per share, the market value of such stock on that date, the amount that could have been realized would have been \$49,050, which, less \$24,000, the cost of the shares, would have left \$25,050 profits, of which Collins would have been entitled to one-half, viz., \$12,525; but, instead of this, he received 150 shares of the stock, worth on that date \$24,525, or \$12,000 more than one-half of the profits would have amounted to, and Bullock just that amount less than he was entitled to. This argument is based on the assumption that Bullock and Collins were only interested together in the stocks specified in Bullock's order of sale. But the evidence shows they were interested in a large number of shares of different mining stocks, and that the business was carried on in the name of Bullock. Now, when they came to settle their partnership affairs, they must have had some agreement or understanding as to the division of the stocks specified in Bullock's order of sale, in order to and which was to completely settle up the affairs of their partnership. Bullock transacted business with Fry, Neal & Co. after the 19th of September, 1878, the date the shares were delivered to Collins, and until he died, on the 9th day of October following, and there is nothing to indicate that he was dissatisfied with the transaction. He was, it seems, a shrewd and successful dealer in mining stocks, and although he was rendered incompetent to transact business for a few months, which time he spent in the asylum, at the time the division of the stocks was made, and from thence until his death, he was possessed of his usual business sagacity. The 30 shares of Bulwer that were delivered on October 3, 1878, were delivered, according to the evidence, in the course of business to either Bullock or his order, and were consequently accounted for. The books of Fry, Neal & Co. it is admitted were kept in a very careful manner, but, because the division of the stocks is not explained in full therein, appellant's counsel would have us infer that a fraud had been perpetrated upon Bullock or his estate; but we do not think that such an inference can be drawn from the books, alone, and certainly not in view of the evidence explanatory of the entries claimed to be suspicious. On the contrary, we think the evidence, taken as a whole, fully supports the findings of fact herein, and shows, as stated in one of the findings, "that all the mining stocks purchased or sold by said firm of Fry, Neal & Co., for or on account of said Frank Dyer Bullock, deceased, were honestly and justly accounted for to him or his representatives, and that the actions of said Fry, Neal & Co., do not show the least suspicion of fraud."

Our conclusion that the findings are sustained by the evidence disposes of the only contention made on this appeal, and we therefore advise that the judgment and order be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For reasons given in the foregoing opinion the judgment and order are affirmed.

84 Cal. 281

LARUE V. GROEZINGER. (No. 12,708.)

(Supreme Court of California. June 6, 1890.)

ASSIGNMENT—CONTRACTS—SALE.

1. Defendant and one H. entered into a contract whereby the latter was to sell to defendant all the sound grapes he might raise, for a period of 10 years, from vines in a certain vineyard, at \$25 per ton, the grapes to contain 22 per cent. of saccharine matter, and to be delivered in boxes. The vineyard was purchased by plaintiff, the contract assigned to him, and a crop of grapes, in boxes, was tendered to defendant; and, upon refusal on the ground that there was no contract with plaintiff, it was resold at a sacrifice. Held, in an action for the difference in price and the expenses of resale, that the contract was assignable, and plaintiff was entitled to recover for its breach.

2. It was error for the jury to include in their verdict the expenses of boxing and selling that portion of the grapes which did not contain 22 per cent. of saccharine matter.

Commissioners' decision. Department 1. Appeal from superior court, Napa county; R. CRANCH, Judge.

F. E. Johnston, A. H. Loughborough, and E. W. McKinstry, for appellant. A. B. Catlin and Dennis Spencer, for respondent.

HAYNE, C. This was an action for damages for the breach of a contract to buy grapes. The substance of the material portions of the contract was as follows: One Hopper agreed to sell all the grapes which he might raise during a period of 10 years, from the vines which were then growing, or which he might thereafter plant, in a certain vineyard. The grapes were to be "sound," and were to be gathered when they contained 22 per cent. of saccharine matter, and to be delivered in boxes at the wine-cellar of the defendant; the "first crop" to be delivered separately from the "second crop" of the same year. In consideration whereof, the defendant agreed to accept the grapes, and pay for them, after delivery, at the rate of \$25 per ton in specified installments; any advancements which might be made to draw interest at a given rate. The parties performed this contract for five years. At the end of that time, viz., in October, 1885, Hopper conveyed the vineyard and assigned the contract to the plaintiff. At the time of the transfer, the first crop of that year was being delivered by third parties, who had made advances upon it. The plaintiff does not appear to have had anything to do with this crop. He gathered the second crop of the same year, however, and delivered it to the defendant, who accepted and paid for it. This crop, it will be observed, was grown during the ownership of Hopper, and consequently may be supposed to have received the benefit of whatever care and skill he may have been able to give to it. The crop of the following year was grown, gathered, and tendered by the plaintiff. The defendant refused to accept it, saying that he had no contract with the plaintiff, and was not buying grapes. The plaintiff thereupon

sold the crop to the best advantage he could, and brought this action to recover the difference in price, and the expenses of resale. The jury rendered a verdict in his favor for \$2,473.20, and judgment was entered accordingly. Afterwards the court required him to remit \$119.20 as a condition of denying the defendant's motion for new trial. Such remission was made, and the defendant appeals from the judgment and the order denying a new trial.

1. It is contended that the contract was not assignable. The rule of the early common law as to the assignability of choses in action has been much changed in modern times. The Civil Code of this state provides that written contracts "for the payment of money or personal property" may be transferred by indorsement in the same manner as negotiable instruments. Section 1459. And there are other provisions which are more sweeping, viz.: "Sec. 1044. Property of any kind may be transferred, except as otherwise provided by this article." "Sec. 1458. A right arising out of an obligation is the property of the person to whom it is due, and may be transferred as such." These sections seem to do away with whatever restrictions there may formerly have been upon the power of the parties to assign their ordinary contracts. It is clear, however, that the provision cannot be construed to render assignable all contracts whatever, regardless of their nature or effect, but must be taken with some qualification. In the first place, it was not intended to render null any agreement that the parties may have made on the subject. Hence, if the contract itself provides in terms that it is not transferable, it certainly cannot be transferred, although it otherwise might be so. Leases, and the tickets usually issued by railroad companies, are familiar instances of this. Upon the same principle, although a contract may not expressly say that it is not transferable, yet, if there are equivalent expressions, or language which excludes the idea of performance by another, it is not assignable. Of this character is the case of *Shultz v. Johnson*, 5 B. Mon. 497, which is much relied upon for the appellant. There the defendant agreed to buy from one Johnson successive crops of hemp "of his own raising," and it was held that the defendant could not be compelled to accept hemp raised by Johnson's administrator. The court said that "the question \* \* \* in every case must turn at last upon the intention of the parties," and that the phrase "of his own raising" meant that the hemp was to be raised by him, or under his personal superintendence and direction. Upon the same principle, it would probably be held that, if the contract provided that it was not to be assigned to a particular person, it could not be assigned to such person; and it would seem, from one of the cases cited by the appellant, that, if an intention not to deal with a particular person appears from circumstances outside of the contract, it cannot be assigned to such person. In the case referred to the plaintiff had previously been supplying the defendant with ice; but the latter had become dissatisfied, and had transferred his

custom to a company called the 'Citizens' Ice Company, and had made a contract with it. After this the plaintiff bought out the Citizens' Ice Company, and, without letting the defendant know of the transfer, went on supplying him with ice. When the defendant found out what had been done, he refused to pay for the ice; and the court held that he was not liable, although he had consumed the ice, and had no fault to find with it. *Ice Co. v. Potter*, 123 Mass. 30. We think that this case may be distinguished from the one before us on the ground of the extraneous circumstances showing the defendant's intention not to deal with the plaintiff. If it cannot be so distinguished, we should be inclined to question the soundness of the decision. In the next place, although the language may not show an intention that the contract should not be assigned, yet the nature of the case may be such that performance by another would be an essentially different thing from that contracted for. Thus, a picture by one artist is an essentially different thing from a picture on the same subject by another artist; and so of a book composed by an author, or any other act or thing where the skill, credit, or other personal quality or circumstance of the party is a distinctive characteristic of the thing contracted for, or a material inducement to the contract. Under this general head come several cases relied upon for the appellant. Thus, in *Lansden v. McCarthy*, 45 Mo. 106, it was held that a contract to deliver meat to a hotel, to be paid for at the end of each month, could not be assigned by the hotel-keeper, the court saying: "The defendant's estimate of the solvency and pecuniary credit and standing of the plaintiffs' assignors may have constituted an important inducement to the contract, without which he never would have entered into it." So, in *Arkansas Val. Smelting Co. v. Belden Min. Co.*, 127 U. S. 388, 8 Sup. Ct. Rep. 1308, it was held that a contract to sell ore to a smelting company, the price of which was to be adjusted and paid by the mutual acts of the parties after delivery, was not assignable by the smelting company; the court, per GRAY, J., saying: "During the time that must elapse between the delivery of the ore, and the ascertainment and payment of the price, the defendant had no security for its payment except in the character and solvency" of the smelting company. If, therefore, the case before us comes within either of the qualifications above stated, then it must be conceded that the contract was not assignable. But, if it does not,—that is to say, if the language does not exclude the idea of performance by another, and the nature of the thing contracted for, or the circumstances of the case, do not show that the skill, credit, or other personal quality or circumstance of the party was a distinctive characteristic of the thing stipulated for, or a material inducement to the contract, then the contract was assignable under the provisions above quoted. It is obvious, therefore, that in this state, at least, the question whether a contract is assignable is a question of construction. As was said in the *Kentucky*



case above referred to, "the question \* \* \* in every case must turn at last upon the intention of the parties." But upon a proper construction there is nothing to show that the contract was not assignable.

(a) There is nothing in the language which excludes the idea of performance by another. The mere fact that the name of the owner of the vineyard was used does not exclude the idea of such performance. The name of the contracting party is almost always inserted as a convenient means of identification. Thus, where John Smith signs a contract which stated that John Smith agrees to pay John Doe a sum of money in consideration of a conveyance of land which the latter agrees to make to the former upon such payment, there can be no doubt that the use of Smith's name does not indicate an intention that his assignee could not perform the contract. To say otherwise would be to say that hardly any contract is assignable unless the word "assigns," or equivalent language is inserted, which would hardly be contended. Nor is the use of personal pronouns of more significance. The counsel for the appellant lay stress upon the circumstance that Hopper agreed to deliver "all the grapes 'he' may raise on the vines 'he' now has growing on 'his' place," etc. But it seems clear that these pronouns were used as equivalents of the proper name, and merely to save repetition of such name. They do not import a desire for the personal services or attention of the owner as contradistinguished from his assignee. This will be readily seen if the same words are applied to different subject-matter. Thus, if it be agreed to buy from another, at a fixed price, a specific quantity of fire-wood which "he" agrees to cut during a certain period from the timber "he" then has growing upon "his" farm, etc., it would surely not be argued that the mere language indicated that the wood was to be cut by the owner himself, or by his agents, and not by his assignee. And so of similar language in contracts to pay money, to convey land, and the like.

(b) There is nothing in the nature or circumstances of the case which shows that the skill or other personal quality of the party was a distinctive characteristic of the thing stipulated for, or a material inducement to the contract. There is no evidence that grapes for wine-making, containing a specified amount of saccharine matter, raised upon a particular vineyard by one man, would necessarily or probably be different from grapes raised from the same vines by another man. Possibly there would be difference between grapes from different vineyards, as the difference between the climate and soil of different places in close proximity is known to be considerable. But here not only is the vineyard the same, but the vines were the same; that is to say, the crop in question was from vines planted by the assignor. It is not impossible that one man might have some peculiar skill or secret by which he could raise better grapes from the same vines than other men could. But there is no evidence that there was any such pe-

culiarity about the original owner of this vineyard, and we do not think that the court will assume that there was. And, while it is to be conceded that men have perfect liberty to contract with whom they choose, and to exclude the idea of performance by another, yet, in the absence of anything indicating such an intention, we do not think that the court should indulge in speculation as to possible prejudice or fancied preference. It should not assume that the parties were influenced by unusual or conjectural motives merely because some men might be so affected under similar circumstances. For example, some men of solvency and credit have preferences as to the persons from whom they borrow money, and would be displeased at having their paper passed around among usurers. Yet at the present day all the courts would hold that, in the absence of indication of a contrary intention, contracts for the payment of money are assignable. So in many cases owners of real property have some choice as to the persons they admit as tenants. Yet it is well settled that an ordinary lease is assignable by the tenant, in the absence of the manifestation of a contrary intention; and the case of a lease is not to be disposed of by saying that it is an interest in property, for, by the express provision of the Code, the right to the performance of an obligation is property. Civil Code, § 1458. These instances, and others which might be mentioned, show that it will not do to indulge in conjecture as to fanciful and unusual motives and prejudices. Now, in the case before us, as has been stated, there is no evidence of anything from which it can be inferred that performance was to be by the original owner of the vineyard, and not by another. Suppose that he had gone to live permanently in Europe, and had given no kind of attention or supervision to the place. Would it have been contended that under such circumstances the defendant would have been justified in refusing to accept grapes of the required standard grown upon the vineyard by an agent? We imagine not. And in the case put there would be no kind of supervision by the owner, who would be entirely and permanently absent; and it seems purely fanciful to say that in such case he would exercise some skill in the selection of an agent, and that the parties must be supposed to have had this in view. Now, if, in the case put, the defendant would be liable, how can it be said that the circumstances show that the personal qualities of the owner were a material inducement to the contract? We cannot see any reason that would make this contract non-assignable which would not equally apply to the ordinary crops of corn, wheat, oats, potatoes, etc. If, in such cases, a party prefers to deal with one person to the exclusion of assignees, it is very easy to indicate such preference in the contract. Courts will not assume that unusual motives exist.

The learned counsel for the appellant have advanced other considerations which may be noticed briefly. The fact that the contract provided in substance that,



if advances should be made by the wine-maker, they should bear interest at a certain rate, does not indicate that the solvency or credit of the owner of the vineyard was an inducement to the contract; for the making of such advances was entirely optional with the wine-maker. Nor is there anything in the circumstance that the owner of the vineyard was not bound to raise grapes. What the contract secured to him was the right to raise grapes of a specified standard, and to compel the defendant to take them at a fixed price. This may have been an unwise contract for the defendant to make. But an optional contract is binding. *Hall v. Center*, 40 Cal. 63. And the mere fact that it is optional cannot be a reason why it should not be assigned. We have not overlooked the distinction pointed out by counsel between executory contracts and contracts which have been executed on one side. What we have said applies where something remains to be done by the party who assigns. And, as a matter of course, since a party cannot release himself from an obligation by his own act without the consent of the other party, it is only the benefit of a contract which can be assigned. Where there is a burden, it cannot be transferred without the consent of the other party. Civil Code, § 1457. It may be added that we have examined the English case of *Robson v. Drummond*, 2 Barn. & Adol. 303, cited by counsel, but consider it to have been disapproved in the subsequent case of *Wagon Co. v. Lea*, 5 Q. B. Div. 149. It is true that the principle of the former case was approved in the latter; but it is only the application of the principle which makes the case in point here, and this is what was disapproved in the latter case, which did not turn upon the use of the word "executors" in the contract.

2. The jury included in their verdict the expenses of boxing and shipping the whole of the first and second crops of the year in question, while the recovery was restricted by the court to that portion of the grapes which contained 22 per cent. of saccharine matter. We think that it was error to include in the verdict the expenses of boxing and shipping that portion of the grapes which did not come up to the required standard. The respondent contends in this regard that he ought to have recovered for all the grapes, regardless of the amount of saccharine matter they contained, and that the error was in favor of the appellant. But we do not take that view of the matter. The contract provides that the grapes were not to be gathered until they contained 22 per cent. of saccharine matter; and, as they could not be delivered at the wine-cellar until they were gathered, we think it is to be inferred that the defendant was not to receive them unless they came up to the standard mentioned. Any other construction would bind the defendant to pay the \$25 per ton for grapes which might not contain any saccharine matter, at all. But the judgment can be modified so as to avoid the consequences of this error. Giving the appellant the benefit of small fractions, the verdict was too large, for the

reason mentioned, by \$337.57. The respondent, under the order of the court, on motion for a new trial, remitted \$119.70, leaving the verdict still too large by \$217.87. We therefore advise that the judgment be modified by deducting therefrom the sum of \$217.87, and that as modified the judgment and order denying a new trial be affirmed; the appellant to recover his costs of appeal.

We concur: BELCHER, C. C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is modified by deducting therefrom the sum of \$217.87, and that as modified the judgment and order denying a new trial are affirmed; the appellant to recover his costs of appeal.

#### LARUE V. GROEZINGER. (No. 18,560.)

(Supreme Court of California. June 10, 1890.)

Commissioners' decision. Department 1. Appeal from superior court, Napa county; R. CRANCH, Judge.

F. E. Johnston, A. H. Loughborough, and E. W. McKinstry, for appellant. A. B. Cullen and Dennis Spencer, for respondent.

HAYNE, C. The general features of this case are the same as those of No. 12,708, ante, 42, between the same parties, which has just been disposed of; but there is no complication herein in relation to grapes containing less than 22 per cent. of saccharine matter, for it is found that the grapes for which a recovery was had, contained the required amount of saccharine matter. Upon the authority of said case, we advise that the judgment and order appealed from be affirmed.

We concur: BELCHER, C. C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

83 Cal. 619

#### In re WIARD'S ESTATE. (No. 13,093.)

(Supreme Court of California. April 10, 1890.)

APPEAL—ORDER OF FINAL DISTRIBUTION—TIME.

1. An appeal from a decree of final distribution under Code Civil Proc. Cal. § 963, making such a decree appealable, must be taken within 60 days, as provided by section 1715, Id., governing appeals from orders and decrees in probate proceedings when inconsistent with the general provisions.

2. An order refusing to vacate a decree of final distribution is not appealable. Code Civil Proc. § 963, subd. 3.

In bank. Appeal from superior court, Alameda county; N. HAMILTON, Judge.

C. M. Jennings, for appellant. J. H. Smith, for respondent.

FOX, J. Appeal from a decree of final distribution, and from an order subsequently made denying an application or motion to vacate and set aside said decree, and for a new trial.

The decree was rendered, filed, and entered March 12, 1888. An appeal from such a decree may be taken to the supreme court, (Code Civil Proc. § 963, subd. 3,) and the general provisions of part 2, (of which said section is a part,) relative to appeals, are applicable, except so far as they are in-

consistent with the provisions of title 11, pt. 3, (Code Civil Proc. § 1714.) Appeals from orders and decrees in probate proceedings are governed by chapter 12, tit. 11, pt. 3. Section 1715, found in that chapter, provides that the appeal must be taken within 60 days after the order, decree, or judgment is entered. This appeal was not taken until December 22, 1888. The appeal from the decree must therefore be dismissed. Subdivision 3, § 963, Code Civil Proc., enumerates all the cases in which an appeal may be taken to this court from the superior court in probate proceedings, and an order refusing to vacate a decree of distribution and settlement of final account is not one of them. Estate of Calahan, 60 Cal. 232; Estate of Lutz, 67 Cal. 457, 8 Pac. Rep. 39. See, also, Blum v. Brownstone, 50 Cal. 293; and Estate of Dean, 62 Cal. 613. Counsel has not made the point that the order refusing to vacate the decree is not appealable, but we cannot ignore the plain provisions of the statute, particularly after attention has been frequently called to them, because counsel has overlooked the point. The policy of the law is to facilitate, and not to delay, the settlement of the estates of deceased persons. The law gives a direct appeal from the decree, if taken in time, but it gives no appeal from an order of the court below refusing to vacate that decree, which is made only after several months of delay.

Appeal dismissed.

We concur: SHARPSTEIN, J.; MCFARLAND, J.; PATERSON, J.; THORNTON, J.

83 Cal. 77

*In re STEPHENS.* (No. 20,457.)

(Supreme Court of California. May 5, 1890.)

ATTORNEY—UNPROFESSIONAL CONDUCT—DISBARMENT.

Respondent was associated with one W. in defending respondent's brother upon a prosecution for criminal libel. Believing that W. had abandoned the case, respondent represented to the prosecuting witness that W. was the real author of the libel, and that he could produce documents purporting to be in the handwriting of W., which he believed to be genuine, and which his brother would testify were so, and that, if genuine, they would show W.'s guilt. Upon these representations, W. was arrested when about to leave the state, but gave bail, continued his journey, and did not return for some time. On his return, respondent learned that he had not, and never intended to, abandon his brother's cause; and thereupon respondent appeared for and defended W. at the preliminary hearing, and afterwards procured his discharge by a writ of prohibition, though still believing the documents to be genuine. Held, that his conduct was unprofessional, and he is therefore forbidden to practice in the courts of the state for two months; the punishment being reduced on a petition by numerous members of the bar of the same county with respondent, calling attention to the fact that the proceedings had been pending over a year, and representing that during that time his practice had been entirely suspended, and that he had heretofore borne an excellent reputation.

In bank. Upon proceedings for disbarment.

*John S. Chapman and J. W. Swanwick*, for prosecution. *Houghton, Silent & Campbell*, for respondent.

PATERSON, J. This is a proceeding for

the disbarment of C. C. Stephens, an attorney and counselor at law. The allegations of the accusation are set forth in the opinion of this court rendered at the time of the decision overruling the demurrer. 77 Cal. 357, 19 Pac. Rep. 646. Many immaterial matters are stated in the accusation; but, as there was no motion to strike out, they were not referred to at the time the demurrer was overruled. The result was that, in taking testimony, the commissioners appointed by the court, not knowing what allegations would be deemed material, admitted many hearsay statements, and a great deal of evidence that was not relevant to the material matters charged. Some of the evidence went in without objection, but we have considered only such portions of the evidence as is competent and relevant to the material issues.

The gist of the charge is that, while associated with Col. Wells as an attorney of record for the defendants in the cases against B. A. Stephens and A. M. Thornton for criminal libel, the respondent, C. C. Stephens, represented to Bell, the accuser herein, and prosecuting witness in said case, that Col. Wells was the person really guilty of the libels alleged in those actions, Thornton and B. A. Stephens having acted only at the instigation of said Wells; that he further represented that said Wells "had gone back on" said Thornton and B. A. Stephens, and they proposed to furnish evidence sufficient to convict him of libel if he (said Bell) would dismiss the action against Thornton and B. A. Stephens, the evidence proposed being the original manuscript, portions of which, he said, were in the handwriting of Wells, and a letter written by the latter requesting B. A. Stephens to change certain portions of the article before publication so as to make it more bitter and malevolent against Bell; that the documents referred to were produced; that respondent consulted with said Bell and his attorney concerning the law and facts involved in the proposed prosecution, and repeatedly urged said Bell to file a complaint against Wells; that said Bell, not being satisfied as to the genuineness of the documents exhibited by respondent, refused to dismiss the actions, but during the negotiations said actions were repeatedly continued for trial; that at the urgent request of respondent, and upon repeated representations that he would procure the evidence required to establish the guilt of Wells, a complaint was filed on December 19, 1887, by C. A. Bell, son of the accuser herein, charging said Wells with libel. A warrant was issued. Wells was arrested while on his way to Washington; but he gave bail, and did not return to this state until March 20, 1888. That respondent advised said Bell that in his opinion the absence of said Wells from the state would suspend the running of the statute of limitations, and promised that his brother, B. A., whose address he gave for the purpose of service of subpoena, would appear as a witness at the preliminary examination of Wells, and testify to the genuineness of the letter; that the preliminary examination of Wells was continued from March

20, 1888, to April 17, 1888; that respondent continued to act with said Bell and his attorney in the prosecution of said Wells until the 17th of April, when he appeared and acted as attorney for Wells at the preliminary examination, objected to the examination of Wells on the ground that the prosecution of the action was barred under the provisions of sections 801, 802, of the Penal Code, and, upon said objection being overruled, he procured the discharge of said Wells by virtue of a writ of prohibition, prohibiting the justice of the peace from proceeding with the preliminary examination.

It is conceded that respondent did not act as attorney or counsel for Bell in anything he said or did. There is a conflict in the evidence as to whether the respondent advised Bell to have Wells arrested and prosecuted for libel. Three witnesses testified that he did. The respondent denied it. Bell testified that Stephens did not urge him to file a complaint against Wells, but that he did request him to do so. C. A. Bell, son of Horace, testified that Stephens, respondent, came to his office, and said that Wells was going away that day, and if they wanted to arrest him a complaint should be filed. Williams, counsel for Horace Bell, testified that Stephens told him Wells was the guilty party, had inveigled his brother into the matter, and that he ought to be arrested before he could get away. During the negotiations between the parties, the question arose whether the statute of limitations would continue to run during the absence of Wells from the state. It is alleged in the accusation that respondent advised Bell and his counsel that the statute would not run during such absence. Upon this question, also, the evidence is conflicting; respondent denying that he advised them at all in relation to it, or any other matter of law or of fact. Respondent, in his testimony, denies that he ever said Wells was the guilty party, or represented that he would produce evidence sufficient to prove that fact, but, on the contrary, insists that all he offered to do was to produce the documents which purported to be in the handwriting of Wells,—the manuscript of the original article and the letter,—and that Bell knew all the time that his (Stephens') information as to the genuineness of the documents, and the part which Wells had taken in the production of the libel, was a matter of hearsay.

In view of the nature of this proceeding, and the effect of an adverse decision upon the future of the respondent, we give him the benefit of the doubt which necessarily arises out of the conflict of evidence upon these issues, and find (1) that respondent did not urge or advise Bell to have Wells arrested and prosecuted for libel; (2) that respondent did not advise Bell or his counsel as to whether the statute of limitations would run during the absence of Wells from this state; and (3) that respondent did not represent to Bell that he could or would procure the evidence required to convict Wells of libel. The facts remain, however, that respondent's proposition and conduct resulted in the arrest of Wells on a charge of libel, and that he

(respondent) must have known that such would be the effect of his offer to produce the documents which he had in his possession and exhibited to Bell. He knew that Bell would certainly prosecute Wells if he could be made to believe that the papers, or any part of them, were in the handwriting of Wells. He told Bell that his brother had said they were genuine. He held them out as genuine, himself believing them to be genuine, and at the trial testified that he still believed them to be in the handwriting of Wells. If he believed at the time he offered them that Wells was innocent, or if he had no reasonable cause to believe that they would tend to establish the guilt of Wells, his conduct in thus encouraging the prosecution of Wells was in direct violation of his duties as an attorney and counselor, which require him "to counsel or maintain such actions, proceedings, \* \* \* only as appear to him legal or just." Section 282, subd. 3, Code Civil Proc. And the fact that his brother was in trouble, and that Wells, who had been engaged in the defense of his brother, had abandoned the case, would in that case have afforded no excuse or justification, but would have tended to show that he had violated another provision of the same section, which requires an attorney and counselor at law "not to encourage either the commencement or the continuance of an action or proceeding from any corrupt motive of passion or interest." Id. subd. 7.

The case in a nutshell, according to the undisputed evidence, is this: Respondent's brother was being prosecuted for criminal libel. Wells was engaged in defending the brother. Believing that Wells had deserted his brother, and refused to act further in his defense, respondent, desiring to punish Wells for his desertion, and to procure the discharge of his brother, proposed to Bell, the prosecutor, that, if he would dismiss the charges against the defendants in the libel suit, he (respondent) would produce documents tending to show that Wells was the person really guilty of the offense charged against his brother. The documents were exhibited. A complaint was filed. Wells was arrested and gave bail while departing from the state. During the pendency of the negotiations between respondent and Bell, and the pendency of the action against Wells, several continuances of the action against respondent's brother were had in pursuance of the proposition referred to. When Wells returned to this state, respondent discovered that Wells had in fact never deserted the cause of his brother, but always intended to return and defend him. Thereupon, and without any further evidence of the guilt or innocence of Wells, but still believing that he had written the documents produced by respondent as tending to show the guilt of Wells, and which had in fact led to his arrest, respondent, without any notice to the prosecution, appeared on behalf of Wells, objected to any evidence against the defendant on the ground that the statute of limitations had run against the prosecution of the offense charged, and, upon his objection being overruled, procured the

discharge of the defendant Wells on a writ of prohibition issued out of the superior court. This state of facts leads to one of two conclusions: Either that the respondent encouraged the commencement and prosecution of a criminal charge against Wells which he did not believe to be just, or had no reason to believe was true, and through motives of "passion or interest," or that, after his production of evidence tending to show the guilt of Wells, and which in fact resulted in the commencement and prosecution of a criminal charge, he undertook the defense, and procured the discharge of the accused, although he entertained the same opinion as to the genuineness of the documents tending to show guilt that he held at the time that the prosecution was commenced. He does not say that he had changed his mind as to the guilt or innocence of Wells, and therefore undertook to defend him. He found that Wells had not in fact abandoned, or intended to abandon, the defense of his brother; therefore he had done Wells an injustice, and desired to right him,—not because he had discovered that the documents were not genuine, or that Wells had not participated in the alleged libel. No such excuse as this is offered. It is admitted by counsel for respondent that "it might have been wiser, and more in accordance with good taste, if he had declined to have any further connection with any of the cases except in the necessary defense of his brother." We cannot thus lightly excuse the respondent's conduct. It was not only a breach of good taste, but was a transgression of those ordinary rules of professional practice which are universally recognized as binding upon attorneys and counselors with or without statutory legislation, if it was not a violation of the express provision of the Code with respect to the duties of such officers of the court. Weeks, Attys. § 80.

While we do not regard the offense as one of so grave a nature as to call for the disbarment of the respondent, we think the practice should be condemned, and that some penalty should be imposed which will deter others from following the same course. In determining the penalty to be inflicted, we consider, in mitigation of the offense, the fact that the respondent was greatly concerned in behalf of his brother, who was in trouble, and that he naturally felt grateful to those who aided him, and unfriendly to those who deserted him. His gratitude to Wells for continuing to defend his brother doubtless led him to assume a position in the case inconsistent with his relations to the parties prosecuting the same. It is ordered that the respondent be deprived of the right to practice as an attorney and counselor in the courts of this state for the term of six months from date hereof.

We concur: BEATTY, C. J.; MCFARLAND, J.; FOX, J.; SHARPSTEIN, J.

ON PETITION FOR MODIFICATION OF SAID ORDER.

(June 18, 1890.)

PATERSON, J. In this matter, we have received a petition, signed by a large num-

ber of members of the judiciary and bar of Los Angeles county, asking on behalf of respondent herein a modification of the order of suspension heretofore entered herein. In support of this request, they represent that the proceedings have been pending for over a year, and that during that time his practice has been almost entirely suspended; that he has heretofore borne an excellent reputation, has never been charged with any infraction of the rules governing professional conduct, and will be careful not to do so in the future; that he is of a sensitive nature, and, in the opinion of the petitioners, has already been sufficiently punished. In determining the matter, we overlooked the fact that the proceedings had been pending for over a year, and of course were not aware of the alleged effect upon the respondent and his practice, and did not consider them in mitigation of punishment. We think that the request of so large a proportion of the members of the bar with whom the respondent is engaged in practice is entitled to consideration. It is therefore ordered that the respondent be permitted to resume the practice of law on July 1, 1890, and the order heretofore entered herein is modified to that extent.

We concur: BEATTY, C. J.; MCFARLAND, J.; SHARPSTEIN, J.; FOX, J.

84 Cal. 456

HARRIGAN v. MOWRY. (No. 11,815.)  
(Supreme Court of California. June 10, 1890.)

#### QUIETING TITLE.

Where plaintiff conveys land in trust to be reconveyed at the end of five years, an action to quiet title does not lie, on a failure to reconvey, since the effect of such action is simply to declare the title as it is, while the purpose here is to have the title changed.

In bank. On rehearing. For former report, see 22 Pac. Rep. 658.

R. Percy Wright, for appellant. C. H. Parker and Parker & Eels, for respondent.

WORKS, J. The judgment in this case was reversed by department 1, the opinion having been written by Commissioner VANCLIEF. A rehearing was granted. The second argument and further consideration of the case have convinced us that the decision of the department was right, for the reasons stated in the opinion of the learned commissioner.

In addition to what is said in the former opinion, it may be remarked that the evidence clearly proved that the plaintiff was the owner of the equitable title to the property in litigation, and that the defendant was the owner of the legal title thereto as her trustee. Therefore, conceding that an action to quiet title was the proper remedy, the court, under the evidence, should have rendered judgment accordingly. Such a judgment would have availed the plaintiff nothing. It would have left her just as she was in the beginning. Her object was not to declare the title as it really was, which is the effect of a successful action to quiet title; her purpose was to change the title, and vest in herself the legal title that was outstanding in her trustee. This could not be done

by an action to quiet title. The proper action would have been one to close up the trust, or to show that it had been closed, and to compel a conveyance of the legal title. It can make no difference that the reasons of the defendant for withholding a conveyance were insufficient or even unreasonable, as claimed. The court below could not, nor can we, declare that she has no title because she should, in justice, have conveyed it to the plaintiff. Judgment reversed, and cause remanded for further proceedings.

We concur: PATERSON, J.; MCFARLAND, J.; FOX, J.; SHARPSTEIN,

KULLMANN *et al.* v. GREENEBAUM *et al.*  
(No. 12,671.)

(Supreme Court of California. May 8, 1890.)

SPECIAL FINDING—JUDGMENT.

Where, under allegations of fraud too indefinite to sustain the charge, the jury found specially that defendants were guilty thereof, the finding was properly disregarded in entering judgment, and the judgment will not be modified to accord therewith.

Department 2. Appeal from superior court, city and county of San Francisco; WALTER LEVY, Judge.

Wal J. Tuska, for appellant. Jarboe, Harrison & Goodfellow, for respondent.

THORNTON, J. The plaintiffs in this case seek a modification of the judgment. They ask the court to direct a modification of the judgment by the court below by ordering that court to enter judgment in accordance with the facts found by the jury, adjudging the defendants guilty of fraud, and directing process to issue against these persons according to law. This we decline to do, for the reason that the complaint sets up no fraud by defendants of which the plaintiffs can complain. The action is one for the conversion by defendants of shares of stock belonging to plaintiffs. The other matters pleaded to show fraud show no connection with the conversion, and show no relation between the plaintiffs and defendants setting forth fraud on plaintiffs' rights. The allegations in that part of the complaint are too general and indefinite in regard to fraud to make it clear that defendants have defrauded plaintiffs in regard to the stock alleged to have been converted. If there was any fraud alleged, it was disconnected from the subject of the action, viz., the conversion of the stock. Inasmuch as the complaint in respect of fraud is insufficient, the court did not err, though special issues were submitted to the jury, in not entering such judgment as the plaintiffs now ask. The *allegata* and *probata* do not correspond. It may be conceded that the court was bound to enter judgment on the verdict of the jury. But, under the state of facts above pointed out, the court did not err in disregarding the verdict of the jury in respect to fraud. It is unnecessary to determine any other questions made on the argument. The proper judgment was entered. Judgment affirmed.

We concur: SHARPSTEIN, J.; MCFARLAND, J.

v.24p.no.1—4

UNITED TEL. CO. v. CLEVELAND *et al.*

(Supreme Court of Kansas. June 7, 1890.)

NEGLECT—APPEAL—SUFFICIENCY OF EVIDENCE.

Where there is sufficient evidence to support the charge of culpable negligence on the part of the defendant, and the jury find the defendant negligent, the verdict thereon, approved by the trial court, will not be disturbed upon the ground that it is against the evidence or without evidence.

(Syllabus by Strang, C.)

Commissioners' decision. Error from district court, Sumner county; J. T. HERRICK, Judge.

Murray & Elliott and Glead & Glead, for plaintiff in error. James Lawrence and McDonald & Parker, for defendants in error.

STRANG, C. July 3, 1885, the plaintiff, by its agent, H. C. Chipchase, hired of the defendants a team, harness, and buggy to drive, in connection with the business of said company, in and about the repair of its telephone lines, in and around the city of Wellington. In driving out of said city, along their telephone line leading from Wellington to Hunnewell, the said agent of the plaintiff had to cross State creek; and in crossing the same the team was drowned, and the buggy and harness injured. Plaintiffs below demanded of the defendant below the value of the horses drowned, and \$50 damage to the harness and wagon,—in all, \$300,—which was refused; and this action was brought in the court below to recover therefor. The case was tried by a jury. Verdict for plaintiffs. Motion for new trial. Motion overruled, and judgment for plaintiffs.

The record in this case is badly mutilated. We do not think a trial judge should settle and sign a case made in the condition in which this one was when settled and signed. When a party makes a case for this court, and omits so much that should have been incorporated therein, and puts so much therein that is foreign thereto, that, in order to make it speak the truth, it becomes necessary to so alter and mutilate it that it becomes almost or quite unintelligible, the trial judge should refuse to sign it until it is properly made. In this case, as made and served, there are 10 pages of evidence; and it required 13 pages of amendments to correct the case so made, and make it speak the truth, so that the trial judge would settle and sign it.

There are numerous errors assigned in the case, but most of them are answered by the amendments allowed to the case as served. We will notice but two of the assignments: First, that the verdict is against the evidence. The evidence is meager upon the question of negligence, and what there is in the case seems to have got in rather accidentally, than by any orderly attempt to make such proof. There is, however, some evidence upon the question of negligence; and it is the rule of this court, too well settled to require citations in its support, that, where there is any proper evidence on a matter in issue before a jury, the verdict of the jury thereon, approved by the trial court, will not be disturbed. The condition of the

stream and its surroundings should have put Chipchase on his guard, and thus notified him of the danger to himself and team in crossing the stream at that time. We think Chipchase, in his evidence, discloses negligence. He testifies that after he had crossed the main stream and reached a branch, the place in which the team was drowned, he found that the small bridge that was usually there was gone, and yet he drove into the stream. Now, it is quite apparent that a stream that requires a bridge to cross it ordinarily could not, with safety, be crossed at such a time, with the water as high, and running as swiftly, as the evidence shows it was on that occasion, and the attempt to cross at such a time, with the bridge gone, displayed such a want of care and prudence as in our judgment amounted to negligence. One witness testifies that he called to Chipchase, and warned him not to attempt to cross the stream. He says he does not know that Chipchase heard him, but that he called loud enough so he could have heard, and Chipchase does not directly say he did not hear the call of that witness. Chipchase attempts to justify his crossing by reason of the remark of Dr. Barnet that he had come through. But this remark of the doctor's was made near the crossing, and the condition of the doctor's horse and buggy, being dry, should have satisfied Chipchase that Barnet did not mean him to understand that he had crossed the stream. If Chipchase had so understood the doctor, he would have been curious to note how much of the horse and wagon had been buried in the water, that he might have formed some idea as to the safety there was in crossing. Besides, the party in the buggy with Barnet, immediately following Barnet's remark, informed Chipchase that they had not crossed. We think there was evidence to support the charge of negligence.

It is alleged in the petition in error, but not in the briefs, that the jury were guilty of misconduct. It is perhaps unnecessary to notice this, in the absence of any complaint or reference thereto in the arguments. Upon the authority, however, of *City of Kinsley v. Morse*, 40 Kan. 577, 20 Pac. Rep. 217, the method in finding the verdict of the jury is not sufficient misconduct to set it aside. We recommend that the judgment of the district court be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

#### CURTIS v. DAVIS.

(*Supreme Court of Kansas. June 7, 1890.*)

#### RELEASE OF ATTACHMENT—APPEAL—REVIEW.

This court will not reverse a ruling of the district court, sustaining a motion to discharge certain specific personal property from the lien of an order of attachment, in a case where a large number of witnesses were examined orally, the record of whose testimony makes over a hundred pages, and about which there is much conflict, there being direct and positive evidence to support the ruling of the trial court.

(*Syllabus by Simpson, C.*)

Commissioners' decision. Error from district court, Sumner county; J. T. HERBICK, Judge.

*George, King, Scwhinn & Wood*, for plaintiff in error. *J. M. Graham and Isaac G. Reed*, for defendant in error.

SIMPSON, C. This action was commenced in the district court of Sumner county on the 21st day of February, 1888, by Curtis, against W. E. and J. F. Davis, to recover judgment on five promissory notes, amounting to \$170, with interest. An order of attachment was issued, and certain property that it was alleged belonged to the said W. E. and J. F. Davis was seized by the sheriff. The Davis brothers filed a motion to dissolve the attachment, denying all causes therefor, but this motion was overruled. Mary Davis, this defendant in error, then filed her motion asking that certain property seized by the sheriff, to-wit, two wagons, two ponies, two horses, and one set of harness, be discharged from the attachment lien for the reason that said property belonged to her. This motion came on for hearing in regular order. Eleven witnesses were examined orally before the court, and 115 pages of the record are devoted to their testimony. The trial court took the matter under advisement for several days, and then sustained the motion of the said Mary Davis, except as to one certain horse. Curtis, the attaching creditor, brings the action of the court on the motion of Mary Davis here for review.

It is claimed that this evidence does not show that Mary Davis was the owner of the property that she claimed belonged to her. It is further asserted that, even if she was the owner, she has acted so towards it herself, and permitted her sons to claim it in her presence, that she is now estopped from claiming it. As to the first there is a finding of the trial court necessarily included in the decision on the motion that the property belonged to Mary Davis. It is beyond dispute that there is some evidence to support that finding. We do not hear the witnesses and observe their demeanor on the stand, and consequently we cannot weigh the evidence, and from this condition arises a rule, so often repeated that its assertion has become one of dull uniformity, that we can reverse only where there is no evidence to support a material fact. If there is any conflict among the witnesses, a finding by the court is as conclusive as if made by a jury. This same rule is applicable to the existence of the facts upon which the estoppel rests. It is perfectly evident that, if we should reverse on this ground, we would view the facts differently from that taken by the trial court. While it would seem to us in some cases that the statements of the witnesses as they appear in the cold type would lead us to different conclusions than those adopted by the trial court, we must always recollect that the trial judge has had the very great advantage of a personal view of the witness, can observe his manner, note his demeanor, determine his degree of intelligence, estimate his feeling, weigh his interest in the result, develop his prejudices, and make

due allowance either for his timidity, or for that "exceeding freshness" sometimes manifested on the witness stand. The operation of the rule, so far as we have observed, has invariably been in the interest of truth and justice. It compels us to say that in this particular case there is no legal cause for a reversal of the ruling of the trial court. It is therefore recommended that the judgment of the court below be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

GIBBONS v. ADAMSON, Treasurer, *et al.*

(Supreme Court of Kansas. June 7, 1890.)

TAXATION—ASSESSMENT—CHANGE—NOTICE.

When a township assessor receives a personal property statement from a person without making any objection thereto, and afterwards makes his return to the county clerk, and such statement is filed in his office, the assessor has no authority to change and alter the returns so made, without notice, by adding a greater sum than that returned by him.

(Syllabus by Green, C.)

Commissioners' decision. Error from district court, Jackson county; ROBERT CROZIER, Judge.

*Hayden & Harden*, for plaintiff in error.  
*R. G. Robinson*, for defendant in error.

GREEN, C. John Gibbons brought this action in the district court of Jackson county to restrain the collection of a personal property tax claimed to be illegally assessed against him. The material allegations of the petition are that on the 9th of May, 1887, the plaintiff made and submitted to the assessor of Netawaka township his personal statement for the purposes of taxation in said township, in Jackson county, which statement contained: "Average amount of merchant's moneys and credits for preceding year, three hundred dollars; assessed value, one hundred and fifty dollars. Mortgages, six hundred dollars; assessed value, three hundred dollars. Aggregate value of all other personal property, forty dollars,"—making a total of all taxable property of \$490. Deducting the constitutional exemption left the amount of \$290 for the purpose of assessment and taxation. That on the 31st of May the township assessor duly made out and delivered to the county clerk, in tabular form, a list of the names of the persons in said township for the purpose of taxation, and that this list was on the 31st of May filed with the clerk of Jackson county. That, after the filing of the list with the clerk, the township assessor, without authority of law, entered an interlineation opposite the name of the plaintiff upon the list so returned, as follows: "Doubly assessed;" and, in the column designating the amount of personal property of plaintiff subject to taxation, entered the amount \$6,290; and, in the column designating the assessed value of the plaintiff's property, the figures \$6,290,—thereby altering the list of the plaintiff's personal property and statement liable for taxation for the year 1887 to the sum of \$6,290, instead of \$290, as returned by him. That

the county clerk carried to the tax-roll of 1887 as the assessed value of the plaintiff's property the sum of \$6,290, instead of \$290, and wrongfully and unlawfully entered the sum of \$213.85 as the total amount of taxes assessed against the plaintiff for 1887, instead of the sum of \$9.86, which should have been entered as the proper legal amount of taxes assessed against him. That the plaintiff had no knowledge that the assessed value of his personal property had been raised or altered until on or about the 5th of December, 1887, and that he thereupon notified the defendant Adamson, as county treasurer, of the erroneous assessment, and offered to pay the amount of tax due upon an assessed valuation of \$290, which was refused. A warrant was afterwards issued by the treasurer to the defendant Francis, sheriff of said county, for the sum of \$224.54. That on the 31st of January, 1888, plaintiff tendered to the defendant Francis, sheriff, etc., the sum of \$11.61 in payment of the amount of personal property tax which he admitted to be due upon a valuation of \$290. A temporary restraining order was obtained upon the filing of this petition, on the 13th of February, 1888. A demurrer was interposed to this petition, which was sustained by the court below, and the plaintiff below elected to stand upon his petition. Judgment was rendered for the defendants for costs. The plaintiff in error brings the case here for review.

The sole question presented in this case for consideration is whether, after a person has duly made out and delivered to the township trustee his personal property statement, as provided by sections 4 and 10 of chapter 107 of the Compiled Laws of 1885, and after return has been made to the county clerk, as provided by section 65 of chapter 187 of the Tax Laws, a township assessor may, without notice to the person assessed, increase the amount of the personal property for which the person is liable for taxation. We think this question must be answered in the negative, and the court below was in error in sustaining the demurrer to the petition of the plaintiff. It appears from the allegations of the petition that the assessor had made his return to the county clerk without any change or alteration in the personal property statement of the plaintiff in error. After the return was made and filed in the office of the county clerk, we do not think the assessor had any authority to make any change whatever in his return; especially without notice to the plaintiff. It is claimed upon the part of the defendant in error that the petition does not show that the plaintiff had listed all of his property which was subject to taxation. We do not think this can be successfully maintained. A personal property statement is set out in full in the plaintiff's petition, and it contains the oath required in all personal property statements, which states that the plaintiff did set forth all personal property which by law he was required to list, either on his own account or in behalf of others. We think this sufficient to bring the plaintiff within the rule, and entitles him to the protection of the court. It appears from the petition that



the plaintiff offered to pay to the county treasurer the amount of the taxes due upon the valuation as returned by him, and that after the issuance of the tax-warrant he tendered to the sheriff the amount of such tax, with the additional costs for the warrant. These tenders, it appears from the petition, were refused upon the part of the treasurer, as well as the sheriff. We think this is a sufficient allegation to entitle the plaintiff to the relief prayed for; and we are of the opinion that the effort, upon the part of the assessor, to change the statement as made by the plaintiff in error, after having been returned to the clerk, was unauthorized, and made without any authority of law. If the allegations of the petition are true, the tax over and above the valuation of \$290 was unlawful. We think the petition did state facts sufficient to constitute a cause of action, and that the court below erred in sustaining the demurrer thereto. We recommend that the judgment of the court below, in sustaining the demurrer to plaintiff's petition, be reversed, and the cause remanded for further proceedings.

PER CURIAM. It is so ordered; all the justices concurring.

#### WILLIAMS V. MAY.

(Supreme Court of Kansas. June 7, 1890.)

#### TRESPASS—REVIEW—SUFFICIENCY OF EVIDENCE.

Where there is any proper evidence to support the verdict of a jury, approved by the trial court, this court will not disturb such verdict.

(Syllabus by Strang, C.)

Commissioners' decision. Error from district court, Osage county; R. B. SPILLMAN, Judge.

C. S. Martin, for plaintiff in error.  
Frank A. Hay, for defendant in error.

STRANG, C. This was an action in trespass under the statute for treble damages, commenced in the district court of Osage county April 26, 1887. Plaintiff claimed damages in three separate counts: For taking and carrying away coal from the plaintiff's land; *second*, for taking and carrying away earth; and, *third*, for damages to a well on the premises. The second and third counts were practically abandoned on the trial. The defendant answered by general denial, and the case was tried by the court and a jury December 16, 1887, and resulted in a verdict in favor of the plaintiff for \$285.05. A motion for new trial was filed and overruled; and the plaintiff, defendant below, brings the case here, and alleges that the verdict is not sustained by the evidence. This is the only error argued in the brief of plaintiff in error, and the only one relied on, though others are assigned. It is true plaintiff says in his brief that his demurrer to the evidence of the plaintiff below should have been sustained; but, as that raises practically the same question as the one raised in the allegation that there is no evidence to sustain the verdict, we will not consider it separately.

It is the rule of this court, so well established that it goes without saying,

that, where there is any proper evidence to support the verdict of a jury which has the approval of the trial court, this court will not disturb such verdict. The plaintiff in error recognizes this in his brief, but says there is no evidence sustaining the verdict in this case, and that this court has not gone so far as to sustain a verdict that is not supported by any evidence because such verdict is approved by the trial court. In this case, Williams, defendant below, testified that he never removed the coal from the premises of Mrs. May, plaintiff below, and that he never authorized any one to do so,—did not know until after it was removed that it was being done; and there is no direct testimony contradicting this evidence. But the witness Gray testified that he was a miner of 15 years' experience, that he was acquainted with the mine of the defendant below, that he had surveyed it for both the plaintiff and defendant below and for the state; showing his thorough knowledge of the mine and its surroundings. Then Gray testified that it would take a year, the way that shaft was operated, to take the coal from under the land of the plaintiff below. Williams testified that he leased his shaft to one Branstrom August 15, 1886, and at that time the mine was worked pretty close to the land of Mrs. May. All the evidence showed that the coal was taken from Mrs. May's land prior to the 1st of May, 1887. While there was no direct evidence showing that Williams removed coal from Mrs. May's land, yet, if the evidence of Gray is true, a portion of the coal was taken from her land prior to August 15, 1886; and the jury, who were the judges of the weight to be given to the testimony of witnesses, may have given the testimony of Gray more weight than they did the evidence of Williams, and may, under the circumstances of Gray's testimony, have entirely disbelieved Williams' statement. We may not undertake to say whether the jury should have done so or not, because that would be weighing and attempting to give weight to the evidence, which must be left to the jury. We think there was some evidence to support the verdict; and, as the jury weighed it, and gave it greater weight than they gave the evidence of Mr. Williams, and thereon found for the plaintiff, we will not interfere. We therefore recommend that the judgment of the district court be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

#### CHICAGO, K. & W. R. CO. v. ABBOTT.

(Supreme Court of Kansas. June 7, 1890.)

#### EMINENT DOMAIN—PROCEDURE—DAMAGES.

1. The map, profile, and notice required by paragraphs 1208 and 1209 of the General Statutes of 1889 need not be given or filed prior to the commencement of proceedings for condemnation of the right of way for a railroad company. *Railroad Co. v. Shepard*, 9 Kan. 647, cited and followed.

2. In an action brought by the land-owner for damages on account of the company taking possession and occupying a right of way for its road over the land wrongfully, and without the consent of the owner, the company justified under



condemnation proceedings. The trial court excluded the proceedings for the reason, among others, that a certified copy of the report of the commissioners had not been filed within 10 days after being certified to as prescribed by paragraph 1393, Gen. St. 1889. It appeared that the report of the proceedings of condemnation was filed in the office of the county clerk on April 28, 1886; that a copy thereof was prepared and filed by the county clerk in the office of the treasurer of the county on April 29, 1886; that the railroad company caused to be paid to the treasurer on the same day the amount in full of the appraisement, in accordance with the report, and that a certified copy of the report was filed in the office of the register of deeds on December 13, 1886, before any action was commenced for damages by the land-owner. *Held*, that the failure to file the certified report within 10 days, in the office of the register of deeds, did not invalidate the proceedings, or prohibit occupation of the land for its right of way by the railroad company.

(Syllabus by Simpson, C.)

Commissioners' decision. Error from district court, Sedgwick county; T. B. WALL, Judge.

Lemuel Abbott brought an action in the district court of Sedgwick county, Kan., against the Chicago, Kansas & Western Railroad Company; and in his amended petition, filed March 21, 1887, he stated, in substance: *First*. That he had been for more than a year past the legal owner, and in the exclusive possession, of the S. E.  $\frac{1}{4}$  of section 32, township 29 S., range 4 W., in Sedgwick county, Kan.; that during all of that time he had used and occupied said land incessantly as a homestead and place of residence for himself and family; that the defendant, the Chicago, Kansas & Western Railroad Company, is, and since the 31st day of May, 1886, has been, a corporation duly and legally incorporated, and doing business within the state as a railroad corporation, under the laws of the state of Kansas; that in the month of July, 1886, said defendant, by its employes and servants, forcibly, wrongfully, and without the consent of the plaintiff, and against his protest, entered upon said land, and constructed its line of railroad, and in process thereof making upon said land along said line of railroad large embankments and excavations, and trampled down and destroyed the crops and grass of plaintiff growing on said land; that about August 1, 1886, said defendant completed said line of railroad, and commenced to operate the same by running thereon daily trains carrying on a general business and railroad traffic through plaintiff's land, and it has ever since and does now continue; that, by reason of the aforesaid act of said defendant, plaintiff has sustained damage to his land in the sum of \$900, the damage consisting in inconvenience in being compelled to cross and recross said railroad in going to and from his farm, pasture, and stock-water, all of which are located on said land, and separated from his dwelling by said railroad, thus causing a depreciation in the actual value of said land in the sum of \$900. *Second*. Plaintiff says that defendant, in constructing said line of railroad and operating the same, as set forth, without plaintiff's consent, and against his protest, forcibly took possession of and appropriated to its own use, and still retains, 10 acres of plaintiff's said land, of

the value of \$25 per acre, thus causing a damage to plaintiff in the sum of \$250. *Third*. Plaintiff says that the defendant, in the construction of said railroad, trampled down and destroyed along said railroad, against plaintiff's will, grass and corn to the amount of 15 acres, and of the value of \$50, to which amount plaintiff has sustained damage from the hand of the defendant. Further, that, for more than a year prior to the commencement of this action, he has been an actual occupant of said land, and was never by said defendant, or any other person or corporation whatsoever, given any written notice of the proposed construction of said railroad, or of the commencement of work upon the same, or in any manner relating thereto, as provided by law; that plaintiff has never been allowed by any person or corporation, or by said defendant, any sum whatever, for his land so appropriated, for any damages sustained by him as aforesaid; that no proceedings whatever were taken for the construction of said railroad until the year 1886. Plaintiff demands judgment in the sum of \$1,200, and costs of suit. In its answer, the defendant sets up—*First*. A general denial. *Secondly*. That the Chicago, Kansas & Western Railroad Company was formed by consolidation of the Leroy & Western Railway Company and several other companies, the agreement of consolidation being duly ratified and filed in the office of the secretary of state of the state of Kansas,—the agreement being entered into on the 1st day of June, 1886; that the Leroy & Western Railway Company was at the time stated, and prior to June 1, 1886, a railroad company duly organized and existing under the laws of the state of Kansas, and authorized to build a line of railroad through Sedgwick county, Kan., and that on the 15th day of March, 1886, it made application to the Hon. T. B. WALL, judge of the district court of Sedgwick county, for the appointment of commissioners to appraise lands along the line of its railroad, and make appraisement and assessment of damages for lands taken as a right of way, etc., as required by law; and the judge appointed three commissioners as required by law; that said commissioners gave due notice as required by law; that on the 26th day of April, 1886, in pursuance of such notice, they proceeded to view, survey, and assess damages for right of way through the land described in plaintiff's petition, and damages to the land not taken, and damages to the crops on said land, in the aggregate sum of \$141.50; that the report of said commissioners was filed and recorded in the office of the county clerk of said county on the 29th day of April, 1886; and on said day the said the Leroy & Western Railway Company deposited said sum of \$141.50 with the county treasurer of said county for the owners of said land; that the application and appointment of said commissioners were duly recorded in the office of the register of deeds of said county on the 15th day of March, 1886; that said award for damages to said land has never been set aside, vacated, or appealed from, and is in full force and effect. To this the

plaintiff in reply filed a general denial, not supported by affidavit.

At the trial the plaintiff's evidence tended to prove that he was the owner of the premises at the time of the appropriation of the right of way by the Leroy & Western Railway Company, and at the time of the commencement of this suit, and that he was in possession at the time the Leroy & Western Railway Company constructed its line of railroad across his said premises, and had for a long time prior thereto continuously occupied said premises as a homestead and place of residence; that the permanent location of said railroad had depreciated the value of the land in the sum found in the general and special verdicts. Plaintiff's farm was not fenced at the time of the appropriation of the right-of-way across it. That the plaintiff was never given written notice by said defendant, or any other person whatsoever, of the proposed construction of said railroad, or the commencement of work on the same. Plaintiff also introduced evidence tending to prove each and every item and element of damage found in the special verdict, and that the Leroy & Western Railway Company had been consolidated with the Chicago, Kansas & Western Railroad Company, and that the latter company, by the articles of consolidation, assumed all the liabilities and obligations of the former. Defendant, in its testimony, first offered in evidence the articles of agreement consolidating the Chicago, Kansas & Western Railroad Company, the Leroy & Western Railway Company, and other railway companies, under the corporate name of the Chicago, Kansas & Western Railroad Company. These articles of agreement recited, among other things, that the Leroy & Western Railway Company was duly chartered under the laws of Kansas, as will appear by its charter filed with the secretary of state of the state of Kansas on the 22d day of November, 1885. The articles of consolidation appear in the record, and, from the certificate of the secretary of state, appear to have been filed in his office on May 31, 1886. Thereupon the defendant offered in evidence the condemnation proceedings of the Leroy & Western Railway Company filed in the office of the county clerk of Sedgwick county, the same being the report of the commissioners, and the map and profile of the Leroy & Western Railway as located through the premises in question. It was admitted by the plaintiff that the documents were from the files of the county clerk of Sedgwick county, and what they purport to be on their face, and that the facts set forth in the certificate of filing were true. These documents were read in evidence. From them it appears that the Leroy & Western Railway Company, by its president, applied to Hon. T. B. WALL, judge of the district court of Sedgwick county, Kan., for the appointment of three commissioners to lay off a route, and make appraisalment and assessment of damages; and upon the 16th day of March, 1886, said judge appointed three commissioners, each a freeholder and resident of said county, as commissioners to lay off a route as required by law through

said county. This was recorded in the office of the register of deeds of said county March 22, 1886. The commissioners took their oath of office, and on the 18th day of March, 1886, caused a notice to be published in the Wichita Weekly Beacon. In this notice they specified the time and place when they would proceed to lay off a route for said railroad company, and make assessment and appraisalment of damages. This notice was published for 30 days before the time fixed for proceeding to lay off said route. That at the time fixed, to-wit, April 26, 1886, at the time and place specified, they proceeded to lay off said route, and make assessment and appraisalment of damages, as required by law. The report of the commissioners was signed by them April 27, 1886. In this report they showed that they laid off a right of way over all the land within 50 feet of the center line of railroad over the S. E.  $\frac{1}{4}$  of section 32, township 29 S., range 4, designating, as the probable owner, Abbott; the amount of land taken as 6.07 acres; the value of the land taken as \$91.50; the amount of damage to the land not taken, \$45; damage to the crops, \$5; total, \$141.50. This report was filed in the office of the county clerk on April 28, 1886; and upon the report is indorsed the certificate of the county treasurer to the effect that he received from the Leroy & Western Railway Company the sum of \$4,210.50, for payment for the right of way described in the above report, 29th day of April, 1886. This instrument was subsequently recorded in the office of the register of deeds of Sedgwick county, Kan. Defendant also introduced in evidence the map and profile filed in the office of the county clerk, and which was filed there on March 18, 1886. This shows the line of railroad through the land above described. It was thereupon admitted by the plaintiff that the sum of \$141.50, the amount of the award made by the commissioners for the plaintiff, was deposited with the county treasurer of Sedgwick county for plaintiff at the time this report was filed.

The jury returned a verdict in favor of Abbott for the sum of \$740.95. The jury also found in their special verdict, among other things, the following: They allow plaintiff for the land actually taken by the railroad company \$133.55; that 6.07 acres were appropriated, and were worth \$22 per acre. They allow plaintiff for the grass and corn destroyed by the defendant \$7.40. That 9-16 of an acre of corn, and 5 3-5 acres of grass, were destroyed by defendant. The value of the corn destroyed was \$6, and the grass, \$1.40. Further, they allow as the total amount of damages for inconvenience in crossing and recrossing the railroad, in going to and from his farm, pasture, and stock-water, the sum of \$400. That the actual value of the quarter section prior to the construction of the road was \$3,200, and the value of the same after the construction of the railroad was \$2,459.05. They allow plaintiff, by reason of the construction of the railroad between his residence, on the one side, and his stock-water and pasture on the other, the sum of \$200. Further, that the defendant built its road over and

across plaintiff's premises, and appropriated a part of the same to its own use, at the time in question, against the consent and will of plaintiff; that plaintiff was the actual occupant of the land at the time of the construction of the railroad. They do not know how long before the commencement of the construction of the railroad plaintiff had actual knowledge that defendant was preparing to construct its said road. That the damages which they find plaintiff is entitled to recover are estimated for a continual and permanent appropriation of plaintiff's land by the defendant to its own use. The jury further find that the railroad company took possession of the land with the intent to permanently occupy the same for the purposes of its railroad; that the Leroy & Western Railway Company, at the time of the first publication of notice given by the commissioners appointed, made an actual and open location of its railroad on the line across plaintiff's land in controversy in this suit, on which the defendant subsequently built its road; that the Leroy & Western Railway Company or the defendant did not, at any time prior to the commencement of the construction of the railroad over plaintiff's land, give the plaintiff written notice of its intention to construct its railroad over said land. The motion for a new trial filed by the defendant was overruled by the court. The railroad company brings the case here for review.

*Geo. R. Peck, A. A. Hurd, and Robert Dunlap*, for plaintiff in error. *Sluss & Stanley and John A. Murray*, for defendant in error.

**SIMPSON, C.,** (after stating the facts as above.) The first error assigned by the railroad company for reversal is the ruling of the court excluding from the consideration of the jury the condemnation proceedings which were offered as a bar to the action. It is asserted in the brief of counsel for the defendant in error that these proceedings are void for the following reasons:

**First.** No written notice, as provided by section 49, c. 23, Comp. Laws 1885, was given to Abbott, who at the time of the construction of the road, and for some time prior thereto, had occupied the land as a homestead for himself and family. That section provides: "The company shall give written notice to all actual occupants of the land over which the route of the road is so designated, and which has not been purchased by or donated to the corporation." The exact question presented by this contention was decided by this court in the case of *Railroad Co. v. Shepard*, 9 Kan. 647. Shepard brought an action against the Gulf Railroad Company for certain alleged trespasses. The railroad company answered, and, among other defenses, justified under condemnation proceedings. At the trial the presiding judge excluded them, and held that they were void; the principal objections being that they did not show the service of a written notice on the actual occupant, and that a map and profile of the route had been filed in the office of the county clerk. The conclusion of this court was that the notice,

map, and profile need not be given or filed prior to the commencement of the proceedings for condemning the right of way. Hence these things do not vitiate the condemnation proceedings.

**Second.** Because the land of the plaintiff below was not properly described. In the copy of the report of the commissioners to make the award, it is described as the "south-west quarter." The map on file describes it as the "south-east quarter of section 32, township 29, range 4." The commissioners were on the land; saw Abbott. He pointed out the lines of his quarter section. He describes it in his petition as the "south-east quarter," and the description in the report may be properly regarded as a clerical error.

**Third.** All these proceedings are fixed by the record in the county of Sedgwick, and it sufficiently appears that both the land and the condemnation proceedings were all located in that county.

**Fourth.** The description of the land taken is definite and certain enough, according to the case of *Hunt v. Smith*, 9 Kan. 137.

**Fifth.** Because the defendant never caused to be filed in the office of the register of deeds of Sedgwick county a certified copy of the commissioners' report, as required by section 84, c. 23, Comp. Laws 1885. The fact is that a certified copy of the report was filed in the register of deeds' office on the 13th day of December, 1886, but this was after the time fixed by statute. We cannot see how this would affect the defendant in error, but it is plain that it might affect the rights of third parties, if they intervened intermediate the expiration of the 10 days and the date of the actual filing. So far as the defendant in error is concerned, the important date to him was the time of filing the report of the commissioners in the county clerk's office, as his appeal must be taken within 10 days after that filing. The defendant in error contends that the filing of the certified report in the office of the register of deeds is a condition precedent to the right to occupy and use the same for railroad purposes. There is no authority cited to sustain such a claim, and it seems to us to be a very strict and inequitable construction of the section. After the report of the commissioners is filed with the county clerk, it is made the duty of that officer to prepare and file with the county treasurer a copy thereof. If the railroad company, within 90 days from the filing of the copy with the county treasurer, shall pay the full amount of the appraisement, the county treasurer must certify the fact of payment upon the copy of the report under his hand and seal. It is the copy of the report thus certified that the railroad company is required to file for record in the office of the register of deeds. The failure of the railroad company to file a certified copy of the commissioners' report with the register of deeds within the time prescribed by the statute did not in this case injuriously affect the land-owner, or prejudice his rights in any way. Under these circumstances, we should hesitate to give the section the construction urged. We find no case in point. The nearest ap-

proach to an analogous proposition are the decisions of the supreme court of the United States in the cases of *Lansdale v. Daniels*, 100 U. S. 117, and *Johnson v. Townsley*, 13 Wall. 73. These two cases hold that, notwithstanding the pre-emption laws require a declaratory statement to be filed by the claimant within three months from the time of settlement, yet it is valid if made within any time before another party commences a settlement or files a declaration. Our statutes require chattel mortgages to be filed forthwith for record, but this is held to be for the protection of creditors and third parties, and the mortgage is valid as between the parties without record. Again, it has been repeatedly declared by this court that after the award of commissioners has been filed with the county clerk, and the amounts named therein deposited with the county treasurer, the amount of compensation becomes conclusive unless either party appeals from the award within 10 days. The requirement of the constitution of the state is that compensation be first made or secured by a deposit of money before occupation by the railroad companies, and we do not believe that the legislature intended by this provision to add to these a record of the proceedings in the registers' office before railroad companies should commence the work of permanent construction. At least, these considerations influence us to adopt in this case the strict construction of section 84 applied by the trial court. In all other respects the condemnation proceedings seem to conform strictly to the requirements of the statute, and we think the court committed material error in excluding the record. For this error we recommend that the judgment of the district court of Sedgwick county be reversed, and the cause remanded, with instructions to grant a new trial.

PER CURIAM. It is so ordered; all the justices concurring.

#### RIGG, Sheriff, et al. v. BIAS.

(*Supreme Court of Kansas. June 7, 1890.*)

#### SEALED VERDICT—AGREEMENT OF COUNSEL—DISCHARGE OF JURY.

The agreement of the attorneys of the parties to a civil action that the jury may return a sealed verdict does not operate as a discharge of the jury. In such a case, the jury should assemble again when their sealed verdict is to be delivered in court, to the end that they may be polled, should either party desire it.

(*Syllabus by the Court.*)

Error from district court, Kingman county; S. W. LESLIE, Judge.

*Lydecker & Cooper*, for plaintiff in error.  
*Jones & Denton and McClanahan & Cone*, for defendants in error.

HORTON, C. J. This was an action in the court below by Oliver Bias against C. T. Rigg, sheriff of Barber county, and the sureties upon his official bond, to recover the value of 400 bushels of corn levied upon and sold under execution. Bias alleged that the corn was exempt from seizure and sale, being necessary for the sup-

port of himself, family, and his stock for one year. After the introduction of the evidence, the charge of the court, and the arguments of the attorneys, the jury retired for deliberation in charge of the bailiff. This was Saturday, the 16th of December, 1887. It being late in the evening when the jury retired, it was stipulated between the attorneys for the parties that, if the jury agreed before the convening of the court on the following Monday, they might return a sealed verdict. The jury agreed about 10 o'clock P. M. on Saturday, the 16th, sealed up the verdict, and delivered it to the bailiff. The bailiff thereupon discharged the jury from further service in the case. The bailiff delivered the verdict to the court, and upon the convening of the court on Monday, December 18th, the verdict was read, and delivered by the court to the clerk to be recorded. The jury did not report to the court on Monday morning at the time the verdict was read, and no opportunity was given Rigg or his sureties to poll the jury. The attorneys of Rigg were present when the verdict was read and handed to the clerk for entry, but made no objection to the verdict, or asked to have the jury called.

We think, under the facts disclosed, that the verdict was a privy one, and of no force and validity, not having been affirmed by the jury in open court. *Bishop v. Mugler*, 33 Kan. 145, 5 Pac. Rep. 756; *Young v. Seymour*, 4 Neb. 86. It was said in *Bishop v. Mugler*, supra, that "it will be observed that the agreement of counsel and the direction of the court did not go further than to permit the jury, when they had agreed upon a verdict, to seal it, and separate for the night. This did not operate as a discharge of the jury, but it remained in existence as an organized body, and it was the duty of the jurors to have appeared at the convening of the court the following morning, and there, through their foreman, to present and publicly announce the verdict previously agreed upon. The permission to seal the verdict and separate for the night did not dispense with the necessity of their attendance upon the court at the time to which it had adjourned. The determination of a jury, although formally stated in a verdict, and signed and sealed, is not final with them, but it remains within their control, and subject to any alteration or amendment they desire to make, until it is actually rendered in court and recorded. It is well settled that any member of the jury is at liberty to withdraw his consent from a verdict already agreed upon at any time before it is received and recorded; . . . and until a sealed verdict is properly received and recorded in court it is without force or validity." It is held by the authorities that a sealed verdict partakes of all the characteristics of a privy verdict, and is no verdict of itself, but must be affirmed by the jury in open court. 3 Bl. Comm. 377. In this case the attorneys did not agree that the jury should be discharged by the bailiff or the court upon handing in a sealed verdict; therefore they should have assembled again on Monday, when their verdict was

announced, to the end that they might be polled, should either party have desired it. *Thomp. & M. Juries*, §§ 333-339. In order to have cured the error of the trial court in the reception and entry of the verdict in the absence of the jury, the attorneys of the parties should have expressly agreed that the jury might be discharged when they had agreed upon their verdict, or they should have expressly waived the polling of the jury. To cure the verdict, affirmative, not negative, action was necessary. We perceive no error in the ruling of the trial court concerning security for costs. Bias had made an affidavit that on account of his poverty he was unable to give security. Section 581, Civil Code. If this affidavit is false, he can be convicted of perjury. As the case must go back for a new trial, we suggest to the plaintiff below that he amend his petition so as to allege that he is a resident of the state, the head of a family, and that the stock for which the corn is necessary is exempt to him under the statute. The judgment of the district court will be reversed. All the justices concurring.

#### EASTER v. EASTER.

(Supreme Court of Kansas. June 7, 1890.)

#### LIMITATIONS—ACKNOWLEDGEMENT—INDORSEMENT OF CREDIT ON NOTE.

1. An indorsement of a credit upon a promissory note, made by the payee after the statute of limitations has run upon the note, and without the direction or knowledge of the maker, is not admissible as evidence of payment in favor of the payee.

2. Where the issue framed between the parties is the statute of limitations, and whether the debt sued upon has been taken out of the statute by a part payment, the burden of proof is upon the plaintiff to show, not only that payment was made by the maker to the payee, but that it was intended as a payment upon the identical note upon which the action has been brought.

(Syllabus by the Court.)

Error from district court, Osage county; R. B. SPILLMAN, Judge.

*Foster & Wilson*, for plaintiff in error.  
*Utley & Martin* and *Ellis Lewis*, for defendant in error.

JOHNSTON, J. This was an action on a promissory note for \$1,000 made and dated December 25, 1872, by John B. Easter and A. C. Easter, payable to Mary Ann Easter one day after date, with interest at 6 per cent. per annum. When the action was brought in December, 1886, the following indorsements were upon the back of the note: "Paid on the within note \$5, Sept. 14, 1884. Paid on the within note \$5, Dec. 14, 1884. Paid on the within note \$8, Feb. 19, 1886." John B. Easter died in December, 1885, and in the following year the note was exhibited in the probate court as a demand against his estate, after notice to Anna N. Easter, who was the wife of the deceased, and had been appointed as executrix of his estate. She defended upon the ground that the claim was barred by the statute of limitations, and in respect to the indorsements on the back of the note she denied, under oath, that any payments were ever made upon the

note by the maker, or by any one for him. Judgment was rendered in the probate court in favor of the claimant for \$1,795, and upon appeal to the district court, where the case was tried with a jury, the result was in favor of the executrix, it being determined that the action was barred by the statute of limitations. An action accrued upon the note one day after its date, and five years thereafter the deed was barred under the statute, unless revived by partial payment or by a written acknowledgment or promise of liability thereon. It was conceded that no indorsements were written upon the note until some time after the death of John B. Easter. On the trial the indorsements were first introduced in evidence over the objection of the executrix, but when it was developed that they were not made during the life-time of John B. Easter, nor until more than eight years after the bar of the statute had run against the note, the court withdrew the indorsements from the consideration of the jury; and this ruling is the first error assigned.

The ruling of the court in withdrawing the indorsements was right. The controversy between the parties was whether the payor of the note had by a payment acknowledged the existence of the debt, and the indorsements written on the back of the note by the payee were offered as evidence to establish that fact. They did not constitute any evidence of payment as against the payor of the note. They were not made until more than 13 years after a cause of action had accrued, nor until after the death of the payor. They were therefore *ex parte* statements of the payee, favorable to her own interests, and upon well-settled rules were not admissible as evidence in her behalf. If they had been written by the payee before the lapse of five years, they might have been treated as declarations against her own interest, and on that ground might have been received as evidence in her favor. If the payee could make indorsements after a bar was complete, without the consent or direction of the payor, it would be within his power to manufacture evidence in his own behalf. The authorities all agree that indorsements made by the creditor after the statute has run upon the claim, and without the authority or knowledge of the debtor, furnish no evidence whatever that the payment was made, for the reason that it is an *ex parte* declaration by a party in his own favor, and no one is allowed to make evidence for himself. *Wood, Lim.* § 115, and cases cited; *Ang. Lim.* § 241. After the court had stated the issue which had been formed between the parties it instructed the jury "that the burden of proof rests upon the plaintiff, and to entitle her to recover in this suit she must prove by the preponderance of the evidence that John B. Easter executed the note sued on, and that the payments alleged to have been made upon said note were in fact made by said John B. Easter in his life-time, and were by him intended, when made, to be applied upon said note." The plaintiff contends that the evidence established that money was paid by John B. Easter to Anna N. Easter, and that

the money so paid must be regarded either as payments upon the note or gifts, and that the presumption is that it was a payment rather than a gift, and that the burden of showing that the sums were not gifts devolved upon the defendant. The defendant had filed a verified denial that the payments were made as alleged by the plaintiff, and it was a controverted question on the trial whether any money was paid upon the note upon which the action was brought. Under the issues framed between the parties it was not enough to show that there had been money transactions between the plaintiff and John B. Easter during his life-time, but the burden was upon the plaintiff to show that they related to, and that any payments of money were made upon, the identical debt upon which suit has been brought. If an additional instruction was desired by the plaintiff in regard to the presumptions as between gifts and payments under a given state of facts it should have been requested; but no such request was made, and hence no error was committed by the court for failing to further amplify its instructions. The evidence is sufficient to sustain the verdict of the jury. There is nothing substantial in the claim that the motion for a new trial should have been granted on the ground of the misconduct of the defendant's attorneys. Finding no error in the record, the judgment of the district court will be affirmed. All the justices concurring.

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NELSON *et al.* v. STATE.

(Supreme Court of Kansas. June 7, 1890.)

RECOGNIZANCE—CONDITIONS—VALIDITY.

A recognizance in a criminal case that recites that the defendant was granted a new trial, and that he entered "into a good and sufficient recognizance, in the sum of five hundred dollars, for his appearance at the next regular term of this court, to be held at Lyndon, Kansas, October 4th, A. D. 1881, and that he shall not depart the same without leave," is not invalid because in another part it requires him to appear before the judge of said court to answer the information filed against him in said court.

(Syllabus by Simpson, C.)

Commissioners' decision. Error from district court, Osage county; R. B. SPILLMAN, Judge.

*Foster & Wilson*, for plaintiffs in error. *L. B. Kellogg*, Atty. Gen., and *P. E. Gregory*, for the State.

SIMPSON, C. This is an action on a forfeited recognizance, commenced in the district court of Osage county on the 21st day of February, 1882. The trial was had at the November term of that court, in 1887. The recognizance was in the words and figures following:

"Whereas, on the seventh day of April, A. D. 1881, the above-named cause came on to be heard, a jury was impaneled, and the evidence produced, and on the seventh day of April, A. D. 1881, a verdict of guilty was rendered against defendant by the said jury. That on the twenty-eighth day of April, A. D. 1881, an order of the above-named court was made, setting aside the said verdict of guilty as rendered against

the defendant, and that the defendant have a new trial, and that the defendant enter into a good and sufficient recognizance, in the sum of five hundred dollars, for his appearance at the next regular term of this court, to be held at Lyndon, Kansas, October 4th, A. D. 1881, and that he shall not depart the same without leave: Now, we the undersigned, residents of said Osage county, Kansas, acknowledge ourselves to be indebted, and bind ourselves severally and jointly, to the state of Kansas, in the sum of five hundred dollars, that the said defendant, John Womack, shall be and appear before the judge of said court to answer the information filed against him in said case in said court, and abide the judgment of said court, and not depart the same without leave.

"J. A. NELSON.

"WM. J. HOLLENBECK.

his

"LEWIS X. A. OGLE.

mark.

"B. F. GOFF."

A trial was had to the court, a jury being waived, and the court made the following findings of fact and conclusions of law: "*Findings of Fact.* (1) That on the 16th day of March, 1881, a complaint was made to E. G. LOUK, a justice of the peace of Osage county, Kan., charging John Womack with the crime of an assault with intent to kill, upon which complaint a warrant was issued by said justice, and by virtue of which warrant the said John Womack was arrested and brought before said justice for preliminary examination, and that thereupon, on said 16th day of March, 1881, the state of Kansas, being present by S. B. Bradford, county attorney of Osage county, and said John Womack being present in person, and F. S. Singletary, his attorney, the said John Womack waived a preliminary examination; and he was thereupon by said justice required to enter into a recognizance in the sum of \$500 for his appearance at the next term of the district court of said county of Osage, and in default of such recognizance that he be committed to the jail of said county until discharged according to law; and that on the said 16th day of March, 1881, the said John Womack, having failed to enter into such recognizance, was, by written order of commitment by said justice, ordered to be committed to the county jail of said county of Osage, and under such order of commitment was, by Wm. McBee, a constable, delivered into the jail of said county. (2) That afterwards, on the 5th day of April, 1881, an information was filed against the said John Womack, in the district court of Osage county, Kan., charging him with the crime of an assault with intent to kill. (3) That on the 7th day of April, 1881, the said John Womack, being present in open court, with Ellis Lewis and F. S. Singletary, his counsel, entered a plea of not guilty to the charge contained in said information, and was thereupon duly tried for said offense, and was by the verdict of the jury, on the 8th day of April, 1881, found guilty as charged in the information. (4) That a motion for a new trial was duly filed in said case, upon the hear-

ing of which motion, on the 28th day of April, 1881, a new trial was granted by the court; and at the same time it was ordered by the court that the amount of defendant's bail be fixed at \$500, and that the case be continued until the next term. (5) That on the 6th day of May, 1881, the defendants in this action, John A. Nelson, Wm. J. Hollenbeck, Lewis A. Ogle, and B. F. Goff, executed the recognizance sued upon in this action, a copy of which is set out in the petition in this case; and on the 18th day of May, W. H. Smith, sheriff of said county of Osage, approved said recognizance, and released the said John Womack from his custody. (6) That from the 16th day of March, 1881, when the said John Womack was committed to the jail of said county of Osage, until the 18th day of May, 1881, he, the said John Womack, had not been discharged from said jail, and that during all that time he remained in said jail, and in the custody of the sheriff of said county of Osage. (7) That on the 18th day of May, 1881, W. H. Smith was sheriff of said county of Osage. (8) That on the 5th day of October, 1881, and at the next term of the district court of said county of Osage, after said recognizance was entered into, the defendant having failed to appear before the court according to the terms of said recognizance, said recognizance was by the court declared forfeited. *Conclusions of Law.* (1) That the said defendants are liable as sureties upon said recognizance. (2) That the state of Kansas is entitled to recover from said defendants, jointly and severally, the sum of \$500, with interest thereon from the 5th of October, 1881."

The cognizors bring the case here for review, and allege as error, first, that there was no allegation or showing that Womack was in the custody of the sheriff, or that the sheriff had any right to take the recognizance.

1. The petition alleges that this recognizance was executed and delivered to the sheriff of Osage county on the 18th day of May, 1881, after the adjournment of the court, for the purpose of procuring the release of the defendant, John Womack, from the custody of the sheriff. It also alleges the conviction of Womack at the April term, 1881, of the charge of intent to kill one Robert Reynolds; that on the 28th day of April, 1881, the court set aside the verdict, and granted Womack a new trial, and held him to bail in the sum of \$500. At the trial the sheriff was a witness on behalf of the state, and testified that in the month of May, 1881, he was holding the office of sheriff of Osage county; that he was keeper of the jail of the county; that he had the person of John Womack in custody; and that the recognizance was taken and approved by him. This was sufficient of itself, without reference to finding No. 6, as made by the court, and probably supports the finding; but if not, and the finding be discarded, it is amply sufficient to support the judgment.

2. The second objection is that the recognizance requires the defendant Womack to appear before the judge of the court, instead of "at the regular term of this court." It does both. It recites that he

was granted a new trial, and that "he was required to enter into a good and sufficient recognizance, in the sum of five hundred dollars, for his appearance at the next regular term of this court, to be held at Lyndon, Kansas, October 4th, 1881, and that he shall not depart the same without leave." So that, construing the whole instrument together, it is perfectly plain that he was required to be in attendance at the next regular term, to be held on the 4th day of October, and to appear before the judge of said court to answer the information filed against him in said court. We think this recital, "before the judge," is such a defect in form, or omission of recital, as is contemplated in section 154 of the Criminal Code.

3. The last objection is that the record shows a default to appear on the 5th of October, instead of on the 4th, and that there is no presumption that the court continued longer than the 4th day of October. There is no occasion for the aid of any presumption. At the trial the journal entry of the proceedings of the court was produced and read, and it recited that on the 5th day of October, 1881, the case of *State v. John Womack* was called for trial, and that the defendant Womack came not; that he was called three times at the front door of the court-house, and made no appearance, and thereupon the recognizance was produced, and all of these plaintiffs in error called in the usual form, and then the court, by order, declared a forfeiture of the recognizance. This establishes conclusively that court was in session on the 5th of October; that the case against Womack was reached for trial; that he was called, and did not appear; and that in consequence of his default the bond was broken, and declared forfeited. This is good enough for every purpose. It is recommended that the judgment be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

#### LYETH v. GRIFFIS.

(*Supreme Court of Kansas. June 7, 1890.*)

#### ATTACHMENT—LEVY AND LIEN—REPLEVIN.

To constitute an existing and valid levy of an attachment under section 32 of the Justices' Code, the officer holding the writ must do that which will amount to a change in the possession of the property attached; his custody must be such as will enable him to hold the property subject to the order of the authority issuing the writ; and so, where an officer holding an order of attachment merely goes to the place where the property is found, and appraises the same, without taking it into his possession, and does not exercise any dominion or control over it, and the property is removed beyond the control of the officer, *held*, that there was no valid levy on the goods and chattels, and the officer did not obtain such an interest therein as entitled him to bring an action in replevin.

(*Syllabus by Green, C.*)

Commissioners' decision. Error from district court, Chase county; FRANK DOSTER, Judge.

A. A. Hurd, C. N. Sterry, and Robert Dun-



lap, for plaintiff in error. *Madden Bros.*, for defendant in error.

**GREEN, C.** This was an action of replevin, commenced by the defendant in error, J. W. Griffiths, sheriff of Chase county, against J. C. Lyeth, who was the agent of the Atchison, Topeka & Santa Fe Railroad Company at Strong City. The plaintiff below held an attachment issued by a justice of the peace at Strong City, directed to him as sheriff of Chase county, in a suit commenced by George Smith against William McMurphy upon a claim for \$16.47. The writ of attachment was issued on the 12th day of November, 1885, and on the morning of the same day a deputy-sheriff went with the writ to the depot of the Atchison, Topeka & Santa Fe Railroad in Strong City for the purpose of executing the same. Lyeth was not in the depot at the time, but the deputy-sheriff left a copy of the order of attachment with an employee of the railroad company under Lyeth, and then went to the wareroom in the depot building, where the goods of McMurphy had been left for shipment some two days before, consigned to Samuel Cody, at Wilson, Kan., and had the goods appraised, and left them in the wareroom. The goods in question consisted of household and kitchen furniture, two boxes, and a trunk. About 4 o'clock in the afternoon of the same day the deputy-sheriff returned to the depot for the purpose of removing the goods, and found that Lyeth was loading them in a car for the purpose of shipping them away. Lyeth did not have any personal knowledge of the attempted levy and appraisal in the forenoon, and refused to deliver the goods to the officer, claiming they were in the custody of the railroad company, and could not be attached, and could only be reached by garnishment proceedings. An effort was made to take possession of the goods, but the officer only succeeded in securing a safe and roll of carpet. The balance of the goods were either loaded in the car or locked up in the depot. This suit was instituted the next day; and the goods, in the mean time, had been shipped away from Strong City. In the attachment suit the defendant William McMurphy was not served with summons, as he was not found in the county. Service by publication was made, and judgment rendered against him in justice's court. After the introduction of all the evidence in the trial of this case in the court below, certain instructions were asked by the defendant below, which were refused by the trial court. The court instructed the jury to return a verdict for the plaintiff. The plaintiff in error brings the case here for review.

The claim made by the plaintiff in error is that the sheriff was not entitled to the immediate possession of the goods; that there was no legal levy of the attachment; that there was no wrongful detention by the defendant below; and that, therefore, replevin did not lie. It is provided by section 32 of the Justices' Code that, when the property can be come at, the same shall be taken into custody, and held subject to the order of the justice of the peace.

By this section of the Code, it is made the imperative duty of the officer serving the writ to take the property into his custody. His possession should be open and exclusive, to enable him to hold it. Did the officer do this? The evidence shows he went to the place where the property was found, and appraised it, but the possession was not changed. The rule that the first duty of an officer holding a writ of attachment is to obtain and retain the possession of the property rests upon reason, as well as authority. He must necessarily sustain such a relation to the property he seizes as will enable him to hold it subject to the authority of the court issuing the order. If such were not the case, the remedy would be valueless. The supreme court of Iowa has held, under a statute similar to our own, that, to constitute a valid levy of a writ of attachment, the officer having the writ must do that which amounts to a change of the possession of the property, or something which is equivalent to a claim of dominion, coupled with a power to exercise it. *Crawford v. Newell*, 23 Iowa, 453; *Bickler v. Kendall*, 66 Iowa, 703, 24 N. W. Rep. 513. Again, it was held by the same court that, to make a legal and valid levy upon personal property, the officer must do such acts as that but for the protection of the writ he would be liable. A levy under which the officer does not have actual control of the personal property levied upon, with power of removal, is invalid. *Rix v. Silknitter*, 57 Iowa, 262, 10 N. W. Rep. 653. It could hardly be claimed that the officer would have been liable as a trespasser, upon the facts as developed in this case, if suit had been commenced by the owner of the goods, as his possession had not been interfered with in the least. In executing a levy upon personal property of a tangible sort, the officer must take possession; and the possession, to render the attachment effectual, must be actual, in the sense that it takes the property from the immediate control of the defendant, and gives the officer control over it. 1 Amer. & Eng. Cyclop. Law, 919; *Wade, Attachm.* § 129. The rule is well established, too, that, if the provisions of the statute are not fully complied with by the officer in levying or executing the writ, no lien is obtained. *Greenvault v. Bank*, 2 Doug. (Mich.) 502; *Buckley v. Lowry*, 2 Mich. 420; *Millar v. Babcock*, 29 Mich. 526; *Adams v. Abram*, 38 Mich. 302; *Fairbanks v. Bennett*, 52 Mich. 61, 17 N. W. Rep. 696. This court has held, in the case of *Crisfield v. Neal*, 36 Kan. 282, 13 Pac. Rep. 272, that in levying an execution upon personal property, it is necessary for the officer to reduce the property to his possession, or bring it within his immediate control; that a mere pen and ink levy will not do. *Chittenden v. Rogers*, 42 Ill. 100; *Minor v. Herriford*, 25 Ill. 344; *Havely v. Lowry*, 30 Ill. 446; *Davidson v. Waldron*, 31 Ill. 120; *Beekman v. Lansing*, 3 Wend. 446. Inasmuch as the officer did not have the actual control of the property in controversy, the levy was invalid, and he did not obtain such an interest as entitled him to bring a suit in replevin. It follows from this view of the law that the court was in error in instruct-



ing the jury to return a verdict for the plaintiff below. We therefore recommend that the judgment be reversed, and the cause remanded for a new trial.

PER CURIAM. It is so ordered; all the justices concurring.

CLEVENGER *et al.* v. HANSEN *et al.*

(Supreme Court of Kansas. June 7, 1890.)

EXCESSIVE JUDGMENT—MODIFICATION—CORPORATIONS—RIGHTS OF CREDITORS.

1. Where the record shows that a judgment in the trial court is entered for a sum larger than the plaintiff is entitled to under his petition, it may be modified by the court at or after the term at which the judgment was rendered.

2. Where two or more suits are commenced under paragraph 1204, Gen. St. 1889, and judgments are obtained against the stockholders in such suits at the same term, and executions are issued thereon during the term, or within 10 days thereafter, the fund raised thereon, or upon any one of such executions, must be distributed *pro rata* among all such execution creditors.

(Syllabus by Strang, C.)

Commissioners' decision. Error from district court, Brown county; R. C. BASSETT, Judge.

W. W. & W. F. Guthrie, for plaintiffs in error. James Falloon, for defendants in error.

STRANG, C. This case comes here on error from the district court of Brown county. January 29, 1886, the plaintiffs obtained judgment against the elevator and mill company at Everest, Kan., for \$7,146.50. April 30, 1886, the said elevator and mill company was dissolved by proceedings had in court. April 25, 1887, the plaintiffs commenced suit in the court below, under paragraph 1204, Gen. St. 1889, to ascertain and establish the liability of the defendants as stockholders in said elevator and mill company. February 22, 1888, they obtained a judgment or order ascertaining and establishing such liability, and on the same day the plaintiffs issued their execution to Atchison county, Kan., where, being indorsed "No goods," it was on the 24th day of said month levied upon the land of the defendant Honnell. Pending the appraisal and sale of the land so levied upon, and before said land had been sold, the plaintiffs were notified by the clerk of the district court of Brown county, whence the execution issued, that the money thereon had been paid into court, and the plaintiffs were asked to return their execution, which they did, and on March 14th received by their attorney from the clerk of the court the amount of their judgment, less \$843.08; the clerk claiming that they were not entitled to the latter amount, because their judgment was so much too large. Bemis Bros., who had a judgment in the same court against the elevator and mill company, commenced suits in the district court in the same county, July 6, 1887, to ascertain and fix the liability of the same defendants as stockholders in the same company, and on August 31st the defendants Aiken and Hansen, having each a judgment against the elevator and mill

company, commenced their suits to ascertain and establish the liability of the defendant stockholders in said company. Bemis Bros., Aiken, and Hansen each obtained their judgments or orders ascertaining and fixing the liability of the defendant stockholders at the same term during which the plaintiffs obtained theirs. The defendants Aiken and Hansen and Bemis Bros. issued their executions on the 27th of February, and they were placed in the hands of the sheriff of Brown county. On the 19th of March these executions were returned. On the 20th Bemis Bros. received from the clerk out of the \$843.08 in his hands the full amount of their claim, and on the next day the clerk divided the balance between Hansen and Aiken. At the next term of the district court, May 9, 1888, a motion was filed in all the cases, asking that each of the judgments therein be corrected, and that the whole sum of money paid into court by Honnell and Henney, \$5,500, be prorated among all the said judgment creditors. This motion was resisted by the plaintiffs, but it was sustained. The court modified the judgment of plaintiffs by reducing it to the sum of \$4,218.60. The court also prorated the \$5,500 among all the judgment creditors, giving the plaintiffs \$3,392.50, instead of \$4,218.60.

The plaintiffs complain of the ruling of the court upon both branches of the motion. They say that the court had no right, upon the motion as filed, at the time when filed, to modify their judgment. An examination of the plaintiff's petition shows that they claimed a judgment for \$7,146.50, and \$142 costs and interest, less a credit of \$3,500. Without stopping to figure the exact amount plaintiffs thus claimed a judgment for, it is certain it was for a sum considerably less than the amount for which they recovered judgment. The judgment being for a sum larger than the plaintiffs claimed, with interest and costs, it appears upon the record that the judgment was too large, and for a sum in which the court was not authorized to render it. The jurisdiction of the subject-matter is limited by the plaintiff's claim in their petition, and if, by mistake, a judgment is rendered for a sum beyond the jurisdiction of the court in the case, the court undoubtedly may correct it on motion. The case of *Tobie v. Commissioners*, 20 Kan. 14, settles the right of the court to correct its judgment at or after the term at which the judgment is rendered. Also *Small v. Douthitt*, 1 Kan. 335. The court, therefore, committed no error in modifying the plaintiff's judgment so as to make it correspond with the sum the plaintiffs had a right to recover.

The second question is one that has given us more trouble. It would seem that under the circumstances surrounding and attending this case the plaintiffs should recover the full amount of their modified judgment. But turning to the General Statutes of 1889, par. 4544, we find it reads as follows: "When two or more writs of execution against the same debtor shall be sued out during the term in which judgment was rendered, or within ten days thereafter, and when two of

more writs of execution against the same debtor shall be delivered to the officer on the same day, no preference shall be given to either of such writs; but if a sufficient sum of money be not made to satisfy all [such] executions, the amount made shall be distributed to the several creditors in proportion to the amount of their respective demands. In all other cases the writ of execution first delivered to the officer shall be first satisfied; and it shall be the duty of the officer to indorse on every writ of execution the time when he received the same. But nothing herein contained shall be so construed as to affect any preferable lien which one or more of the judgments on which execution issued may have on the lands of the judgment debtor." This section provides that where two or more executions against the same debtor shall be sued out during the term in which judgment was rendered, or within 10 days thereafter, no preference shall be given either of said writs. In this case all the judgments were rendered at the same term, and all the writs were issued during the same term. It seems to us that whatever would be the rights of the plaintiffs under the general authorities in relation to the distribution of funds recovered upon judgments against stockholders of a corporation, our statute above quoted applies under the circumstances of this case, and renders the fund raised upon the execution of the plaintiffs subject to a *pro rata* distribution among all the creditors having judgments at the same term upon which executions were issued during the term. It is argued that an order obtained in a proceeding instituted under paragraph 1204, Gen. St. 1889, to ascertain the liability of stockholders of a corporation, is not a judgment; that the proceeding under this statute is not an ordinary action at law, or proceeding in equity, but is a special proceeding to ascertain the amount of a liability that does not grow out of the relation of debtor and creditor, but exists solely by the terms of the statute; and that, therefore, the provisions of paragraph 4544, above quoted, do not apply. The language of paragraph 1204 is: "If any corporation created under this or any general statute of this state, except railway or charitable or religious corporations, be dissolved, leaving debts unpaid, suits may be brought against any person or persons who were stockholders at the time of such dissolution, without joining the corporation in such suit; and if judgment be rendered and execution satisfied," etc., suits may be brought, a judgment recovered, and execution issued under this statute. If the legislature did not contemplate an action and a judgment under the statute, it was very unfortunate in the selection of its language. We feel constrained to say that the result of a proceeding under the statute is a judgment, and that executions on such judgments are subject to the provisions of paragraph 4544, *Id.* We therefore recommend that the judgment of the court below be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

BOARD OF COUNTY COMMISSIONERS OF CHEROKEE COUNTY V. CHEW *et al.*

(*Supreme Court of Kansas.* June 7, 1890.)

STATUTES—TIME OF TAKING EFFECT—COUNTY TREASURERS—FEES.

Chapter 159, Laws 1887, took effect and was in force after its publication in the statute book, and upon the expiration of the terms of all the officers named therein. Said chapter states a time when it shall take effect and be in force, and is therefore not in conflict with the first clause of section 19, art. 2, of the constitution.

(*Syllabus by Strang, C.*)

Commissioners' decision. Error from district court, Cherokee county; GEORGE CHANDLER, Judge.

C. D. Ashley, for plaintiff in error. R. M. Cheshire and Case & Glasse, for defendants in error.

STRANG, C. This case was tried in the district court of Cherokee county, on May 16, 1888, by the court without a jury, on the following agreed statement of facts: "It is agreed that upon the trial of this cause the following facts shall be taken as true: *First.* That W. H. Chew, one of the defendants above named, is the duly elected, qualified, and acting register of deeds of said county; that his term as such commenced January 10, 1888, and that said other defendants, G. G. Gregg, Z. H. Loudermilk, and James Murphy are the sureties on the official bond of said defendant Chew, as register of deeds as aforesaid, for the term commencing as above stated; and that said defendant executed and delivered the official bond, a copy of which is given as an exhibit to the plaintiff's petition herein. *Second.* That said defendant W. H. Chew kept an accurate account of all fees charged by him as such register of deeds for the first quarter of the year 1888, to-wit, from January 10, 1888, to March 31, 1888, which amounted in the aggregate to the sum of \$1,017.70, and that he has refused to turn over to the treasurer of said county one-half of the excess of said sum above six hundred dollars, and claims that he is entitled to the whole of said fees for his services as such register of deeds for the term above specified, and claims the act of the legislature of the state of Kansas entitled 'An act regulating the fees and salaries of the county treasurers, county clerks, county attorneys, probate judges, county auditors, and registers of deeds of Cherokee and Labette counties, Kansas,' approved March 5, 1887, the same being chapter 159 of the Session Laws of 1887, is unconstitutional and void, and of no force or effect. *Third.* That the term of the county auditor of Labette county, who was duly appointed and qualified, commenced March 4, 1886, and ended March 4, 1888, and that the term of the present county auditor of Cherokee county, who was duly appointed and qualified, commenced October 8, 1887, and will expire October 8, 1889."

The court found for the defendants, and rendered judgment against the plaintiff for costs; whereupon the plaintiff filed a motion for a new trial, which was overruled. The plaintiff excepted to such ruling, and brings the case here for review.

The first question in the case, and the

one upon which the court below based its finding and judgment in favor of the defendants, is, was the cause in the district court prematurely brought? The determination of this question involves a construction of section 8, c. 159, Laws 1887, which reads as follows: "This act shall take effect and be in force from and after its publication in the statute book, and after the present term of the officers hereinbefore named shall have expired." The constitutional provision touching this subject is as follows, (article 2, § 19): "The legislature shall prescribe the time when its acts shall be in force, and shall provide for the speedy publication of the same, and no law of a general nature shall be in force until the same be published." The plaintiff in error contends that the act of 1887 (chapter 159 of the Laws of that year) takes effect after its publication in the statute book, and was in force, or became operative, as to the officers named therein, upon the expiration of the terms of the respective occupants thereof. If this construction is adopted, the act takes effect in part at one time, and in part at other and different times, and may on that account be obnoxious to the constitutional provision above quoted, which requires the legislature to fix a time when its enactments shall take effect and be in force. If another construction can be placed upon section 8 of the Laws of 1887, above quoted, which frees it from any objection under the constitutional provision, and such construction is equally consistent with the language of said section 8, and with the intention of the legislature in enacting the law of which section 8 is a part, such construction should be adopted. If we construe the words, "and after the present term of the officers hereinbefore named shall have expired," to mean after the terms of all the officers named shall have expired, the act not only takes effect, but becomes operative in all its parts, and upon all the offices therein named, at the same time, and is thus free from the objection that it takes effect piecemeal, and also, as we think, from the objection that the legislature in its passage did not fix a time when the act should take effect and be in force. We conclude, therefore, that the legislature intended to have chapter 159, Laws 1887, take effect and be in force after its publication in the statute book, and after the expiration of the terms of all the officers therein named. As above intimated, we believe this answers the argument against the constitutionality of the law, based upon the alleged fact that the legislature did not fix a time when the act should be in force and take effect. We do not think the legislature is required by the constitutional provision to name a day of the month when its acts shall take effect. If the legislature requires the act to take effect after its publication, either in the official state paper, in the statute book, or in some other paper or other manner designated therein, and upon an event that is certain and may be ascertained by reference to the other statutes of the state, it is sufficient in that respect.

The objection that the act is special legislation is answered by referring to the

case of *Commissioners v. Shoemaker*, 27 Kan. 77. The second point made by the plaintiff in error has already been passed upon by his court. Chief Justice HORTON, in *Board v. Leahy*, 24 Kan. 55, used the following language: "Under section 7, c. 39, Gen. St. 1868, any excess over two thousand dollars which accrued from the fees of a treasurer, as allowed by law, was to be paid into the county treasury, and placed to the credit of the county, where the population of the county was less than 15,000. The findings show that, during Leahy's term of office, Neosho county did not have 15,000 inhabitants. As the county was entitled to the excess retained by the treasurer, the action was rightfully brought in the court below in the name of the board of county commissioners of the county of Neosho. There is no constitutional inhibition against the power to turn over the said excess to the county as a county fund, and the provision to that effect cannot be called an unwarrantable stretch of legislative authority."

This case settles the question of power in the legislature to require an officer to turn the fees of his office, in excess of a certain amount, into the treasury. It may also be said that as the county furnishes these officers with offices in which to do their business, and at great expense, with material used in connection with their business, and with fuel and lights to heat and light them, it is entirely fair to the officer that he should be required to turn over to the county, in compensation therefor, a portion of his fees. The fees of these officers are created by the legislature, and that body may increase or diminish them, and, if it sees fit to regulate them in the way pointed out in this statute, we do not think the officers can complain, so long as the act does not seek to curtail the fees of any officer elected before the passage and taking effect of the act. Those elected afterwards take the office with full notice and understanding as to what the basis of their compensation is.

It is also said that the statute under consideration is unconstitutional, because it requires persons who have instruments recorded to pay therefor a fee greater in amount than a reasonable compensation of the officer, for the purpose of having a portion of such fee turned into the treasury,—a method of raising revenue not authorized by the constitution. We think, however, that if the county provides the officers who are the agents of the public, with offices in which to serve the public, and provides stationery, including books, paper, pens and ink, for use therein, and fuel and lights to warm and light them, the legislature may, in order to make such offices self-sustaining, require such persons as are served therein by having their instruments recorded, or other services rendered, in the other offices of the county, to contribute thereto; and, if so, we know of no better way to secure that end than by the method pointed out in chapter 159, Laws 1887. We therefore hold that chapter 159, Laws 1887, is constitutional; and that it took effect and was in force after its publication in the statute book, and after the terms of all the officers therein

named had expired. It follows, therefore, that the case was prematurely brought. We recommend that the judgment of the district court be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

**CITY OF FORT SCOTT V. KAUFMAN.**  
(*Supreme Court of Kansas.* June 7, 1890.)

**CONSTRUCTION OF SEWERS—ASSESSMENTS.**

Under paragraph 834 of the General Statutes of 1889, the costs of the construction of a discharging sewer, in a city of the second class, that is situated wholly outside of a sewer district, cannot be assessed against the lots and pieces of ground in said sewer district.

(*Syllabus by Simpson, C.*)

Commissioners' decision. Error from district court, Bourbon county; C. O. FRENCH, Judge.

Ware, *Biddle & Cory*, for plaintiff in error. J. D. McCleverty, for defendant in error.

SIMPSON, C. This case was tried in the district court of Bourbon county on the following agreed statement of facts: "(1) That from and since May 30, 1888, the said defendant, the city of Fort Scott, Kan., has been, and still is, a city of the first class, duly organized and existing under the laws of this state. (2) That for several years prior to said May 30, 1888, the said city had been a city of the second class, duly organized and existing under the laws of this state. (3) On April 6, 1888, said city duly enacted and published the ordinance creating sewer district No. 3, as alleged in the petition of plaintiffs herein, which sewer district comprised the territory as set forth in said petition. (4) That thereafter, and prior to August 14, 1888, said city caused a discharging sewer to be built, commencing at a point 26 feet north of the center of the alley in block 16, in Wilson's addition to said city, and running in a north-easterly direction about 2,591 feet, to a point near the Marmaton river, into which it emptied; said sewer being wholly built of sewer-pipe 18 inches in diameter. (5) That said city, during the said time, caused to be built certain sewers within said sewer district No. 3, commonly known and called 'lateral sewers,' built of sewer-pipe of 6, 8, and 10 inches in diameter; each of which said lateral sewers connected with and emptied into the said discharging sewer mentioned in the preceding section. (6) Attached hereto, and made a part hereof, is a plat of said city, showing, marked thereon in red ink lines, the territory comprising said sewer district No. 3, and showing, also, in dotted lines of red ink, the lines of sewer above mentioned, numbered from 1 to 5. Upon the north of the sewer district is Elm street, which is a street 45 feet wide. The other streets in the sewer district are 72 feet wide. The alleys are 18 feet wide, and the lots are 50 by 120 feet. None of the territory through which said discharging sewer passes is now, or has ever been, comprised within any other sewer district. The greater part of said sewer district No.

3 is upon a rocky bluff, about 50 feet above the valley of the Marmaton river. Said river runs through the city, and is the available place for discharge of sewers. At the point north of sewer district No. 3 the valley is much taken up with railroad buildings, tracks, switches, stock-yards, etc. It is a level, alluvial flat, and not used as sites for stores or residences or business property. The said discharging sewer runs throughout its whole distance, either through Elm street, or through railroad ground and right of way; only about 391 feet being in Elm street. At no point does it run through any property owned by a private individual. Said discharging sewer is laid very shallow, averaging three feet under ground. It is an 18-inch pipe, and it has no T's or Y's or joints permitting connection from any source or direction except the laterals from said district. It is laid in the soft, alluvial earth at little expense, and has a fall of one foot in two hundred feet,—just enough to drain well; and at present it benefits no property outside of said sewer district No. 3; nor does any sewage pass into or through it from outside of said district; nor was it intended, in the construction of said sewer, that any property outside of said district should be benefited; nor was it built for any other purpose than to discharge the sewage of said district, except as said discharging sewer might be extended south to accommodate new sewer districts, which it is capable of doing; nor is it built or situated so that any property outside of said district can be benefited, or use said sewer, until extended as above stated. The laterals are laid deep, and are in part blasted out of hard rock, and have the following fall: No. 1, 44 feet; No. 2, 44 and  $\frac{1}{2}$  feet; No. 3, 47 and  $\frac{1}{2}$  feet; No. 4, 40 feet. The said discharging sewer runs to the best point of discharge at the Marmaton river, considering engineering difficulties and sanitary considerations, and was built pursuant to a well-considered plan, and with the possibility of being extended as above stated. (7) Said sewers above mentioned are built wholly within the corporate limits of said city. (8) On the 14th of August, 1888, said city, after due notice of such assessment, duly enacted and published the ordinance, a copy of which is attached to plaintiff's petition, levying assessments, as therein set forth, upon each and every of the lots and parcels of ground in said ordinance mentioned and described, and situated within said sewer district No. 3, to pay the cost of constructing said sewers; and in said assessment the said city counted and charged in as a part of the amounts so levied and assessed upon the said property in said sewer district No. 3, the cost of construction of all of the said sewers above mentioned.—the discharging sewer constructed as aforesaid outside of the limits of said sewer district No. 3 as well as the said lateral sewers within said district,—and caused the same to be certified up to the proper taxing officers of the county of Bourbon, Kan., in which said city is situated. The accounts of the cost of construction of all of said sewers was kept by said city as one charge; and the

relative cost of constructing so much of said sewers as are situated outside of said sewer district, as compared with the cost of constructing all of said sewers, is not definitely known, but amounts to about one-third of such total cost. The precise relative cost of such sewers can only be determined by a special survey and estimate thereof. (9) That said Z. A. Hornaday is county treasurer of said county, and J. R. Smith county clerk, as alleged in plaintiff's petition, who, respectively, as therein alleged, placed said assessments upon the tax-rolls of said county, and are proceeding to enforce the collection of the same as in case of other taxes; and said assessments appear as a lien against said respective pieces of property, as alleged in said petition. (10) That the said plaintiffs are the owners, and in the actual use and possession, respectively, of said lots and parcels of land, as alleged in said petition. (11) In this agreed statement the city raises no point upon the question of tender prior to the bringing of this suit, and the case is submitted upon the question as to the legal right to charge upon the property holders of said sewer district the cost of the construction of the discharging sewer situated outside of said district."

It appears from this statement that the discharging sewer, the cause of this contention, was built wholly outside the limits of sewer district No. 3 for a distance of 2,591 feet, but was constructed for the sole purpose, at present, of receiving the discharges from the lateral sewers in district No. 3, and has no connection with the other sewers of said city, and accommodates the people of no other sewer district in the city except those residing in sewer district No. 3. Is the property of the inhabitants of sewer district No. 3 to be specially assessed to pay for its construction? This is the question involved in the case. The trial court denied the right of the city to assess its costs upon the taxable property of the sewer district. The solution of this question depends solely on the proper construction of the act entitled "An act to authorize cities of the second class to construct and maintain a system of sewerage and drainage." Sess. Laws 1887, c. 102, p. 151. Section 2 of the act says: "The mayor and council shall have power to provide for a system of sewerage and drainage for the city, or any part thereof, and to build and construct sewers or drains, by districts or otherwise, as the mayor and council may designate. The cost and expenses of constructing the same shall be assessed against the lots or pieces of ground contained in the district in which the same is situated," etc. In this case the mayor and council determined to construct sewers by districts, and created sewer district No. 3, and provided for the construction of a certain number of lateral sewers therein, but further provided for the construction of a discharging sewer, with which these lateral sewers connected, but 2,591 feet of whose length was entirely outside the boundaries of sewer district No. 3 as they established that district, but its whole length was within the boundaries of the city. Whatever may be said of

the inequitable operation of this statute, it seems that its meaning is so plain that serious doubts ought not to arise as to its application. In specific terms it provides that the costs and expenses of the construction of a sewer shall be assessed against the lots and pieces of ground contained in the district in which it is situated. The cost of that discharging sewer of 2,591 feet, that is expressly stated and agreed to be entirely and wholly outside of the limits of sewer district No. 3, and is not in the district, cannot be assessed against that class of property in sewer district No. 3 that is taxable for that purpose. The meaning of the statute is so apparent that we are at a loss to enlarge upon its construction. In fact, there is no room for construction, and we do not think that its evident force and effect can either be lessened or enlarged by a citation of authorities. We recommend an affirmation of the judgment.

PER CURIAM. It is so ordered; all the justices concurring.

KOESTER v. BOARD OF COUNTY COMMISSIONERS OF ATCHISON COUNTY *et al.*

(*Supreme Court of Kansas. June 7, 1890.*)

CONSTITUTIONAL LAW—LOCAL AND SPECIAL LAWS  
—COUNTY HIGH SCHOOLS.

Chapter 147, Laws 1886, an act to authorize the establishment and maintenance of county high schools, is not in conflict with section 2, art. 6, of the constitution, nor with the first clause of section 17 of article 2.

(*Syllabus by Strang, C.*)

Commissioners' decision. Error from district court, Atchison county; ROBERT M. EATON, Judge.

B. F. Hudson, for plaintiff in error, Jackson & Royse and S. Heath, for defendants in error.

STRANG, C. Action of injunction, commenced in the district court of Atchison county, August 5, 1889, to restrain the board of county commissioners of said county from levying a tax for the erection and maintenance of the county high school at Effingham, in said county, and to restrain the county clerk of said county from placing such tax upon the tax-rolls of the county. Separate answers were filed by the defendants, and separate replies thereto. Afterwards, on the 23d day of September, the defendants filed a joint motion to set aside the temporary injunction, and the same was heard upon oral testimony and other evidence; and on September 30th the court sustained the motion of defendants, and set aside and dissolved the injunction. The case comes to this court on the exception of the plaintiff to the order of the court dissolving said injunction.

Plaintiff desires to be heard only upon one question,—the constitutionality of the statute under which the tax sought to be restrained is authorized. The plaintiff alleges that the law of 1886 (chapter 147, Laws 1886) is unconstitutional, because—*First*, it is in violation of section 2, art. 6, of the constitution; and, *second*, be-

cause it conflicts with the first clause of section 17, art. 2, of the constitution. Section 2, art. 6, of the constitution reads as follows: "The legislature shall encourage the promotion of intellectual, moral, scientific, and agricultural improvement, by establishing a uniform system of common schools, and schools of a higher grade, embracing normal, preparatory, collegiate, and university departments." Plaintiff says the constitution, in this section, provides for two systems of schools,—a system of common schools, and a higher grade of schools, normal and preparatory schools and colleges and universities,—and that the county high school provided for by chapter 147, Laws 1886, falls within neither class. We think the county high school, as provided for in the Laws of 1886, falls within that clause of section 2, art. 6, which says, "and schools of a higher grade," and is therefore specially provided for in said section; but, if that were not so, there is nothing in the section of the constitution pointed out forbidding such schools as are provided for in the law of 1886,—the county high school. The constitution declares that the legislature shall establish a common-school system, and provide schools of a higher grade, embracing normal and preparatory schools, colleges and universities; but it does not attempt to inhibit the creation of other schools. The concern of the constitution makers does not seem to have been to provide against the danger of too many schools, but to secure a common-school system principally, and also other schools of a higher grade. We do not think the law of 1886 violates section 2, art. 6, of the constitution of Kansas. The first clause of section 17, art. 2, reads as follows: "All laws of a general nature shall have a uniform operation throughout the state." It is argued that the law of 1886, creating the county high school, is in conflict with the above provision of the constitution, because it is a law of a general nature, and does not have a uniform operation throughout the state, in that it does not apply to all the counties in the state alike. It is true the act does not apply to all the counties in the state at once. It applies to a class of counties, but its operation is uniform as to all the counties in the state within the class therein named. The right of the legislature to classify with respect to counties, cities, and otherwise has never been challenged. Cities are classified as cities of the first, second, and third classes. The legislature has frequently classified the counties of the state for the purpose of fixing the fees and salaries of county officers, which the legislature has established upon the basis of population, fixing the salary at a certain sum in a class of counties having a certain population, and at a different sum in a class of counties having a greater or lesser population; and this court has held that the salary of a county officer may be so regulated. *Board v. Leahy*, 24 Kan. 54. We are of the opinion that the argument that the act of 1886 is in conflict with the first clause of section 17, art. 2, of the constitution, is not good. *People v. Henshaw*, 76 Cal. 439, 18 Pac. Rep. 413. We

therefore recommend that the judgment of the district court be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

#### STATE V. REEDY *et al.*

(Supreme Court of Kansas. June 7, 1890.)

CRIMINAL LAW—PRELIMINARY HEARING—PLEAS IN ABATEMENT—INCEST.

1. The preliminary examination of a person charged with felony is based upon the warrant, and not upon the original complaint; and, to sustain a plea in abatement that the preliminary examination was had upon a charge other than as alleged in the information, there should be proof of the offense charged in the warrant, and that it was a different offense than is set forth in the information.

2. A formal and detailed description of the offense in the warrant upon which the preliminary examination is held is not necessary; and an examination, upon a charge of incest, which is full and formal, except that it does not state the exact relationship existing between the parties charged, but which does allege, in the language of the statute, that they are within the degrees of consanguinity within which marriages are by law declared to be incestuous and void, is sufficient to give the defendants reasonable notice of the nature and character of the charge made against them.

3. Marriage between a man and the daughter of his half-brother is prohibited by the statute, and their lewd and lascivious cohabitation with each other is punishable as incest.

(Syllabus by the Court.)

Appeal from district court, Norton county; LOUIS K. PRATT, Judge.

J. R. Hamilton, for appellant. L. B. Kellogg, Atty. Gen., and L. H. Thompson, for appellee.

JOHNSTON, J. At the May term, 1889, of the district court of Norton county, Daniel Reedy and Catherine Baker were convicted of incestuous cohabitation; she being a daughter of his half-brother. They appeal, and assign as error the overruling of a plea in abatement which averred that they had not been granted a preliminary examination on the charge of which they were convicted. The record shows that a preliminary examination was held, and the appellants were recognized to appear at the next term of the district court for trial upon a charge of incest. The warrant upon which the preliminary examination was held was not introduced in evidence to sustain the plea, and the evidence fails to show the allegations contained in the warrant. The complaint was introduced in evidence, and a copy of the same is contained in the record, but the preliminary examination was had upon the warrant of arrest, and not upon the complaint; and hence the court cannot say that the charge contained in the information was not the one upon which the preliminary examination was had. "The original complaint has spent its force when the order of arrest is issued, and the order of arrest is the foundation for the preliminary examination." *Redmond v. State*, 12 Kan. 172. If the original complaint was the basis of the examination, or if the warrant in this case charged the offense in the same language contained in the original complaint, the appellants' plea

could not be sustained. The charge in the complaint and information is substantially the same, except that the relationship existing between the parties is not as fully stated in the complaint as in the information. In the complaint it is alleged that they are related within the degrees of consanguinity within which marriages are by law declared incestuous and void, and in the information the averment is added that Daniel Reedy was the brother by half-blood to the father of Catherine Baker. An averment of the exact relationship of the parties was essential in the information, and might well have been included in the complaint and warrant. A specific, detailed, and formal description of the offense, however, is not required in the preliminary papers upon which an examination is had. All that is required in such cases is a general description of the offense, such as will afford a defendant reasonable notice of the character and nature of the crime with which he is charged. Within the decisions already made, the charge as stated in the original complaint was sufficient notice to the defendants of the offense alleged against them. *Redmond v. State*, supra; *Jennings v. State*, 13 Kan. 90; *State v. Smith*, Id. 274; *State v. Spalding*, 24 Kan. 4; *State v. Bailey*, 32 Kan. 83, 3 Pac. Rep. 769; *State v. Tonnison*, 39 Kan. 726, 18 Pac. Rep. 948. To properly present the question, however, the warrant should have been introduced in evidence, and made a part of the record, as it is the basis of the preliminary examination, and may have contained as full a description of the offense as is set forth in the information. In the absence of the warrant, we must presume that it sufficiently described the offense.

The next contention is that the information did not state a public offense, and that the motion to quash should have been sustained. The information charges that Daniel Reedy was the brother by half-blood to the father of Catherine Baker, and it is claimed that they are not so closely allied in blood as to fall within the prohibition of the statute. In section 230 of the crimes act, it is provided that "persons within the degrees of consanguinity within which marriages are by law declared incestuous and void, who shall intermarry with each other, or who shall commit adultery or fornication with each other, or who shall lewdly and lasciviously cohabit with each other, shall upon conviction be punished by confinement and hard labor not exceeding seven years." In section 2 of the act in relation to marriage, it is provided that "all marriages between parents and children, including grandparents and grandchildren of any degree, and between brothers and sisters of the one-half as well as the whole blood, and between uncles and nieces, aunts and nephews, and first cousins, are declared to be incestuous and absolutely void." Was Daniel Reedy an uncle of Catherine Baker, within the meaning of the statute? An "uncle" is defined to be the brother of a father or mother; and, according to the common understanding, there is no distinction between the whole and half blood. 2 Bouv. Law

Dict. tit. "Nephew." In 1 Bish. Mar. & Div. § 317, it is said: "The relationship by half-blood is the same in these cases as by whole blood; so that, for example, it is incestuous for a man to marry the daughter of his brother of the half-blood, or the daughter of his half-sister." See, also, *State v. Wyman*, 59 Vt. 529, 8 Atl. Rep. 900, where it was held that a charge of incest was made out by proof of fornication between the defendant and the daughter of his half-brother. The language employed by the legislature is to be interpreted according to its common meaning; and, when the terms "uncle" and "niece" are viewed in that light, they will include the half-brother of the father, and the daughter of a brother of the half-blood. They are more closely allied in blood than some of those who are specifically mentioned in the statute as being within the forbidden degrees, and this to some extent indicates the meaning and purpose of the legislature.

None of the other objections made by the appellants are of sufficient importance to require comment. The judgment of the district court will be affirmed. All the justices concurring.

#### STATE v. SPENDLOVE.

(*Supreme Court of Kansas. June 7, 1890.*)

##### MURDER—EVIDENCE—THREATS—CHARACTER.

The evidence in a criminal prosecution for murder was such as to render the following instruction, requested by the defendant and refused by the court, relevant and material, to-wit: "If the evidence leaves you in doubt as to what the acts of the deceased were at the time, or immediately before the killing, you may consider the threats and character of the deceased in connection with all the other evidence, in determining who was probably the aggressor." *Held*, that the court erred in refusing to give the instruction.

(*Syllabus by the Court.*)

Error from district court, Shawnee county; JOHN GUTHRIE, Judge.

*Case & Curtis*, and *J. S. Ensminger*, for appellant. *L. B. Kellogg*, Atty. Gen., *R. B. Welch*, and *E. A. Wagoner*, for appellee.

VALENTINE, J. This was a criminal prosecution upon information in the district court of Shawnee county, in which the defendant, Joseph J. Spendlove, was charged with murder, in the first degree, in killing and murdering one Gustave Werner. The defendant was found guilty of murder in the second degree, and sentenced to imprisonment in the penitentiary for the term of 21 years, and from this sentence he appeals to this court.

It appears that for nearly two months prior to March 20, 1889, the day on which Werner's death occurred, Spendlove and Werner together occupied a certain small building, numbered 716, situated on the east side of Kansas avenue, in the city of Topeka. This building belonged to Hiram Higgins, but it was leased to Werner and Spendlove. The written lease was in Werner's name. The building contained two rooms, — a west or front room, and an east or back room; and the two rooms were separated by a partition, with a door opening through the partition, near the



south side, from one room into the other. Werner used the back room for a tailor shop, and a part of the front room for his goods. Spendlove used the other portion of the front room for a loan office; he being engaged at the time in the business of loaning money. During the occupancy of this building by Spendlove and Werner, a difficulty arose between them which continued up to the night of March 20, 1889, between the hours of 8 and 9 o'clock, when the difficulty culminated in the death of Werner, and in the very dangerous wounding of Spendlove. Just how the death and wounding occurred is not satisfactorily shown. Spendlove and Werner at the time were the only persons in the building, and each received a pistol-shot wound. Werner was shot in the back of the head, and died almost instantly. Spendlove was shot just below the right ear; and the ball, penetrating his neck, passed forward, and towards the left side, and lodged in his left cheek-bone. Only one instrument with which the shooting could have been done was found in the building or about the premises, and that was a 38-caliber Smith & Wesson revolver. To whom this revolver belonged is not satisfactorily shown. Somewhere from three to five shots were fired,—probably four or five. Several persons heard them, or a portion of them. A few persons saw Spendlove and Werner during portions of the time during which these shots were being fired. One witness, J. D. Smith, testified that he saw the pistol, about the time the first two shots were fired, in Spendlove's left hand. Spendlove, however, testified that he did not do any of the shooting, and that all the shooting that he had any remembrance of was done by Werner. But, really, as to who in fact did the shooting, or how these shots were fired,—whether one did all, or whether one did a part and the other a part,—the evidence is not at all harmonious or satisfactory. Immediately after the last shot was fired, the building was entered by other persons, and these other persons found Spendlove in the front room, on his hands and knees, weak and debilitated, with his head towards the front door, and his wound bleeding profusely; and they found Werner dying in the back room, in the south-west corner thereof, near the partition door, with his head to the south-west, and his feet and body extending towards the middle of the room; and they found the pistol lying between Werner's legs, near his knees. The prosecution claims that Spendlove did all the shooting, while the defense claims that it was all done by Werner; but, upon any theory that all the shooting was done by one of them, the manner in which the wounding of the other was effected is not satisfactorily accounted for or explained. Indeed, it is not explained at all.

There are other facts in the case, which we shall mention when we come to consider the special questions presented by counsel. Before proceeding further, however, we shall give the dates of some of the principal occurrences. Prior and up to March 20, 1889, Spendlove and Werner together occupied the building when and where the final tragedy took place. On

the next day a coroner's inquest was held. On April 23, 1889, the preliminary examination was had. On April 24, 1889, the information upon which this prosecution is based was filed in the district court. On August 19, 1889, a motion to quash the information was filed by the defendant. On September 24, 1889, the following proceedings were had: The motion to quash the information was overruled by the court. The defendant was then arraigned, and he pleaded not guilty. He then filed a motion for a continuance supported by an affidavit, which motion was overruled by the court. A jury was then impaneled to try the cause, and the trial was commenced. On October 4, 1889, the trial was completed, and the jury retired to deliberate upon their verdict; and on the next day they agreed upon their verdict, and returned the same into court. On October 19, 1889, the defendant filed a motion for a new trial, which was supported by affidavits and other evidence. On October 22, 1889, the defendant filed a motion in arrest of judgment, and on the same day the motions for a new trial and in arrest of judgment were overruled, and the defendant was sentenced as aforesaid; and on November 20, 1889, the defendant perfected his appeal to this court by filing herein a transcript of the record of the proceedings of the court below.

The defendant claims that the court below erred in the following particulars, to-wit: *First*, in overruling the defendant's motion to quash the information upon the ground that it did not state facts sufficient to constitute a public offense; *second*, in refusing to grant the continuance asked for by the defendant upon the ground of the absence of material testimony which he had been unable to procure; *third*, in refusing to give to the jury instructions numbered 1, 2, 7, and 8, requested by the defendant; *fourth*, in failing to require the bailiff who took charge of the jury to be sworn in the manner prescribed by law; *fifth*, in overruling the defendant's motion for a new trial, founded upon the ground, among others, of misconduct of the jury in receiving and examining a map, etc., not introduced in evidence, and without the permission of the court.

While the information was not as formal as it might have been, yet we think it was and is sufficient. Whether the court below erred or not in refusing to grant the continuance is a difficult question; and, with the view that we entertain of one of the other questions presented in the case, it will not be necessary to decide this one. We think the first, second, and eighth instructions requested by the defendant were sufficiently covered by other instructions given by the court. We shall hereafter consider the refusal of the court to give the seventh instruction requested by the defendant. We think the bailiff who took charge of the jury was not properly sworn, but he was in fact sworn; and the irregularity in the oath, under the facts of the present case, is immaterial. As to whether the defendant was prejudiced by the jury's receiving and examining the map and other things not introduced in evidence, and without the permission of the court,



is a difficult question, and we do not think that it is necessary to decide it in this case. This leaves only the question whether the court below committed material error or not in refusing to give the seventh instruction requested by the defendant. That instruction reads as follows: "If the evidence leaves you in doubt as to what the acts of the deceased were at the time, or immediately before the killing, you may consider the threats and character of the deceased, in connection with all the other evidence, in determining who was probably the aggressor."

No instruction in lieu of this, or similar to it, was given by the court. Among the evidence, including that with reference to the facts already mentioned, tending to render this instruction applicable and of importance, is the following: Spendlove testified that he did not do any of the shooting, that he did not have the pistol in his hand, that he did not have any pistol on or about the premises, and that he did not own the pistol with which the shooting was done; and there was but little except circumstantial evidence that tended to contradict Spendlove's testimony. R. L. Johnson testified that, about a week before the shooting, he saw a revolver upon a shelf in the back room of the building where the shooting was done, and that Werner said it belonged to him, and that about that time Werner said "he would have Spendlove out of there before that time, [before 20 or 30 days,] or he would cut his damned throat." W. O. Ewing testified that he heard Werner say to Spendlove about March 15, 1889, "Get out, or I will throw you out," and that Werner seemed to be quite angry at the time. Jacob H. Hartman testified that about this same time he saw Werner go into the back room, and get a "gun" or "weapon" which he afterwards described as a revolver. He says: "It was a revolver." George W. Reed testified that about March 19, 1889, at the residence of Hiram Higgins, who was the owner of the building where the shooting was done, Werner said to Higgins, in the presence of Reed and Spendlove: "He [meaning Spendlove] is an interloper, and the rent is mine. I have increased my business and taken in a partner, and I want my rights. He must move. I want him to move,"—and then Werner said to Spendlove: "You take your things, and get out. I want the place, and I don't want you in there,"—and Spendlove then said, in substance, that he had as much right there as Werner had; and then Werner said: "You have not, and I will scratch your name off the door when I get back." Werner also at this same time said to Spendlove: "I have caught you at some of your damned underhanded work again;" and also said: "I will have you out. I will put you out." Werner at the time seemed to be "excited and mad." Hiram Higgins testified that Werner said on this same day, and at his place, but probably not in the presence of Spendlove: "By God, he has got to get out. \* \* \* By God, he was going to get him out, one way or another." Jacob H. Hartman also testified that, on the morning before the shooting, he heard

Werner say that, "If Spendlove did not get out of there inside of twenty-four hours, he would be carried out; that the damned son of a bitch indicted him for selling liquor." George H. Evans testified that on the evening of the shooting, at about 7 o'clock, he was at the building where the shooting was done, and heard Werner say: "He had had some trouble. He was going to put Spendlove out of there." This was said in German. Cal. Brewer testified that he was at the building where the shooting was done, on the evening of the shooting, at about 20 minutes before 8 o'clock, and that he heard Werner say to Spendlove: "Only for you, I would not have been indicted." Spendlove said: "I can prove that I didn't." Werner then said: "You are a damned liar." Werner had just been indicted by the grand jury for selling intoxicating liquors in violation of law; but it was admitted by the county attorney, on the trial of this case, that Spendlove had nothing to do with procuring the indictment. There was still other evidence introduced on the trial tending to prove that Werner was a man of perverse and refractory character and disposition, and that he entertained hostile feelings and bitter enmity towards Spendlove.

Of course, no threat made by Werner, or any ill feeling entertained by him, nor any wicked or depraved character or disposition possessed by him, would be any defense to Spendlove, if Spendlove actually and deliberately shot Werner; and Spendlove makes no pretense of shooting Werner in self-defense. On the contrary, he claims that he did not shoot Werner at all. Therefore, none of the foregoing evidence was introduced upon any theory of justifiable or excusable homicide, or of self-defense, or in mitigation or reduction of the degree of any offense; but it was introduced for the sole purpose of tending to prove, along with the other evidence, that Werner was the aggressor, and that Spendlove did not do the shooting at all, nor commit any homicide, or any offense at all. We think the evidence was competent, and that a proper instruction should have been given to the jury with reference thereto.

Dr. Wharton, in his work on Criminal Evidence, (section 757,) uses the following language: "On the other hand, if the question is as to which party in the encounter is the assailant, then it is admissible to prove by the prior declarations of either that the attack was one he intended to make. Threats to this effect by the defendant are always, as has been seen, admissible; and it is properly held that there is equal reason, supposing a collision between the deceased and the defendant to be first proved, for the admission of such threats by the deceased. It is true that by some courts it has been insisted that, to make the deceased's threats prior to the encounter admissible, they must be proved to have been brought to the knowledge of the defendant. But it is difficult to understand the reason why an acquaintance by the defendant with the deceased's threats should strengthen the admissibility of such threats. If the defendant knew

beforehand that his life was threatened, it might be argued that he should have applied to the law for redress. If he did not know, and was attacked without warning by the deceased, then proof of the deceased's hostile temper, whether such proof consists of preparations or declarations, is pertinent to show that the attack was made by the deceased. The question whether A. [the defendant] or B. [the deceased] was the aggressor in the fatal collision is to be determined; and if, in such case, A.'s threats are admissible to prove that A. was the aggressor, B.'s threats, by the same reasoning, are admissible to prove that B. was the aggressor. For the purpose, therefore, in cases of doubt, of showing that the deceased made the attack, and, if so, with what motive, his prior declarations, uncommunicated to the defendant, that he intended to attack the defendant, are proper evidence; and so it has been frequently held."

In the case of *State v. Brown*, 22 Kan. 222, 226, 227, the following language is used: "It appears the defendant called witnesses on the trial to prove that the deceased said at one time 'he would kill him the first time he saw him,' at another time, 'that he didn't intend that Brown's scattles should run near his place,' and again, 'that he had a chunk of cold lead for Brown, and would kill him the first time he saw him.' These threats were uttered by the deceased three months before his death, repeated the week preceding the homicide, and again made the day prior. None of them were brought to the knowledge of the defendant, and were therefore rejected by the court. The courts, as well as the legislatures, are constantly widening the doors for the reception of evidence; and the later and better authorities establish the rule that in a trial for homicide, where the question whether the defendant or the deceased commenced the encounter which resulted in death is in any manner of doubt, it is competent to prove threats of violence against the defendant made by the deceased, though not brought to the knowledge of the defendant. The evidence is not relevant to show the *quo animo* of the defendant, but it may be relevant to show that at the time of the meeting the deceased was seeking defendant's life."

In the case of *State v. Turpin*, 77 N. C. 473, 478, 479, the following language is used: "It is true that the character of the deceased, *per se*, can never be material in the trial of a party for killing, because it is as much an offense to kill a man of bad character as a man of good character. If the killing was done with a felonious intent, the character of the deceased cannot come in question. But, if the killing is done under such circumstances as to create a doubt as to the character of the offense committed, the general character of the deceased may be shown if that character is known to the prisoner, because it then becomes a material, and it may be a necessary, fact to enable the jury to ascertain the truth; and as such it is involved in, and becomes an essential part of, the *res gestæ*. *State v. Dumphrey*, 4 Minn. 438, (Gil. 340;); *State v. Hicks*, 27 Mo. 588; *State*

*v. Keene*, 50 Mo. 357; *Amer. Crim. Law*, 296; *Whart. Hom.* 215. In the more recent trials of capital offenses, the laws of evidence which once governed the courts have been much mitigated from their ancient rigor, and more latitude of investigation is allowed, in order that the jury may be possessed of the true character of the transaction; and it must be conceded that a strong current of decisions in our sister states has considerably modified the stern rule of evidence as laid down in *Barfield's Case*, 8 Ired. 344. The courts of this state also, in subsequent decisions, have more accurately defined and explained the limits of the general rule, and pointed out some of the exceptions to it, where evidence of the general character of the deceased would be admissible. *Hogue's Case*, 6 Jones, (N. C.) 381, and *Floyd's Case*, Id. 392. It was in evidence that the deceased had, a short time before the homicide, threatened to take the life of the prisoner, if he did not keep away from Mrs. Tates, which threats had been communicated to him. The prisoner also offered testimony to show other similar threats made by the deceased, but which had not been communicated. This evidence was competent, and should have been admitted, for several reasons: (1) The uncommunicated threats were admissible for the purpose of corroborating the evidence of the threats which had already been given. (2) They were admissible to show the state of feeling of the deceased towards the prisoner, and the *quo animo* with which he had pursued his enemy to the house. (3) In ascertaining whether the prisoner had acted in self-defense, a most material question was, who introduced the rock into the conflict, and when and for what purpose? Whether for offense or defense was it used? As to this important inquiry the evidence was wholly circumstantial, and testimony of both the general character and threats of the deceased was competent, under the principles laid down in *Tackett's Case*, 1 Hawks, 210; *Floyd's Case*, 6 Jones, (N. C.) 392; and *Hogue's Case*, Id. 381."

In the case of *Wiggins v. People*, 93 U. S. 465, it was decided as follows: "In a trial for homicide, where the question whether the prisoner or the deceased commenced the encounter which resulted in death is in any manner of doubt, it is competent to prove threats of violence against the prisoner made by the deceased, though not brought to the knowledge of the prisoner."

In the case of *People v. Scoggins*, 37 Cal. 677, it was decided as follows: "In a case of homicide, where it is doubtful which party commenced the affray, threats made by the deceased are admissible on the part of the defendant, although unknown to him at the time of the homicide, as facts tending to illustrate the question as to which was the first assailant."

In the case of *Abernathy v. Com.*, 101 Pa. St. 322, a murder case, it was held that "evidence is admissible on behalf of the defendant that the deceased was a man of quarrelsome disposition." See, also, the following cases: *Fields v. State*, 47 Ala. 603; *Burns v. State*, 49 Ala. 371; *Pitman v. State*, 22 Ark. 354; *Palmore v. State*, 29 Ark. 248; *Holler v. State*, 37 Ind. 57; *Pot-*

ter v. State, 1 Pickle, 88, 1 S. W. Rep. 614; Keener v. State, 18 Ga. 194, 228; State v. Sloan, 47 Mo. 604; State v. Keene, 50 Mo. 357; State v. Goodrich, 19 Vt. 116; Cornelius v. Com., 15 B. Mon. 539; Stokes v. People, 53 N. Y. 164; Com. v. Wilson, 1 Gray, 337.

The principal question presented to the jury in this case, and one of considerable doubt, was, which was the aggressor in the tragedy that resulted in the death of Werner? Both were shot; Werner, in the back of the head, and he died almost instantly; Spendlove, just under the right ear, and the ball lodged in his left cheek bone, and he bled profusely, and would have died in a few minutes except for assistance. Dr. H. W. Roby, a physician and surgeon, who heard the shooting, and who arrived at the place where it occurred immediately afterwards, testified that, except for assistance, "I do not think he [Spendlove] could have lived over seven or eight minutes \* \* \* from the time he was shot." Roby stopped the bleeding, and saved Spendlove's life. How this shooting was done, or who did it, is not satisfactorily shown, and it was not shown that Spendlove did it, by any direct or positive evidence; and Spendlove himself testified positively that he did not do it. Now, if Spendlove had made threats such as Werner did, then proof of such threats might have been given in evidence, along with the other evidence, for the purpose of showing that Spendlove was the probable aggressor, and proof of the threats as actually made by Werner was competent, along with the other evidence in the case, as tending to show that Werner was the probable aggressor; and, as such proof was competent, then an instruction with regard to the same was not only competent and proper, but was necessary, to be given to the jury, if either party requested it. Without such an instruction, the evidence might be useless, and might answer no purpose. We think the refusal of the court below to give the seventh instruction requested by the defendant was material error, and for such error the judgment of the court below will be reversed, and cause remanded for a new trial. All the justices concurring.

(44 Kan. 135)

#### STATE v. ADAMS.

(Supreme Court of Kansas. June 7, 1890.)

#### INTOXICATING LIQUORS—ILLEGAL SALE—EVIDENCE.

1. It is within the discretion of the court trying a criminal cause to admit the testimony of witnesses whose names were not indorsed upon the information until the beginning of the trial, and the defendant has no cause to complain unless there has been an abuse of that discretion.

2. In a prosecution for the unlawful sale of intoxicating liquors, where a controversy arises as to the intoxicating quality of the beverage sold, testimony that the defendant had a jug of whisky in stock at his place of business about the time of the alleged sale, and that the persons who drank the beverage became intoxicated, tends to sustain the charge of the state, and is admissible in evidence.

3. The testimony in the record is sufficient to sustain the conviction.

(Syllabus by the Court.)

Appeal from district court, Republic county; F. W. STURGES, Judge.

N. T. Van Natta and Noble & Surface, for appellant. L. B. Kellogg, Atty. Gen., and J. F. Close, for the State.

JOHNSTON, J. James C. Adams appeals from a conviction for the illegal sale of intoxicating liquors. The judgment was that he should be imprisoned in the county jail for 30 days, and pay a fine of \$100 and the costs of prosecution. At the beginning of the trial, the county attorney obtained permission to indorse the names of two witnesses upon the information, and this is the first ground of complaint. It was within the discretion of the court to permit the indorsement, and to admit the testimony of the witnesses whose names were so indorsed. Unless there has been an abuse of this discretion,—which is not shown in the present case,—there is no cause for complaint. State v. Cook, 30 Kan. 82, 1 Pac. Rep. 32; State v. McKinney, 31 Kan. 570, 3 Pac. Rep. 356; State v. Taylor, 36 Kan. 329, 13 Pac. Rep. 550; State v. Dowd, 39 Kan. 412, 18 Pac. Rep. 483; State v. Reno, 41 Kan. 674, 21 Pac. Rep. 803. The testimony on which the conviction rests is that the appellant sold a drink called "cider," which produced intoxication. There is some controversy as to whether it was intoxicating in its effects or not, but there is sufficient evidence to sustain the affirmative finding of the jury. To establish the character of the liquor, and that it was illegally sold, the state offered testimony, in connection with the other evidence, showing that about the time of the alleged unlawful sale the appellant had a jug of whisky in his place of business, and that he was heard to admit that he was selling the same. Testimony was also received to the effect that those who drank the beverage sold by the appellant became drunk. There was no error committed in the admission of this testimony. There was a controversy in regard to the intoxicating quality of the liquor prepared and sold by the defendant; and the fact that he had a jug of whisky in stock, which was unquestionably intoxicating, and that those who drank the beverage prepared and placed on sale by him became intoxicated, tended to support the charge of the state. State v. Pfeifferle, 36 Kan. 90, 12 Pac. Rep. 406. The allusion of counsel for the state in his opening argument to the price of cider was improper, under the testimony; but we do not regard it to be so prejudicial a character as to require a reversal. Judgment affirmed. All the justices concurring.

(44 Kan. 132)

NEMAHA FAIR ASS'N v. MYERS, Chairman, etc.

(Supreme Court of Kansas. June 7, 1890.)

#### CONSTITUTIONAL LAW—GRANTS TO AGRICULTURAL SOCIETIES.

Section 8 of an act for the encouragement of agriculture, approved February 19, 1872, (Gen. St. 1889, par. 6236,) authorizing the chairman of the board of county commissioners, under certain circumstances, to issue an order on the county treasurer in favor of the treasurer of a county or district agricultural society for a sum of money not in any case exceeding \$200, is not unconstitutional or void.

(Syllabus by the Court.)

**Mandamus.**

*Emery & Thompson and C. H. Stewart,*  
for plaintiff. *Abijah Wells,* for defendant.

VALENTINE, J. This is an action of *mandamus* brought originally in this court by the Nemaha Fair Association, a corporation existing under the laws of this state, and whose principal place of business is in Nemaha county, against S. R. Myers, the chairman of the board of county commissioners of said county, to compel him to issue an order on the treasurer of that county in favor of the treasurer of the plaintiff for the sum of \$200. The application for the writ of *mandamus* is founded upon the provisions of an act entitled "An act for the encouragement of agriculture," approved February 19, 1872, and the amendments to such act passed in 1873 and 1874. Gen. St. 1889, pars. 6249-6260. The only sections of the act which need to be referred to are section 2, as amended in 1873, and section 8. These sections read as follows: "Sec. 2. That every county or district agricultural society, composed of one or more counties, whether now organized or hereafter to be organized under the laws of the state of Kansas, shall be entitled to send the president of such society, or other delegate therefrom, duly authorized in writing, to the annual meeting of the state board of agriculture, to be held on the second Wednesday of January of each year, and who shall, for the time being, be *ex officio* members of the state board of agriculture: provided, that the secretary of each district or county society, or such other person as may be designated by the society, shall make a monthly report to the state board of agriculture, on the last Wednesday of each month, of the condition of crops in his district or county, make a list of such noxious insects as are destroying crops, and state the extent of their depredations, report the condition of stock, give a description of the symptoms of any disease prevailing among the same, with means of prevention and remedies employed so far as ascertained, and such other information as will be of interest to the farmers of the state: and provided, further, that each county or district society herein mentioned, which shall have held a fair the current year, offered and awarded premiums for the improvement of stock, tillage, crops, implements, mechanical fabrics, and articles of domestic industry shall make out a statement containing a synopsis of the awards, and an abstract of the treasurer's account, and report on the condition of agriculture in their county to the state board. Such statement to be forwarded, by mail or otherwise, to the secretary of the state board, on or before the fifteenth day of November of each year. It shall be the duty of the secretary of the state board of agriculture to furnish the monthly reports provided for in this section to the press of the state." "Sec. 8. Whenever any county or district society, composed of one or more counties, which shall have complied fully with the provisions of the second section of this act so as to be entitled to a representation in the state board of agriculture, and

shall then have raised and paid into the hands of their treasurer a sum not less than fifty dollars, (\$50,) either by voluntary contribution or fees imposed upon their members, and a certificate showing the fact, attested by the president and treasurer of said society under oath, shall be presented to the chairman of the board of county commissioners of the county where said fair has been held, then it shall be the duty of the chairman of said board of county commissioners to issue an order on the treasurer of said county in favor of the treasurer of said society for a sum equal in amount to the sum so paid into the treasury of said society by the members thereof, said moneys to be used wholly for the payment of premiums awarded at the fair held by the society within said county: provided, the amount so drawn from the county treasury shall not exceed two hundred dollars (\$200) in any one year." Everything is alleged in this case necessary to entitle the plaintiff to the relief demanded, provided the foregoing sections are constitutional and valid. It is claimed that section 8, above quoted, is unconstitutional and void, as being in contravention of section 4, art. 11, of the constitution, which provides that "no tax shall be levied except in pursuance of a law which shall distinctly state the object of the same, to which object only such tax shall be applied." We do not think that the statute is invalid for any such reason. The amount permitted to be drawn from the county treasury under this statute will be paid out of the general county fund levied and collected for the payment of the general current expenses of the county. Nor is the act invalid because it authorizes the chairman of the board of county commissioners to issue the order without the previous allowance of the demand by the full county board. It is a matter within the control of the legislature, and for them to determine, and they may provide that one person, or three or any other number, may investigate claims against the county, and may audit and allow the same. As the plaintiff in this action has set up every fact necessary to entitle it to the amount demanded, we think the writ of *mandamus* should be allowed. If, however, there are any other facts which would defeat the plaintiff's right, such facts may be set up as a defense. The demurrer to the application and writ will be overruled. All the justices concurring.

(44 Kan. 84)

**STATE v. ASH.**

(Supreme Court of Kansas. June 7, 1890.)

**FALSE PRETENSES—INFORMATION—SUFFICIENCY.**

1. A defendant desiring to test the sufficiency of an information before a verdict should do so by a motion to quash, and not by an objection to the introduction of evidence after a jury has been sworn. *Rice v. State*, 3 Kan. 141; *State v. Jessup*, 42 Kan. 423, 23 Pac. Rep. 637.

2. The information for obtaining money under false pretenses considered, and held sufficient on an objection to the introduction of evidence.

(Syllabus by Green, C.)

Commissioners' decision. Appeal from district court, Atchison county; ROBERT M. EATON, Judge.

*L. B. Kellogg*, Atty. Gen., for the State.  
*C. D. Walker*, for appellee.

GREEN, C. The state appeals in this case from the ruling of the Atchison county district court in sustaining an objection to the introduction of any evidence because the information did not state facts sufficient to constitute a public offense. The defendant was prosecuted for obtaining money from J. F. Class under false pretenses. The information charged that the defendant obtained \$600; that said sum was obtained by means of certain false and fraudulent representations made at the time, which are set out in the information. Among other things, it was charged that the defendant represented to the said Class that the firm of Shaw & Ash, of which the defendant was a member, owned certain promissory notes, which were executed by various parties, and payable to the order of said firm, and then enumerated them; that the defendant represented the notes to be in the possession of himself and the firm; that none of them had been paid, or any part thereof; that he had good right to pledge them as security for the loan of said sum of \$600; that Class believed and relied upon the representations; that, at the time the \$600 were paid, Class received from the defendant four of the notes mentioned. The other notes mentioned were promised, but never in fact delivered. The information contained the allegation that one of the notes had been paid before the same was delivered, except a small sum, and that the defendant well knew at the time it had been paid, and that a large number of the other notes enumerated were not owned by Shaw & Ash or the defendant. The information further alleged that each and all of the representations made by Ash were false and untrue, and were known by the defendant to be false and untrue at the time he made them, and were made with the intent to cheat and defraud Class out of \$600. It appears from the record in this case that a jury was impeached, and the trial commenced. The state offered evidence to sustain the averments in the information, when the defendant interposed the objection that the information did not state facts sufficient to constitute a public offense. No motion was made to quash the information.

Complaint is made upon the part of the state that the court erred in sustaining the objection; that it was not the proper practice to raise an objection to the information in this way, and at that stage of the trial. We are inclined to sustain the state in this view. It was decided by this court in one of the earlier cases (*Rice v. State*, 3 Kan. 135) that the proper time to raise the question of the sufficiency of the indictment before verdict was by motion to quash; after verdict, by motion in arrest of judgment. In this case Chief Justice CROZIER said: "The proper way to raise the question of the sufficiency of the indictment before verdict is by motion to quash; after verdict, by motion in arrest of judgment. Of course a question of the jurisdiction of the court may be presented at any time. We do not

pretend to say that it would be error to sustain the motion made under the circumstances indicated, but we do say that overruling the motion would not be error. If the court could clearly see that, in case a verdict was rendered against the defendant, the judgment must be arrested, and that therefore further proceeding in the trial would be a useless consumption of time, it would be proper to arrest the case. But ordinarily the court should not stop in the midst of a trial to consider the indictment. If the defendant neglects to make his motion to quash, he should be made to wait until he may present his objection to the indictment by a motion in arrest of judgment." The same rule of criminal practice was recently adhered to in the case of *State v. Jessup*, 42 Kan. 422, 22 Pac. Rep. 627. The court erred in sustaining the objection to the introduction of evidence, and discharging the defendant. A careful examination of the information satisfies us that it states facts sufficient to constitute the offense of obtaining money under false pretenses, especially upon an objection to the evidence after the trial had commenced. We recommend that the judgment of the court below be reversed, and the cause remanded.

PER CURIAM. It is so ordered; all the justices concurring.

#### STATE v. DAVIS.

(*Supreme Court of Kansas. June 7, 1890.*)

#### INTOXICATING LIQUORS — SALE BY DRUGGIST — INJUNCTION.

A pharmacist having a permit to sell intoxicating liquors for medical purposes, but who sells the same without requiring the applicant therefor to make the affidavit required by the statute, may be enjoined, under paragraph 2533 of the General Statutes of 1889. It is error, therefore, to sustain a demurrer to a petition alleging such sales, the petition otherwise being sufficient.

(*Syllabus by Strang, C.*)

Commissioners' decision. Appeal from district court, Leavenworth county; ROBERT CROZIER, Judge.

*L. B. Kellogg*, Atty. Gen., and *W. W. Black*, for the State. *William Dill*, for defendant in error.

STRANG, C. This is an action of injunction, commenced in the district court of Leavenworth county, January 14, 1890, wherein the state alleges that the defendant, E. C. Davis, is a druggist, having a permit to sell intoxicating liquors for medical purposes; and that in the city of Leavenworth, in a building situated on lot 16, in block 49, he was, and for six months had been, selling liquor for medical purposes without requiring the purchaser of said liquor to make the affidavit required by law as a condition precedent to such sales, and without requiring the purchasers of such intoxicating liquors to sign the affidavits required by law with ink. The petition asked that the place where such liquors were alleged to be kept for sale be adjudged a nuisance, and that an order issue directing the proper officer to shut up and abate the same; and, second, that the defendant be perpetually enjoined from

using or permitting said premises to be used as a place where intoxicating liquors are sold, bartered, or given away, or kept for sale, barter, or gift, except as provided by law. To the petition a demurrer was filed, which was by the court sustained. An amended petition was thereupon filed, to which a general demurrer was also filed, and sustained by the court.

The case comes here on the exception to the ruling of the court upon said second demurrer; and the question presented to this court is, does the petition state facts sufficient to authorize and require injunction under section 13 of the prohibitory law? Section 4 of the law of 1881, as amended subsequently, being paragraph 2524 of General Statutes of 1889, among other things provides as follows: "Any druggist having a permit to sell intoxicating liquors under the provisions of this act may sell the same only by himself in person, or by a clerk who is a registered pharmacist or assistant pharmacist under the laws of this state, for medical purposes only, upon the printed or written affidavit of the applicant setting forth the particular medical purpose for which such liquor is required, the kind and quantity desired, that it is necessary and actually needed for the particular purpose by the patient to be named, and that it is not intended for a beverage, nor to sell or give away, and that the applicant is over twenty-one years of age; which affidavit shall be in the following form, and subscribed by the applicant in ink." It will be seen that this section provides that, before any druggist is authorized to sell intoxicating liquor for any purpose, he must not only have a permit to sell, but certain other conditions precedent must exist. He must be a registered pharmacist; must sell only for certain purposes,—for medical, mechanical, and scientific purposes. For medical purposes he can only sell to an applicant who has made an application, either printed or in writing, which application shall be in form of an affidavit, signed by the applicant in ink, and sworn to by him before the pharmacist to whom the application for said liquor is made. The same section provides that no application for liquor shall be received by the pharmacist unless it shows upon its face that it has been properly subscribed and sworn to by the applicant. Paragraph 2529 provides that a pharmacist may not sell intoxicating liquor upon any affidavit other than those in the law required. These are positive requirements of the statute, and any person selling in the absence of these positive conditions precedent is declared to be guilty of a misdemeanor, and punishable by fine and imprisonment. Paragraph 2533 provides that all places where intoxicating liquors are sold in violation of any of the provisions of this act shall be declared to be common nuisances, and shall, upon the judgment of a court having jurisdiction, be shut up and abated. Said paragraph also provides that the said nuisance may be perpetually enjoined.

It is admitted on the part of the defense in this case that the sales charged to have been made by the defendant were made in violation of two of the positive require-

ments of the statute above pointed out. But it is argued that the acts complained of are rather irregularities than substantial violations of the law; and that, while the defendant is technically liable therefor in a criminal prosecution, he may not be enjoined under paragraph 2533. It is argued that the object of the law is to prevent the sale of liquor as a beverage, and that it is only those places where liquor is sold as a beverage that may be declared nuisances, and abated or enjoined. We agree that the object of the law is to prevent the sale and use of intoxicating liquor as a beverage. We also think that the very object of the provisions of the statute in forbidding the pharmacist, who is permitted to sell for medical purposes, from so selling until the applicant for the liquor has subscribed with ink and sworn to an affidavit properly filled out under the statute, is to prevent the sale and use of such liquor as a beverage. The pharmacist is bound to know all the provisions of the law. If the applicant honestly wants intoxicating liquor for medical use, he will not hesitate to make the necessary affidavit required by the law. But he may well hesitate about making such affidavit when he wants the liquor for use as a beverage, because the statute declares that if he makes a false affidavit he shall be guilty of perjury. It is the fear of prosecution for perjury that causes the shuffling in connection with the making of the affidavit, and which results in incomplete affidavits such as were made in this case. The whole force and effect of the law may rest upon this affidavit; for if it may be evaded, as in this case, by simply signing it with a pencil, and not swearing to it, then any person by simply saying in writing that he wants a certain quantity of liquor, and that he wants it for medical purposes, can get it; and it is well suggested in the state's brief that, if that could be done, it would become very fashionable to drink for medical purposes. We think all the provisions of the statute relating to the affidavit required of the applicant before a sale of intoxicating liquor can be made to him are material and vital parts of a law to prevent the sale and use of intoxicating liquor as a beverage, and that sales by a pharmacist without having observed them subjects the said pharmacist to punishment by fine and imprisonment, and renders his place of business subject to the provisions of paragraph 2533. It is said that his place of business may not be declared a nuisance, and shut up and abated, because he has a right, under the law, to sell for medical purposes, and that he should be allowed to continue the sale for such purposes. A sufficient answer to that position is that he has no right to sell for medical purposes unless he sells for medical purposes according to law, and that, if he does sell according to law, his business will not become a nuisance, and will not be in any danger of abatement. It is recommended that the judgment of the district court be reversed, and cause remanded.

PER CURIAM. It is so ordered; all the justices concurring.

*In re HUGHBANKS.*

(Supreme Court of Kansas. June 7, 1890.)

## CONTEMPT—DISOBEDIENCE OF SUBPŒNA SERVED IN ANOTHER COUNTY.

H., a resident of Osage county, went to Lyon county on business for a day, and while there was served with a subpœna, issued by a justice of the peace of Lyon county, commanding him to appear before that officer four days thereafter, and give his deposition to be used in a case pending in Lyon county. He went back to his residence in Osage county, and, failing to return to Lyon county in obedience to the subpœna, was attached, and adjudged guilty of contempt. *Held*, on *habeas corpus*, that H. was not obliged to obey the subpœna, and that the judgment for contempt, and his imprisonment thereunder, are illegal.

(Syllabus by the Court.)

*Habeas corpus.*

*Ellis Lewis and H. B. Hughbanks*, for petitioner. *C. N. Sterry and T. N. Sedgwick*, for respondent.

JOHNSTON, J. On March 29, 1890, H. B. Hughbanks, a resident of Osage City, in Osage county, went on a business trip to Emporia, in Lyon county, and while temporarily there was served with a subpœna, issued by a justice of the peace of Emporia, commanding him to appear before that officer on April 2, 1890, and give his testimony and deposition to be read in a case then pending in the district court of Lyon county. When the subpœna was served on Hughbanks, he demanded his fees, and the constable who served the subpœna produced and tendered to Hughbanks the sum of \$1.50 as witness' fees, which, after some hesitation, he declined to receive. He failed to appear before the officer on April 2, 1890, in obedience to the command of the subpœna; and thereupon, at the instance of the party seeking to take his deposition, he was attached for contempt, and taken before the justice of the peace issuing the subpœna, who, after an investigation and trial, found him guilty of contempt in disobeying the subpœna, and adjudged that he should pay a fine of \$1 and the costs of the attachment proceedings, taxed at \$14, and that he be committed until the fine and costs were paid. Refusing to pay the fine, he was imprisoned, and has applied to this court to be released upon the writ of *habeas corpus*. The petitioner bases his right to a discharge upon two grounds: *First*, that as he is a resident of Osage county, he was not obliged to attend and give his deposition in Lyon county; and, *second*, that the tender of the fees demanded by him was insufficient to compel obedience to the subpœna.

The question whether a person may be subpœnaed, and required to attend to give his deposition at some future time, in some county distant from the one in which he resides, is the principal and controlling one in the case. It is the general theory of the Code that a witness in a civil case shall not be compelled to travel beyond the county of his residence either to testify orally in court, or to give his deposition to be used in court. Section 323 provides: "A witness shall not be compelled to attend for examination on the trial of a civil action except in the county of his resi-

dence, nor to attend to give his deposition out of the county where he resides, or where he may be when the subpœna is served upon him." Provision is made that the deposition of a witness may be used in the trial of an action when he does not reside in the county where the trial occurs. Civil Code, § 346. It is further provided that a person confined in any prison in the state may be produced as a witness for oral examination in the county where he is imprisoned, but in all other cases his examination must be by deposition. Id. § 335. The statute contemplates that a witness shall be paid mileage fees for the distance which he actually and necessarily travels in attending before a court or an officer to give his testimony or deposition, but it does not contemplate that a subpœna sent from another county may be served upon him, nor that he is entitled to mileage fees for traveling from the county of his residence to another county in obedience to such subpœna. *Mylius v. Railroad Co.*, 31 Kan. 232, 1 Pac. Rep. 619. If a party is present where a trial is in progress, or a deposition is being taken, pursuant to a notice previously given, he may be subpœnaed or called to appear forthwith and give his testimony, whether he resides in or out of the county. But the respondent now contends that, under section 323, Hughbanks, who happened to be in Emporia for a day, and was there subpœnaed to attend before a justice of the peace on a future day, can be compelled to return from his residence in Osage county to Emporia, and give his deposition. The parties in whose behalf the deposition was to be taken were aware of his place of residence, and that his presence in Emporia was temporary, and also that his deposition, which was wholly for their benefit, could be taken at Osage City, in the manner provided by statute, without hindrance or difficulty. If a witness can be subpœnaed to attend four days in the future, as in this case, he can be subpœnaed many days thereafter; and, if he is obliged to return from his residence, 30 miles away in another county, he may be required to travel across the entire state, — a distance of 400 miles. Under this theory a resident of Wallace county who chanced to be in Wyandotte county might be there subpœnaed to attend and give his deposition before a justice of the peace of Wyandotte county 30 days thereafter, thus obliging the witness to travel a distance of 800 miles in going and returning; and all this travel and inconvenience would be imposed upon him for the benefit of another, and one who could have taken his deposition in Wallace county without much inconvenience or trouble either to the witness or to himself. It certainly will not be contended that a resident of Cheyenne county who happened to be traveling by rail through Cherokee county, and was there subpœnaed, during a temporary stop of the train, to appear before a notary public of Cherokee county, a month afterwards, to give his deposition, should be obliged to discontinue his journey, or remain away from his home and business, for 30 days, upon the payment of \$1.50, the fee for one day's attendance. If it was



conceded that the witness was entitled to mileage in such case, the fees for travel from Cheyenne county to Cherokee county and return, a distance of about 1,000 miles by the usual route, at 10 cents per mile, would amount to about \$100, when his deposition could be taken at his residence in Cheyenne county for a trifling amount. If this practice was permissible, a plaintiff who was certain of recovering at least a portion of the amount claimed in the action, and therefore sure of a judgment for costs, might with safety to himself harass the defendant by bringing witnesses great distances, and thus largely and oppressively increase the mileage fees that the defendant would be obliged to pay. But, as we have seen, the statute does not contemplate that a party may be liable to pay mileage fees to a witness in a civil case for traveling beyond the county in which the service of the subpoena is made. The last clause of section 328 gives rise to doubt as to the intent of the legislature; but, when it is considered in connection with the other provisions of the Code upon the same subject, it may be given effect, and harmonized with them. It is argued that this clause requires the witness to attend in any county where the subpoena may be served upon him, regardless of how distant the place may be from the county of his residence. This clause evidently relates back to the first part of the section concerning the attendance of a witness in court, as well as his attendance to give a deposition; and, if it is given the effect claimed, the preceding words would be practically meaningless, and the different parts of the section contradictory. According to that interpretation, a witness is not obliged to attend the trial of a civil action, or before an officer to give his deposition, outside of the county of his residence, and he is obliged to attend in any county outside of his residence whenever a subpoena is served upon him. By the first part of the section he would not be required to go outside of his county, and by the last he would. The view insisted on by the respondent is contrary to the general theory and spirit of the Code, and practically nullifies other of its provisions relating to witnesses and the fees for travel to which they are entitled. The more reasonable view of the statutes is that the witness cannot be compelled to go beyond his county to give his testimony or deposition, and is not entitled to mileage fees for travel outside of the county where the service is made; but, if he happens to be in a county other than where he resides, and a trial is in progress, or a deposition is being regularly taken, he may be required to appear forthwith and testify, but cannot be compelled to obey a subpoena which would require him to return from his county and give his testimony at some later time. By this interpretation, effect is given to the clause in question without placing it out of harmony with other provisions upon the same subject.

If the view suggested, that the witness was obliged to return to Emporia on April 2d, and was entitled to mileage fees for going and returning, was correct, then

he would not be in contempt; for the reason that he demanded his fees, and it appears that only \$1.50 was tendered. No fees were tendered to him for travel to and from Osage City, where he resided. In our opinion, however, the matter of tender was not involved in the proceeding, as the petitioner was not obliged to obey the subpoena; and therefore we must hold his imprisonment to be illegal. He will be discharged. All the justices concurring.

#### HAMILTON V. REDDEN.

(Supreme Court of Kansas. June 7, 1890.)

#### PARTITION—HOLDERS OF TAX-TITLE—LIMITATIONS.

When two grantees of a tax-title holder are in the actual possession, each of the one undivided half of the land sold for taxes before the tax-deed has been of record for five years, the statute of limitations does not operate in favor of either, in an action between them for partition.

(Syllabus by Simpson, C.)

Commissioners' decision. Error from district court, Shawnee county; JOHN GUTHRIE, Judge.

Eugene N. Gunn, for plaintiff in error. H. H. Harris and Redden & Schumaker, for defendant in error.

SIMPSON, C. On the 24th day of September, 1884, J. W. Redden commenced an action in the district court of Shawnee county against W. A. Hamilton and George Wendell. This was an action in ejectment to recover the possession of the S. E.  $\frac{1}{4}$  of section 4, township 10, range 16 E. This land was sold on the 4th day of September, 1877, for the taxes of the preceding year, to L. A. James, and on the 27th of September, 1880, a tax-deed was issued to her. On the 15th day of April, 1881, L. A. James made a quitclaim deed to this land to George Wendell and W. A. Hamilton, each paying one-half of the consideration, the total being \$225. Prior to the commencement of his suit, Redden had acquired the title to said land by a number of conveyances, giving him a plain and connected link from the government down. Wendell and Hamilton took possession of the land under the quitclaim deed from Mrs. James. On the 9th day of June, 1885, Redden settled this cause by paying to each of the defendants in that action the sum of \$200, and they accepted it in full settlement of the litigation, and George Wendell and wife and P. W. Hamilton and wife executed and delivered quitclaim deeds to Redden. It was agreed between them that Wendell and Hamilton should continue in possession of the land, as tenants of Redden, during the remainder of the year 1885, and Redden gave them the following written instrument: "Topeka, Kansas, June 9th, 1885. This is to certify that Messrs. Hamilton and Wendell have entire control of the south-east quarter of section 4, township 10, range 16 south, to be used as a pasture, as they desire, free of charge, for the year 1885. [Signed] J. W. REDDEN." Redden then dismissed his action, the order being dated June 12, 1885. In the month of August, 1885, Redden discovered for the first time that the party with whom he settled, and who executed to him a quitclaim deed, to



wit, P. W. Hamilton, was not the W. A. Hamilton against whom he brought suit, but that W. A. Hamilton was the minor son of P. W. Hamilton, aged about five years, to whom P. W. Hamilton had caused Mrs. James to make a quitclaim deed for the land. It appeared that P. W. Hamilton had paid the money, and had personally taken possession of the land, but for some reason caused the deed from Mrs. James to be executed in the name of his minor son as grantee. P. W. Hamilton then caused his minor son, W. A. Hamilton, to execute a quitclaim deed to J. W. Redden for this land. On the 26th day of August, 1885, by leave of the superior court of Shawnee county, to which the cause had been transferred, Redden caused the dismissal to be set aside, and he filed an amended petition in said court, in which he made P. W. Hamilton an additional party, averring that the said P. W. Hamilton had paid all the money for the tax-deed, and that he had possession of the land under the tax-deed and quitclaim from Mrs. James, and that his minor son, W. A. Hamilton, never had any real interest in the land, but was holding the title in trust for his father. To this amended petition an answer was filed by Wendell and P. W. Hamilton. A guardian *ad litem* was appointed for W. A. Hamilton. The person who was appointed *ad litem* for W. A. Hamilton was the attorney who was employed by Wendell and P. W. Hamilton shortly after the service of the summons, and he had no other or further authority to appear for them, or for W. A. Hamilton, than resulted from his first employment, at the time the suit was originally instituted. The superior court, on the 26th day of August, 1885, it being a part of the June term of said court, rendered a decree, purporting to be with the consent to all the parties, that all the title, legal and equitable, in said lands, held by said defendants, or either of them, was vested in J. W. Redden, and he was declared the sole owner. On the 3d day of March, 1886, W. A. Hamilton, by his next friend, Lizzie Hamilton, brought this suit, claiming to be the owner of the undivided one-half of the land heretofore described, and stating that Redden was the owner of the other undivided half, and asking that the same be partitioned. Redden denied that the plaintiff in error had any interest in the property. The cause was tried to the court without a jury, at the January term, 1888, and the court made the following findings of fact and conclusions of law:

"FINDINGS OF FACT.

"(1) That the south-east quarter of section 4, in township 10 south, of range 16 east, in this county, was subject to taxation for the year 1876, and that said taxes were unpaid; and on the 4th day of September, 1877, it was sold for taxes by the treasurer of Shawnee county to one L. A. James, for the sum of \$33.41.

"(2) That on September 27, 1880, said land being still unredeemed from said tax-sale, a tax-deed was duly executed, acknowledged, and delivered by the county clerk of this county to said L. A. James, and on the same day said tax-deed was duly re-

corded in the office of the register of deeds of this county, in volume 66, p. 205.

"(3) That in said tax-sale said lands were sold for certain illegal taxes and illegal costs, but the greater portion of said taxes were valid and legal, and that said tax-deed is invalid and voidable, unless said plaintiff in this action is protected by the statute of limitations.

"(4) That said tax-deed was good upon its face, and *prima facie* conveyed all of said land in fee-simple to said L. A. James, the grantee named and mentioned in said tax-deed.

"(5) That on April 15, 1881, said L. A. James executed, acknowledged, and delivered a quitclaim deed to the plaintiff, W. A. Hamilton, and to one George Wendell, as grantees in said quitclaim deed.

"(6) That the said George Wendell and P. W. Hamilton paid to the said L. A. James, as the consideration for the said conveyance to the said W. A. Hamilton and George Wendell, the sum of \$225; each paying for said conveyance equal parts of said consideration money.

"(7) That at the time said conveyance was made by said L. A. James to the said W. A. Hamilton and George Wendell of the said premises for the consideration aforesaid, he, said W. A. Hamilton, was a minor of the age of five years, and that he paid no part of said consideration money; but that of the said consideration of \$225, one-half was paid by said P. W. Hamilton, father of said W. A. Hamilton, plaintiff.

"(8) That said land was vacant and unoccupied previous to the 1st day of May, 1881, at which time George Wendell and said P. W. Hamilton, father of the plaintiff, went into possession of the same, and inclosed the same with a wire fence, and used it as a pasture.

"(9) That the plaintiff, W. A. Hamilton, is now a minor about ten years old, and is the son of said P. W. Hamilton; that he does now and has always lived with his father, P. W. Hamilton, and that said P. W. Hamilton has now and has always had the custody and control of said minor, and that said minor has never had another guardian than his natural guardian, his said father; that the defendant, J. W. Redden, was, before the commencement of this action, to-wit, March 3, 1886, the owner of a plain and connected title derived from the government of the United States for said premises, and was the holder and owner of such title derived from the government of the United States aforesaid, before September 24, 1884.

"(10) That on September 24, 1884, the said J. W. Redden commenced an action of ejectment in this court for the possession of the south-east quarter of section 4, in township 10 south, of range 16 east, against George Wendell and W. A. Hamilton, this plaintiff, and that on that date the clerk of this court issued in said action a summons for said George Wendell and W. A. Hamilton, and delivered the same to the sheriff of this county, who returned said summons with his return thereon indorsed as follows: 'Received this summons this 24th day of September, 1884, and executed the same this 30th day of September, 1884, by leaving at the usual

place of residence of each of the within named defendants, George Wendell and W. A. Hamilton, each a true and certified copy of the within summons, with all the indorsements thereon. C. THOMAS, Jr., by W. D. DISBROW, Deputy-Sheriff.' That no other summons was issued or served on said W. A. Hamilton, or attempted to be served on him, in said action, while pending in this court, or in the superior court of Shawnee county.

"(11) That after the return of said summons by the said sheriff, P. W. Hamilton, father of said W. A. Hamilton, and said George Wendell employed D. A. Harvey, an attorney of this court, to defend said action, and said Harvey duly filed an answer in said cause for said George Wendell and W. A. Hamilton, defendants in said action.

"(12) That said action, while pending in this court for trial on the petition and answer aforesaid, was duly transferred for trial to the superior court of this county in March, 1885.

"(13) That on June 9, 1885, the said J. W. Redden, believing that W. A. Hamilton, the grantee in the deed, was P. W. Hamilton, offered to pay said George Wendell and said P. W. Hamilton the sum of four hundred dollars, that sum being equal to the taxes, interest, and costs and the value of the improvements on said premises, which said proposition the said parties accepted, and Redden paid Wendell \$200, and Wendell and wife executed a quitclaim deed to said Redden for said premises, and said Redden paid said P. W. Hamilton \$200, and said Hamilton and wife executed a quitclaim deed to said Redden for said premises.

"(14) That at the time said quitclaim deeds were executed and delivered to the said Redden, it was agreed between said Redden and said George Wendell and P. W. Hamilton that said Wendell and Hamilton should remain in possession of said premises the remainder of the year 1885, and they took from Redden the following written instrument: 'Topeka, Kansas, June 9, 1885. This is to certify that Messrs. Hamilton and Wendell have entire control of the south-east 4th, township 10, range 16 south, to be used as a pasture, as they desire, free of charge, for the year 1885. [Signed] J. W. REDDEN.'

"(15) That on June 12, 1885, it being the June term of the superior court of this county, the said court made and entered the following order: 'Joseph W. Redden, plff., vs. George Wendell et al., defts. It appearing to the court that the matters and things in controversy have been settled between the parties to the action, it is by the court ordered that this action be, and the same is hereby, dismissed, at the cost of the plaintiff, taxed at ——— dollars.'

"(16) That on August 12, 1885, the plaintiff in this action, W. A. Hamilton, made, executed, and delivered a quitclaim deed of the said premises to J. W. Redden.

"(17) That, in order to have executed the said quitclaim deed last mentioned, P. W. Hamilton, the father of the said W. A. Hamilton, who lived in North Topeka, brought his son, W. A. Hamilton, to the

office block on the south side of the river, for the purpose of having his son execute the said deed, and it was executed by the son in the presence of the said father, before H. J. Adams, a notary public.

"(18) That no consideration was paid by said Redden to said W. A. Hamilton for the execution of that deed, and no other consideration except the \$200 paid P. W. Hamilton on June 9, 1885.

"(19) That said deed was executed by said W. A. Hamilton at the request of said J. W. Redden, when he discovered that W. A. Hamilton was named as one of the grantees in the deed from L. A. James.

"(20) That on August 26, 1885, after the discovery of the mistake, and by leave of the superior court of this county, J. W. Redden filed an amended petition in said court, making P. W. Hamilton an additional party thereto, averring that P. W. Hamilton had paid all the money for said tax-deed, under which he held possession, and that W. A. Hamilton had never had any real interest in said land, but was holding it in trust for his father, P. W. Hamilton, and praying that the said J. W. Redden might be declared the owner in fee-simple of said land, to which petition the said D. A. Harvey, an attorney of said court, filed answer both for P. W. Hamilton and W. A. Hamilton, and also an answer as guardian *ad litem* for said minor; he having been appointed said guardian *ad litem* by the said court. And the said cause coming on for trial August 26, 1885, it being the June term of said court, the said court entered the following decree: 'J. W. Redden, plaintiff, vs. George Wendell, W. A. Hamilton, and P. W. Hamilton, defendants. Parties hereto appear in open court, and consent that judgment for costs and order of dismissal entered herein on the 12th day of June, 1885, may be set aside, and this case set down for hearing at this day, whereupon it is so ordered, and said judgment and order are hereby vacated, and whereupon, upon the consent of defendants, plaintiff, with leave, filed his amended petition herein, wherein and whereby P. W. Hamilton is joined as a co-defendant, and said amended petition is filed against George Wendell and W. A. Hamilton, the original defts., and also against the said P. W. Hamilton, who appears to said petition, and the joint answer of said Wendell and said P. W. Hamilton is filed, and it appearing that the defendant, W. A. Hamilton, is within the age of 21 years, on motion of plaintiff, D. A. Harvey, an attorney of this court, is hereby appointed guardian *ad litem* for said W. A. Hamilton, whereupon said D. A. Harvey appears, accepts the appointment, and files answer herein for said W. A. Hamilton, infant defendant; and afterwards, on this day, came again said parties, the said plaintiff by H. H. Harris, and defendants by D. A. Harvey, their attorney, and defendant W. A. Hamilton by D. A. Harvey, his guardian *ad litem*, and, this case coming on to be heard on the amended petition and answer of George Wendell and P. W. Hamilton, admit said petition to be true, and the answer of the guardian *ad litem* for the minor defendant, W. A. Hamilton, and proofs, and on due consideration

thereof the court finds said petition to be true; that defendant W. A. Hamilton held only the legal title to the one-half of the land, as interest therein, in trust for his co-defendant, P. W. Hamilton, and that all the defendants have made conveyance of said premises to plaintiff, and have received full payment therefor. It is therefore, with the consent of the parties hereto, considered, ordered, and decreed that all title or interest, either legal or equitable, held by defendants, or either of them, is hereby vested in the plaintiff, J. W. Redden, and he is hereby decreed to be the true, legal, and equitable owner of the said land, to-wit, the south-east quarter of section 4, township 10, range 16, in Shawnee county, Kansas, and the defendants are forever barred from setting up title thereto; and it is further ordered and adjudged that plaintiff pay all costs of this action.

"(21) That after the amended petition was filed by said Redden in said action, no summons was issued or served on either George Wendell, P. W. Hamilton, or W. A. Hamilton; that D. A. Harvey, as aforesaid, was not employed nor authorized by said P. W. Hamilton or W. A. Hamilton, or either of them, to appear in said superior court on the 26th day of August, 1885, or at any other time, and consent that the judgment for costs and order of dismissal entered in said court on the 12th day of June, 1885, might be set aside, or for any other purpose whatever.

"(22) That said D. A. Harvey, as aforesaid, was not employed or authorized by either of the defendants, George Wendell, W. A. Hamilton, or P. W. Hamilton, to appear in said superior court of this county on the 26th day of August, 1885, to consent to the making of any order, or to enter the appearance of said defendants, or either of them, to the amended petition filed by the said J. W. Redden against the defendants, George Wendell, W. A. Hamilton, or P. W. Hamilton, and that such appearance, so made by said Harvey, was wholly unauthorized, and against the interests and rights of said defendants, and each of them, and that said decree, so entered on the 26th day of August, 1885, in said superior court, was entered and made without the knowledge or consent of said defendants, or either of them.

"(23) That said J. W. Redden was not present when W. A. Hamilton executed the deed to him, and said Redden never saw the said W. A. Hamilton until the trial of this action.

"(24) That said J. W. Redden did not know P. W. Hamilton was a different or other person from W. A. Hamilton until after he had paid the said P. W. Hamilton the said sum of \$200, and received from said P. W. Hamilton and wife a quitclaim deed for said land.

"(25) That at the time the said W. A. Hamilton signed and acknowledged the deed of conveyance to said J. W. Redden, dated August 12, 1885, and described in conclusion of fact No. 16, the said W. A. Hamilton was not of such mature age as to know the nature of the transaction, and was incapable of contracting with said Redden, or being contracted with.

"(26) That if the plaintiff's title, derived

through the tax-deed made to L. A. James on September 27, 1880, described in conclusion of fact No. 2, is voidable on account of said premises having been sold for illegal taxes September 4, 1877, there is due on said tax-sale of one-half of the premises described in plaintiff's petition the sum of \$204.30, and the parties agree that this is the sum for taxes, costs, penalties, and interest upon the said sale.

#### "CONCLUSIONS OF LAW.

"(1) The deed signed and acknowledged by the plaintiff, W. A. Hamilton, to the defendant, J. W. Redden, was and is a fraud on the legal rights of said plaintiff, and in law is voidable, and ought to be set aside.

"(2) That the return indorsed by the sheriff on the summons (conclusion of fact No. 11) issued by the clerk of this court on September 24, 1884, in this action, commenced by said J. W. Redden against George Wendell, does not show that such summons was served on the said W. A. Hamilton in the manner provided by law, and that neither this court, while said action was pending herein, nor the superior court, while said action was pending in said court, had jurisdiction of the said W. A. Hamilton, to make and enter a decree against the said W. A. Hamilton, and that the decree made and entered August 26, 1885, was and is void.

"(3) That the tax-deed under which the plaintiff held title is not protected by the statute of limitations, and is voidable in this action, and that there is due to the plaintiff, on account of the said sale for taxes, principal, penalties, interest, and costs, the sum of \$204.30, and that said sum of money is a lien on the one undivided half of the premises described in plaintiff's petition,—the south-east quarter of section 4, township 10 south, of range 16 east.

"(4) That the plaintiff is entitled to have a lien for said sum of money declared a lien on said premises."

The plaintiff, in error saved all proper exceptions, filed a motion for a new trial, that was overruled, and brings the case here for review. He claims that there was no service upon him in the original action; that the attorney was not empowered to appear for him; that his father was his tenant, and could not transfer the possession of the land so as to avoid the statute of limitations; and that as to many of the findings of the trial court there is no evidence to sustain them, and that the legal conclusions are all wrong. In the view that we take, however, a discussion of many of these questions is avoided. Conceding, for all the purposes of this opinion, that he is not bound by the decree in the case of Redden against him and Wendell, either for want of service or for authority on the part of the attorney, and discarding the record of that action for all purposes, the questions of the validity of the tax-deed to Mrs. James, and the operation of the statute of limitations, are controlling in this action instituted by him against Redden. This tax-deed was executed and delivered to Mrs. James on the 27th of September, A. D. 1880. On the 15th of April, 1881, she conveyed an undivided half interest to each of the persons, W. A. Hamilton

and George Wendell. P. W. Hamilton and Wendell took possession under these quitclaim deeds immediately. It does not make any difference in this connection what the motive of P. W. Hamilton was in having that quitclaim deed from Mrs. James, executed in the name of his minor son, W. A. Hamilton. The possession was that of P. W. Hamilton, and his right to the possession passed to Redden on the 9th day of June, 1885, by reason of the compromise made on that day, and by the execution and delivery of a quitclaim deed from P. W. Hamilton and wife to Redden. At this time the statute had not run in favor of Mrs. James, who had not held the title long enough, or of P. W. Hamilton and Wendell, who had not been in actual possession long enough, to bar Redden's action, that had been commenced in September, 1884. Redden has the original title, and about this fact there does not seem to be a dispute. On the 9th day of June, 1885, he acquired from Wendell the tax-deed title to an undivided half of the land and the possession that accompanied it. All this was done before the tax-deed was on record for five years. This seems to us conclusive against the plea of the statute of limitations, relied on by the plaintiff in error, and this, too, with reference to a fact strongly pressed, that P. W. Hamilton was the tenant of W. A. Hamilton, and that his possession was that of his son. From the date of that purchase from Wendell, Redden had equal rights with W. A. Hamilton in the land, so far as the tax-deed gave either or both any interest, as by that purchase they became tenants in common. *Jones v. Commissioners*, 30 Kan. 278, 1 Pac. Rep. 76. In any view that can be taken, the statute of limitations does not run in favor of W. A. Hamilton as against J. W. Redden.

So far as the validity of the tax-deed is concerned, the findings of the trial court are conclusive against it. The evidence is not preserved in the record; only the pleadings, findings, and journal entries are here. The trial court finds that the land was sold for certain illegal taxes and illegal costs, and for these reasons the tax-deed is invalid. A copy of the tax-deed is not contained in the record, and this finding, therefore, precludes all inquiry as to that question. The tax-deed being invalid, and the statute of limitations not operating in favor of the plaintiff in error, it follows that the decision below is right, and it must be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

#### WILSON *et al.* v. EMIG.

(Supreme Court of Kansas. June 7, 1890.)

##### SPECIFIC PERFORMANCE—SUCCESSORS IN INTEREST.

1. A party entitled to specific performance against the original party to a contract may have judgment against the person claiming under him with notice.

2. A party who enters into a contract for the sale of real estate described as the E.  $\frac{1}{4}$  of the N. E.  $\frac{1}{4}$  of section 4—14—18, and a part of the E.  $\frac{1}{4}$  of the S. E.  $\frac{1}{4}$  of section 4—14—18, for the sum of \$3,800, and a deed is made out on the same day,

properly describing the land, and placed in escrow, and afterwards, at different times, accepts from the purchaser the sum of \$3,150.50 on the purchase price, cannot avoid specific performance of such contract by returning to the purchaser by mail a certificate of deposit of a local bank of the amount paid by such purchaser.

3. The evidence examined, and held sufficient to support a judgment and decree for specific performance.

(Syllabus by Green, C.)

Commissioners' decision. Error from district court, Ellis county; S. J. OSBORN, Judge.

Charles A. Hiller and Gleed & Gleed, for plaintiff in error. *Stapbaugh, Hurd & Dewey*, for defendants in error.

GREEN, C. This was an action brought by George S. Emig, in the district court of Ellis county, against Joseph E. Wilson and others, for the specific performance of a contract for the purchase of certain real estate in Ellis county. The facts, so far as they are material, are: Joseph E. Wilson became the owner of the land in controversy in 1869 by a patent from the government. The Union Pacific Railway Company had a right of way through said land, and occupied said right of way at the time and before the land was patented to Wilson. In the year 1886 Wilson placed the land in the hands of Love & Cummings, of Hays City, for sale. On the 15th day of May, 1886, the plaintiff below made the following written proposition to purchase said land: "Messrs. Love and Cummings—Gents: I will give for E.  $\frac{1}{4}$ , N.  $\frac{1}{4}$ , section 4—14—18, and part of E.  $\frac{1}{4}$ , S. E.  $\frac{1}{4}$ , section 4—14—18, thirty-three hundred (\$3,300) dollars: provided, the entire tract will contain one hundred acres; the same to be surveyed at the expense of seller. If the tract contained less than one hundred acres, then I will pay *pro rata* less. If it contains more than one hundred acres, then I will pay *pro rata* more. Thus, should the tract contain 98 acres, I will pay therefor \$3,234. If it contains 102 acres, I will pay \$3,366, or in that same proportion; one hundred dollars to be paid by me in cash, and the balance of purchase money as per above proposition, when the title is given free from all mortgages or other incumbrances, taxes, etc. Seller to furnish abstract. Geo. S. Emig." Which was accepted by Wilson, as appears from the following indorsements: "Received on the above contract one hundred dollars, and I do hereby agree to deposit warranty deed with Messrs. Love and Cummings, awaiting the examination of title, and paying off the mortgages and taxes, etc." "Hays City, Kas., 5-15, 1886. This is to certify that I hereby accept the written proposition submitted to me this day by Love and Cummings, from the person named in written proposition submitted for the purpose of purchasing the tract of land named, and according to specification in written proposition named above; and I hereby agree to survey the land named and specified in written submitted proposition. J. E. WILSON." "Received of Geo. S. Emig check on Abilene Bank, Abilene, Kansas, for one hundred dollars, part purchase money on E.  $\frac{1}{4}$ , N. E.  $\frac{1}{4}$ , and part of E.  $\frac{1}{4}$ , S. E.  $\frac{1}{4}$  section 4—14—18,

Ellis county, Kansas. Balance to be paid as per proposition in writing this day made. May 15, 1886. LOVE AND CUMMINGS." In pursuance of the acceptance of the proposition made by the plaintiff below, the following agreement was signed by Emig: "Whereas I became the purchaser of the following real estate, to-wit, N. E.  $\frac{1}{4}$  of N. E.  $\frac{1}{4}$ , and S. E.  $\frac{1}{4}$  of S. E.  $\frac{1}{4}$  and that portion of N. E.  $\frac{1}{4}$  of S. E.  $\frac{1}{4}$  lying immediately north of Fort Hays military reservation, in section four, (4,) township fourteen, (14,) range eighteen (18) west, containing one hundred and one and  $\frac{1}{4}$  acres, according to actual survey made May 15, 1886, at and for the sum of \$33.00 per acre. Now, know all men by these presents, that I do hereby promise and agree to and with the said seller thereof, Joseph E. Wilson, that I will, from time to time, furnish the money to pay off and have released such mortgages and taxes as are a lien against said real estate, as shown by an abstract now in hands of Love & Cummings, pertaining, among other lands, to the land above mentioned; the said Joseph E. Wilson to deposit a warranty deed with Love & Cummings, to be delivered to me when the transaction is fully completed, according to the terms of a certain proposition in writing made by me and in the hands of said Love & Cummings on the 15th day of May, 1886, the whole transaction to be closed as promptly as can be done. I do further agree to assume the payment of all interest on said mortgages that shall accrue after the 1st day of June, 1886. The said Wilson to pay all interest now due and to become due up to the 1st day of June, 1886. It is, however, understood and agreed that all sums advanced for the payment of liens, mortgages, etc., as well as hand money now paid, shall be deducted from the purchase money on final settlement. The warranty deed to be clear of all incumbrances. GEO. S. EMIG. Witness: R. H. LOVE. I agree to pay the balance of the purchase money, after deducting amount of mortgages and hand money, on or before 1st day of June, 1886. GEO. S. EMIG. Witness: R. H. LOVE."

The land was surveyed by Wilson, and a deed executed and placed in the hands of Love & Cummings, to be delivered to Emig upon the payment of the entire amount of the purchase money. Different sums of money were paid by the plaintiff below upon this land until the 16th day of June, when the plaintiff below paid \$200, making the aggregate payments upon the land \$3,159.50. Some question arose, after the purchase of this land, between Emig and Wilson, with reference to the right of way, Emig claiming that he should not be compelled to pay for the right of way over this land. There was some doubt, too, as to whether the right of way was 200 or 400 feet wide, making a difference in the tract, if it was 200 feet, of something like 6 acres, and if 400, of about 12 acres. A correspondence was carried on between the agents of Wilson and Emig in regard to the right of way of the railroad, after the payment of the sum of \$3,159.50, until the 29th day of July, when a letter was written by the agents of Wilson, demand-

ing a compliance with the contract and a settlement at once. On the 3d day of August, 1886, Joseph E. Wilson and his wife, in consideration of \$3,339, deeded the land in controversy to Hill P. Wilson, his brother, who knew of the transaction between his brother and Emig; and on the 4th day of August, 1886, Wilson undertook to rescind this contract, claiming that Emig had failed to make the payments in accordance with the contract, and that, time being of the essence of the contract, he had a perfect right to do so; and returned to Emig, at Abilene, Kan., through a certificate of deposit from one of the banks in Hays City, the amount of the purchase money which had been paid by Emig. Upon the receipt of this letter, Emig returned the certificate of deposit to Wilson, and tendered to him the amount which he claimed to be due, \$181.75, being the amount of the purchase price of this land as it was surveyed on the 15th of May, for 101 $\frac{1}{4}$  acres. This tender was declined, and Emig brought this action, bringing the balance of the purchase money into court, and Wilson paying into court the amount that had previously been paid by Emig upon this contract.

There is no controversy with reference to the tender upon the part of Emig and Wilson, and no dispute as to the amount actually due. The material question in this case is whether the plaintiff below, under all the circumstances, was entitled to a specific performance of his contract. We think the evidence in this case shows that the plaintiff in error, Hill P. Wilson, took the title to the land in controversy with knowledge of the existing equities between Emig and Joseph E. Wilson, and shall assume that specific performance will be decreed against him, if good, against the original party, as he took the deed from his brother with notice. The rule is well settled that where a specific performance will be decreed between original parties it will lie as to parties claiming under them with knowledge. *Nelthorpe v. Holgate*, 1 Colly. 218; *Bishop v. Newton*, 20 Ill. 180; *Corbus v. Teed*, 63 Ill. 205; *Roberts v. Marchant*, 1 Phil. Ch. 370; *Ewins v. Gordon*, 49 N. H. 444; *Currier v. Howard*, 14 Gray, 511; *McMorris v. Crawford*, 15 Ala. 271.

It is claimed upon the part of the plaintiffs in error that the description of the land in the contract between Emig and Wilson was too indefinite; that on account of its ambiguity it was no contract at all. We do not agree with counsel in this view of the case. No difficulty arose between the parties about the description of the land as an entirety. The only question was as to the right of way through the land, and whether the plaintiff below was to pay for the land occupied by the railroad. By the terms of the contract the land was to be surveyed, and by this survey the description was to be determined; and it seems that it was, as a matter of fact, surveyed, and a deed made on the same day that the proposition for the sale of the land was accepted by Wilson. The rule is well established in actions of this kind, where the boundary to property contracted for can be defined, the parties will be bound, and a general description of the subject-mat-

ter of the sale is sufficient. Fry, Spec. Perf. §§ 325, 328, 329; *Monro v. Taylor*, 8 Hare, 51; *Owen v. Thomas*, 3 Mylne & K. 353; *Haywood v. Cope*, 25 Beav. 140. The evidence shows in this case that the deed was executed by Joseph E. Wilson and his wife, and delivered to his agents, Love & Cummings, on the same day that the proposition of Emig was accepted, and no question was raised but what the property was properly described in the deed. We think the contract was sufficiently definite and certain to be enforced.

The next contention of counsel is that the contract was rescinded by Wilson, and the only question for our further determination is whether Wilson had a right, under the state of facts disclosed, to make a rescission. There seems to have been no intention upon the part of Joseph E. Wilson to rescind this contract until about the 1st of August, 1886. The evidence shows that as late as July 29th, through his agents, Love & Cummings, he insisted upon a full performance of the contract, and demanded a settlement of the balance due on that contract. Emig had already paid him \$3,159.50, leaving, according to his own claim, \$181.75 still due. The deed was in the hands of his agents at Hays City, and on the 4th of August he sent a notice to Emig of his intention to rescind the contract. He notified him that the contract was rescinded, and transmitted to him a certificate of deposit of the amount that Emig had paid him, which was promptly returned. We do not think that Wilson was in a position to rescind this contract in such a summary manner. The rule has been well stated by Mr. Justice STORY, in the case of *Taylor v. Longworth*, 14 Pet. 173: "In the first place, there is no doubt that time may be of the essence of a contract for the sale of property. It may be made so by the express stipulations of the parties, or it may arise by implication from the very nature of the property, or the avowed objects of the seller or the purchaser. And even when time is not thus expressly or impliedly of the essence of the contract, if the party seeking a specific performance has been guilty of gross laches, or has been inexcusably negligent in performing the contract on his part; or if there has, in the intermediate period, been a material change of circumstances, affecting the rights, interests, or obligations of the parties,—in all such cases courts of equity will refuse to decree any specific performance upon the plain ground that it would be inequitable and unjust. But, except under circumstances of this sort, or of an analogous nature, time is not treated by courts of equity as of the essence of the contract, and relief will be decreed to the party who seeks it, if he has not been grossly negligent, and comes within a reasonable time, although he has not complied with the strict terms of the contract. But in all such cases the court expects the party to make out a case free from all doubt, and to show that the relief which he asks is, under all the circumstances, equitable, and to account in a reasonable manner for his delay and apparent omission of his duty." Applying this rule to

the facts in this case, we do not think the plaintiff below was so grossly negligent as to deprive him of the right of specific performance. He had paid all he claimed was due on the contract, and more, too. He had, in our judgment, a perfect right to adjust the question of the amount of land he was to pay for. While it is true he was to pay for the land by the 1st day of June, the evidence shows that Wilson accepted \$200 on this contract 16 days after the time had expired. If time had been of the essence of the contract, there was certainly a waiver upon the part of Wilson by the acceptance of this payment, and the demand that Wilson made upon Emig for a settlement, long after the expiration of the time when the contract was to have been performed. Fry, Spec. Perf. § 1091. As a general rule, time will not run as laches, pending negotiations between the parties, even though it may be carried on without prejudice to a notice given by one party. Fry, Spec. Perf. § 1088; *Gee v. Pearce*, 2 De Gex & S. 325; *Southcomb v. Bishop of Exeter*, 6 Hare, 219. A rescission of a contract necessarily implies that the parties shall be restored to the condition in which they were before the contract was made. This was not done by Wilson. Simply transmitting a certificate of deposit upon a local bank to Emig for the amount he had paid upon the contract was not sufficient. The principle is clearly recognized that contracts can only be rescinded by the mutual consent of parties, and a contract cannot, in general, be rescinded *in toto* by one. *Gatlin v. Wilcox*, 26 Ark. 309; *Chit. Cont.* (4th Amer. Ed.) 573. In our opinion the plaintiff below was not guilty of unreasonable and inexcusable delay in the performance of his part of the contract, and was entitled to a deed for the land in question when he tendered Joseph E. Wilson the amount which he admitted to be due, on the 6th of August, 1886. We think the judgment of the court below was in accordance with the evidence, and recommend that it be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

#### CITY OF TOPEKA *et al.* v. GAGE *et al.*

(*Supreme Court of Kansas.* June 7, 1890.)

#### STREET ASSESSMENTS—INJUNCTION—LIMITATIONS.

An action to enjoin the collection of an assessment made by a city of the first class to curb and pave its streets must be commenced within 90 days from the time when the amount of such assessment is ascertained, or the action will be barred by section 1, c. 101, Laws 1887. *Wahlgren v. Kansas City*, 42 Kan. 243, 21 Pac. Rep. 1068.

(*Syllabus by Strang, C.*)

Commissioners' decision. Error from district court, Shawnee county; JOHN GUTHRIE, Judge.

*S. B. Isenhardt* and *W. A. S. Bird*, for plaintiffs in error. *A. Bergan*, for defendant in error.

STRANG, C. This was an action, commenced in the court below November 21, 1889, to enjoin the city of Topeka, James

Ramsey, Byron Roberts, as treasurer of Shawnee county, and the Capital City Vitrified Brick & Paving Company from paving Van Buren street, between Third and Eighth streets, under a contract entered into between said city of Topeka and James Ramsey, dated August 1, 1889. Answers were filed by the several defendants, setting forth—*First*, a general denial; *second*, the regularity of the successive and necessary steps showing the necessity, propriety, and legality of the contract between the city of Topeka and James Ramsey for the pavement of said street; and, *third*, the statute of limitations,—to which answers the plaintiffs replied, and on the 9th day of December, 1889, the case came on for trial, resulting, on the 12th day of December, in a judgment for the plaintiffs, to which each of the defendants duly excepted. December 13th the several defendants filed their motions for a new trial, which motions were overruled, and the ruling duly excepted to, and the case brought to this court for review. March 11, 1889, the city council adopted a resolution declaring the necessity of paving Van Buren street, which resolution was duly published. Afterwards the city engineer was instructed to prepare plans, specifications and estimates for curbing and paving said street, and on July 19th the city clerk was directed to advertise, and did advertise, for sealed proposals for the work of paving said street. The proposals were received and opened July 23, 1889. The bid of James Ramsey was accepted, and the contract therefor awarded to him, and the council instructed the mayor to enter into a contract with said Ramsey therefor. Afterwards appraisers were appointed, and the property liable for the improvements was appraised. The council met and adopted and confirmed the said appraisement. An ordinance was then passed fixing the rate of the levy to be assessed against each lot and piece of ground liable to pay the cost of said improvement. The city clerk afterwards computed the amount of the assessment, and gave the owner of each lot or piece of ground notice of the amount of the assessment. This notice was given the defendants as early as the 12th of September, 1889, and this suit was not commenced until November 21, 1889, and the plaintiffs in error allege that the statute of limitations provided for in cases like this had run, and the defendants' case, if any they had, was barred.

Section 1, c. 101, Laws 1887, among other things, provides that "no suit to set aside said special assessments, or to enjoin the making of the same, shall be brought, nor any defense to the validity thereof be allowed, after the expiration of thirty days from the time the amount due on each lot or piece of ground liable for such assessment is ascertained." The language of this statute is such as to leave little or no room for construction. Its provisions are plain, direct, and positive, and seem sufficiently broad to cut off all defenses not asserted within the period of time named therein. It says no suit shall be brought, nor any defense allowed, after the expiration of 30 days from—what? From the time the amount due on each lot is ascer-

tained. It not only declares that no suit shall be brought to set aside or enjoin the making of the assessments, but provides that no defense to the validity thereof shall be allowed after 30 days from the time the assessment is ascertained. However, the defendants, plaintiffs below, insist that at the time the contract was entered into between the city and Ramsey, two of the councilmen, representing the city, had a pecuniary interest in said contract, which rendered it null and void; that said fraud was concealed from and unknown to the plaintiffs below until October 29, 1889, when Ramsey assigned said contract to the brick and paving company; and that, because of said concealment of the fraud, the statute of limitations did not commence to run until said 29th of October, a time within 30 days before the suit was commenced, and that therefore the suit is not barred by said statute. We hardly think this position is tenable. The legislature has provided a special statute of limitations for these cases, and any fair construction of its provisions is against this position. It would have been easy for the legislature to have so worded the statute as to have cut off all defenses except for fraud, and to have said that the statute should run as against fraud from the time of its discovery. This is done in the general statute of limitations, but there is nothing of the kind in this statute; and as the legislature was providing a special statute of limitations, different from the general statute, we must presume that they intended it to have the effect they said it should have, and cut off all defenses of whatever kind or character. This may be a harsh rule, but that fact does not furnish a reason why we should not construe the statute as it is, though it may furnish a reason why the legislature should modify it.

In this case it is claimed that the amount assessed against the several lots liable for the improvement sought to be made was not properly ascertained; that it was ascertained by the city clerk instead of by the council. The record shows that on the 6th of September, 1889, the city council passed an ordinance levying the special assessment complained of, which ordinance was approved September 7th, and published September 12th. This ordinance fixed the rate of the levy, and all that remained to be done was to compute the amount of the assessment upon each lot or piece of ground at the rate designated in the ordinance; and the ordinance directed the clerk to make the computation. We think the clerk had authority to make the computation, and the assessment so made was properly ascertained. In this case it is not shown that the contract was let at an unfair or extravagant price for the work, so it would seem that the plaintiffs below will suffer no injury from the execution of this contract; and in fact it appears in the record that one of the plaintiffs has, since the action was commenced, paid her assessment, showing that she has become satisfied with the proposition to improve the street under the contract sought to be enjoined in this case. At all events, we think the action was barred by the stat-



ute, and therefore recommend that the judgment of the district court be reversed.

PER CURIAM. It is so ordered; all the justices concurring.

STATE V. SMITH *et al.*

(Supreme Court of Kansas. June 7, 1890.)

CRIMINAL LAW—CUSTODY AND CONDUCT OF JURY.

At the trial of a criminal action, after the evidence both for the state and the defendants had been given, the jury were permitted to separate, and go to their homes. During this recess, it was reported to the court that one of the jurors was sick, and unable to attend. The determination of the fact of sickness on the part of the absent juror must be by judicial methods, and these include the presence of the defendants while that fact was being investigated, their right to produce witnesses, and of cross-examination; and it is error in the trial court to proceed to investigate and determine the fact of sickness of the absent juror, and for that cause to discharge the jury from any further consideration of the case, in the absence of the defendants from the court-room, they being charged with a felony.

(Syllabus by Simpson, C.)

Commissioners' decision. Appeal from district court, Rice county; J. H. BAILEY, Judge.

C. F. Foley and W. E. Borah, for appellants. L. B. Kellogg, Atty. Gen., and J. W. Brinkerhoff, for the State.

SIMPSON, C. At the regular January term, 1890, of the district court of Rice county, the appellants, James Smith, John Smith, and Martin Smith, were placed upon their trial, charged with burglary and larceny. They waived arraignment, entered a plea of not guilty, a jury was sworn, and the state and defendants both submitted their evidence. All this transpired on the 10th day of January. When the court met on the morning of the 11th of January, counsel for appellants asked permission to introduce further evidence in their behalf. The jurors were called, and all were present, and took their seats in the jury-box, and thereupon Frank Fry, a juror, stated to the court that he was unable to sit as a juror on that day, on account of sickness; and upon this statement the court adjourned the hearing of the case until the 13th day of January. When the court met on the 13th, and the jury were called, all were present except two jurors,—John Johnson and John Kelly. The court was informed that these two jury-men were sick, and an adjournment was ordered until the morning of the 14th of January. On that morning all the jurors were present and ready for duty, except John Kelly. The jury were permitted to separate until 5 o'clock P. M. of that day, the 14th of January. At 5 o'clock A. M. the jury were again called; and, it appearing that the juror Kelly was still absent, and reported sick, the trial court discharged the jury from any further consideration of the case. During all this day, except during a short time in the morning, the defendants were absent from the court-room, being confined in the Rice county jail. They were not present at the time the jury was discharged, but their attorneys were in attendance, and objected to the discharge of

the jury. The trial court entered on the journal the following order discharging the jury: "Afterwards, to-wit, on the 14th day of January, 1890, and just before adjourning for supper, court being duly convened, the said jury was by the clerk called, and all responded to their names except John Kelly, who was then absent from court, and, upon inquiry being made regarding the absence of said juror, Kelly, the sheriff informed the court that a messenger had been sent for the said juror, John Kelly, and that said messenger stated that said Kelly reported himself too sick to be present in court; that said Kelly did not know when he would be able to be present in court; that he might not be able to come into court for a week; and that said Kelly stated he would come into court as soon as he was able. And the court, being satisfied from the report of said sheriff, and also from a letter received from said juror by said court purporting to be written by said juror, Kelly, that said juror, John Kelly, was seriously sick and unable to attend court, thereupon discharged said eleven jurors from the further consideration of said case. Whereupon, and at the same time, the defendants being then absent from the court-room, and confined in the county jail of Rice county, Kan., the court discharged the said jury from the further consideration of this cause; to all of which action of the court the defendants, by their counsel, then and there duly excepted, which exception was by the court allowed. That, at the time of the discharge of said eleven jurors, neither of defendants' counsel, Messrs. Borah or Foley, who were present, and defendants' said counsel, objected to the discharge of said eleven jurors from said case, on the ground that their said clients, James, John, and Martin Smith, defendants herein, were not present in court. During all the proceedings had in this cause on the 14th day of January, 1890, except upon convening of court in the morning, at which time no proceedings in this cause were had except to adjourn the further hearing of the same till the afternoon of the same day, in order to hear from juror, for whom a messenger was sent, the defendants, and each of them, were absent from the court-room, and were confined in the county jail of Rice county, Kan. Before the said eleven jury-men in attendance upon the trial of said cause were by the court discharged, the court duly inquired of said Foley and Borah if they were willing to proceed with the trial of the cause with the eleven jurors who were able to be and were present, and they replied that they were not willing so to do, but would require a full panel. That the continuance from the 13th to the 14th day of January was made by the court at its own instance; the defendants, by their counsel, object to such continuance."

On the 20th day of January, 1890, the appellants were arraigned upon the same information upon which they had previously been put upon trial, and objected to being required to plead to the information on the ground that a jury had once been sworn to try them, and that said jury had been discharged without their consent, in



their absence, and while they were confined in the jail, and that they had once been put in jeopardy upon the offenses charged against them in the information. This was overruled. The appellants then filed their plea in abatement, setting up the same facts, and this was overruled. The appellants then pleaded not guilty, and pleaded these same facts in bar. The trial proceeded, and the appellants were convicted of the larceny of goods of the value of \$50.93. A motion for a new trial and a motion in arrest of judgment, in which all these facts were again set forth, were both overruled. The appellants had all proper exceptions noted and saved on all these various rulings. At least, they have done enough to fairly present the questions they discuss here for review. Their contention is embraced in these two propositions: That there was no evidence of the sickness of the juror Kelly that authorized the court to discharge the jury, and that such discharge was not legal without the presence of the appellants.

Section 281 of the Civil Code provides: "The jury may be discharged by the court on account of the sickness of a juror, or other action or calamity requiring their discharge, or by consent of both parties, or after they have been kept together until it satisfactorily appears that there is no probability of their agreeing." Section 208 of the Criminal Code provides: "The proceedings prescribed by law in civil cases in respect to the impaneling of jurors, the keeping of them together, and the manner of rendering their verdict, shall be had upon trials on indictments and informations for criminal offenses, except in cases otherwise provided by statute." The court had the right to discharge the jury on account of the sickness of one of the members thereof. *State v. White*, 19 Kan. 445. It is insisted upon one side that the determination of the existence of such a sickness rests largely, and almost exclusively, in the discretion of the court, while the appellants contend that its existence must be established as a fact in accordance with the rules of evidence, and that a trial court cannot of its own motion, or from mere reports, unverified by affidavits, or unsupported by oaths administered in open court, determine that there exists such an unavoidable necessity that the remaining jurors should be discharged, and, by such an arbitrary exercise, deprive the appellants of the plea of once in jeopardy. The power to so discharge a jury is not to be arbitrarily exercised. One of the constitutional rights of a party charged with crime is that he is not to be twice put in jeopardy for the same offense, and the power of a court to discharge a jury that has been sworn to pass upon the question of his guilt and innocence must be exercised with a view to preserve inviolate his constitutional right in this respect. The sickness of a juror is one of those unavoidable necessities that arise beyond the power of the court or the prosecution to foresee. It seems clear on principle, as well as in view of the constitutional privileges of the prisoner, that this authority cannot be arbitrarily exercised; for, in the language of the supreme court of the state

of Pennsylvania in the case of *Com. v. Clue*, 3 Rawle, 498: "Why it should be thought that the citizen has no other assurance than the arbitrary discretion of the magistrate for the enforcement of the constitutional principle which protects him from being twice put in jeopardy of life or member for the same offense, I am at a loss to imagine. If discretion is to be called in, there can be no remedy for the most palpable abuse of it but an interposition of the power to pardon, which is obnoxious to the very same objection. Surely, every right secured by the constitution is guarded by sanctions more imperative. But, in those states where the principle has no higher sanction than what is derived from the common law, it is nevertheless the birthright of the citizen, and consequently demandable as such. But a right which depends upon the will of the magistrate is essentially no right at all, and for this reason the common law abhors the exercise of a discretion in matters that may be subjected to fixed and definite rules." This was said in a capital case, but the language of the section of the bill of rights in our state constitution is broad enough to include all felonies. It seems, however, to be the rule in all grades of felony that the only justification for the exercise of the power of a trial court to discharge a jury which has heard the evidence in a criminal case is the existence of an absolute necessity for the discharge. Some unforeseen fact must intervene, beyond the power of the court to control, before such a power can be legally exerted. The existence of this unforeseen fact that operates to stop the deliberation of the jury, and prevents a verdict, must be judicially ascertained and determined. That is to say, if the sickness of the juror does not occur in the immediate presence of the court, but commences during a recess, and is reported, the fact of sickness must be established as any other fact is established in a court of justice, in accordance with the rules of evidence governing such matters. When an order is made by a trial court discharging a jury, without verdict, to whom has been committed the question of the guilt or innocence of a prisoner charged with a crime, the record ought to show affirmatively the existence of the fact that induced such order, and justified the exercise of such extraordinary power. This much seems demanded in order to preserve to the prisoner the full benefit of the constitutional requirement in his behalf.

The case of *Conklin v. State*, decided by the supreme court of Nebraska in February, 1889, and reported in 41 N. W. Rep. 788, illustrates this view. Section 485 of the Criminal Code of that state provides that, "in case a jury shall be discharged on account of sickness of a juror, or other accident or calamity requiring their discharge, or after they have been kept so long together that there is no probability of agreeing, the court shall, upon directing their discharge, order that the reasons for such discharge shall be entered on the journal, and such discharge shall be without prejudice to the prosecution." The journal showed this order: "Comes also

the jury, \* \* \* and report in open court their inability to agree upon a verdict in this cause; and it appearing to the satisfaction of the court, upon examination of M. L. Brown, one of the jurors in said case, that, by reason of his sickness, he was unable to further perform his duties as a juror, and upon further examination of each and every juror in said case, the court finds that there is no probability of the jurors agreeing upon a verdict, and that they had been out 21 hours without sleep, or a suitable place to sleep or rest, said jury is therefore discharged without day, without prejudice to the prosecution." Commenting on this journal entry, the court say: "The sickness of a juror is one of the causes recognized by the statute above quoted for the discharge of a jury, but it is submitted that such sickness is classed with 'other accident or calamity requiring their discharge;' and it appears to me that such sickness must be of a sudden and calamitous character, and of such a nature as to render his further detention in the jury-room manifestly improper. It does not appear here that the jury reported the sickness of one of their number, or that the juror himself claimed to be sick, or incapacitated on account of sickness from further service on the jury, nor in what the examination of the juror by the court consisted, nor whether the advice and services of a physician were had to ascertain and advise the court of the condition of the juror. Again, it does not appear that the jury were discharged solely on account of the sickness of this juror; but, on the contrary, I think that, taking the whole journal entry together, it fairly appears that the sickness of the juror was not such that the court would have discharged the jury for that cause alone. If the sickness of this juror was such that his further service on the jury was impossible, what was the necessity, or even the propriety, of further examining each and every juror as to the probability of their agreeing upon a verdict, the length of time they had been out without sleep, or a suitable place to sleep or rest?" The logic of this case seems to require that there should, in effect, be a finding of fact as to the incapacity of the juror, by reason of sickness, to properly discharge his duty. In the case of *State v. Shuchardt*, 18 Neb. 454, 25 N. W. Rep. 722, Judge MAXWELL says: "It was never intended to permit a court arbitrarily to discharge a jury for disagreement until a sufficient time had elapsed to preclude all reasonable expectation that they will ever agree." In the case of *Dobbins v. State*, 14 Ohio St. 493, the court, commenting on the power to discharge juries in criminal cases, say "that this power does not rest upon the arbitrary or uncontrollable discretion of the judge presiding at the trial, but is a legal discretion to be exercised in conformity with known and established rules; and, finally, unless the facts stated in the record clearly establish a case of necessity, the discharge will operate as an acquittal of the accused, and preclude his further prosecution." This court, in the case of *State v. White*, 19 Kan. 445, by the chief justice,

say that where the jury have deliberated so long, without finding a verdict, as to preclude a reasonable expectation that they will agree, they may be discharged, if the record shows a necessity for such action, without the consent of the defendant, and the prisoner be tried by another jury. All these authorities require that there must be a legal showing made and entered on the record of the necessity for the discharge, and of the existence of the facts that authorize the exercise of the extraordinary power of the court.

Now, the record in this case shows that one of the causes for which the trial court is authorized to discharge a jury in a criminal case, by the statute of this state, happened on this trial, to-wit, the sickness of a juror. This sickness did not happen in the immediate presence of the court. The juror took sick at home during a recess of the court, and the fact of sickness had to be established in accordance with the rules that govern in all cases when a fact is to be judicially established, and made a finding upon which to base a legal conclusion or judicial action. Then, in accordance with these authorities quoted, and in view of the constitutional rights of the appellants, and the requirements of section 207 of the Code of Criminal Procedure, these appellants ought to have been present in person during the investigation and determination of the existence of the fact of sickness. This case is not like that of *State v. White*, 19 Kan. 445, where the jury were discharged because there was no reasonable probability of their agreement. In such cases a consulting jury is, in legal contemplation, always in the presence of the court. All their reports, of every kind and character, are made directly to the court, and the court alone has the sole right to question them as to the probabilities of an agreement. In the very nature of things, as no one is allowed to be present at their deliberations, a determination by the court as to whether or not there is a reasonable probability of their agreement must be made on the report of the jury. So the language of the court in the case of *State v. White*, as to the absence of the defendant at the time of the discharge of the jury, cannot be fairly applied in a case like this, when the fact alleged as justifying a discharge of this jury happened out of the presence of the court, and while the jury were temporarily discharged from attendance in court. In one case the court acts on an official report made by the jury, which the defendant has no right to question. In the other, an inquiry as to the existence of a fact alleged to have occurred away from the presence and observation of the court is to be made by judicial methods; and these include the presence of the parties interested, their right to introduce evidence and cross-examine witnesses. We think that error was committed in determining the sickness of a juror as a cause for the discharge of the jury, in the absence of the appellants. It is evident from the record that error was also committed on the trial of the issue of fact made by the plea in abatement filed by the appellants, and the replication filed by the county attorney. This issue of

fact was the sickness of the juror Kelly; and, to maintain the issue on the part of the state, the county attorney was permitted, over the objection of the appellants, to read in evidence a letter purporting to have been written by the juror Kelly to the trial judge, without any preliminary proof whatever of its genuineness. For these errors there must be a reversal; and for the reasons suggested by the court in the case of Conklin v. State, 41 N. W. Rep. 788, we prefer this course, rather than to pass upon the other question until all the facts are fully and fairly presented. This accords, too, with the case of State v. Myrick, 38 Kan. 238, 16 Pac. Rep. 330. We recommend that the judgment of the district court of Rice county be reversed, and the cause remanded, with instructions to grant the appellants a new trial.

**PER CURIAM.** It is so ordered; all the justices concurring.

(44 Kan. 186)

**STATE ex rel. KELLOGG, Attorney General,**  
v. **BOARD OF COUNTY COMMISSIONERS OF**  
**ATCHISON COUNTY.**

(*Supreme Court of Kansas. June 7, 1890.*)

**COUNTY-SEATS—LOCATION—EXTENSION OF BOUNDARIES.**

A county-seat will remain precisely where it was originally located, until changed or removed under the provisions of the constitution and statutes of the state; and *held*, where a county-seat was located upon the territory of an incorporated city, and afterwards the boundaries of such city were enlarged, this extension of the boundaries of the city did not have the effect to extend the boundaries of the county-seat, but the county-seat remained precisely where it was originally located.

(*Syllabus by the Court.*)

Error from district court, Atchison county; ROBERT M. EATON, Judge.

*L. B. Kellogg, Atty. Gen., and J. F. Tufts*, for plaintiff in error. *W. W. & W. F. Guthrie and T. M. Pierce*, for defendant in error.

**VALENTINE, J.** It is admitted by both parties to this action that the county-seat of Atchison county is, and has been since the year 1855, located upon territory now included within the boundaries of the city of Atchison. It was first located upon such territory under an act of the legislature of 1855. Laws 1855, c. 30, §§ 26, 36. It was again located upon such territory on October 3, 1858, by an election held on that day in the county of Atchison, under chapter 21 of the General Laws of 1858. At that time the town of Atchison was an incorporated city, having known and definite boundaries. It had previously been incorporated under the provisions of chapter 77 of the Private Laws of 1858, which took effect February 12, 1858. No relocation of the county seat of Atchison county has since been had. At the time of this second location, and prior thereto, the city of Atchison did not include any part of the territory afterward known as "L. C. Challiss' Addition." On August 13, 1858, the site for the public county buildings was selected by the then county board of Atchison county, and such site included lots

Nos. 1, 2, and 3, in block 65, of the city of Atchison. On November 18, 1858, a map or plat of L. C. Challiss' addition was filed in the office of the probate judge of Atchison county, and on April 1, 1859, this map or plat was recorded in the office of the register of deeds. On February 11, 1859, an act of the legislature (Priv. Laws 1859, c. 93) was passed, providing for adding territory to the corporate limits of the city of Atchison, and, under the provisions of this act L. C. Challiss' addition, on April 1, 1860, became a part of the city of Atchison. The city of Atchison, within the boundaries within which it was incorporated on February 12, 1858, is known and designated, at least in this case, as "Old Atchison," and the site for public county buildings, with some additional territory, has remained the same ever since such site was first selected, in August, 1858. The county commissioners are now about to change the location of the public county buildings from the place where they were first located, in 1858, to L. C. Challiss' addition, a distance of about one-half mile; and the principal question now presented to this court is whether they have the power to do so or not. It is claimed by the plaintiff that they have no such power, and for these reasons: *First.* L. C. Challiss' addition not being a part of the territory of the city of Atchison when the county-seat was located, such addition is not now, and never has been, a part of the territory constituting the county-seat of Atchison county. *Second.* That as the county board of Atchison county fixed the site for the public county buildings in 1858, such board then exhausted all its power to locate the county buildings, and could never again exercise any such power, unless the county-seat, at some subsequent time, should be relocated, or unless additional authority, at some subsequent time, should be given such board by the legislature.

We think it has already been settled by the decisions of this court that a county-seat will remain precisely where it was originally located until changed or removed under the provisions of the constitution and statutes of the state. *State v. Harwl*, 36 Kan. 588, 14 Pac. Rep. 158; *State v. Stevens*, 40 Kan. 113, 119, 19 Pac. Rep. 365; *School-Dist. v. Roach*, 41 Kan. 531, 533, 21 Pac. Rep. 597. In this present case, the county-seat was located on October 3, 1858, at the city of Atchison. Of course it could not have been located in or upon the city of Atchison, as a governmental organization, a municipal corporation, a corporate entity, or an artificial person, and all bodies politic and corporate in Kansas are, in law, persons,—artificial persons. See act relating to the construction of statutes, § 1, par. 13; Gen. St. 1839, par. 6687. It was in fact located upon territory,—the territory occupied by the corporate being, the artificial person, known as the city of Atchison. It is not necessary, however, in any case, that a county-seat should be located within or upon territory occupied by an incorporated city, or within the territory of a city at all, or within the territory of any town or village or township, or school-district or road-district, or any

corporation or organization of any kind. County-seats do not necessarily have any relation to or connection with any such things. A county-seat may be located upon vacant and unoccupied land, and by any name that will sufficiently designate it, or by which it may be known. *Conley v. Fleming*, 14 Kan. 382, 386. It might be located upon John Smith's farm, and be designated by that name, provided there was any such place, and only one such place, in the county, and provided a sufficient portion thereof could be obtained for public buildings and other public necessities; and in such a case John Smith, with like impotence as the city of Atchison, could not enlarge the boundaries of the county-seat by enlarging his own possessions; nor could he remove the county-seat by simply exchanging his farm for some other farm. When a county-seat is located, its exact location is fixed, and it cannot be changed by the subsequent mutations of the municipal corporation within whose territory it may happen to be located. It can be changed only under the provisions of the constitution and the statutes. (Const. art. 9, § 1; acts relating to the location and removal of county-seats,) and it can be changed only by the consent of a majority of the electors of the county, given at an election duly called and held for that purpose. But suppose that, by the taking of L. C. Challiss' addition into the corporate limits of the city of Atchison, the boundaries of the county-seat have been extended over such addition, and then suppose that "Old Atchison" should be abolished or be taken from the boundaries of the enlarged city, leaving only L. C. Challiss' addition as the city of Atchison, then would the county-seat of Atchison county be on Challiss' addition, and exclusively on such addition? And, if so, would the change of the location of the county-seat of Atchison county, as thus made, be a change within the provisions of the constitution and the statutes of the state of Kansas? We think not. The restraining order prayed for by the plaintiff will be granted.

JOHNSTON, J., concurring.

HORTON, C. J., not sitting, or taking any part in the decision.

#### MISSOURI PAC. RY. CO. v. CASSITY.

(*Supreme Court of Kansas. June 7, 1890.*)

#### NEGLIGENCE OF MASTER — EVIDENCE — INSTRUCTIONS.

1. It is error to refuse to give a special instruction which correctly states the law, and is material under the evidence, unless the court, in its general instructions, sufficiently instructs the jury upon the matter presented by the special instruction asked and refused.

2. Where there is a conflict in the testimony of witnesses, it is the exclusive duty of the jury to weigh and determine what facts such evidence proves; and when there is any proper evidence which supports the verdict or findings of the jury, such verdict or findings will not be set aside although the apparent weight of the evidence is against the verdict or findings. But where there is no evidence to support a verdict or finding, and much more where the verdict or findings are

against all the evidence in the case, they should be set aside.

(*Syllabus by Strang, C.*)

Commissioners' decision. Error from district court, Nemaha county. R. C. BASSETT, Judge.

*B. P. Waggener and Conwell & Wells*, for plaintiff in error. *J. E. Taylor and M. A. McCoid*, for defendant in error.

STRANG, C. September 11, 1885, Tillman P. Hinshaw was killed by the cars at Wetmore station, on the Missouri Pacific Railway, in Nemaha county, Kan. M. P. M. Cassity was afterwards, at Washington county, Kan., the domicile of said Hinshaw at the time of his death, appointed administrator of the estate of said Tillman P. Hinshaw, deceased. Cassity, as such administrator, on the 3d day of June, 1887, commenced this action in the district court of Nemaha county to recover damages for the killing of said Hinshaw, for the benefit of Laura P. Hinshaw and Florence Leah Hinshaw, widow and daughter and next of kin of said Tillman P. Hinshaw, deceased. Amount claimed, \$10,000. Plaintiff alleged that near the station of Wetmore the railway company had constructed a box drain or culvert across its track to allow the water, which otherwise would accumulate on the north side of the track in large quantities, to escape across the track and pass away. The walls of said box drain were composed of railway ties, two on each side, lying down and spiked together. The top of the drain was originally covered with planks or boards, but the board next to the inside of the north rail had become loose, and was gone, leaving an open space from 10 to 12 inches square. Plaintiff also alleged that next to the east wall of said drain, and on the outside of it, there was a washout or ditch running parallel with the drain across the track, 8 to 10 inches wide, and several inches deep, caused by a larger amount of water accumulating, on account of heavy rains, on the north side of the track than could escape through the box drain. Plaintiff says that the box drain was so uncovered on the morning of September 11, 1885, and that said washout or ditch existed as above described at such time; that the train on which the deceased was at the time braking reached Wetmore on said morning about 4 o'clock and 55 minutes, and just before daylight; that the deceased, as the train backed up, went in between the cars on said track to uncouple the cars, in order to set out a car that was to be left at Wetmore, and, while walking along between the cars, waiting a slack so he could pull the coupling-pin, he stepped into the ditch next to said box drain with one foot, and through the hole on top of said drain, into the drain, with the other foot; and that, while his foot was in such drain, he was caught by the brake-beam of the car and thrown down, and dragged along the track and crushed to death. And plaintiff says that by omitting to cover up said box drain, and to fill up said ditch, the plaintiff herein was guilty of negligence in connection with the death of said Hinshaw, and therefore liable for damages under the statute.

The defendant below answered, admitting it was a railway corporation duly incorporated according to law, but denied all other allegations in plaintiff's petition, and also pleaded negligence on the part of the deceased which contributed to his death. Plaintiff below replied, denying negligence on part of deceased. Trial was had on the issues thus made, December 3, 1887, by the court and a jury, resulting in a verdict for the plaintiff below for the sum of \$3,000. There were a large number of special findings by the jury, some of which supported the general verdict, and some that did not. The defendant below moved for judgment in its favor upon the special findings of fact, notwithstanding the general verdict. Then followed a motion to set aside the verdict, and for a new trial. These and other rulings, to demurrers to the petition and to the evidence, in receiving and rejecting evidence, upon an application for a continuance, and in giving and refusing to give instructions, were properly excepted to. Some of these alleged errors we will notice, and some of them it is unnecessary to consider.

We think the court erred in refusing to give instruction 16, as asked by the defendant below, and not giving in its general instructions something equivalent thereto. The instruction asked is as follows: "*Sixteenth.* The jury are instructed that, if they find from the evidence that the said Hinshaw was guilty of ordinary negligence, which contributed directly, in whole or in part, to the death of said Hinshaw, then the plaintiff cannot recover herein, even though the defendant was guilty of negligence in permitting said track to become and remain out of repair." This instruction, we think, correctly states the law, and should have been given, either as asked by the defendant below, or in the general instructions given by the court. An examination of the instructions given by the court fails to disclose anything that we think can take the place of the instruction refused, and excuse the court from giving such instruction. The eighth instruction as given by the court comes nearer stating the law of contributory negligence than any other instruction given, and we think this instruction fails to give a complete statement of the law upon that question; and therefore the instruction asked by the defendant below, which is a correct statement of the law upon that question, should have been given. The instructions of the court only inferentially and incompletely state the law of contributory negligence.

We also think that, in the absence of any instruction clearly setting forth the law of contributory negligence, instruction 11 as given by the court is misleading, or there is danger of its being so construed by the jury as to mislead them. The jury are told in this instruction that, before the plaintiff can recover, three things must be found, reciting them. In the absence of any well-defined instruction upon the subject of contributory negligence, the jury may have construed this instruction to mean that, if they found from the evidence in the case the three things so numbered and recited in this instruction 11, they

should then find for the plaintiff anyway, without any regard to the question of contributory negligence.

Again, we find that a number of the special findings of the jury are not only unsupported by any evidence in the case, but are squarely against all the evidence in the case upon the questions to which they relate. All the evidence in the case upon that question shows that the cars to be uncoupled were either the first and second or the third and fourth, while the jury find the fourth and fifth cars were the ones to be uncoupled. The jury finds that Hinshaw was head brakeman on the train, and then, in the 107th finding, say his duties did not require him to be on the cars near the engine, especially at stations where cars were to be cut out. And yet all the evidence in the case relating to his duties shows that they required him to be on the front car, to receive from the conductor or rear brakeman signals for the management of the train, and transmit them to the engineer, and to handle the brake to aid the engineer in stopping the train. The jury were asked in question 77: "During said time, from September 1st to the day of his death, did he frequently, in the day-time, pass over said track, and over said culvert, in the discharge of the duties as brakeman?" and answered, "No," while the undisputed evidence shows that he did pass over said track and culvert frequently, almost daily, and sometimes twice in one day during the period of time mentioned. In findings 44 and 45 the jury say Hinshaw was required, in the proper discharge of his duties, to go in between the cars, while in motion, to uncouple them, while all the evidence in the case shows he was not required to go in between the cars to uncouple them while moving, nor for any other purpose. The same jury say in finding 86 there were no general orders of the company that required Hinshaw, in his capacity of brakeman, to go in between the cars when they were moving; and in finding 90 they say Hinshaw did not act in obedience to any direction of the conductor of the train in going in between the cars to uncouple them. In finding 36 they say that orders were given Hinshaw to uncouple said cars, while all the evidence on the point negatives such a conclusion.

There are other findings that are against the evidence; but we will not notice them, as they are less material than these, and we have noticed enough to show that the jury made many of their findings in utter disregard of the evidence. When there is a conflict in the testimony of witnesses, it is the exclusive duty of the jury to weigh and determine what facts such evidence proves; and, when there is any proper evidence which supports the verdict of the jury, such verdict will not be set aside, although the apparent weight of the evidence is against the finding. But where there is no evidence to support a finding, and much more when the finding is against all the evidence in the case, it should be set aside.

The defendant below saved many exceptions to the rulings of the trial court refusing to admit evidence offered by the said

defendant, and have assigned as error such rulings. While we think it is unnecessary to say whether there is reversible error in such rulings, we desire to say we think the rule of evidence was held very rigid against the defendant all the way through the trial.

There is one other matter that we wish to call attention to. The defendant presented to the court, and requested the court to submit to the jury, 121 special questions, 33 of which the court refused to submit, which refusal is assigned as error. We do not think the court erred in this. On the other hand, we think the court might with great propriety have cut out and refused to submit a great many that were submitted. There is a good deal of aptness and force in the remark of counsel for defendant in error when they say that the statute provides for special verdicts, but does not provide for a cross-examination of the jury on the subject of their general finding. It looks too much as though counsel present questions for submission to the jury for the mere purpose of entrapping the jury. The statute does not contemplate any such practice. This matter was referred to in *Bent v. Philbrick*, 16 Kan. 190. The court there says: "Under chapter 91 of the Laws of 1874, either party may request of the court to submit to the jury a question as to a particular fact; and if the fact be involved in the issues, and material to the controversy, the court has no discretion, but must submit the question, and require the jury to answer." Again, in *Morrow v. Commissioners*, 21 Kan. 484. In *Railroad Co. v. Plunkett*, 25 Kan. 198, the court says: "It is generally error for the trial court to refuse to submit to the jury questions of fact material to the case, and based upon the evidence." In *City of Wyandotte v. Gibson*, Id. 243, the court says: "A party has a right in a jury trial to have answers returned to specific questions as to material facts," but the court adds: "This right is not one which enables him to determine what are material facts, and what questions must be answered. He may present any number of questions for submission, as any number of instructions, but it is the duty of the court to determine what in the one case shall be submitted, as in the other what shall be given." In *Railway Co. v. Jacobs*, 39 Kan. 204, 17 Pac. Rep. 791, another phase of this question is discussed. An examination of all these authorities discloses that the law upon this subject is settled by this court as follows: *First*, a party has the right to have special questions submitted to a jury where the questions are material under the issues and the evidence; *second*, that it is the duty of the court to determine what questions are material under the issues and the evidence, and to reject all questions not material; *third*, when questions are submitted, the court must require the jury to return a direct and positive answer thereto. It follows that the trial court should pursue such a course touching the submission of special questions to the jury as will limit the questions submitted to material questions, and not permit the changes to be rung on them resulting in a repetition

thereof. We recommend that this case be reversed, and remanded for new trial.

PER CURIAM. It is so ordered; all the justices concurring.

### *In re CAMERON.*

(*Supreme Court of Kansas. June 7, 1890.*)

#### FALSE PRETENSES.

Where A., the agent of B., obtains personal property belonging to B., by means of false statements, from C., and it appears that neither A. nor B. intended to defraud C., and the false statements were made by A. to enable B. to obtain the property that belonged to him, and to the immediate possession of which he is entitled, A. cannot be convicted, under the statute, of obtaining property by false pretenses.

(*Syllabus by the Court.*)

Original proceeding in *habeas corpus*.

*J. W. Rose*, for petitioner. *W. H. Robb*, for respondent.

HORTON, C. J. The petitioner, Hannah Cameron, alleges that she is illegally restrained of her liberty by the sheriff of Edwards county, under a warrant issued on the 27th day of March, 1890, by J. Kenneck, a justice of the peace of that county, charging her with having unlawfully, feloniously, and designedly, by false pretenses, obtained from George W. Crawford an organ, of the value of \$95. It appears from the agreed statement of facts that Crawford had purchased in November, 1888, an organ from Mrs. Cameron, who acted as agent; that he had made a cash payment upon the organ, and gave two promissory notes for the deferred payments. The notes were so executed that the payee was entitled to take possession of the organ at any time if Crawford failed to pay as the notes matured, or if he undertook to remove the organ from the place where it was. That he paid upon the organ sums aggregating \$66; that at the time Mrs. Cameron came for the organ, on January 8, 1890, there was due upon the last note between \$35 and \$40; that she stated to him "she was the agent of the Western Temple of Music, of which S. R. Huyett was the general manager; that the company had sent her to take the organ on account of the non-payment of the last note; that she would take the organ to her house at Macksville, in this state, a few miles distant from where Crawford lived, and that he could have the organ at any time by making payment;" that Crawford relied upon these statements, and surrendered the possession of the organ to Mrs. Cameron. Soon afterwards Crawford went to Macksville, to see Mrs. Cameron and make the last payment, but found the organ had been taken to Hutchinson, in this state. It further appears, however, that, although Mrs. Cameron has been acting as agent for the Western Temple of Music for about two years, and had sold several organs for the company, that the one purchased by Crawford belonged to her daughter, Mrs. Ursula Searles; that she sold the organ to Crawford as the agent of Mrs. Searles; that after the last note was overdue, at the request of her daughter, and as her agent

she obtained possession of the organ from Crawford, who was then in default upon the last note for an amount exceeding \$30. It also appears that Mrs. Cameron believed, at the time she went to Crawford's for the organ, that he was about to remove with his family to Texas, and take the organ with him.

According to all the testimony, the conditions of the last note which Crawford had executed for the organ were not complied with. It is also conceded that the holder of the note, under its terms, was entitled to the possession of the organ upon default of payment, or if the purchaser undertook to remove the organ from the place where it was. Upon the facts, as disclosed by the testimony, Mrs. Cameron has not been guilty of any public offense. Her daughter, Mrs. Searles, was legally entitled to the possession of the organ at the time that Mrs. Cameron made the demand for it. It is true, according to the testimony of Mr. Crawford, that she made false statements concerning the Western Temple of Music, and the order alleged by her to have been given by S. R. Huyett, its general manager; but nothing is a false pretense, within the term of the statute, which has no tendency to, and does not, harm a person. It is not an indictable offense, under the statute, for one to obtain by false statements payment of a debt already due, or of personal property to which he is entitled to the possession thereof, because no injury is done. In *People v. Thomas*, 3 Hill, 169, the defendant was charged with obtaining property by false pretenses,—the fraudulent pretense being that a note of the prosecutor, which he had for the amount, had either been lost or burned, which was known by him to be false; and afterwards he negotiated the note to a third person. The court held that the false representation, tending merely to induce one to pay a debt previously due from him, was not within the statute against obtaining property by false pretenses; the court saying: "A false representation by which a man may be cheated into his duty is not within the statute." And in *Com. v. Henry*, 22 Pa. St. 253, *WOODWARD, J.*, makes use of almost precisely the same language. In this case, Mrs. Searles was entitled to the possession of the organ. Her mother obtained that possession by false statements; but, as Crawford was not entitled to the possession of the organ, and Mrs. Cameron obtained it for her daughter, and at her daughter's request, no injury was done to Crawford, or any one else, and Crawford cannot complain. No crime or offense was committed. Section 94 of Crimes and Punishment; 1 Bish. Crim. Law, (7th Ed.) § 438; 2 Bish. Crim. Law, (7th Ed.) § 466; *Com. v. McDuffy*, 126 Mass. 467; *State v. Hollyway*, 41 Iowa, 200; *State v. Hurst*, 11 W. Va. 54. If Mrs. Cameron had sold the organ to Crawford as the agent of the Western Temple of Music, and not as the agent of her daughter, Mrs. Searles, yet if, at the time she made the demand, the notes given by Crawford had not been paid, Crawford had no right to hold or retain possession of the organ. Upon default in failing to pay the notes, or any of

them, the payee thereof, not Crawford, was entitled to the possession of the organ. If the testimony of the prosecution is all true, Mrs. Cameron was guilty of statements contrary to the truth and good morals, but she has not rendered herself criminally liable.

It appears from the testimony that Mrs. Cameron was discharged by the probate judge of Stafford county, in this state, upon a writ of *habeas corpus*, on the 5th day of February, 1890; that a full hearing was had of the matters in controversy before the probate judge, and we are now asked to rule that the determination of the probate judge is final and conclusive, notwithstanding the filing of a subsequent complaint and the arrest thereon. In view of the conclusion we have reached, that Mrs. Cameron is not guilty of any offense or crime, we deem it unnecessary to pass upon the question so forcibly presented. The petitioner will be discharged.

All the justices concurring.

(44 Kan. 146)

WINTON *et al.* v. WILSON.

(Supreme Court of Kansas. June 7, 1890.)

SHERIFF'S SALE—MANDAMUS.

A sheriff holding an order for the sale of real estate cannot be required, by a writ of *mandamus*, to publish the notice of sale in a newspaper selected by the plaintiff.

(Syllabus by Green, C.)

Commissioners' decision. Error from district court, Labette county; JOHN N. RITTER, Judge.

*Cuse & Glasse*, for plaintiffs in error. *Johnson, Martin & Keeler*, for defendant in error.

GREEN, C. The plaintiffs in the court below applied for a writ of *mandamus* to require the defendant, who was the sheriff of Labette county, to publish a certain notice of a sale of real estate in the *Oswego Independent*, having paid the publisher the fee for such notice, and, taking a receipt therefor, presented the same to the sheriff with the request that he publish said notice in said newspaper. The sheriff refused, assigning as a reason the right to decide for himself where he would publish his legal notices. The court below held that the plaintiffs were not entitled to the writ.

Section 457 of the Code of Civil Procedure prescribes that lands taken on execution shall not be sold until the officer causes public notice of the time and place of sale to be given for at least 30 days before the day of sale by advertisement in some newspaper printed in the county. Section 460 gives authority to the officer to refuse to publish such notice until the party for whose benefit the process issues advances to such officer money sufficient to pay for such publication. Under this authority for publishing legal notices, can the party asking for the process require the sheriff to make the publication in such newspaper as he may select? While it is generally true that it is the duty of the sheriff to act upon the orders of the party in whose favor the process is issued, still we do not think he can be controlled to the extent of the plaintiff's saying where he shall publish his no-



tices. He is an officer of the court. Certain statutory requirements are enjoined. The duty of making the publication is cast upon him. Now, when he is willing to perform that duty, and make the publication in a newspaper printed in the county, can he still be required, by one of the extraordinary remedies of the court, to publish the notice in a paper to be selected by the plaintiffs? There is nothing in the writ to show that he had failed to perform any duty enjoined upon him by law. It should be borne in mind, too, that, to entitle the plaintiffs to such a writ, it must clearly appear that they had the legal right to have this thing done. There was no refusal upon the part of the sheriff to do his duty in regard to the sale and the notice. The statute says the lands and tenements shall not be sold until the officer causes notice to be published in some newspaper. He alone is charged with this statutory duty of giving public notice of the sale. He signs this notice, and is in a measure responsible for all the steps necessary to be taken from the time he receives the execution or order of sale until the return is made. He is the executive officer of the court, and can be held responsible for any failure upon his part to do his duty. But if the plaintiffs, or any other party interested in the process, can direct where publication shall be made, who would be responsible if the necessary notice was not given, or the statute was not fully complied with? We think the law imposes the duty of giving this notice of the sale of real estate upon the sheriff, and he cannot be compelled to make publication in any newspaper the plaintiffs or other party in interest may designate. The sheriff, in making the sale, is not alone the agent of the creditor. He acts as an officer of the court for all interested in the sale. "In effecting the sale, the sheriff is the agent of the creditor, the debtor, and the purchaser, and his acts may, more or less, affect them all." *Farr v. Sims*, Rich. Eq. Cas. 122; *Walker v. Braden*, 34 Kan. 664, 9 Pac. Rep. 613. We think the court committed no error in refusing the writ prayed for, and therefore recommend an affirmance of the judgment.

PER CURIAM. It is so ordered; all the justices concurring.

#### STATE V. SCHAEFER.

(Supreme Court of Kansas. June 7, 1890.)

#### INTOXICATING LIQUORS — ILLEGAL SALES — EVIDENCE.

1. In re Eddy, 40 Kan. 592, 20 Pac. Rep. 283, followed.

2. Where a person is charged with unlawfully selling intoxicating liquor contrary to the statute, and upon the trial the testimony tends to prove that the defendant sold hard cider, which intoxicated the persons drinking it, an analysis of the cider which was seized upon the premises of the defendant at the time of his arrest is competent testimony. All the circumstances connected with the analysis of the cider, the time it was made, the distance the cider was carried from the premises to be analyzed, etc., of course, should go to the jury, for their consideration in determining the value or weight to be given to such testimony.

3. Hard cider is fermented, or an excessively fermented, liquor, and, therefore, being fermented

liquor, is within the prohibition of the statute when sold, without a permit, as a beverage. If the defendant denies that the hard cider or fermented liquor sold by him is intoxicating, it devolves upon him to remove the presumption of the law by evidence.

(Syllabus by the Court.)

Appeal from district court, Shawnee county; JOHN GUTHRIE, Judge.

Frank Herald, for appellant. L. B. Kellogg, Atty. Gen., and R. B. Welch, for the State.

HORTON, C. J. Nick Schaefer and Matthew Schaefer were tried in the district court of Shawnee county on an information of six counts, each charging them with an unlawful sale of intoxicating liquors. Matthew Schaefer was acquitted by the jury, but Nick Schaefer was found guilty upon the first, second, and third counts of the information. The court sentenced him to pay a fine of \$300, and to be committed to the jail of Shawnee county for 90 days. The court further ordered that he be imprisoned in the county jail until the fine and costs were all paid. He appeals.

It is contended that the district court had no jurisdiction, as the offense, if any, was cognizable before a justice of the peace only. Therefore, that the plea of abatement filed by the defendant should have been sustained. It has already been decided by this court that section 2, c. 178, Sess. Laws 1887, does not oust the district courts of jurisdiction. *State v. Brooks*, 33 Kan. 708, 7 Pac. Rep. 591; *In re Eddy*, 40 Kan. 592, 20 Pac. Rep. 283.

It appears from the testimony that Nick Schaefer keeps a restaurant at 414 Kansas avenue south, in the city of Topeka. On the part of the prosecution, Calvin Smith, John Mayfield, William Covert, and Elmer Emmens testified that they had purchased in April, 1889, hard cider at the restaurant of Schaefer, when he was present, and that the cider was intoxicating; that it intoxicated them. After Schaefer was arrested, the cider on his premises was seized and analyzed by Prof. Lovewell, of Washburn College. He reported 13.14 per cent. of alcohol, by weight, in the cider. On the part of the defendant, John E. Stone, J. E. Kitsman, John O'Connor, and several others testified they had drunk cider frequently at Schaefer's restaurant in April and May, 1889, and that the cider was not intoxicating. It is also contended that the court committed error in permitting the state to show by the evidence of Prof. Lovewell the amount of alcohol found in the cider seized upon the premises of the defendant. In support of this contention, it is claimed that the cider was taken off the ice in hot weather, moved, agitated, and carried to Prof. Lovewell, at Washburn College, some distance from the premises of the defendant. We think the evidence was admissible for what it was worth. All of the facts surrounding the analysis went to the jury, and they could judge as to its value. The cider was seized at the time of the arrest of the defendant, and on the same day taken to Prof. Lovewell. The testimony tended in some degree to show that the cider the defendant



kept and sold was not sweet or fresh cider, but fermented cider.

It is further contended that the trial court erred in instructing the jury that they might find the defendant guilty although he was ignorant that the cider he sold was intoxicating. If the cider was sweet or fresh cider, such an instruction would have been erroneous and prejudicial. *Intoxicating Liquor Cases*, 25 Kan. 751; *State v. Brown*, 38 Kan. 390, 16 Pac. Rep. 259. But the instruction complained of referred to hard cider only,—not sweet or fresh cider. It was, in effect, that, if the defendant sold hard cider, he was bound to know it was intoxicating. This court has ruled that beer is presumed to be intoxicating until the contrary is proved. *State v. Teissedre*, 30 Kan. 476, 2 Pac. Rep. 650. Beer is both a fermented and malt liquor, and generally contains from 3.40 to 4.94 per cent. of alcohol. "Cider" is defined by Worcester as "a fermented liquor made from the juice of apples." Watts, in his *Dictionary of Chemistry*, says that "cider is a fermented liquor prepared from apples; that the fermentation is the most delicate part of the process. Slight fermentation leaves the liquor thick and unpalatable. Rapid fermentation impairs its strength and durability, and excessive fermentation makes it sour, harsh, and thin. Cider contains, in 100 volumes, 9.87 of alcohol of 92 per cent; the weakest, 5.21." Johnson's *Cyclopædia*, in referring to cider, says: "It is the fermented juice of apples, extensively prepared in parts of England, in Ireland, in the northern districts of France, and in North America. In Normandy, vast quantities of apples are grown for the preparation of cider. The apples are first reduced to pulp in a mill, and the pulp is afterwards subjected to pressure. The apple juice is placed in casks in a cool place, when fermentation begins. Part of the sugar is converted into alcohol, and a clear liquid is obtained, which can easily be racked off from sedimentary matter. Cider is largely used as a beverage. It contains from 5¼ to 10 per cent. of alcohol, and is intoxicating when drunk in large quantities. Cider quickly turns sour, becoming hard cider, owing to the development of acid; and great difficulty is experienced in the attempt to keep it sweet." Paragraph 2521, Gen. St. 1889, reads: "Any person or persons who shall manufacture, sell, or barter any spirituous, malt, vinous, fermented, or other intoxicating liquors shall be guilty of a misdemeanor, and punished as hereinafter provided: provided, however, that such liquors may be sold for medical, scientific, and mechanical purposes, as provided in this act." And paragraph 2530, *Id.*, provides that "all liquors mentioned in section one of this act, and all other liquors or mixtures thereof, by whatever name called, that will produce intoxication, shall be considered and held to be intoxicating liquors, within the meaning of this act." Where the general meaning of a word is once established by common usage and general acceptance, we look for its definition in the dictionaries, and do not require evidence of its meaning by the testimony of witnesses. *Briffitt v.*

*State*, 16 N. W. Rep. 89; *State v. Teissedre*, supra. Therefore, all the courts will take judicial notice that, when "hard cider" is used in court by a witness, it means "fermented cider" or "liquor," and is within the prohibition of the statute. If the witnesses for the state had testified that they drank cider,—not hard cider,—then, under the definitions of Webster and some of the other lexicographers, we would not presume that the cider was fermented and intoxicating. Hard cider is cider excessively fermented; and therefore, presumptively, hard cider is not only a fermented liquor but intoxicating. Whatever is generally and popularly known as intoxicating liquor may be declared as a matter of law by the courts. Under the statute, all fermented liquor is presumed to be intoxicating; and, if the defendant denies that the fermented liquor sold by him is intoxicating, it devolves upon him to remove the presumption of law by evidence. *State v. Volmer*, 6 Kan. 371; *Intoxicating Liquor Cases*, 25 Kan. 751. The judgment of the district court must be affirmed. All the justices concurring.

#### HEYFRON v. MAHONY.

(*Supreme Court of Montana*. May 14, 1890.)

##### ELECTION—CONTEST—PRACTICE—EVIDENCE.

1. Under Comp. St. Mont. div. 5, § 1044, which provides that "technicalities or error in spelling the name of any candidate" shall not be regarded, a ballot for "Dan Heyfron" for a county-office is sufficiently definite, when there is only one person having that surname in the county.

2. Under Comp. St. Mont. div. 5, § 1015, which provides that "previous to votes being taken, the judges \* \* \* shall take and subscribe the \* \* \* oath," the failure of the judges to take the oath will not invalidate the votes cast at that precinct.

3. Under Comp. St. Mont. div. 5, § 1013, which provides that the clerk shall post, at least 30 days before any general election, notice of the house at which the election will be held, the vote of the precinct will be invalidated by the removal of the voting place by the judges from the house designated to one more than three miles off.

4. When it appears that a certain number of votes are fraudulent, and there is nothing to show for which candidate they were cast, the vote of the whole precinct may be thrown out, or the number may be apportioned among the candidates in proportion to the number of votes received by each.

5. The court may allow the statement of contest to be amended during the trial by the correction of mistakes in spelling names in the list of alleged illegal voters, and by additions thereto.

6. To explain the absence of certain witnesses, a subpoena, with the return of the officer that he was unable to find them is admissible.

Appeal from district court, Missoula county; STEPHEN DE WOLFE, Judge.

Woody & Webster, for appellant. Word & Smith, for respondent.

BLAKE, C. J. At the general election held November 6, 1888, Daniel J. Heyfron was the Democratic, and Cain B. Mahony was the Republican, candidate for the office of sheriff of the county of Missoula. The official canvass of the returns from all the precincts showed that Mahony had received 1,843 votes, and Heyfron 1,797 votes, and the certificate of election was delivered to the first-named person. Heyfron then initiated this contest by filing with the

county clerk his statement, which sets forth many grounds under the provisions of the statute. Comp. St. div. 5, §§ 1043, 1044. Mahony interposed a demurrer, which was overruled, and thereupon answered, and Heyfron filed his replication. The cause was tried by the court without a jury, and the evidence, which was offered by the contestant, related solely to the precinct at Bonner, where Mahony had 171 votes, and Heyfron had 51 votes. No testimony was introduced by Mahony, and the court made its findings of the facts from the pleadings and the evidence, and adjudged that Heyfron was entitled to the office. The motion of Mahony for a new trial was overruled, and an appeal was taken to the supreme court of the territory of Montana. The transcript does not contain any request for a finding in writing by the parties, and we will examine the errors which have been assigned.

It is admitted by the pleadings that six ballots were cast at the precinct of Noxon with the name of "Dan Heyfron" for the office of sheriff upon them; that the contestant was the only person having this surname within the county of Missoula; and that the board of canvassers did not count the same for the respondent. The statute requires that "the district court shall hear and determine in such manner as shall carry into effect the expressed will of a majority of the legal voters, as indicated by their votes for such office, not regarding technicalities or error in spelling the name of any candidate for such office." Comp. St. div. 5, § 1044. It was therefore properly ordered that these votes should be counted for Daniel J. Heyfron for said office.

The court further finds "that the whole vote returned by the canvassers from O'Keefe precinct, being twenty-eight votes for contestee, Cain B. Mahony, and twelve votes for contestant, Daniel J. Heyfron, be excluded or thrown out and disregarded in making up the sum total of votes cast in the county for said office of sheriff." The statement of the contestant upon this ground is as follows: "Because at the voting precinct known as 'O'Keefe,' the election was not held at the place designated by the county commissioners for holding the election, and because the judges who held such election were not sworn. The place designated by the county commissioners was the house of one Blanchard, and the election was held at Evaro, more than three miles distant from the place designated by the commissioners." The answer does not deny these averments, but alleges the reasons for the opening of the polls at Evaro; that one of the judges, who had been appointed, and had in his possession the poll-books and ballot-box, notified the persons at Blanchard's house of this change; that every citizen who lived in the vicinity voted, and that no one was prevented by this removal from voting; and that the election held at this precinct was conducted honestly, and according to law. The replication controverts these reasons, which are matters regarding the convenience of voters, the size of Blanchard's house, and the quantity of whisky therein on the day of the said

election, and "denies that all the voters of said precinct of O'Keefe had an opportunity to vote at said election." No evidence upon this point appears in the record, and we must be governed by the pleadings, which confess the facts specified in this ground. "Previous to votes being taken, the judges \* \* \* shall take and subscribe the \* \* \* oath." Comp. St. div. 5, § 1015. The statutes provide for the holding of elections "in the several counties, townships, or precincts" when the same may be necessary; that the clerk of the board "shall, at least thirty days before any general election, make out \* \* \* three written notices for each township or precinct, said notices to be, as near as circumstances will admit, as follows: Notice is hereby given that \* \* \* at the house of —, in the county of —, an election will be held;" that these notices shall be posted in the township or precinct,—"one at the house where the election is authorized to be held;" and that the form of entry in the poll-books, "as near as circumstances will admit," shall be as follows: "At an election held at the house of A. B., in the township or precinct." Comp. St. div. 5, §§ 1009, 1011, 1013, 1014, 1030. We cannot ascertain from the transcript the views of the court below upon the objections of the contestant to the returns of the O'Keefe precinct. That which is founded upon the failure of the judges to be sworn cannot be sustained. In *Wells v. Taylor*, 5 Mont. 208, 3 Pac. Rep. 255, Mr. Chief Justice WADE, as the organ of the court, said: "The question is, was there a fair vote and an honest count? If there was, the election is valid, though the officers conducting the same were not duly sworn or chosen, or did not possess the qualifications requisite for the office." And see the cases there cited.

What, then, was the legal effect of the removal of the polling place more than three miles from the house of Blanchard to Evaro? Mr. McCrary, in his work on Elections, writes: "It must be conceded by all that time and place are of the substance of every election, while many provisions which appertain to the manner of conducting an election may be directory only." Section 141. (3d Ed.) The same opinion is expressed by Mr. Paine in his treatise on Elections: "The requirement that the election shall be held at the place designated by law is not directory; it is mandatory, and must be obeyed." Section 327. In *Knowles v. Yates*, 31 Cal. 92, the court says: "Sullivan's house, which was three miles from the warehouse, was the place designated by the board of supervisors, and the fact that a copy of the proclamation was posted upon the warehouse is not sufficient to overcome the direct and positive evidence that Sullivan's house was the place designated. The conduct of the persons acting as officers of the election, in opening the polls and holding the election at a distance of three miles from the place appointed by the proper authority, was without any just excuse, and unauthorized, and in that respect was, in the sense of the statute, misconduct." In *Melvin's Case*, 68 Pa. St. 338, Mr. Chief Justice THOMPSON says: "A fixed

place, it seems to me, is as absolutely a requisite, according to the election laws, as is the time of voting. The holding of elections at the places fixed by law is not directory; it is mandatory, and cannot be omitted without error. I will not say that, in case of the destruction of a designated building on the eve of an election, the election might not be held on the same or contiguous ground, as a matter of necessity.—*necessitas non habet legem*. But then the necessity must be absolute, discharging all mere ideas of convenience.

\* \* \* To move the place of election three miles from that designated by law, or from a village, and across a considerable stream, a half a mile or more distant from the village where it ought to have been held, or from a designated school-house to a vacant house, more than a half a mile distant therefrom, without authority or any absolutely controlling circumstances, must render the election therein void, and, if the votes taken be counted, constitute an undue election." See, also, McCrary, Elec. (3d Ed.) §§ 123, 124; Paine, Elec. §§ 327-330. The circumstances which do not affect the result when the place designated for the holding of the election has been changed, are shown in Preston v. Culbertson, 58 Cal. 209, wherein the court holds: "The polls were opened a short distance from and in plain view of the place appointed,—the owner of the house selected having objected to the election proceeding at his house,—and it does not appear that any voter was misled or deprived of his vote by reason of the change." Dale v. Irwin, 78 Ill. 180. There was no error in the action of the court respecting the returns from this precinct.

The third and last finding is as follows: "That at the precinct at Bonner sixty-six illegal votes were cast for said office of sheriff, and which said number of votes are to be deducted from the whole vote of said precinct for said office; that said sixty-six illegal votes be apportioned to and deducted from the whole vote received by contestant, Daniel J. Heyfron, and contestee, Cain B. Mahony, at said precinct of Bonner, in the same proportion that the vote of each of said parties bears to the whole vote cast at said precinct, to-wit, fifteen votes from the vote of contestant, Daniel J. Heyfron, and fifty-one votes from the vote of contestee, Cain B. Mahony,—leaving one hundred and twenty votes cast for Cain B. Mahony at said precinct, and thirty-six votes cast for contestant, Daniel J. Heyfron, at said precinct." It is the contention of the appellant that there is no testimony to prove that 66, or any other number, of illegal votes were cast at this precinct for him for the office of sheriff, or for the office of sheriff. The statement of contest alleges that 120 "men, who were not legal voters of the county of Missoula, voted for said Cain B. Mahony for sheriff." After giving a list of the names, the eleventh ground concludes: "Not one of the said men had been in the county of Missoula thirty days preceding election, not one of them had been in the territory of Montana six months preceding said election, and every one of them voted for Cain B. Mahony at said election, and were

counted for him by said board of canvassers." Another ground in the statement concerning some of the persons who voted for Mahony for said office is stated thus: "No one of whom had legally declared his intention to become a citizen of the United States prior to said election; no one of said persons went to the office of the clerk of the district court to make said declaration; but the deputy of said clerk left his office, and took the declaration of each one of said persons in the county at a distance from his office, and that was the only declaration of such intention any one of them made." The finding of the court is general, the illegal voters are not named or otherwise identified, and the nature of the disqualification is not pointed out. There is no proof, outside of the official returns, that any ballots were cast for Mahony or Heyfron. While we do not deem the evidence clear or satisfactory, there is testimony which tends to prove that laborers upon a railroad in the vicinity of the precinct at Bonner voted at this time, and that they had not resided in the county of Missoula 30 days before that election. The rule is settled by this court that the finding is like the verdict of a jury, and, under the circumstances appearing in the record, cannot be disturbed. We refrain, therefore, from an examination of the other ground, affecting the illegality of voters of foreign birth. The appellant relies upon McDaniels' Case, Brightly, Elec. Cas. 249, where it is said: "But if the individual do not know for whom he voted, and the fact cannot be established by other evidence, then the complaint must fail for want of proof, like any other cause which is lost for want of sufficient evidence to sustain it." This case, however, related to the illegality of only one voter, whose ballot would decide the contest, and the opinion states correctly the law which is applicable to the facts of that controversy, but has no bearing upon the question before us. Mr. McCrary says in his work on Elections: "But it does not follow that such illegal votes must necessarily be counted in making up the true result, because it cannot be ascertained for whom they were cast. In purging the polls of illegal votes, the general rule is that, unless it be shown for which candidate they were cast, they are to be deducted from both candidates, according to the entire vote returned for each." Section 460, (3d Ed.) He continues: "Let it be understood that we are here referring to a case where it is found to be impossible, by the use of due diligence, to show for whom the illegal votes were cast." Section 462. Mr. Paine, in treating this subject, writes: "Where illegal votes have been cast, the true rule is to purge the poll by first proving for whom they were cast, and thus ascertain the real vote; but, if this cannot be done, then to exclude the poll altogether. This is safer than the rule which arbitrarily apportion the fraud among the parties." Paine, Elec. § 513. Under the authorities, it was proper for the court to exclude the entire vote of the precinct of Bonner, or apply the rule of apportionment to the facts. In either event, the same judgment would be entered

against the appellant. While it may be the safer rule to reject the whole vote of a precinct which is tainted by fraud or illegality, we cannot conclude that the court erred in pursuing a different mode to arrive at a like end. The result of the findings was to give Mahony 1,776 votes, and Heyfron 1,788 votes, and the contestant was declared elected to the office in dispute.

During the trial, Heyfron obtained leave to amend his statement of contest to conform to the proof by changing the following names, which are specified in the aforesaid eleventh ground, to-wit: "William McCarthy to read William McGarry, W. Bugg to read N. Berg, Louis Gunther to read Louis Guenter, Wade Beck to read Wade Beach," etc. Eight names were also added to the list therein. The appellant insists that the court erred in allowing these amendments to be made. Mr. McCrary says: "It may be stated, as a general rule recognized by all the courts of this country, that statutes providing for contesting elections are to be liberally construed, to the end that the will of the people in the choice of public officers may not be defeated by any merely formal or technical objections. Immaterial defects in pleadings shall be disregarded; necessary and proper amendments should be allowed as promptly as possible." Section 396, (3d Ed.) "In most of the states of the Union, there are statutes to regulate pleadings, under which courts are authorized to allow amendments where petitions or other pleadings are found to be defective, and under most of these statutes a petition in a contested election case may be amended. In the absence of any statute of this character, the court trying a case of contested election may, under its general common-law power, permit such a petition to be amended; and an amendment ought to be allowed whenever the court, in the exercise of a sound discretion, shall be of opinion that the ends of justice will be thereby promoted." *Id.* § 406. This author continues further: "If, therefore, an amendment of a petition would necessarily result in a continuance, or in considerable delay, it ought not to be permitted, because it is better that he whose fault it is that the original petition is insufficient should suffer than that an innocent party should be deprived of his right to a speedy trial. In such a case, the furtherance of justice requires that leave to amend should be refused." *Id.* § 407. In Election Cases, 65 Pa. St. 35, the court says: "And, in point of reason, why should the court not have power to amend in a contested election case? It is a judicial remedy, and concerns important rights. \* \* \* It would be an intolerable technicality if the petitioners were required to set forth in their complaint, within ten days after the election, every illegal vote, every illegal act of the election boards, and every instance of fraud. Such a nicety would prevent investigation, and defeat the remedy itself." See *Palme, Elec.* §§ 827, 840, and cases cited. We have upheld in a liberal spirit the action of courts in permitting amendments to pleadings, and executing the provisions of the Code of Civil Procedure. Under

the authorities, this principle embraces election contests. The effect of the first amendment was to correct the spelling of the names of persons, who could have been distinguished by the court without this change. The addition of the other parties was not sufficient to control the judgment. The appellant did not allege that he was surprised by this ruling, or ask for a continuance, and we do not think the court abused its discretion in this matter.

The court received in evidence a subpoena issued out of the office of the clerk of the court below in December, 1888, with the return of the coroner thereon, showing that he was unable to find 118 persons therein named. They comprise the names of the voters in the precinct of Bonner, against whom the contestant preferred the charge of illegality. The subpoena and return are *prima facie* evidence of some matters which are connected with the case. They tended to prove that the contestant made a proper effort to secure the attendance of these witnesses, and explained his failure to produce them upon the trial, and enabled the court to understand the cause of the omission to bring before it the best evidence. Considered from any stand-point, we cannot see how their introduction prejudiced the appellant. The judgment is affirmed, with costs.

HARWOOD and DE WITT, JJ., concur.

JOURNAL PUB. CO. v. KENNEY, State Auditor.

(*Supreme Court of Montana.* April 14, 1890.)

STATE LIABILITIES — APPROPRIATIONS — CONSTITUTIONAL LAW — MANDAMUS.

Const. Mont. art. 12, § 10, provides that no money shall be drawn from the state treasury except upon specific appropriations made by law. Comp. St. Mont. div. 5, § 1636, passed before the adoption of the constitution, provides that the governor and auditor shall examine the itemized account of the contractor for territorial printing, and, if they find it correct, "the auditor shall draw his warrant for the payment of the same." *Held* that, under said constitutional provision, the auditor could not be compelled by mandate to draw such warrant until the state legislature had made an appropriation therefor.

Appeal from district court, Lewis and Clarke county; W. H. HUNT, Judge.

McCutcheon & McIntire, for appellant. H. J. Haskell, Atty. Gen., for respondent.

BLAKE, C. J. This is an appeal from the order of the court below denying the application of the relator for a writ of mandate to compel the auditor of the state to draw his warrant on the treasurer of the state in payment of an account. The affidavit, which accompanies the application, is not controverted, and recites the following facts: The Journal Publishing Company entered March 11, 1889, into a contract with the territory of Montana to do all the printing therefor, which is required by law. The account of the printing and advertising done by this company for the inspector of mines, an officer of the state, under the contract, amounted to the sum of \$389.39, and was presented March 1, 1890, to Kenney, the auditor of the state. This

account was examined by the governor and auditor of the state, and found to be correct, March 4, 1890. Afterwards a demand was made of the auditor that he should draw his warrant on the treasurer of the state for the amount of the account in favor of the company, and the auditor refused to perform this act. Upon the hearing of the application, it was adjudged that the writ of mandate be denied upon the ground that the foregoing facts do not entitle the relator to this remedy. It is conceded that the claim of the relator against the state is valid, and the defense of the respondent is based upon the failure of the legislature to make an appropriation for its payment.

The provisions of the constitution, which are applicable to this controversy, declare that "no money shall be paid out of the treasury except upon appropriations made by law, and on warrant drawn by the public officer in pursuance thereof, except interest on the public debt." Section 34, art. 5. "No money shall be drawn from the treasury, but in pursuance of specific appropriations made by law." Section 10, art. 12. In *State v. Hickman*, 23 Pac. Rep. 740, it was decided that a clause of the constitution which fixed the salary of the secretary of state, and prescribed the times of its payment, was an appropriation made by law. It is obvious that this principle does not determine the question before us. The statute specifies the prices which shall be paid for the printing that has been authorized by the contract between the relator and the territory. Comp. St. div. 5, c. 98. The law further provides that the governor and auditor shall examine the "itemized account" of the contractor which shall be rendered "once in each month," and, "if they find it to be correct and in accordance with the provisions of this chapter, the auditor shall draw his warrant on the territorial treasurer for the payment of the same." Id. § 1636. "The auditor of the territory is hereby empowered to issue territorial warrants, drawn upon the treasury of the territory, in favor of all persons to whom the legislative assembly of the territory may direct." Id. c. 64, § 1122. The obligations of the territory, under the terms of the contract with the relator for the public printing, have been assumed by the state, and the constitution in the most solemn manner protects and enforces the rights of individuals, associations, and corporations which existed at the time when Montana was admitted into the Union. Article 20, schedule, §§ 1, 2, 9, 10, 12. This historic event operated as a repeal or amendment of "all laws enacted by the legislative assembly of the territory of Montana and in force" which were inconsistent with the constitution of the state. Article 20, schedule, § 1. The writ of mandate shall be issued "to compel the performance of an act which the law specially enjoins as a duty resulting from an office." Code Civil Proc. § 566. Are the foregoing provisions of the statute concerning printing consistent with the constitution? There is no law which appropriates in express language a certain sum for the payment of the claim of the relator. Is the auditor empowered,

after the admission of the state into the Union to draw his warrant according to the territorial statute, *supra*?

The constitution of the United States provides that "no money shall be drawn from the treasury but in consequence of appropriations made by law." Article I, § 9. The leading case upon the interpretation of this clause is *Reeside v. Walker*, 11 How. 272. This was a petition for a writ of *mandamus* to direct the secretary of the treasury to enter upon the books of his department the sum of \$188,496.06 to the credit of, and to pay the same to, the plaintiff. Upon the trial of another action, the jury returned a verdict, and certified that the United States was indebted in this amount to James Reeside. A final judgment was entered in his favor therefor, which was in full force when this proceeding was commenced by his executrix. Mr. Justice WOODBURY, as the organ of the court, said: "No officer, however high, not even the president, much less a secretary of the treasury or treasurer, is empowered to pay debts of the United States generally, when presented to them. If, therefore, the petition in this case was allowed so far as to order the verdict against the United States to be entered on the books of the treasury department, the plaintiff would be as far from having a claim on the secretary or treasurer to pay it as now. The difficulty in the way is the want of any appropriation by congress to pay this claim. \* \* \* Hence the petitioner should have presented her claim on the United States to congress, and prayed for an appropriation to pay it. If congress after that make such an appropriation, the treasury can, and doubtless will, discharge the claim without any *mandamus*; but without such an appropriation it cannot and should not be paid by the treasury, whether the claim is by a verdict or judgment, or without either, and no *mandamus* or other remedy lies against any officer of the treasury department, in a case situated like this, where no appropriation to pay it has been made. The existence of this other and ordinary mode of redress by resort to congress may be another reason against a *mandamus*, as that lies only when no other adequate remedy exists. *Marbury v. Madison*, 1 Cranch. 137; *Kendall v. U. S.*, 12 Pet. 525."

The history of this vital clause of the constitution forms a grand part in the struggle for liberty between the people and monarchs of England. In *Magna Charta* it is confirmed that "no scutage or aid shall be imposed in our kingdom unless by the general council of our kingdom." In 1688, the act "for declaring the rights and liberties of the subject and settling the succession of the crown," (or bill of rights,) declared "that levying money for or to the use of the crown by pretense of prerogative, without grant of parliament, for longer time, or in other manner, than the same is or shall be granted, is illegal." Words have changed in signification during the progress of time, but the principle has not been modified, and this bulwark of freedom has been preserved in the constitutions of the states of the Union. The decisions are in harmony with the doc-

trine of *Reeside v. Walker*, supra, although there have been dissensions respecting the acts of the legislative department to ascertain whether they are in legal effect appropriations. The supreme court of Indiana in *Ristine v. State*, 20 Ind. 328, held that the interest upon the public debt of the state could not be paid without a specific appropriation by the legislature. Mr. Justice PERKINS, in the opinion, says: "There are some things which, plainly enough, are not severally an appropriation. A promise by the government to pay money is not an appropriation. A duty on the part of the legislature to make an appropriation is not such. A promise to make an appropriation is not an appropriation. The pledge of the faith of the state is not an appropriation of money with which to redeem the pledge. \* \* \* Appropriation, as applicable to the general fund in the treasury, may perhaps be defined to be an authority from the legislature, given at the proper time and in legal form, to the proper officers, to apply sums of money, out of that which may be in the treasury in a given year, to specified objects or demands against the state. An appropriation of the money to a specified object would be an authority to the proper officers to pay the money, because the auditor is authorized to draw his warrant upon an appropriation, and the treasurer is authorized to pay such warrant if he has appropriated money in the treasury." In *Swann v. Buck*, 40 Miss. 298, Mr. Justice ELLETT delivered the opinion, and said: "The only remedy for a debt due by a state is by an application to the legislature to make an appropriation for its payment. Indeed, no money can be drawn from the treasury but in consequence of such an appropriation. \* \* \* The grants and executed contracts of a state are contracts within the protection of the constitution. But its executory contracts, such as promises to pay money, and the like, have no other than a moral sanction, and depend upon good faith for their performance." See, also, *State v. Wallichs*, 12 Neb. 407, 11 N. W. Rep. 860; *State v. Wallichs*, 15 Neb. 609, 20 N. W. Rep. 110; *State v. Babcock*, 18 Neb. 221, 24 N. W. Rep. 683; *Stratton v. Green*, 45 Cal. 149; *Marshall v. Dunn*, 69 Cal. 223, 10 Pac. Rep. 399; *Brown v. Fleischer*, 4 Or. 132; *People v. Burrows*, 27 Barb. 89; *People v. Tremain*, 29 Barb. 96.

Upwards of 20 years ago the supreme court of the territory in *Langford v. King*, 1 Mont. 38, thus expressed the law through Mr. Justice KNOWLES: "There is, then, no legal power to enforce territorial contracts. In other words, there is no obligation in territorial contracts. They rest simply upon the good faith of the territory." The case of *Fisk v. Cuthbert*, 2 Mont. 593, which is cited by the appellant, is rendered inapplicable by the adoption of the constitution of the state. We conclude from the authorities, supra, that the respondent cannot draw his warrant upon the treasurer of the state in payment of the claim of the relator, in the absence of an appropriation by law. The foregoing prohibitions of the constitution refer to the auditor as well as the treasurer, and

any other officer who is empowered to disburse the public funds, in pursuance of a lawful appropriation. To this extent the statute regulating printing, which requires the drawing of a warrant after the "itemized account" has been found correct by the governor and auditor, cannot be enforced at this time. The relator must apply to the legislative assembly of the state for relief, and this, according to the precedents, appears to be the "plain, speedy, and adequate remedy." It is therefore ordered that the judgment of the court below be affirmed, with costs.

HARWOOD and DE WITT, JJ., concur.

MAXFIELD v. WEST *et al.*

(Supreme Court of Utah. April 12, 1890.)

PAROL CONTRACT—STATUTE OF FRAUDS—EQUITY PRACTICE.

1. A parol sale of land without delivery of possession is void, even though part of the purchase money is paid.

2. A decree which is supported by the evidence as a whole will not be reversed because some of the findings of the court are not thereby supported.

Appeal from district court, first district; H. P. HENDERSON, Judge.

For former hearing, see 23 Pac. Rep. 754.

*Sutherland & Judd*, for appellant. *A. R. Haywood*, for respondent.

BLACKBURN, J. We adhere to the opinion that the contract this action seeks to enforce is a parol contract for the purchase of land with a part payment of the purchase money, and is within the statute of frauds, and cannot be enforced in a court of equity. But the contention of counsel is that the finding of facts by the court below are not supported by the evidence, and on that account the cause should be remanded, and a new trial be had, even if the decree is right and fully supported by the evidence. This contention cannot be maintained. This is a suit in equity, and, even if the findings of the court below have the force under our statute of the verdict of a jury, it does not follow that the decree should be set aside and a new trial ordered, where the decree is the one that ought to be made on the evidence. The fundamental principles and doctrines of courts of chancery are not abolished by the new procedure; their practice is only modified to a limited extent. 1 Pom. Eq. Jur. § 84; *Improvement Co. v. Bradbury*, 132 U. S. 509, 10 Sup. Ct. Rep. 177. In an equity cause, the findings of a jury are not binding on a chancellor. He may do any one of three things in reference thereto: He may set aside the verdict of the jury, and order a new trial; he may set the findings aside; or he may pay no attention to them, and render the decree the evidence justifies. *Improvement Co. v. Bradbury*, supra. Therefore, if the findings of the court in a cause in equity have the force of the findings of a jury, the court may disregard them, and render the proper decree; and error cannot be assigned upon these findings; and the appellate court should not be governed by these findings when all the evidence in the case

is in the record. It need only look into the evidence, and see that the proper decree is made. It would be a legal monstrosity if an appellate court was compelled to set aside a proper decree made on the evidence, and order a new trial, because the court below blundered in any or all of its findings. A rehearing must be denied.

ZANE, C. J., and ANDERSON, J., concur.

BATES *et al.* v. WILSON *et al.*

(Supreme Court of Colorado. Jan. 20, 1890.)

TRUSTS—CORPORATIONS—ORGANIZATION—STOCK—ESTOPPEL.

1. Plaintiff and defendant entered into a contract whereby defendant was to buy certain mining property, and plaintiff was to perfect the title by foreclosing a certain trust-deed on the property, and buy it at foreclosure sale, and was also to obtain patents, the proceeds of the property to be used first to reimburse defendant, and then plaintiff, and the residue to be divided between them. *Held* that, upon purchase by defendant, plaintiff became vested with a beneficial interest in the property; the performance of the contract by him not being a condition precedent to his acquiring such interest.

2. A certificate of incorporation which provides that the corporate affairs shall be controlled by its president, vice-president, and attorney, instead of providing for a board of directors or trustees, as required by Gen. St. Colo. 1883, § 233, is insufficient to create a corporation *de jure*.

3. One who has signed such certificate, has conveyed property to the company, and has acted as one of its officers, is estopped from denying its *de facto* existence.

4. Where three owners of mining property, each owning an undivided one-third interest, organize a corporation, and convey to it the said property in payment for all its stock, which, by the certificate of incorporation signed by the three, is to be "divided half and half between the parties," each incorporator is entitled to one-third of the capital stock.

Commissioners' decision. Appeal from district court, El Paso county.

L. C. Rockwell, for appellants. Hugh Butler, for appellees.

PATTISON, C. The judgment appealed from in this case was rendered June 26, 1886. It was found by the court that "the equity of this case is not with the said plaintiffs, but is with the said defendants." There was no other finding. The decree, dismissing the bill, was predicated upon this finding alone. To determine the appeal, therefore, a review of all the evidence is necessary. The trial having been had entirely upon depositions, it is the duty of the court, not only to sift and weigh the testimony, but to consider the whole case, not only upon the law, but upon the facts as well. *Jackson v. Allen*, 4 Colo. 263; *Miller v. Taylor*, 6 Colo. 41; *Sieber v. Frink*, 7 Colo. 148, 2 Pac. Rep. 901; *Bank v. Newton*, 22 Pac. Rep. 444, (not yet officially reported.)

There is a conflict of evidence upon all, or nearly all, the issues in the case. A discussion of the testimony in detail is impracticable. The entire record, however, has been rigidly examined, and the conclusions reached are the result of careful investigation and analysis. The evidence tends to show that prior to November 1, 1884, George R. Gwynn and James Moynahan

claimed to be the owners of eight certain lode mining claims, situate in the county of Park, which had been theretofore the property of the Great West Mining Company. The interest of Gwynn was an undivided two-thirds, and that of Moynahan an undivided one-third. They derived their title from sheriff's deeds, issued to them as purchasers at execution sales, upon judgments recovered against the Great West Mining Company. No part of the property had been patented. The validity of the title was doubted, on account of the irregularities in the judgments. The property was subject to a trust-deed, which had been made by the Great West Mining Company in April, 1882, to secure the payment of a promissory note given to one Duncan McBride, for the sum of \$3,000, with interest at the rate of 1½ percent. per month. Two thousand dollars had been paid upon the note. The mining company was insolvent, and could make no further payment. Prior to the month of October, 1884, this note and trust-deed had been placed in the hands of George C. Bates, one of the original plaintiffs in this case, for collection. Gwynn, through Bates, as the attorney for McBride, had agreed to purchase the note, and had employed him to institute suit in the federal court to foreclose the trust-deed. The purpose of the foreclosure was to perfect the title to the property. In October, Gwynn decided to sell the property. He claimed to represent his own interest, and also that of Moynahan. He authorized Bates to negotiate a sale. The price and terms do not appear to have been definitely settled when the authority was given. Gwynn proposed to sell the entire property, and any interest which he had acquired in the McBride trust-deed and note by his arrangement with Bates. Pursuant to this authority, Bates, prior to November 1, 1884, brought the property to the attention of the defendants Alfred H. and Randall W. Wilson. They were engaged in business as grocers, in this city. They became interested, and during November, Alfred H. Wilson went to Park county to examine the property. After the examination, they decided to take the property, if it could be purchased at a reasonable price. Before the purchase was made, negotiations were had between Bates and the defendants, for the purpose of making some arrangement or agreement under which Bates might also acquire some interest in the property. These negotiations resulted in a parol contract, by the terms of which Bates undertook to negotiate the purchase of the property upon the best terms possible. He also undertook to prosecute the suit brought to foreclose the McBride trust-deed to final judgment, at his own expense. He further agreed to pay the amount of the judgment, and to purchase the property for the benefit of the parties at the sale to be had under the decree. He also agreed to apply for and obtain patents to the entire property, at his own expense. He also undertook to render such legal services as might be required in the defense of the title, and to protect the interests of the parties. The Wilsons agreed that they would advance the money



to pay for the property. It was further mutually agreed that, if the purchase should be made pursuant to the agreement, the title should be taken in the name of the defendants Alfred H. and Randall W. Wilson, to be held by them for the joint interest and benefit of the three; that from the proceeds of the property the amount advanced by the defendants to purchase the property should first be paid; the amount paid by Bates to perfect the title under the decree of foreclosure was next to be paid; the expenses incurred by him in obtaining the patents and reasonable compensation for legal services should then be allowed; and thereafter the property should be worked for the joint interest and benefit of the three parties. After this arrangement was made, Bates transferred to his wife, Mary Barker Bates, one-half of the interest which he expected to acquire. The negotiations for the property with Gwynn were had pursuant to this agreement. A contract for the purchase of his interest was made on or about the 5th day of December, 1884. Prior to that time, Moynahan had denied Gwynn's authority to represent him, and negotiations were had with him independently. By the terms of the contract with Gwynn, the parties agreed to pay the sum of \$6,194 for his interest in the property, and his right to purchase the McBride trust-deed; \$2,000 of this sum was paid in cash, and the balance was to be paid 45 days thereafter. Gwynn thereupon executed a deed, conveying his interest in the property, which was placed in escrow in the First National Bank of Denver, to be delivered to Alfred H. Wilson and Randall W. Wilson upon the payment of the sum of \$4,194, the balance of the purchase price. The interest of Moynahan was purchased on December 6, 1884, for the sum of \$2,000. Five hundred dollars of this sum was to be paid on December 16, 1884; \$1,000 on January 16, 1885; and the balance of \$500 on February 3, 1885. Moynahan duly executed a deed to his interest upon December 6, 1884, which deed was placed in escrow in the Colorado National Bank, and there remained until the several sums mentioned were paid, when it was delivered to Alfred H. and Randall W. Wilson. At the time this purchase was made the property was in the possession of a lessee. The lease was to expire at noon on December 8th. Gwynn agreed to deliver possession of the property to the Wilsons immediately upon the expiration of the lease, and entered into a contract with them to work the mines until they could take charge of the business themselves. By the terms of this agreement he was to receive \$5 per day for his services, and to account for the entire proceeds of the property. By these transactions, the Wilsons acquired the legal title to the premises in question, and became entitled to the possession of the property on December 8, 1884.

December 8, 1884, Gwynn took possession of the property as the representative of the defendants. The mines were then very productive. Gwynn violated his contract in every particular. He began to work the property, but failed to account

for the proceeds, and failed to keep the Wilsons advised of his operations. Early in January, 1885, Bates went east, and did not return until about the 1st of March. The balance of the purchase price was due to Gwynn on or about the 14th of January, 1885. Before that day arrived the Wilsons, believing that Gwynn, in violation of his contract, had taken from the property more than sufficient money to pay this balance, and in order to get time to investigate, obtained from Gwynn an extension of the time to March 3, 1885. The balance due to Moynahan was paid in accordance with the terms of the agreement with him. Bates being absent, nothing was done by the Wilsons to protect their rights as against Gwynn until his return. In the interval, Gwynn actually realized from the property, more than \$20,000. When Bates returned, he determined to commence suit against Gwynn at once to recover this money. As a first step, however, it was thought necessary to obtain the deed, which was still in the First National Bank in escrow. A bill was filed in the district court of Arapahoe county, and an injunction obtained, restraining Gwynn from working the property, and also enjoining the First National Bank from paying over to Gwynn the amount of money which was then deposited, for the purpose of obtaining possession of the deed. Gwynn appeared, and answered the complaint, setting up as defenses that, by the failure of the Wilsons to pay the purchase price in accordance with the terms of the contract, they had forfeited their interest in the property, and that the subsequent payment to the bank was not a good payment, because the bank was enjoined from paying the money over to him. This suit was settled by the practical surrender to Gwynn of all that beclaimed. Defendants insist that Bates was guilty of a violation of his agreement to defend the title to the property, and protect the interest of the Wilsons, because the compromise was made upon the unjust terms demanded by Gwynn. It is clear, however, from the evidence, that the Wilsons settled with full knowledge of their rights, believing that it would be best to obtain possession of the mine upon any terms, rather than enter into protracted litigation. By the settlement, they received one-third of the net proceeds which Gwynn realized from the mines; it being conceded that the one-third belonged to them, as owners of the Moynahan interest. This amounted to about \$3,500. After this settlement, the parties acquired undisputed possession of the property, and immediately began the prosecution of the enterprise under their contract. Bates began to take the necessary steps to obtain patents for the property. He also continued the prosecution of the suit in equity brought to foreclose the McBride trust-deed. Prior to April 1, 1885, after some discussion, the parties agreed to organize a body corporate for the purpose of conducting their common business. On or about April 7, 1885, a certificate of incorporation was prepared by Bates, which was executed by him and by the Wilsons upon that day. On account of the importance of this instrument in



evidence, and the effect which it is claimed to have upon the rights of the parties, the material parts of the certificate are here stated in full: "First. The corporate name of said company is the Woodmass of Alston Mining Company. Second. The object of such corporation is the working, operating, buying, and selling ore, and leasing mines of gold and silver, in Park and other counties, in Colorado; buying, selling, and smelting ore in all parts of Colorado; and doing a general mining business in said state. Third. The capital stock is \$500,000, divided into 50,000 shares, of \$10 for each share, divided half and half between the parties. Fourth. The company shall exist for 50 years. Fifth. That the affairs and management of said corporation are to be under the control of Alfred H. Wilson, president, financial agent, and treasurer; Randall W. Wilson, vice-president; and George C. Bates, attorney, secretary, and accountant,—who are selected to act as such officers to manage the affairs and concerns of such corporation until May 1, 1886. Sixth. The operations of said corporation to be carried on in Park county. The principal place and business office is located at Alma, with a branch office in Denver. Seventh. The president, vice-president, and attorney have power to make by-laws as they deem proper, and no stock shall be issued or delivered except by their joint action in writing." This certificate was duly executed, acknowledged, and filed in the office of the secretary of state, and a copy thereof in the office of the clerk and recorder of Park county. Upon the following day, a deed was made and executed by the Wilsons, conveying to the body corporate the entire property acquired from Gwynn and Moynahan. The consideration expressed in the deed is \$500,000. This sum represents the entire capital stock of the company. This deed was duly recorded. At the time the deed was made the corporation had not been organized.

After filing the certificate, and until the bringing of this suit, the business of these parties seems to have been conducted in the name of this corporation, to-wit, the Woodmass of Alston Mining Company. Bates spent a considerable portion of his time at Alma, in the business of the company. He continued to take the steps deemed to be necessary by him to obtain patents for the property. It appears, however, that at about this time the parties decided not to apply for patents until after the sale under the trust-deed. The mines were worked with varying success. Mary Barker Bates was recognized by the Wilsons as a party in interest. Bates appears to have taken several hundred dollars with the consent of the defendants. In May, 1885, Bates obtained a decree of foreclosure of the McBride trust-deed. By this decree it was adjudged that there was due to McBride the sum of \$1,916, and it was further adjudged that, if the defendant the Great West Mining Company should fail to pay this sum and costs of suit within 30 days from the date of decree, then the property should be sold. Under this decree the property was advertised to be sold at Alma upon the 15th day

of August, 1885. William M. Burns, sheriff of that county, was appointed a special master in chancery to make the sale. The defendant Alfred H. Wilson and George C. Bates attended the sale. Prior to that time, no serious controversy appears to have arisen between the parties. It had been claimed by defendants that they had been misled in executing the articles of incorporation, with the clause therein declaring that the stock should be "divided half and half between the parties." They contend that Bates was to receive but one-third of the capital stock, and that his right to any interest therein was entirely dependent upon his performance of the contract entered into at the time the original purchase was made. It appears, however, that this controversy did not seriously interfere with the relations of the parties, and that they continued their operations together, the same after as before the misunderstanding arose. Upon the day of the sale Bates did not have the money to pay the amount of the decree. He therefore proposed to Wilson to bid for the property the amount found due by the court, in the name of his client Duncan McBride. His purpose seems to have been to bid in the property, and afterwards secure the certificate of purchase from McBride, before the time to redeem had expired, for the benefit of the company. He claimed that, under his arrangement with McBride, he could control the certificate. Wilson objected to this course. He proposed to buy the property individually. Bates would not consent. Finally it was agreed that Wilson should bid as president of the Woodmass of Alston Mining Company, and buy the property for the company. Before the sale took place it had been arranged between Wilson and the special master that the money should be paid to him some days thereafter. The sale was made and the property was sold to the corporation for the sum of \$2,300. After the sale, Wilson demanded that Bates should provide the money to pay for the property, as he had agreed to do under the contract. This he would not or could not do. Wilson refused afterwards to pay his bid. In his testimony he states, as a reason for his refusal, that he had become satisfied that the trust-deed had been paid; that nothing was due thereon; and that he desired an opportunity to investigate. After this attempted sale, the parties continued the business of working the mines as before. A resale was ordered, which was advertised to take place upon October 16th. Bates and defendant Alfred H. Wilson, accompanied by counsel, attended the second sale. Bates again proposed to bid off the property for the amount of the decree, in the name of his client McBride. To this Wilson strenuously objected, and a serious controversy arose between the parties. They were not able to agree as to the manner of conducting the sale. When the property was offered by the special master, Wilson bid for the property the sum of \$2,600. He then demanded that the master should immediately deliver to him a certificate of sale. The master declined to do this until the money had been paid to

him, assigning, as a reason, that Willson had failed to complete his bid and pay the money at the first sale. As a result of this controversy, Willson was permitted to withdraw his bid, and made a second bid, which was also withdrawn, because the master again refused to deliver the certificate until he had received the money. The property was again offered for sale, and was bid off by Willson individually, and the money paid over. Bates violently objected to this course, and threatened to have the sale set aside, but upon what grounds it does not appear. Willson was permitted to withdraw his money, and the property was thereupon again offered. Bates bid the amount of the decree in the name of McBride, and received the certificate of sale. This certificate was forwarded by Bates to his client. Whether any arrangement was made by him to pay to McBride the amount due him, and take the certificate before the time for redemption should expire, does not clearly appear. Prior to the sale, a serious controversy had arisen between the parties. The defendants first insisted that the complainant Mary Barker Bates had no interest in the property, either as a stockholder or otherwise. They also claimed that Bates was without a present interest in the property, for the reason that his interest was conditional, and could not vest until he had performed his contract, obtained patents for the property, and provided for the payment of the McBride trust-deed. It appears that, at or about the time of the sale, the defendants had refused to permit Bates, or any one representing him, to enter upon the premises. Thereupon, and on the 17th of October, 1885, this suit was begun.

The action was originally brought by the complainants, as the owners of one-half of the capital stock of the company. Their claim to relief was entirely predicated upon their relations to the corporation as stockholders. They alleged that they were the owners of one-half of the capital stock; that the defendants denied their interest, and interfered with the exercise of their rights. They prayed for an injunction, for the appointment of a receiver, and for other relief. A writ of injunction was issued at the time the bill was filed, and afterwards, upon motion, Nathan S. Hurd was appointed receiver of the property. To the complaint a demurrer was first interposed, which was overruled, and, after the appointment of a receiver, the defendants answered. By their answer, most, if not all, of the material allegations of the complaint were put in issue. As affirmative matter, it was averred that a contract had been entered into between the defendants and Bates substantially the same in its terms as the contract already recited, except that the interest which Bates was to acquire was an undivided one-third interest, and the further important exception that the performance of all of his covenants and agreements was a condition precedent to his obtaining any interest whatever in the property. There are many allegations which charge Bates with misrepresentation, misconduct, fraud, and bad faith.

As these allegations are not sustained by the evidence, they are not deemed material. All the material allegations of the answer were put in issue by the replication. The trial was had upon all the issues presented by the pleadings. A very large part of the testimony was taken prior to the 11th of February, 1886, upon which day George C. Bates died.

March 23d, by leave of court, an amended complaint was filed by Mary Barker Bates, as surviving plaintiff, in her own right, and as widow and only heir at law and executrix to the last will and testament of George C. Bates, deceased. In this complaint the contract alleged to have been entered into by George C. Bates in his life-time is set forth in detail. It is also alleged that, pursuant to said contract, the plaintiff had caused to be prepared an application for patents upon the property, and presented the same to Alfred H. Willson, as president of the corporation, with the request that he duly sign the same, but he refused so to do. It is further alleged that the plaintiff was ready and able to carry out all the terms of the agreement, and ready and willing to pay the amount due McBride, and to obtain the certificate of sale for the use of the company; that the costs of the foreclosure and sale, amounting to \$190, had been duly paid. June 14, 1886, a supplemental complaint was filed by leave of court, in which it is alleged, in substance, that since the filing of the amended complaint the plaintiff had purchased the McBride certificate of sale for the benefit of the defendant corporation. To this supplemental complaint the defendants answered that the said certificate had not been acquired by the said plaintiff, but by Lewis C. Rockwell, her attorney, for the purpose of harassing and oppressing the defendants, etc.

Upon the trial of these several issues, it appeared that the plaintiff Mary Barker Bates had, through her attorney, Mr. Rockwell, entered into negotiations with McBride, some time prior to April 14, 1886, the day upon which the right to redeem would expire, and that such certificate was actually received by Rockwell on the morning of April 14, 1886; that he then went directly to the residence of Alfred H. Willson, to inform him that he had received the certificate; that Willson was not at home, having left the city the night before to go to Park county, for the purpose of finding Mr. Burns and redeeming the property from sale; that Willson did pay to Burns the amount of the decree, judgment, and costs; and that the master thereafter paid the same into court. Before the conclusion of the trial, the certificate was presented to and filed with the court, as evidence of the performance of the original contract between the parties. At the time the decree was rendered, the situation of the parties seems to have been about as follows: Mrs. Bates had caused the application for patent to be prepared and presented to the defendants to be signed by them as officers of the corporation, but they declined to sign the application. The certificate of purchase had been obtained from McBride, the amount due him having been paid. The certificate was tendered to

the court for the benefit of the parties in interest. The property, from the time the suit was begun until the decree was rendered, had been in the possession of and operated by the receiver. It appears that the net proceeds of the property during the receivership amounted to about the sum of \$19,400. By the terms of the decree, the bill of complaint was dismissed, the receiver was directed to pay over to Alfred H. Wilson and Randall W. Wilson the sum of \$16,000, and to apply the balance to the payment of the costs and expense of the receivership. From this decree this appeal was taken.

In the application of equitable principles to the facts stated, it is necessary, first, to determine the nature of the contract entered into by George C. Bates and Alfred H. Wilson and Randall W. Wilson, and the relations and rights of the parties under that contract. The evidence tends irresistibly to establish the fact that the terms of the contract were settled and agreed upon before or at the time the negotiations with Gwynn and Moynahan for the purchase of the property began. The conditions upon which the parties were to join in the enterprise were clearly and well defined. The mutual promises which sustained and supported the agreement were clearly understood. The negotiations for the purchase were to be carried on by Bates. He undertook to acquire the title, vested in Gwynn and Moynahan together with Gynn's right to purchase the trust-deed, upon the best terms that could be secured. The Wilsons did not agree to purchase the property upon any terms, but upon terms which might be satisfactory to them. If Bates secured favorable propositions from Gwynn and Moynahan, then the Wilsons, if necessary, were to advance money sufficient to pay the entire purchase price of the property. Having secured the title of Gwynn and Moynahan, it was the duty of Bates, at his own expense, to perfect that title by foreclosure and sale under the McBride trust-deed, and also to obtain letters patent from the United States. When the property had been secured, the title was to be held by Alfred H. Wilson and Randall W. Wilson for the benefit and mutual interest of all concerned. The relation which resulted was in the nature of a mining partnership. That it was so understood by the parties is clear from the evidence of all three, as to the reasons which induced them to form a corporation, to the effect that they sought to avoid liability as partners.

The contract being a valid one, and sustained by sufficient consideration, and having been entered into prior to the purchase, it necessarily follows that, when Gwynn and Moynahan conveyed their title to A. H. and R. W. Wilson, the property was acquired, charged with a trust of which the three parties to the precedent agreement were beneficiaries. The subject of the trust was the property in controversy. The terms of the trust were settled by the contract. The rights of the beneficiaries, to participate in the proceeds of the mines, were dependent upon the performance of their several undertakings. Before Bates could participate in the pro-

ceeds of the property, the defendants were entitled to receive the entire amount of money which they had advanced to pay the purchase price. When that sum had been realized by them, Bates was entitled to be reimbursed for the expenditure made by him in and about obtaining the patents and the satisfaction of the trust-deed. The performance of these undertakings, however, were none of them to be conditions precedent to the acquisition of an interest in the enterprise. If, by the operation of the mines, a sufficient amount was realized to pay the amount advanced by the Wilsons, as cash payments, and the balance of the purchase price as it became due, they were clearly entitled to make that application. If, after the payment of those sums, there remained sufficient of the net proceeds to pay the expense of obtaining patents and the payment of the McBride trust-deed, then Bates became entitled to such proceeds. The interests of the parties, after the terms of the contract had been settled and agreed upon, and the property acquired pursuant thereto, were present, and not contingent, interests. The parties all became beneficiaries by virtue of the contract, as soon as the legal title was acquired. That this was the legal effect of the contract is manifest. That it was so understood by the parties is affirmed and emphasized by nearly every written communication which passed between them until the controversy arose which preceded this litigation. Performance of the several covenants and agreements made by them was not a condition precedent, but a condition subsequent, to the acquisition of an interest in the enterprise. It was a condition which did not affect the legal title of the parties, but their right to enjoy the equitable interest and benefits of the estate created by the contract. The agreement was not in the nature of a contract by the Wilsons to sell and convey to Bates an interest in the property. Bates acquired the interest as soon as the property was purchased pursuant to the contract. This suit is not in the nature of a suit for specific performance. On the contrary, it is a suit brought to restrain defendants from interfering with complainants in the enjoyment of the beneficial estate, the right to which sprang into being as soon as the property was acquired. If Bates was guilty of inequitable conduct, if the complainants failed to discharge the obligations imposed by the contract, the interest was not thereby forfeited. The defendants could not arbitrarily terminate the trust. This could be done only by suit, involving an accounting and the settlement and adjustment of the rights of the parties as beneficiaries, as defined by the terms of the contract itself. If it appeared that a reasonable time had elapsed, and that Bates had failed to perform his contract, or that he had been guilty of conduct so fraudulent or inequitable as to warrant a forfeiture of his interest, then, by decree, the trust could be terminated, and, but for the conveyance to the corporation, the effect of which will be discussed hereafter, the defendant declared to be vested, not only with the legal title, but with the beneficial

estate as well. It is clear that the parties proceeded, under the contract, from December to April, with a clear understanding of their mutual rights and duties.

The next question presented is the effect upon the rights of the parties, resulting from the attempt to organize a corporation. If a body corporate was in fact created, and if by the conveyance of the legal title to that body, which was made by the Wilsons, the corporation actually acquired the property, the effect of that transaction would be clear and unmistakable. The corporation would then have become trustee in place of A. H. and R. W. Wilson. Such is always the relation between a body corporate and its stockholders. The interest of the parties in the capital stock of the company should then have been taken and considered as a substitute for their interest in the body of the property itself. Instead of beneficiaries under a trust, their legal *status* became that of stockholders of a corporation.

First, then, was a body corporate in fact created? This may well be doubted. It is unnecessary to define or discuss the nature of a corporation in this connection. In this state, corporations are organized under the general laws, and are therefore creatures of statute, and can be brought into existence only by substantial compliance with statutory provisions. The statute is in the nature of a general grant of the right to exercise corporate franchises to such persons as may comply with its terms. The certificate of incorporation constitutes the evidence of the acceptance of the terms and conditions contained in the statute. After it has been duly filed, it is the only evidence of the existence of a corporation *de jure*. The requisites of the certificate are clearly stated in the second section of the statute. Gen. St. 1883, § 238.

If any one of these statutory requirements is omitted, such omission is a fatal defect, and confers no *de jure* right to exercise corporate franchises. Tested by this provision of the statute, the certificate in question is clearly insufficient. Disregarding the omissions, which may be considered as mere irregularities, upon examination it will be found that one of the essential requisites of corporate existence does not appear. It contains no provision for directors, trustees, or any governing body. By its fifth provision, the control and management of its affairs are vested in Alfred H. Wilson, president, Randall W. Wilson, vice-president, and George C. Bates, attorney, etc. These officers can in no sense be regarded as a board of directors. In all regularly constituted corporations, they are elected by and are executive officers of the board of directors or trustees. The corporation consists of its shareholders. The control of its affairs is vested in a board of directors. The shareholders elect this board, except for the first year. The number of directors and their names for the first year must be inserted in the certificate. The body corporate can be regularly organized only by and through its directors or trustees. It is their duty to select the officers, who in this instance are named in the certificate.

This corporation was not regularly organized. The legal right, therefore, to exercise franchises as a corporation *de jure*, was not secured. If the defendants were in a position to question the validity of the certificate in question, or to challenge the right of the corporation to exercise corporate franchises, or its capacity to take title to property, they might successfully do so. Mining Co. v. Herkimer, 46 Ind. 142; Reed v. Railroad Co., 50 Ind. 842; Harris v. McGregor, 29 Cal. 124; People v. Selfridge, 52 Cal. 331; State v. Central, etc., Ass'n, 29 Ohio St. 399; Abbott v. Refining Co., 4 Neb. 416; Stowe v. Flagg, 72 Ill. 397; Bigelow v. Gregory, 73 Ill. 197; Doyle v. Mizner, 42 Mich. 332, 3 N. W. Rep. 968.

But can the defendants be permitted to raise this question? They participated in the organization of this company. They conveyed the property in controversy to the company. For many months they conducted the common business, in the name of and as officers of the company. Until after the institution of this suit, they never questioned its legal existence. Are they not estopped from denying the existence of the body corporate as a corporation *de facto*? This question must be answered in the affirmative. The principles which must control in the determination of this question have already been settled by this court in Duggan v. Investment Co., 11 Colo. 113, 17 Pac. Rep. 105. The following authorities also lay down a like doctrine: Baker v. Neff, 73 Ind. 68; Close v. Glenwood Cemetery, 107 U. S. 466, 2 Sup. Ct. Rep. 267; Hasenritter v. Kirchhoffer, 79 Mo. 239; Tayl. Corp. § 145 et seq.

The rule and the reason for it cannot be better stated than in the language of Cooley, J., in Swartwout v. Railroad Co., 24 Mich. 389: "It will be seen that the associates, under a statute which authorized them to incorporate themselves, had taken steps for that purpose, had assumed that the purpose was accomplished, and had for some time exercised corporate powers. The defendant was one of their number. He had acted with the rest in laying claim to corporate authority, and he had made payments on the assumption that the claim was well based. \* \* \* The original associates, together with those with whom they became united by the consolidation, were unquestionably a corporation *de facto*, whether they were such *de jure* or not; and, as a corporation in view of the facts in proof, it is reasonable to presume they had contracted debts and incurred obligations. \* \* \* Where there is thus a corporation *de facto*, with no want of legislative power to its due and legal existence; where it is proceeding in performance of corporate functions, and the public are dealing with it on the supposition that it is what it professes to be, and the questions suggested are only whether there has been exact regularity and strict compliance with the provisions of the law relating to incorporation,—it is plainly a dictate alike of justice and of public policy that, in controversies between the *de facto* corporation and those who have entered into contract relations with it as corporators or otherwise, such question should not be suffered to be

raised." The principles established by these authorities are clearly applicable to this case. It necessarily follows that the defendants cannot now question the corporate capacity of the Woodmass of Alston Mining Company to take title to the property in controversy, or that the title to the property is actually vested in that company by the deed executed by them.

This *de facto* corporation, therefore, became, and is now, the representative of all the parties. Instead of being beneficiaries, with an interest in the property, the parties have become stockholders in the corporation, and as stockholders their rights are to be determined. The effect of the declaration of the rights of the parties in the capital stock contained in the certificate as a contract need not be determined. The fact that it appears in an instrument, executed before the body corporate was created, is not material. The arrangement was participated in by the entire constituency of the company. This being so, it is obligatory upon all parties in interest, and, having been acted upon by all the members which constituted the corporation, no one of them can be heard to deny that it is binding upon the corporation itself. The effect of this declaration, as an item of evidence, is not so clear. The language used by the parties is as follows: "The capital stock is \$500,000, divided into 50,000 shares, of \$10 for each share, divided half and half between the parties." There were three parties, and the expression, "divided half and half between the parties," standing alone and unexplained, is without significance, unless construed to mean "equally between the parties." Bates claimed to be entitled to one-half the capital stock. On the other hand, the Wilsons insist that his interest was to be but one-third. In the light of the evidence and all the circumstances of the case, an equal division seems just and equitable, and upon this basis the rights of the parties will be finally determined. For the reasons which have been stated, the parties must be permitted to work out their equities in the property in controversy through the form and by the means of the corporate organization.

This fact, however, is by no means conclusive upon the issues in this case. These remain practically the same. The entire body of the capital stock is substituted in place of the property. If, as has been stated, at the time this suit was instituted, Bates had been guilty of inequitable or fraudulent misconduct; if a reasonable time had elapsed, and complainants had failed to discharge the contract obligations imposed upon them; if, by reason of their omission to institute the necessary proceedings to perfect the title to the property, by securing patents, or through the purchase under the McBride trust-deed, the defendants have sustained injury which cannot be compensated,—then, notwithstanding the organization of a corporation, the declarations as to the division of the capital stock, the subsequent conveyance of the property to the corporation, and the conduct of the parties under the corporate organization, it was still competent for the court to find that the equi-

ties were with the defendants, and not with the plaintiffs. No extended discussion of these propositions is necessary. The facts must be considered in connection with the construction which has been given to the original contract between the parties. It is not the duty of the court below to determine the right of complainant to acquire an interest in the property, but her right to enjoy the benefits of an interest already vested. Time was not of the essence of the contract. Performance was not, had not been made, a condition precedent by the parties. A decree, therefore, which, in effect, forfeited the estate and the beneficial interest of complainant, was inequitable, unless unavoidable. If, in equity and good conscience, a decree could have been rendered defining the rights of the parties, and providing for their enforcement through the corporate organization; if, by an accounting, the interests of all could have been fairly settled without prejudice to the rights of any, or violation of the original contract,—then this course should have been adopted. That such a decree should have been rendered will be clear, upon a brief consideration of the facts.

Bates did not make application for letters patent, as he had agreed to do. It appears, however, that, by an arrangement between the parties, this application was postponed until after the sale under the decree could be had. It further appears that, before the close of the trial, the present complainant, having taken the necessary steps, as must be presumed, presented the application to the defendants, as officers of the company, with the request that the same be executed in order that she, in her own right and as the representative of her deceased husband, might institute proceedings to secure patents in compliance with the contract. The contention of defendants, that the postponement of the application had resulted in expensive litigation, is not sustained by the evidence. On the contrary, it appears, from the testimony of Alfred H. Wilson himself, that adverse claims were expected at the time, or soon after the property was purchased. Again, at the first sale under the decree of foreclosure, the property was purchased by the Wilsons, as officers of the corporation. The only reason given by Alfred H. Wilson for his failure to complete the purchase, by the payment of the money, is that he believed nothing was due upon the trust-deed, and he wanted time to investigate. It is true that Bates had failed to provide the money to bid in the property in the manner insisted upon by the Wilsons. He had, however, proposed to purchase it in the name of his client, undertaking to secure the certificate thereafter, for the benefit of the company. How this was to be done could not be questioned by defendant. His interest to secure the benefit of the foreclosure was equal with their own. As officers *de facto* of the corporation, they had the right to redeem, and could not have been prejudiced by the course proposed by Bates, until the equity of redemption had expired. Notwithstanding his failure to provide the sum required, the

parties continued their business as before.

Again, at the second sale, Bates proposed to pursue the same course. The right to purchase, either as an individual or as an officer of the company, was clearly open to Wilson. At that time controversy had arisen between the parties, and he was acting under the advice of counsel. Notwithstanding the opportunity to purchase, he permitted Bates to bid in the property in the name of his client, and to take the certificate of sale. Subsequently, and before the trial was completed, the certificate was obtained for the benefit of the company. It is true that the Wilsons redeemed the property from sale by payment of the amount of the decree. This was done by them, however, without any effort on their part to ascertain whether the certificate was or could be obtained for the benefit of the parties in interest. It was also done after this litigation was begun, under the advice of counsel, acting undoubtedly upon the theory that performance of the original contract by complainant was a condition precedent to acquiring any interest in the property; that the corporate organization was fraudulent and illegal, and could be ignored; and that defendants were the owners of the entire property. This theory cannot be adopted by this court. The evidence contained in the record is very voluminous, and seems to extend to every issue which has been discussed, or which is raised by the pleadings. There has been no suggestion in behalf of either party that there is other evidence which should be submitted before the case is finally determined. The form of the decree to be entered by the court below is therefore outlined to some extent by this court.

The judgment of this court is that the decree of the court below be reversed, and that a decree be entered in accordance with the views hereinbefore expressed. Such decree should be so framed as to restrain defendants from interfering with plaintiff, in the exercise of her right as a stockholder of the defendant corporation, or from preventing her from making application for patents, in the name of and through the corporate organization, and should require defendants, as officers of that company, to execute all papers necessary in that behalf. It should provide for an accounting between the parties, upon which accounting, among other matters, all sums expended by defendants in the purchase of the property should be allowed, including the amount paid to redeem from the sale under the foreclosure decree; also all sums expended in the operation and development of the property. The amount paid by complainant to secure the certificate of sale should be allowed to her, unless already returned. The decree should also provide that, after United States patents have been obtained, all sums necessarily expended by Bates in his life-time in that behalf should be allowed to complainant; that all further sums necessarily expended in obtaining the patents be charged against the interest of complainant; and that, after such accounting, the net proceeds of the property be divided between the parties accord-

ing to their respective interests in the capital stock of the defendant corporation,—the interest of complainant being one-third, and that of defendants, two-thirds; the trial court to make such orders, in respect to the continuance or discharge of any receiver in the action, as the rights and interests of the several parties and equity and good conscience may require in the premises.

RICHMOND and REED, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion, the decree is reversed, and the cause remanded for the entry of a decree, and further proceedings in accordance with the views and suggestions therein expressed.

HELM, C. J., not sitting.

#### PEOPLE v. HARROLD. (No. 20,638.)

(Supreme Court of California. June 14, 1890.)

##### INDICTMENT—TWO OFFENSES—FORGERY.

1. Pen. Code Cal. § 115, makes it felony to cause to be recorded a false or forged instrument only when the instrument, if genuine, might be recorded under some law of the state or the United States. There is no statute authorizing the recording the assignment of letters patent. *Held*, that an indictment which set forth the recording of a forged assignment of letters patent, and, in addition, a charge of forgery, was not bad as charging two offenses. The part setting forth such recording was mere surplusage.

2. An indictment for forgery which enumerates each one of the series of acts, either one of which constitutes such crime under Pen. Code Cal. § 470, charges but one offense, since under said section they all constitute but a single crime.

Department 1. Appeal from superior court, San Diego county; JOHN R. ARKEN, Judge.

*Jas. L. Copeland, J. M. Lucas, and W. R. Guy*, for appellant. *Atty. Gen. Geo. A. Johnson*, for the People.

Fox, J. In *People v. Frank*, 28 Cal. 513, it was held that, "where \* \* \* a statute enumerates a series of acts, either of which separately, or all together, may constitute the offense, all such acts may be charged in a single count, for the reason that, notwithstanding each act may by itself constitute the offense, all of them together do no more, and likewise constitute but one and the same offense." To the same effect is *People v. De la Guerra*, 31 Cal. 459, and *People v. Tyler*, 35 Cal. 553. It follows that the allegation in this indictment of each one of the series of acts named in the statute, either one of which would constitute the crime of forgery, is not the allegation of two offenses, because all constitute but the single crime, under section 470 of the Penal Code. But the court below probably held that the indictment charged two offenses, because in the latter part thereof the pleader charges the defendant with having offered "the said instrument for record at the office of the county recorder of the county and state aforesaid, and then and there causing the same to be recorded as a record in said office." The instrument purports to be an assignment of an interest in certain let-

ters patent for an invention. There is no law authorizing the recording of such an instrument in the office of the county recorder, or making it a public record when so recorded. Section 1160, Civil Code, cited by respondent, has no application. It relates only to the recording of letters patent affecting the title or possession of real property. Section 115 of the Penal Code, which makes it a felony to procure to be recorded a false or forged instrument, makes it so only when the instrument, if genuine, might be filed, registered, or recorded under the law of the state. As this instrument, if genuine, would not be entitled to be recorded under the law of the state, it was not a felony to offer it for record, or to cause or procure it to be recorded, and it leaves but the one offense charged by the indictment,—that of forgery. All the matter about recording is mere surplusage, and may be disregarded. The material portions of this indictment are in the language of the statute, and are sufficient. *People v. Lewis*, 61 Cal. 366; *People v. Henry*, 77 Cal. 445, 19 Pac. Rep. 830; *People v. Rogers*, 81 Cal. 209, 22 Pac. Rep. 592; *People v. Keeley*, 81 Cal. 212, 22 Pac. Rep. 593. Judgment reversed, and case remanded, with instructions to overrule the demurrer.

We concur: PATERSON, J.; WORKS, J.

(84 Cal. 539)

NAGLE v. McMURRAY. (No. 12,709.)

(Supreme Court of California. June 18, 1890.)

CONFLICT OF EVIDENCE—IMPLIED PROMISE—REPAIRING STREET.

1. In a suit to recover for work done upon a public street, defendant testified that he never authorized the work, and such testimony was in part corroborated by another witness. Both swore that defendant filed in the street superintendent's office a protest against the issuance to plaintiff's assignor of a permit to do the work, and also informed such assignor that he would not be responsible for it. Held sufficient to raise a substantial conflict of evidence, and the judgment will not be disturbed.

2. The fact that defendant saw the work going on upon the street without further protest raises no implied promise or liability to pay for it.

3. Nor can a promise be implied from the fact that defendant several times made suggestions to the workmen.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; JAMES G. MAQUIRE, Judge.

Robert Ash, for appellant. Langhorne & Miller, for respondent.

HAYNE, C. This was an action to recover \$547.75 for work done upon a street upon an alleged parol contract with the defendant. The answer denied the contract, and the court found this issue for the defendant, and rendered judgment in his favor. It is contended that this finding is not justified by the evidence. But there is the direct testimony of the defendant in its support, and this was to some extent corroborated by the witness McGreal; and in addition these two witnesses swore that defendant filed in the street superintendent's office a protest against the issuance to the plaintiff's as-

signor of a permit to do the work, which seems to be undisputed, and in addition informed the plaintiff's assignor that defendant would not be responsible for the work. The foregoing is sufficient to raise a substantial conflict in the evidence.

The appellant also relies upon a promise after the work was completed. But, assuming that such a promise would not be without consideration, the finding is against its existence; and there is evidence in support of the finding.

The fact that the defendant saw the work upon the street going on without further protest does not render him liable, or raise an implied promise to pay. Nor can a promise be implied from the fact that on several occasions he made suggestions to the workmen. The street was a public street, and his explanation ("I noticed that his stakes were not right; and, as I liked to see things done right, I called their attention to their mistake") is not improbable. The permit from the street superintendent to do the work is something that is required in case of private work upon the streets, and imposed no liability upon the defendant.

In view of the foregoing, the other matters are immaterial. We therefore advise that the judgment and order appealed from be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

(84 Cal. 233)

CHURCHILL et al. v. LAUER et al. (No. 13,359.)

(Supreme Court of California. June 2, 1890.)

EQUITY—JOINDER OF PARTIES—INJUNCTION—RIPARIAN OWNERS.

1. The owners in severalty of different tracts of land may join in a bill for injunction to restrain the diversion of the waters of a stream along whose banks their lands are located, and in which they have riparian rights, and rights acquired by appropriation.

2. The complaint alleged that a certain stream, having well-defined beds, banks, and channels, when unobstructed, flowed from its source to, upon, and across the lands of the respective plaintiffs. It then alleged that it flowed upon and across the lands of seven of plaintiffs, "and to some extent, by such natural flow, seepage, and percolation, irrigated and watered portions" of the lands of the others. Held, that the language of the last paragraph did not overcome the first, and that all were riparian proprietors.

Commissioners' decision. Department 1. Appeal from superior court, Modoc county; M. MARSTELLER, Judge.

Spencer & Raker and C. A. Raker, for appellants. Goodwin & Jenks, J. J. May, Ewing & Claffin and Harrington & Harrington, for respondents.

HAYNE, C. This was a suit by 10 plaintiffs against 18 defendants to enjoin the latter from diverting the water of a stream called "Pine Creek," in Modoc county. The complaint contains two counts. The first count alleges, in substance, that each plaintiff is the owner in severalty of a described lot of land, and that "all the said



lots of land constitute one complete lot and body of land, and are all irrigated by the same stream of water, and from a common source, and cannot be irrigated by any other source." As we construe this count, it alleges that all of the plaintiffs are riparian proprietors. It first alleges that "the said stream has natural and well-defined beds and banks, and a natural and well-defined channel, from its source to and upon the lands of the plaintiffs, and across said lands, respectively, and that said creek, in its own natural channel, when unobstructed, naturally flows to and upon the said lands of plaintiffs." The respondents contend that this allegation is overcome by the following, viz.: "That said Pine creek, in its own natural channel, flows upon and across the lands herein described as the lands owned by plaintiffs Churchill and Adin McDowell and Stephen Burgoyne and Ann R. Wood and J. J. Rodkey and Howard B. Porter and John Wall, and across the said lands owned by each of said plaintiffs, and to some extent, by such natural flow, seepage, and percolation, irrigate and water portions of the said lands of plaintiffs Rachel C. Dorris, Carlos J. Dorris, and Ancil Morse," etc. It is true that the implication from this latter allegation is that the stream flowed across the lands of the seven first-mentioned plaintiffs only, and consequently that they alone were riparian proprietors; but this implication is not enough to overcome the allegation first quoted. It is not the case of a general conclusion overcome by a specific fact, as supposed by counsel; and, in addition to this the court afterwards names the plaintiffs "Rachel C. Dorris, Carlos J. Dorris, and Ancil Morse," and then proceeds as follows: "That each one of said plaintiffs last named is the owner of the whole of the beds and banks of said Pine creek at that point where said creek flows upon and across his said lands; that each one of the plaintiffs last named is a riparian owner on the said creek, and, as such riparian owner, is entitled to the full flow, use, and benefit of all the waters of said creek upon and across his said lands," etc. The most that can possibly be claimed for the respondents, therefore, is that there is an inconsistency. But this can only be objected to by a special demurrer for ambiguity, uncertainty, etc. *Blasingame v. Insurance Co.*, 75 Cal. 633, 17 Pac. Rep. 925; *Heeser v. Miller*, 77 Cal. 192, 19 Pac. Rep. 375. Only one of the four demurrers specified this ground; and, as it has not been argued, it must be held to be waived. *Whitby v. Rowell*, 23 Pac. Rep. 382, (No. 13,398, filed February 28, 1890.) It must be held, therefore, that the first count shows that the plaintiffs were riparian proprietors, and that portions of their lands were irrigated by the direct flow of the stream, and portions by the seepage and percolation. See generally *Heilbron v. Canal Co.*, 75 Cal. 431, 17 Pac. Rep. 535.

This count goes on to allege facts which show that plaintiffs are using the water, and will suffer irreparable injury from being deprived of it, and that the defendants, for several months before the com-

mencement of the suit, have unlawfully and without right diverted the water at a point above the plaintiffs' lands, and have thereby prevented it from reaching their lands, and that they threaten to continue so to divert the water. The second count repeats the allegations of the first, and in addition alleges, in substance, that the plaintiffs have constructed certain dams and ditches whereby the waters of said stream are used for the irrigation of such portions of their said lands as are "not properly or sufficiently irrigated by said natural flow, seepage, and percolation of the waters of said creek," and have "appropriated" large quantities of said waters for the purposes mentioned, and that "the plaintiffs, and each and every one of them, have and hold and own a right to the unobstructed flow of the waters of said Pine creek, in the natural channel thereof, to and upon said lands, and to and through their said ditches, for the uses and purposes hereinbefore stated." These latter rights of the plaintiffs are perhaps not very formally set forth; but the mode of statement is not objected to either in the record or in the briefs, and under the circumstances must be held to be sufficient. Neither count alleges that the plaintiffs, or any of them, have been damaged in any particular sum; and no damages are prayed for, but only an injunction. It therefore appears that the plaintiffs are the owners in severalty of certain tracts along the banks of a stream, and that they resort to a court of equity to prevent the wrongful diversion of the waters of such stream, not only because such diversion will irreparably injure their rights as riparian owners, but because it will irreparably injure their rights acquired by appropriation. The defendants demurred to the complaint upon the grounds, among others, that there was a misjoinder of parties plaintiff, and a misjoinder of causes of action. The trial court sustained the demurrer, and rendered final judgment in favor of the defendants, and the plaintiffs appeal. The respondents do not contend that the complaint does not state a cause of action against the defendants; and inasmuch as it is admitted, for the purposes of the demurrer, that the plaintiffs have some rights to the water, and that the defendants have no right thereto, as against the plaintiffs, but are mere trespassers, no such contention could be made. The positions taken in the argument are that there was a misjoinder of parties plaintiff, and a misjoinder of causes of action. It is to be observed that the demurrer does not take the ground, and the respondents do not contend, that there was a misjoinder of parties defendant; and therefore, for the purposes of the appeal, the case is the same as if the diversion complained of was made and threatened by a single defendant.

We think that the plaintiffs had a right to join in the action. There is an exception, at least in equity cases, to the general rule as to joinder. This is stated by Story as follows: "Another exception to the general doctrine respecting multifariousness and misjoinder, which has already been alluded to, is where the parties, ei-



ther plaintiffs or defendants, have one common interest touching the matter of the bill, although they claim under distinct titles, and have independent interests. The cases respecting rights of common, where all the commoners may join, or one may sue or be sued for all, of parishioners to establish a general *modus*, or of a parson to establish a general right of tithes against parishioners, and others of a like nature, already stated under another head, fully exemplify the doctrine; for in all of them there is a common interest centering in the point in issue in the cause." Story, Eq. Pl. § 285. And this exception has been held to cover cases like the present. In *Ballou v. Inhabitants of Hopkinton*, 4 Gray, 328, it was held that the owners of different mills may join in a bill in equity to enjoin a stranger from letting off water from a reservoir which they had erected to collect the waters of a stream for the purpose of supplying their several mills. And SHAW, C. J., delivering the opinion, said: "Although the plaintiffs are several owners of separate and distinct mills injured by the alleged stoppage, diversion, and waste of the water of Mill river, and to recover damages for which each owner must bring his several action at law to obtain a remedy for his particular injury, yet they have a joint and common right in the natural flow of the stream, and in the reservoir by which its power is increased, and a joint interest in the remedy which equity alone can afford, in maintaining a regular flow of the water of the reservoir at suitable and proper times, so as best to subserve the equal rights of them all. The remedy in equity, therefore, would, by one decree in one suit, prevent a multiplicity of actions." In the foregoing case the plaintiffs had increased the flow of the stream by collecting its waters in a reservoir. The decision, however, did not proceed upon this circumstance, but was put upon the ground of the common right "in the natural flow of the stream." The same principle was laid down in *Reid v. Gifford*, Hopk. Ch. 419. There several proprietors of separate and distinct lands and mills, supplied by a natural water-course, were allowed to join in an application for an injunction to prevent the defendants from diverting the water by means of a canal above the plaintiffs' property; and Chancellor SANDFORD said: "The rights of the several complainants to their respective lands are indeed distinct, but the grievance in question is a common injury to all the complainants. The water, in its natural descent from the lake, becomes the property of each of the complainants successively. All the complainants thus have right in the same subject, and the nature of the case forms a community of interests in the complainants." Upon the authority of this case and others, two persons, having separate and distinct tenements which suffered a like injury from a nuisance, were allowed to join in a suit to enjoin the continuance of the nuisance; and Chancellor WALWORTH said of the preceding case that, "as the relief sought was the same as to all the complainants, there certainly was no good reason for compelling them to file several bills

to protect their common right against acts of the defendant which were injurious to all of them." *Murray v. Hay*, 1 Barb. Ch. 59. And in Massachusetts the principle of the case first quoted has been held to sanction the joinder of several complainants in a suit to restrain a private nuisance which was an injury to a passage-way in which they had a right of way as appurtenant to their several estate; and the court, per MORTON, J., said: "Undoubtedly, in a suit at law for the nuisance, they could not properly join. But the rule in equity as to the joinder of parties is more elastic. Generally, when several persons have a common interest in the subject-matter of the bill, and a right to ask for the same remedy against the defendant, they may properly be joined as plaintiffs." *Cadigan v. Brown*, 120 Mass. 494. We find no decision in this state which establishes a contrary doctrine. In the case of *Barham v. Hostetter*, 67 Cal. 274, 7 Pac. Rep. 689, the difficulty in the case seems to have been that an action at law for damages which was "not joint as to all the plaintiffs, but undoubtedly several," was joined with a cause of action for an injunction, "which is common to all the plaintiffs." The decision seems in line with the cases above cited.

In the present case, as above stated, there is no showing of damages sustained in any particular sum, and no prayer for damages; and we consider the proceeding to be in equity to restrain the diversion of the water. In this view, it does not seem to us material how the plaintiffs acquired their rights; i. e., whether they have rights as riparian owners, or as appropriators. It is sufficient, under the decisions cited, that they each have some right to the waters of the stream which will suffer an injury from the diversion complained of. We therefore advise that the judgment be reversed and the cause remanded, with directions to overrule the demurrer to the complaint, with leave of the defendants to answer.

WE CONCUR: BELCHER, C. C.; GIBSON, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed and the cause remanded, with directions to overrule the demurrer to the complaint, with leave to the defendants to answer.

84 Cal. 476

MARTIN v. PORTER. (No. 13,248.)

(Supreme Court of California. June 11, 1890.)

REPLEVIN—PLEADING—COSTS.

1. An assignee in insolvency proceedings brought replevin against his assignor to recover certain hay which he alleged was not delivered to him under the assignment. The answer denied that defendant was ever owner, or in possession, or entitled to possession, of the hay. *Held*, that the answer made an issue, and the plaintiff was not entitled to a judgment upon the pleadings.

2. The defendant was entitled to appeal from the judgment "that plaintiff recover from the defendant all the property named in the complaint," although no costs were awarded the plaintiff.

Commissioners' decision. Department 1. Appeal from superior court, Modoc county; G. F. HARRIS, Judge.

*Spencer & Raker*, for appellant. *Jenks & Claffin*, for respondent.

**BELCHER, C. C.** This is an action of claim and delivery. The complaint alleges that on the 10th day of October, 1888, the defendant, Howard B. Porter, filed in court his petition in insolvency, and thereafter such proceedings were had that plaintiff was duly appointed his assignee, and qualified as such, and thereupon the clerk of the court duly assigned to him all the estate, real and personal, of the insolvent debtor; "that at the time of filing said petition said defendant was, and long prior thereto had been, and still is, the owner and in possession of a certain quantity of hay, to-wit, one hundred and twenty tons, of the value of seven dollars per ton;" that, by virtue of the proceedings and assignment, plaintiff has become and is entitled to the possession of the hay, and has demanded of defendant the possession thereof, but defendant wrongfully and unlawfully withholds possession, and refuses to deliver the hay, or any part thereof, to the plaintiff. The defendant demurred to the complaint, and his demurrer being overruled, answered. The answer denies that defendant is or ever was, at any of the times named in the complaint, the owner, or in the possession, or entitled to the possession, of the hay sued for, or any part thereof; and it disclaims on the part of defendant "any title to or interest in said hay in any way or to any extent whatsoever, or any right or title to the possession thereof, during any of the time or times alleged in the complaint, or at all." It further denies that plaintiff is entitled to the possession of the hay, or that defendant ever withheld possession, or refused to deliver possession thereof to him. The plaintiff moved for judgment on the pleadings upon the grounds—*First*, that the answer did not state facts sufficient to constitute a defense; *second*, that it did not raise any material issue; *third*, that the defendant disclaimed any right, title, or interest in the property sued for. The court granted the motion, and the appeal is from the judgment thereupon entered.

1. The theory on which the action was brought, evidently, was that the defendant was the owner of the hay in question at the time he commenced his proceedings in insolvency, and wrongfully omitted it from his schedule, and that the title to the hay vested in the plaintiff under the assignment made to him by the clerk, and that he thereby became entitled to demand and recover its possession. The complaint was somewhat crudely drawn. It alleges the assignment, and then that the defendant still is the owner, etc. These averments are conflicting and antagonistic; for, if the defendant was still the owner, the plaintiff evidently was not. *King v. Felton*, 63 Cal. 67. Assuming, however, that the complaint was sufficient when tested by a general and special demurrer, and that the plaintiff had a right to resort to an action of this kind, and was not confined to the remedy provided in section 47 of the insolvent act, (*Goodday v. Superior Court*, 65 Cal. 580, 4 Pac. Rep. 626,) still he

was not entitled to recover unless the material averments of the complaint were either admitted or proved to be true. We think the answer raised material issues. It denied that the defendant was ever the owner or in possession, or entitled to the possession, of the hay, or ever withheld it, or refused to deliver it to the plaintiff; and, if this, was so, then clearly the plaintiff had no right to sue for and recover it. Under these circumstances, the plaintiff was not entitled to a judgment on the pleadings; the rule being settled that "it is only where an answer admits or leaves undenied all material facts stated in the complaint that a judgment can be rendered on the pleadings." *Botto v. Vandament*, 67 Cal. 332, 7 Pac. Rep. 753.

2. The judgment was that the "plaintiff do have and recover of and from the defendant the possession of all the personal property described in the complaint, to-wit, one hundred and twenty tons of hay." No costs were awarded the plaintiff and the judgment was not in the alternative form. It is claimed, therefore, for respondent, that the defendant was in no way "aggrieved" by the judgment, and hence had no right to appeal from it. This claim cannot be sustained. If the case had been tried, and the denials of the answer sustained, the proper judgment would have been that the plaintiff take nothing, and that defendant recover his costs. Having been brought into court against his will, and required to contest the case, the defendant should not be turned out without his costs, if the plaintiff failed to show that he was entitled to recover. The judgment should be reversed, and the cause remanded for a new trial.

We concur: **HAYNE, C.; FOOTE, C.**

**PER CURIAM.** For the reasons given in the foregoing opinion the judgment is reversed, and the cause remanded for a new trial.

84 Cal. 544

**FAULK v. STROTHER.** (No. 12,061.)

(*Supreme Court of California.* June 18, 1890.)

**MANDATE TO COUNTY AUDITOR.**

Under the act of the California legislature commonly known as the "Consolidation Act," (article 6, § 92,) providing that any person may appeal from the rejection of his claim by the county auditor to the county board, whose decision thereon shall be final, a writ of mandate will issue against the auditor to pay a claim allowed by the county board on appeal from its rejection by him, though the rejection may have been justified on its first presentation. *Beatty, C. J., and Works, J., dissenting.*

In bank. On rehearing. For opinion on former hearing, see 22 Pac. Rep. 676.

*George Flournoy, Jr., (Philip G. Galpin and Wilson & Wilson, of counsel,)* for appellant. *Oliver P. Evans*, for respondents.

**McFARLAND, J.** After a full consideration of this cause upon hearing in bank, we are satisfied with the decision of department 2, and the opinion rendered by said department. We see no escape from the conclusion there reached. Under section 92 of the consolidation act the action

of the board of supervisors, on an appeal from the auditor, is expressly made final so far as the auditing of a demand is concerned. Upon the appeal, if the board approves and allows the demand, it is made the duty of the auditor to enter it "in the proper book in like manner as other demands allowed by him, and an indorsement must be made of its having been so entered." And this is all that the judgment of the court below requires to be done. Whether or not the payment of the demand could be prevented or enforced at any other stage of its history is a question which does not arise here. Judgment affirmed.

We concur: FOX, J.; SHARPSTEIN, J.; PATERSON, J.

I dissent: WORKS, J.

I dissent: BEATTY, C. J.

94 Cal. 57

HUMBERT v. DUNN. (No. 13,647.)

(Supreme Court of California. May 3, 1890.)

CONSTITUTIONAL LAW—APPROPRIATIONS.

St. Cal. 1884, p. 421, provided for the appointment of three engineers as examining commissioners of rivers and harbors, and "that each member of said commission shall receive a salary, \$2,400 per annum, payable monthly, and his traveling expenses, while engaged in the performance of official duties. Said salary and expenses to be paid out of any money in the state treasury not otherwise appropriated." In a proceeding for mandate to compel the payment of \$200 claimed to be due petitioner as salary, *held*, that the language of the act designates with sufficient clearness the amount to be paid, and the fund out of which it is to be drawn, to constitute an "appropriation," within the meaning of Const. Cal. art. 4, § 22, which provides that "no money shall be drawn from the treasury but in consequence of appropriations made by law."

In bank. Mandate.

Robert P. Delvin, for applicant. Geo. A. Johnson, Atty. Gen., for respondent.

PATERSON, J. This is an application for a writ of mandate, commanding the respondent, as comptroller of the state, to draw a warrant in favor of petitioner for the sum of \$200, claimed to be due the latter on account of salary as a member of the examining commission on rivers and harbors. The petition shows, in substance, that the petitioner is a duly appointed, qualified, and acting member of said commission; that, by virtue of his appointment, qualification, and acts as a member of said commission, there is due to him, as salary for the month of November, 1889, the sum of \$200; that his claim was duly presented to the state board of examiners, and by them audited, allowed, approved, and ordered paid out of any money in the state treasury not otherwise appropriated; that the respondent refused to draw on the treasury for the amount allowed. The attorney general, on behalf of respondent, has filed a demurrer to the petition on the ground that it does not state facts sufficient to constitute a cause of action. It is not claimed that the law is against the constitution or good policy. The only point made against the right of

the petitioner to receive the salary due to him under the provisions of the act is that no appropriation has been made out of which it can be paid.

The act in question provides that "each member of the said commission shall receive a salary of \$2,400 per annum, payable monthly, and his traveling expenses while engaged in the performance of official duties; said salary and expenses to be paid out of any money in the state treasury not otherwise appropriated." St. 1889, p. 421. The question is whether these provisions of the act constitute an "appropriation," within the meaning of that term as used in section 22, art. 4, of the constitution, which provides that "no money shall be drawn from the treasury but in consequence of appropriations made by law." It is true, the usual formula, "There is hereby appropriated the sum of \* \* \* dollars out of any money in the state treasury not otherwise appropriated for the payment of salaries," etc., is not found in the act; but the intention of the legislature to provide for the payment of the salaries of the commissioners as they accrued is clearly manifested in the language used. "Each member \* \* \* shall receive a salary of two thousand four hundred dollars per annum, payable monthly," and it is "to be paid out of any money in the state treasury not otherwise appropriated." There is nothing in this language indicating an intention to postpone the payment of the salaries of the commissioners until the next session of the legislature. They are to be paid monthly, and out of any money not otherwise appropriated. "Not otherwise appropriated," when? Clearly, at the time when the services are performed, and the monthly payments become due.

While it is customary to use the words, "there is hereby appropriated the sum," etc., in bills appropriating money for the payment of salary and other expenses of the government, it is not essential to the validity of an appropriation that those words, or any of them, should be used if the legislature has clearly designated the amount and the fund out of which it is to be paid. Has the legislature fixed the amount of the claim, and designated its payment out of a certain fund? These are the only things necessary to the validity of the appropriation, there being no other constitutional objection to the bill than as to the sufficiency of the act of appropriation. *McCauley v. Brooks*, 16 Cal. 28. The limitation that "no money shall be drawn from the treasury but in consequence of appropriations made by law" is taken literally from the constitution of the United States. Its object is to secure to the legislative department of the government the exclusive power of deciding how, when, and for what purposes the public funds shall be applied in carrying on the government. 2 Ops. Atty. Gen. 670. It had its origin in parliament in the seventeenth century, when the people of Great Britain, to provide against the abuse by the king and his officers of the discretionary money power with which they were vested, demanded that the public funds should not be drawn from the treasury ex

cept in accordance with express appropriations therefor made by parliament, (Hall. Hist. 555;) and the system worked so well in correcting the abuses complained of, that our forefathers adopted it, and the restraint imposed by it has become a part of the fundamental law of nearly every state in the Union. To the legislative department of the government is intrusted the power to say to what purpose the public funds shall be devoted in each fiscal year, and, as stated before, when the legislature has clearly indicated its will as to the claim which is to be paid and the fund from which it is to be paid, the constitutional requirement is satisfied, and no particular form of words is essential to make the appropriation valid. *Proll v. Dunn*, 80 Cal. 220, 22 Pac. Rep. 143. In *Ristine v. State*, 20 Ind. 339, the court said: "An appropriation of the money to a specified object would be an authority to the proper officers to pay the money, because the auditor is authorized to draw his warrant upon an appropriation, and the treasurer is authorized to pay such warrant, if he has appropriated money in the treasury. And such an appropriation may be prospective; that is, it may be made in one year, of the revenues to accrue in another or future years,—the law being so framed as to address itself to such future revenues."

It is claimed that the act is unconstitutional because it does not specify the amount to be appropriated; that the amount which may be incurred as expenses is uncertain. So far as the traveling expenses are concerned, this contention may be good, although it has been held that "it is not essential or vital to an appropriation that it should be of an amount certainly ascertained prior to the appropriation." *People v. Miner*, 46 Ill. 390. We are not called upon to decide this question, however, as the only claim here is for salary, which is fixed by the act at \$2,400 per annum, payable monthly. The act provides for the appointment of three engineers as commissioners, and, so far as their salaries are concerned, the amount appropriated is fixed and certain. The demurrer is overruled, with permission to file an answer, if the attorney general should be so advised, within 10 days after notice of this decision.

We concur: FOX, J.; SHARPSTEIN, J.; MCFARLAND, J.; THORNTON, J.

84 Cal. 37

PEOPLE V. MAURITZEN. (No. 20,613.)  
(Supreme Court of California. May 3, 1890.)

#### FALSE PRETENSES—EVIDENCE.

1. On a trial for obtaining property by false pretenses, it appeared that defendant, desiring to purchase horses, told the owner that he had \$400 in bank, but that he did not want to use it; that he would take the horses to S., sell them, and get the money to pay for them. Defendant took the horses, and gave his note, with the understanding that he should have one week in which to sell the horses, and pay for them out of the proceeds. Defendant was arrested on this charge before the week had expired, and had the horses in his possession in S. *Held*, that the evidence did not warrant a conviction.

2. The execution, contents, and delivery of the note given by respondent were proven by parol without objection, and the court correctly in-

structed the jury that, if the owner sold the horses upon credit and took a note for them, they should acquit. The foreman asked the court if the note was in evidence, and the court replied, "No." *Held*, that the reply of the court was misleading, and error.

In bank. Appeal from superior court, Napa county; R. CROUCH, Judge.

E. D. HAM, for appellant. *Atty. Gen. Geo. A. JOHNSON*, for respondent.

MCFARLAND, J. The defendant was convicted, under section 532 of the Penal Code, of the crime of obtaining three horses from one G. W. Hill by false and fraudulent pretenses. The false pretense alleged was representing to said Hill that the defendant had \$400 on deposit in a certain bank in Napa City, when the horses were purchased by defendant of Hill. The evidence is undisputed that, while defendant stated that he had the \$400 in bank, he also told Hill that he did not want to use that money; that Hill must give him a week's time to pay for the horses; that he would take the horses to San Francisco, and sell them, and wanted to make the turn, and get the money from the sale at the latter place to pay Hill. Thereupon he paid Hill \$20 in cash, and gave him his (defendant's) note for the balance of the purchase money, (\$380,) payable in a week. Defendant then took the horses to San Francisco. As Gardner, one of the witnesses for the prosecution, and one of the owners of the horses, testified: "Defendant was to pay for the horses out of the money derived from the sale of the horses, and was to have one week's time in which to sell the horses and pay for the same." This was on the 17th of June, 1889, but on June 20th—before one-half of the week had expired—defendant was arrested at San Francisco on this present charge. He still had the horses, and when arrested gave them back to Hill, and also gave him his note for Hill's expenses in taking the horses back to Napa City.

This evidence makes a very slender case of the crime charged, at best; and we think that the court misled the jury in answer to their inquiry about the note given by defendant to Hill on the purchase of the horses. The court had correctly instructed the jury that "if said Hill sold horses on credit, and took a note for the same, and relied on the sale of the horses by defendant for his pay, you should find the defendant not guilty, although he may have falsely told the said Hill that he had \$400 in the bank of Seely & Bickford." But after the jury had retired they returned into court, "and through their foreman asked the court if the note given by the defendant to Hill for the purchase of the horses was in evidence before them. The court replied that the note was not in evidence before them." This was clearly error, for the giving of the note and its contents was distinctly proven by the witnesses without objection, and was as much in evidence before the jury as if it had been proven by the production of the written instrument itself. And that the error was material is self-evident, without even considering the fact that the jury specially made inquiry on the subject.

Judgment and order denying a new trial reversed, and cause remanded for new trial.

I concur: BEATTY, C. J.

THORNTON, J., (*concurring*.) I agree in what is said in the opinion of Justice McFARLAND. I am of opinion that the court erred in refusing the first and third instructions asked by defendant. I am further of opinion that the verdict is contrary to the evidence. I cannot perceive how any man of ordinary intelligence could, on the testimony in the record, fail to entertain a reasonable doubt of defendant's guilt. The judgment should be reversed, and cause remanded for a new trial.

PATERSON, J., (*concurring*.) I concur on the ground that the evidence does not support the verdict. Mr. Gardner, one of the owners, testified: "Mr. Hill would not have accepted the note and \$20 for the horses if I had not been satisfied. The money the defendant stated he had in the bank of Seely & Bickford was not to be used in paying for the horses. Defendant was to pay for said horses out of the money derived from the sale of the horses, and was to have one week's time in which to sell the horses and pay for the same. The credit of seven days on said note was to enable him to sell the horses and raise the money and pay for the horses. Defendant was to pay out of the money the horses brought." Mr. Hill, the owner of the horses, and who personally negotiated the sale, testified that the defendant told him he did not have the money to spare then to pay for the horses, but if he would give him a week's time he would pay for them. Defendant was arrested before the expiration of the time given him to sell and pay for them. It is difficult to see how any reliance could have been placed upon a fund which, if it existed at the time, could not be spared to pay for the horses. There was no pretense that defendant would use any of the \$400 in payment of the purchase price. The owners certainly understood that the money defendant claimed to have could not be applied in payment of the purchase price, and that a credit of a week would be necessary. If the money defendant represented he had on hand was to be applied necessarily to other debts, and not in payment of the purchase price, how can reliance be predicated upon any statement in regard to it? There is nothing in the evidence to show that the defendant is insolvent. It is in evidence, and not contradicted, that he owned a store in Napa, where he purchased the horses, though its value is not stated. Mr. Hill now thinks, no doubt, that the statement (as to the money in bank) did induce him to part with the horses, but the testimony of himself and partner and of the defendant, and the circumstances surrounding the transaction, all taken together, show that all parties understood at the time that defendant was to have a week in which to sell the horses and pay the balance of the purchase price out of the proceeds, and that the statement about the \$400 deposit cut little or no figure in the transaction.

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BARBIERI v. RAMELLI et al. (No. 12,756.)  
(Supreme Court of California. May 29, 1890.)

ATTACHMENT—PLEADING—UNCONTRADICTED AFFIDAVIT.

Plaintiff's affidavit for attachment alleged that the mortgage by which the debt of \$700 was secured had become valueless. Defendant's affidavit on motion to dissolve alleged that he was seised and in possession of the mortgaged land; that at the date of the mortgage it was worth \$21,000, and was still worth that amount. Held that, plaintiff having failed to avail himself of the right, under Code Civil Proc. Cal. § 557, to contradict defendant's statement of facts, or to state other facts, defendant's affidavit was conclusive that plaintiff had no right of attachment, on the ground that the "security had become valueless," under section 558.

Department 2. Appeal from superior court, San Mateo county; E. F. HEAD, Judge.

Geo. C. Ross, for appellant. Joseph F. Cavagnaro, for respondents.

McFARLAND, J. This is an appeal by defendants from an order of the court below denying their motion to discharge and dissolve an attachment. The action is to recover upon an alleged indebtedness of \$700, and the part of the affidavit of attachment involved in this appeal is as follows: "That the same was secured by a mortgage on real property only, which was recorded in the recorder's office of San Mateo county, state of California, on the 16th day of November, 1885, in Record 16 of Mortgages, page 589, and said mortgage, without any act of plaintiff, or the person to whom the security was given, became valueless." The affidavit of the defendant Carlo Ramelli, on the hearing of the motion, states specifically, among other things, that the mortgage referred to in plaintiff's affidavit for attachment was of a certain described tract of land in San Mateo county, containing over 1,000 acres; that it was given to secure the identical indebtedness sued on, and none other; that it has never been satisfied, but remains in full force and effect; that the said land was at the date of the mortgage of the value of about \$21,000; that it has not depreciated in value since said date, but, on the contrary, defendants, since then, have put additional improvements thereon to the extent of \$2,000; that said land is still in existence, and is still security for said indebtedness, and is worth fully as much as it was at the date of said mortgage; that defendants have not parted with their interests in said land, except that defendant Beffa has sold and conveyed his interest to the other defendants, who are seised and in possession of the whole of said tract of land; and that the sheriff, under the writ of attachment, has taken and withholds from defendants a large amount of personal property, consisting of cows, calves, horses, etc. Appellants contend that the affidavit for attachment is defective because it merely states that "said mortgage" became valueless, while the Code provides for a statement that the "security" has become valueless; and, furthermore, that there can be no attachment in any case where there is a mortgage, because, under section 726 of the Code of Civil Procedure and the de-

clisions of this court, no action in such a case can be maintained without a foreclosure of the mortgage. But, waiving these questions, we think that the evidence before the court on the motion to discharge showed that the security had not become valueless. The words "has become valueless," as used in section 538 of the Code of Civil Procedure, are, no doubt, of somewhat uncertain meaning, and cases can be readily imagined where it would be difficult to properly apply them; but in the case at bar it very clearly appears that no change had taken place in the security from the time the mortgage was executed until the time of the issuance of the writ of attachment. It cannot be fairly said that there is a conflict of evidence on this point. It is true that the affidavit of plaintiff states the general conclusion that the mortgage has become valueless, which was sufficient, no doubt, to justify the clerk in issuing the writ; but the affidavit of defendant contained a statement of specific facts which, if true, shows that the mortgage had not become valueless. Plaintiff had the opportunity, under section 557 of the Code, to contradict these specific statements of fact made by defendant, or to state any other facts; and, not having done so, we think that defendant's affidavit must be taken as establishing the truth of what it contains. And, if the security had not become valueless, then defendants were entitled to have the attachment dissolved. Of course, if there had been any substantial conflict in the evidence as to the facts involved, we would not disturb the ruling of the court below. The order appealed from is reversed, and the court below is directed to discharge and dissolve the attachment.

WE CONCUR: SHARPSTEIN, J.; PATERSON, J.

84 Cal. 177

FROLICH v. McKIERNAN. (No. 12,670.)

(Supreme Court of California. May 29, 1890.)

SLANDER—WORDS ACTIONABLE PER SE.

The words alleged in the complaint to have been slanderously spoken by defendant of plaintiff were: "You thief!" "You swindler!" "You scoundrel! You want to swindle me out of my money." Defendant claimed that this amounted only to saying that plaintiff wanted to swindle, which was not charging a crime. But the complaint minutely alleged what defendant meant by the language, how he meant it to be understood by those present, and how it was understood by them, and, moreover, that it was spoken of plaintiff as secretary of a corporation, for the purpose of injuring him in his office. *Held*, that the complaint showed the words actionable *per se*, within Civil Code Cal. § 46.

Department 2. Appeal from superior court, Santa Clara county; FRAS. F. SPENCER, Judge.

S. A. Barker, for appellant. Moore & Burchard, for respondent.

McFARLAND, J. Action for slander. Verdict and judgment for plaintiff for \$450. Defendant appeals from the judgment upon the judgment roll alone. The only points made by the appellant relate to the sufficiency of the complaint, to which he demurred upon the grounds that it does

not state facts sufficient to constitute a cause of action, and is ambiguous, uncertain, and unintelligible.

There is supposed to be still some relic of the exaggerated nicety with which pleadings in actions of libel and slander had formerly to be constructed, and it is invoked in this case. The words alleged in the complaint to have been slanderously spoken by defendant of plaintiff are these: "You thief!" "You swindler!" "You scoundrel! You want to swindle me out of my money." Of this language the ordinary man would say, with the hostess in Henry IV.: "These are very bitter words." But it is contended that, for the purposes of the law of slander, the sting of the first part of the language is removed by the qualification of the latter part. That is to say, the contention is that defendant only said that plaintiff was a thief because he wanted to swindle defendant out of his money, and, as wanting to swindle does not make a man a thief, therefore defendant did not, in law, call plaintiff a thief; and, as wanting to swindle a man out of his money does not constitute a crime, therefore the alleged language is not actionable. There is no doubt some authority for this contention; but the complaint minutely and in detail sets forth what defendant meant by the language used, and how he meant to be understood by those in whose presence it was used, and how the latter understood it; and, moreover, that plaintiff was the secretary of a certain corporation, of which defendant was president, and that the language was spoken of and concerning plaintiff, as such secretary, for the purpose of injuring him in his said office. This was sufficient to make the language actionable, and it was not necessary to allege special damages. Civil Code, § 46; *Butler v. Howes*, 7 Cal. 87.

We see nothing in the points that the complaint was ambiguous, uncertain, or unintelligible. Judgment affirmed.

WE CONCUR: SHARPSTEIN, J.; FOX, J.

84 Cal. 239

WILSON v. WHITE. (No. 12,897.)

(Supreme Court of California. June 2, 1890.)

MORTGAGE—FORECLOSURE—PLEADING AND PROOF.

1. A conveyance of land, by the purchaser at a foreclosure sale, to a person who had a contract for the land before the sale, is consideration for a mortgage, whether or not the latter was made a party to the foreclosure suit; for, if his right under his contract was not out off by the suit, the conveyance at least assigned the mortgage debt.

2. In an action to foreclose a mortgage, evidence of plaintiff's fraud is inadmissible, even though not objected to, where there are no allegations of fraud in the answer.

3. A conveyance to and by a person under an assumed name passes title.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; WALTER LEVY, Judge.

Craig & Meredith, for appellant. Fisher Ames, for respondent.

HAYNE, C. This was an action for the foreclosure of a mortgage made to secure the payment of a note for \$250. The answer contained a general denial, and an

affirmative averment that the note was without consideration. The trial court found this averment to be true, and gave judgment for the defendant; and the plaintiff appeals. The material facts shown by the evidence are as follows: While the property involved was held by one Duncan for the benefit of the Pioneer Bank, and was subject to a mortgage in favor of one Bradley, Duncan made a contract to sell it to the defendant, who had no notice of the rights of the bank, for the sum of \$1,800. Of this sum the defendant paid \$1,620, leaving due a balance of \$180. In this condition of affairs the bank was adjudicated a bankrupt, and the plaintiff and one Hyde were appointed assignees. Thereupon Duncan conveyed to the assignees his interest in the property, and in the contract with the defendant. There is mention of a deed from Duncan to the defendant, but that deed does not include the property involved here. Hyde prepared a deed from the assignees to the defendant, signed it, and handed it to the plaintiff, to be by him signed and delivered to the defendant upon his paying the balance due upon his contract. Plaintiff never executed this deed, but kept it in his possession. He purchased the Bradley mortgage, paying full value for it out of his own funds, and subsequently brought suit to foreclose it. It is somewhat uncertain who purchased at this foreclosure sale. No documents were introduced in evidence. The defendant testified that the title passed to Bradley, and that he conveyed it to plaintiff, while the plaintiff seems to testify that he himself purchased at the sheriff's sale, but got a quitclaim deed from Bradley. This uncertainty is immaterial, however; for in either case the title passed to the plaintiff, who thereupon made a deed to "John Warnen," who was plaintiff's brother-in-law, and whose real name was Hardwick or Hardwig. He paid no consideration for the deed, but acted in the interest of the plaintiff, and assumed the name of Warnen at his request, and for the occasion only. The defendant offered to pay the balance due on his contract, but was told by plaintiff that the title had passed to Warnen by the foreclosure proceedings. He, however, introduced defendant to Warnen as the man who had the title; and an arrangement was made by which Warnen made a deed to the defendant, and the latter paid therefor \$200 in cash, and gave his note for \$250 more, secured by mortgage upon the property. This note and mortgage were transferred by Warnen to the plaintiff, and constitute the foundation of the present action.

The defendant contends that there was fraud on the part of the plaintiff. But, so far as the creditors of the bank are concerned, it is a sufficient answer to say that the creditors are not complaining, and that their rights are not involved here; and, so far as the defendant himself is concerned, there is no fraud set up in the answer. Aside from denials, the sole defense pleaded is want of consideration. Nor can it be said that the place of a pleading was supplied by litigating the question without objection. The rule in that re-

gard only covers defects in a pleading, and not a total absence of anything in relation to a defense. Leaving out the question of fraud, as must be done, for the reasons above stated, the only matter discussed by counsel is whether title passed by the deed to John Warnen, and by the deed from him to the defendant; it being assumed by counsel that if it did there was consideration for the note and mortgage sued on, but otherwise that there was no such consideration. We think that the deeds were sufficient to convey the title. It is involved in the very inception of a deed that there must be a grantee, to whom delivery is made, and in whom the title can vest. If there be no grantee, and the deed is to a mere fictitious name, it is obvious that it is a nullity. But if there be a person in existence, and identified, and delivery is made to him, it makes no difference by what name he is called. He may assume a name for the occasion; and a conveyance to and by him under such name will pass the title. This was held in *David v. Insurance Co.*, 83 N. Y. 265. There the owner of property made a deed to "Max David," which was a fictitious name, and subsequently made a deed by said name of Max David to a third person. It was held that the first deed was void, and that the title remained in the owner, but that it passed by the second deed; the court, per EARL, J., saying: "In executing any instruments, I can find no authorities which hold that one is not bound by the name he adopts or uses. *Pro hac vice*, it is his name." So, where a deed was made out in the name of "James O. Brunius," and signed, "J. O. BRUNIUS," it was held that parol evidence was admissible to show that John O. Brunius was the party who signed the deed, and that if this was proved his title passed. The court said: "If the true owner conveys by any name, the conveyance as between the grantor and grantee will transfer title, and in all cases evidence *alunde* the instrument is admissible to identify the actual grantor. The admission of such evidence does not change the written instrument, or add new terms to it, but merely fixes and applies the terms already contained in it." *Wakefield v. Brown*, 38 Minn. 365, 37 N. W. Rep. 788. A somewhat similar ruling was made in *Middleton v. Findla*, 25 Cal. 78; and upon the authority of this last case it was held in *Fallon v. Kehoe*, 38 Cal. 44, that a deed made to "Darby O'Fallon," which was the name under which Jeremiah Fallon sometimes passed, was a good deed, and that a conveyance by him under the name of "Darby O'Fallon" transferred the title; the court, per CROCKETT, J., saying: "We do not understand counsel as contradicting the proposition that, if the true owner conveys the property by any name, the conveyance as between the grantor and grantee will transfer the title." See, also, *Garwood v. Hastings*, 33 Cal. 222; *Andrews v. Dyer*, 81 Me. 104, 16 Atl. Rep. 405; *Hommel v. Devinney*, 39 Mich. 522; *Staak v. Sigelkow*, 12 Wis. 234; *Nixon v. Cobleigh*, 52 Ill. 387. Upon the authority of the foregoing cases it must be held that the Warnen deeds transferred the title;



and it makes no difference in the result whether the defendant was a party to the foreclosure of the Bradley mortgage or not. If he was a party, and the decree cut off his interest, it is manifest that whatever rights he has to the property he got under the deed from Warnen, which was ample consideration for what he promised to pay for it. If he was not a party, then, although his rights under the contract were not cut off, yet the purchaser is in equity the assignee of the debt secured by the Bradley mortgage. *Carpentier v. Brenham*, 40 Cal. 221; *Rumpp v. Gerkens*, 59 Cal. 496; *Henderson v. Grammar*, 66 Cal. 335, 5 Pac. Rep. 488. And a conveyance by him or his grantee operates as a release of this right, and consequently was consideration for a promise to pay for it.

The plaintiff asks that final judgment be ordered in his favor. But, inasmuch as all the allegations of the complaint were put in issue by the answer, and as the only thing found was that the note was without consideration, it is hardly necessary to say that final judgment cannot be ordered as requested. We therefore advise that the judgment and order appealed from be reversed, and the cause remanded for a new trial.

I concur: BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are reversed, and the cause remanded for a new trial.

84 Cal. 272

HAWES v. CLARK. (No. 12,783.)

(Supreme Court of California. June 2, 1890.)

CONTINUANCE — DISCRETION — FINDINGS — JURY TRIAL — WAIVER.

1. The refusal to continue a case because of the inflamed condition of counsel's eyes is not an abuse of the court's discretion, where he was before the court at the time, and immediately proceeded to conduct the trial in person.

2. If the findings made are sufficient to support the judgment, the failure to find upon other issues is not reversible error, where the record does not show that any evidence was introduced thereon.

3. A defendant cannot demand a trial by a jury after having waived his right thereto in consideration of an agreement to transfer a cause to another department of the court.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; WILLIAM T. WALLACE, Judge.

*Theodore Bradley*, (M. G. Cobb, of counsel,) for appellant. *Edward J. Linforth*, and *A. C. Searle*, (Henry M. Clement, of counsel,) for appellee.

FOOTE, C. Hawes obtained a judgment against Clark based upon two promissory notes. From that judgment, and an order denying a new trial, the defendant appeals. Appellant claims that the trial court should have granted the motion for a new trial made in his behalf, because it was guilty of an abuse of discretion in not granting a continuance on the ground of the inflamed condition of the eyes of his counsel. The court saw the counsel and his condition at the time the application was made, and was a further

witness to the fact that, notwithstanding his alleged disability, he immediately proceeded to participate and conduct the trial in person. Under this state of facts, we cannot agree with the defendants' contention on that point.

It is next urged in behalf of the appellant that the court erred in refusing to grant a jury trial, as there was no legal waiver of such trial. The facts surrounding the transaction seem to be that the cause was peremptorily set for trial on the 16th of April, 1888, in a certain department of the superior court for the city and county of San Francisco. The defendant's counsel was desirous of having it transferred to another department of that court, so as to secure a delay in the trial. The plaintiff's counsel acceded to this, if the other side would waive a trial by jury. The matter was agreed to upon that basis, and counsel appeared in open court and waived a jury; the cause being also set for trial on the 3d of May, 1888. The waiver was not entered in the minutes in writing; and when the cause came on for trial, on the 14th of the same month, the counsel for defendant asked for a continuance, which, as we have seen, was refused. He then demanded a jury trial. The court, after full examination of the attorneys and the clerk, became satisfied, and properly so, that the defendant's counsel had made the stipulation above adverted to, and had appeared in open court and waived a jury trial. Thereupon, it refused a jury trial, and ordered the clerk to enter the waiver on the minutes *nunc pro tunc* as of the date when the same had actually been made. Without going into the question as to whether the court had the power then to have such entry made, it is plain that the defendant is not in a position to complain of its action. He got the benefit of one part of the stipulation,—that is, the transfer of the cause to another department of the court than the one in which it was peremptorily set for trial,—and secured about a month's delay, which seemed to be his prime object, and should not be allowed to avoid the accompanying burden of a trial before the court without a jury, which he had in open court, by his counsel, waived. *Himmelman v. Sullivan*, 40 Cal. 126.

By a supplemental brief, he now claims that the court made no finding upon certain affirmative defenses set up in his answer at folios 14 and 29. The record contains nothing to show that any evidence whatever was introduced on any such issues. The findings as they stand are amply sufficient to support the judgment, and contain nothing "inconsistent with it." Therefore the failure to find upon an issue, the finding upon which "would merely have the effect of invalidating a judgment fully supported by the findings made, will not be held ground for reversal unless it is shown by statement or bill of exceptions that evidence was submitted in relation to such issue." *Himmelman v. Henry*, 23 Pac. Rep. 1098, (filed in bank May 7, 1890.) We therefore advise that the judgment and order be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.



PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

84 Cal. 291

PEOPLE v. HANSEN. (No. 20,640.)

(Supreme Court of California. June 6, 1890.)

LARCENY—SUFFICIENCY OF EVIDENCE.

Defendant, of mature age, and without money, met a boy of 17 at a lumber camp, and, expressing a desire to go to S., the boy offered to accompany him, and pay his way. They got intoxicated, and entered a restaurant, where the boy went to sleep, placing his vest under his pillow. Defendant openly, in the presence of two other persons, took from the vest \$150, for the purpose, as he claims, of safe-keeping. He then bought tickets to S. for himself and the boy, had his whiskers shaved off, entered a saloon, became drunk, and was arrested. On seeing the officer, he tried to run away. When searched he had a little over \$100 with him. Being released before quite sober, the clerk retained the money, and gave him a receipt for it. He then returned to the restaurant, and asked for his "son," when the boy caused him to be arrested for stealing the money. He was unable to account for the missing \$50. Held sufficient evidence to justify a conviction of grand larceny.

Commissioners' decision. In bank. Appeal from superior court, city and county of San Francisco; F. W. VAN REYNOM, Judge.

Edgar D. Pelzotto, for appellant. Atty. Gen. Geo. A. Johnson, for the People.

FOOTE, C. The defendant, Hansen, was convicted of grand larceny. He appeals from the judgment therein rendered, and from an order denying him a new trial. The sole ground upon which he bases his contention for a reversal of the judgment and order is that the evidence entirely fails to support the verdict of the jury. His claim is that the money which he was charged to have stolen was in fact taken by him from the clothes of his sleeping friend for safe-keeping; that the friend was drunk in a restaurant, and the money alleged to have been stolen was taken openly, in the presence of two other persons, with the avowed intention to keep it safely until the friend and companion should awake, and become sober. The evidence does, without conflict, show that the taking was open, and in the presence of other persons, and with the avowed intention of taking care of it for the sleeping and intoxicated friend. The doubt which is thrown upon the transaction as being *bona fide*, and is really accompanied by the avowed intent, is the subsequent conduct of the defendant, which throws light upon the true and secretly entertained intent to convert the money larcenously to his own use, at the time of the taking.

The defendant was without means, a man of mature age, who fell in with a boy at a lumber camp in Sonoma county. The boy had something over \$170, and, after some little acquaintance between them, the defendant desiring, as he said, to go to Seattle, the boy offered to pay his expenses there, and to accompany him. In pursuance of this plan the two came to San Francisco, and proceeded to get intoxicated, after which they went to a restaurant, and the boy lay down on a lounge, with the apparent desire to sleep off his intoxi-

cation. The defendant, not so drunk as his companion, took \$150 in seven \$20 and two \$5 gold coins from a vest of the boy, which he had taken off and placed under his pillow. This was done in the presence of Gustave Dallinge, a cook and waiter in the restaurant, and of a Mrs. Oswaldt. The defendant then went off, and purchased a ticket for himself and the boy to Seattle, for which he paid \$20, and, getting drunk after a while in a saloon, was put in jail by a police officer. He was found then to have \$100 in gold upon him, and a little less than \$1 in silver, and a knife belonging to the boy. He got out of jail; and, because he was not then considered sober, the property clerk of the police court, where the money taken from him was on deposit, gave him a receipt for the money, but would not give him the money itself. He then went back to where he had left the boy, a day or so having elapsed since he had been there, and asked for his "son," as he called the boy. The boy was there, and at once grabbed him and demanded his money. The defendant told the boy that he had a receipt for the money, and that it was in the city hall. The latter would not take the receipt, but made an outcry for the police, and the defendant was arrested. According to the evidence of the policeman who arrested him before he returned to the restaurant, the defendant had been in a saloon, and was drunk and boisterous, displaying money, and in company with parties before whom, had he been sober, he would not have made the display. He told the policeman a rambling story about the money he had being his own, and was for the support of his wife, and that, if it was taken from him, he could not support her, and that he thought of making a trip to Europe, and spending a good deal of money, etc. When searched preparatory to being "booked" in the jail for being drunk, \$100 in gold coin were found on him, as well as less than \$1 in silver, a knife, and a bag in which the gold was, which bag was the boy's. The defendant had no money when he started to accompany the boy to San Francisco, and the boy paid his expenses, and gave him money to the amount altogether of \$8.50 before the alleged theft. While absent from the boy, after the taking of the money, the defendant had his whiskers shaved off; and, when the officer came into the saloon where the defendant was drunk, he sought to avoid him, and ran away. What became of some \$30 of the money taken the defendant could not account for. The jury, evidently impressed with the belief that the avoidance by the defendant of a police officer as soon as he saw him coming into the saloon, his shaving off his whiskers, and his conduct in apparently recklessly drinking and spending money not his own, and other circumstances in the case, evidenced on the part of the defendant a felonious intent to take and carry away the money in the first instance, which, as he could not do secretly, he did boldly and openly, and with the declared intent to take care of it, but secretly to steal it.

It is urged here that the case of People

v. Stewart, 80 Cal. 129, 22 Pac. Rep. 124, where the judgment was reversed, was not so strong a case on the evidence in favor of the innocence of the defendant there as are the facts shown here. With this contention we cannot agree. The conduct of Stewart at the time of the taking, and ever after, was to all appearances totally devoid of any felonious intent, and without any of the suspicious circumstances as appeared in the conduct of the defendant here subsequent to the taking. We therefore advise that the judgment and order be affirmed.

We concur: VANCE, C.; GIBSON, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

84 Cal. 244

HART V. MEAD, Sheriff. (No. 12,688.)

(Supreme Court of California. June 2, 1890.)

SALE—CHANGE OF POSSESSION—EVIDENCE.

In a suit against a sheriff to recover certain cattle, or their value, seized on an execution against plaintiff's father, it appeared that she was living in her father's household; that she received and placed on record a bill of sale of the cattle and other property from him more than a year before, and had finished paying therefor more than four months before the seizure; that when buying she was ignorant of her father's indebtedness to the judgment creditor; that she at once sent written notice of her purchase to other persons interested in the same herd, and immediately began to care for the cattle by riding about and looking after them; that she attended the *rodeos*, and superintended the separation of her cattle from the others, and thereafter took personal charge of them to the same extent as a man would do under similar circumstances. *Held* sufficient evidence to sustain a finding of actual and immediate change of possession, as required by Civil Code Cal. § 3440.

Commissioners' decision. Department 1.

Appeal from superior court, Mariposa county; JOHN M. CORCORAN, Judge.

J. M. Congdon, for appellant. G. G. Goucher, Newman Jones, and R. B. Stolder, for respondent.

FOOTE, C. This action was brought by the plaintiff, Nancy J. Hart, to recover of the defendant, as the sheriff of Fresno county, certain cattle alleged by the plaintiff to be her property, and wrongfully taken on an execution against her father, A. W. Bolton, or the value thereof. The cause was tried before a jury, who found a verdict for the plaintiff for the recovery of 23 head of cattle, or for the sum of \$575 if recovery of the property in dispute could not be had. Judgment thereupon followed. Upon motion the court granted a new trial conditionally,—that is, unless the plaintiff would consent to a modification and reduction of the judgment to the sum of \$414; which consent, as required, being given, and the modification made, a new trial was not awarded. From the order made in the premises, and from the judgment, the defendant has appealed.

The contention of the defendant is, in the main, that—*First*, the evidence did not justify the jury in finding the sale of the cattle in dispute to the plaintiff from her father, A. W. Bolton, the judgment debt-

or, to be *bona fide*, under the provisions of section 3439 of the Civil Code; and, *second*, that, supposing the sale to have been shown to be in fact untainted with fraud, the conditions imposed by section 3440, Civil Code, were not sufficiently complied with, under the evidence, to justify the jury in finding the sale of the property involved here to the plaintiff by A. W. Bolton to have been valid.

The plaintiff, it seems, was a young widow, who had been living in the household of her father, A. W. Bolton, most of the time since January, 1885. She testified that the cattle in dispute were in her possession on the 20th day of January, 1887, the date of the levy of an execution on a judgment against her father, and in favor of his creditor, Mr. Reid; that she had bought them from her father on the 2d of September, 1885; that the cattle at that time were part of an undivided band known as the "Pot-Hook" band of cattle, owned in undivided shares by J. J. Westfall, a half interest, and J. R. Westfall and A. W. Bolton each an undivided one-fourth interest. She bought the interest of Bolton in the cattle, and also, in addition, two saddle horses and a mare and two colts. For the whole property she executed her note for \$800, and received a bill of sale for it. This bill of sale was recorded by her on the 16th of September, 1885, in Book G of the Miscellaneous Records of Mariposa county,—the range of the cattle being in both that and Fresno counties; nothing except the cattle being involved in this suit. Her father at the time of this sale owed her \$199.81, which was at once credited on this note. Said amount was made up of \$50 for a horse she had sold him, \$15 she had paid for him at a store, and \$104.81 which she paid for him to Dr. Turner on the day of the sale of the cattle,—this last amount being for some hogs coming to her from her husband's estate, which she gave to Turner; and by the 2d of November, 1886, she had paid up the whole amount of the note. It appears that she began, as soon as she purchased the cattle, to ride around and look after them, as they ran upon the range, just as her father had previously done, and that she performed from that time on all the duties which would pertain to a man similarly circumstanced, and in charge of and owning an interest in cattle running on a range of very considerable extent. At the time of her purchase, she owned some other property exclusive of that coming to her from her deceased husband's estate, viz., some horses, and about 16 head of hogs. She also had delivered to her by her father the branding iron pertaining to this brand of cattle, and branded calves with it. On the 21st of November, 1885, she sent a written notice to the Westfalls, who were joint owners with her of the brand of cattle, that she had purchased her father's interest in them, and seems also to have made this fact known to such other persons as she saw. She stated further that, at the time of the purchase from her father, she did not know that he was indebted to Mr. Reid. She thus succeeded her father at once in the care of the cattle, and looked after them as they were upon

the range, at the time of the purchase, as he had previously done as part owner thereof, and continued to be thus in control of them until about the 25th of April, 1886, when a *rodeo* was had, at which the cattle were gathered up by the parties interested, and those called on to assist at it, and divided out between the plaintiff and the Westfalls; she assisting to gather them up, and being present at the division. The cattle were in charge of her father and J. R. Westfall when she bought; they having gotten them from J. J. Westfall on shares. The notice which she sent to the Westfalls as to her purchase also stated that, she having bought her father's interest in the cattle, they must sell no more of them until a division could be had, and that they would have to settle with her for her share of what they had sold since her purchase, and that she had appointed her father her agent to look after the cattle; but her father did not act under that authority, except some time in December, 1885, when, riding over the range, he would turn the cattle back, if he found them straying off the range, as he would do for any one else. Her father states: "We commenced gathering cattle for the *rodeos* about the 11th of March, and kept on until May 14, 1886. The first division of cattle between J. J. Westfall, J. R. Westfall, and plaintiff took place near the Hart cabin about April 25th. I have been in the cattle business about fourteen or fifteen years. *Rodeos* are usually held from March to May. After the time when I sold the cattle to plaintiff, September 2d, a *rodeo* could not be held until the spring of 1886, as the cattle and horses would be too weak until the grass was good in the spring." The plaintiff is corroborated in the main portion of her testimony, as to the immediate acts of possession and ownership which she exercised over the cattle as changed from that of her father, and the steps which she took to notify others of the change of ownership from her father to herself, by sundry witnesses.

It further appears that Bolton, for some time previous to the sale, had been endeavoring to sell his interest in this band of cattle, in order to wind up his business and quit horseback riding, and try to pay all his creditors, who were not many, nor the amounts due them large, and probably not more than what he owned would suffice to pay; that the plaintiff here did not know he owed Reid, the plaintiff in the execution; that it was uncertain at the time of the sale what the interest in the running cattle would be worth; that she seems to have received at the *rodeo* something over 30 head of cattle, to have driven them off and taken care of them, mainly in person, from that time on to the date of the levy, and to have been as assiduous in her attention to them as a man would be of his own in a like case. From these facts and circumstances surrounding the whole transaction, besides those previously stated, and others which appear in the record, and considering the conditions attending the *status* of the property sold, we cannot say that the jury were not warranted in believing that the sale of the cat-

tle was in fact *bona fide*, and accompanied by an immediate delivery, and followed by an actual and continued change of possession, under the terms of sections 3439 and 3440 of the Civil Code.

We perceive no error of the court in its action upon the giving, refusing, or modification of the instructions; nor is there any other prejudicial error shown by the record. We therefore advise that the judgment and order be affirmed.

We concur: VANCLIEF, C.; GIBSON, C.

PER CURIAM. For reasons given in the foregoing opinion the judgment and order are affirmed.

84 Cal. 486

HOME FOR THE CARE OF INEBRIATES V. KAPLAN, Clerk. (No. 12,464.)

(Supreme Court of California. June 12, 1890.)

ABORTIVE APPEAL—CONSTRUCTION OF STATUTE.

1. Under Code Civil Proc. Cal. § 989, which provides that an appeal may be taken from a final judgment within one year after such judgment is entered, an appeal which was perfected after the rendition, but before the entering, of the judgment, was abortive, and did not bring the case up.

2. Where an order substituting a party was made in the supreme court, in a case supposed to be pending there, though in fact the appeal was abortive, the order of substitution will fall with the dismissal of the appeal.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; T. K. WILSON, Judge.

*George Flournoy*, for appellant. *Tilden & Tilden*, for respondent.

GIBSON, C. In this proceeding the plaintiff corporation obtained a judgment awarding it a peremptory writ of mandate against the defendant, Kaplan, as clerk of the police judge's court No. 2, of the city and county of San Francisco, commanding him, as such clerk, to pay to plaintiff the sum of \$455 received by him for fines and forfeitures collected in said court during June and July, 1887, from persons arrested for being drunk, or under the influence of liquor. This judgment was rendered on the 25th day of October, 1887, but was not entered of record until the 27th day of the same month. On the same day that the judgment was rendered, which, it will be observed, was two days before the entry of it, the defendant perfected this appeal from it. On the 29th of August, 1889, upon the *ex parte* suggestion of the respondent's counsel of the death of Louis Kaplan, the appellant, and that Francis Doran had been duly appointed and had qualified as his successor in office, being made in this court, an order was made substituting Doran as the defendant and appellant herein, instead of the deceased Kaplan. September 3, 1889, upon proper notice to counsel of record for the deceased, Kaplan, respondent moved to dismiss the appeal on the ground that it was prematurely taken. At the same time, Doran appeared by his counsel, and made a motion to set aside the *ex parte* order of substitution, on several different grounds, not necessary to particularize.

The motion to dismiss the appeal is not opposed by Doran; but the respondent contends that the order substituting Doran for Kaplan should be permitted to stand, and the case remanded with Doran as defendant instead of Kaplan. But, as we shall endeavor to show, the *ex parte* order of substitution was inadvertently made and is invalid, and will, in effect, be set aside by the dismissal of the appeal. It is provided by section 939 of the Code of Civil Procedure that an appeal may be taken from a final judgment within one year after such judgment is entered; and since that section went into effect, which changed the previous rule, found in section 336 of the practice act, under which an appeal might be taken from a final judgment within one year after the rendition of the judgment, this court has uniformly held that an appeal taken before the judgment is entered of record (see section 668, Code Civil Proc.) is premature, and must be dismissed, (*McLaughlin v. Doherty*, 54 Cal. 519; *Preston v. Hearst*, Id. 595; *Thomas v. Anderson*, 55 Cal. 43; *People v. Center*, 66 Cal. 551, 5 Pac. Rep. 263, and 6 Pac. Rep. 481; *Scotland v. Mining Co.*, 56 Cal. 625; see *Hayne*, New Trial & App. § 183.) This court, under section 936 of the Code of Civil Procedure, can review a judgment or order in a civil proceeding, which is not expressly made final by such Code, only when it is brought up on an appeal pursuant to title 13 of the same Code, of which title, section 939, above referred to, is a part. *McLaughlin v. Doherty*, supra. Therefore, when an appeal is taken in any other than the prescribed mode, it is abortive, and does not succeed in bringing the case here, but leaves it in the court below, as undisturbed as though no attempt had been made to remove it to this court.

Now, in the present instance, as the futile appeal did not remove the case from the superior court, there was no case here when the order of substitution was made; hence, it must fail for want of a case to support it. We therefore advise that the appeal be dismissed.

WE CONCUR: BELCHER, C. C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the appeal is dismissed.

LEHMANN v. SCHMIDT. (No. 12,547.)

(Supreme Court of California. June 13, 1890.)

FACTORS—LIEN—CONVERSION.

Defendant agreed to sell plaintiff's wine at a certain net price, the excess to be divided equally between them. After receiving a part thereof, and making advances to plaintiff thereon, and paying freight, in accordance with the agreement between them, defendant refused to receive any more; and, before any of the wine had been sold, plaintiff demanded a return of that which defendant had received, without offering to pay back the money which defendant had advanced and expended for freight. *Held*, that under Civil Code Cal. §§ 2026, 3051, 3053, defining a factor, and giving him a lien on the property placed in his hands for money advanced and expended, defendant was a factor, and had a lien on the wine, and a right to retain it, so that his refusal to comply with the demand did not constitute a conversion. PATERSON, J., dissenting.

In bank. On rehearing. For former opinion, see 22 Pac. Rep. 973.

Chapman & Slack, for appellant. A. Heynemann, for respondent.

PER CURIAM. This case was decided in department 2 of this court, December 5, 1889; the court, for reasons given in an opinion submitted by Mr. Commissioner BELCHER, reversing the judgment of the court below. Subsequently, a rehearing was granted in bank. Upon consideration of the case, and of the additional arguments made upon such rehearing, we are satisfied that the judgment in department was correct. For the reasons given in the opinion then filed, and on the additional authority of *Evans v. Bailey*, 66 Cal. 112, 4 Pac. Rep. 1039, the judgment appealed from is reversed, and the case remanded.

PATERSON, J., dissenting.

Cal. 570

DENNIS v. UNION MUT. LIFE INS. CO. (No. 12,760.)

(Supreme Court of California. June 16, 1890.)

LIFE INSURANCE—BURDEN OF PROOF—INSANITY—EVIDENCE.

1. Where, in a suit on a life insurance policy which provides against liability for suicide, whether caused by insanity or not, suicide is pleaded as a defense, the burden of proving it is on defendant.

2. Where the affidavits of plaintiff's proofs of death showed that the insured committed suicide, and such evidence was uncontradicted, a verdict for plaintiff should have been set aside, and a new trial granted.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; JOHN F. FINN, Judge.

Estee, Wilson & McCutcheon, for appellant. Haggin, Van Ness & Dibble, for respondent.

FOOTE, C. This is an action to recover from a life insurance company the sum of \$2,500 upon the death of a person insured by the company. The jury trying the cause returned a verdict for the plaintiff. From the judgment rendered in the premises, and an order refusing a new trial, the defendant appeals. Under the pleadings, the execution of the policy, the payment of the premium, the death of the insured, the giving notice and making proof of the death in due time, and the repudiation by the defendant of any obligation to pay the policy, are admitted. The defense set up was that, under a clause of the policy which reads thus: "It is hereby declared and agreed that the self-destruction of the person within three years from the date hereof, whether voluntary or involuntary, and whether he be sane or insane at the time, is not a risk assumed by the company in this contract,"—the defendant was not liable, because the death of the insured person was the result of, and caused by, self-destruction. The plaintiff rested, after reading the pleadings, upon the admission of the defendant that, if the jury should give a verdict for the full amount of the policy, the sum of \$131 had accrued as interest. The court then held that the burden of proving the de-

fense set up rested upon the defendant. The defendant objected to this, and demanded a nonsuit, which was refused, and the action of the court is assigned for error.

It was not incumbent upon the plaintiff to plead that the insured person had not committed self-destruction; for it is not necessary to insert allegations in the complaint "for the purpose of meeting or cutting off a defense. Thus, one seeking to recover on an insurance policy must aver the loss, and show that it occurred by reason of a peril insured against; but he need not aver the performance of conditions subsequent, nor negative prohibited acts, nor deny that the loss occurred from the excepted risks." *Blasingame v. Insurance Co.*, 75 Cal. 635, 17 Pac. Rep. 925. Therefore the burden of proof was not upon the plaintiff to show what it was unnecessary to allege in his pleadings, and the court was right in its ruling.

The defendant then introduced the proofs of death which had been made to the plaintiff, and some other matters of evidence. The plaintiff was then introduced as a witness, and testified that after these proofs were made on his behalf, and the company had refused to pay the loss, he had sought the advice of a lawyer, and had then taken steps to get depositions from the parties who had made the proofs supplemental thereto. It appeared from the positive declarations of the witnesses in their original affidavits of proof that the insured person had committed self-destruction by shooting himself in the head with a pistol while laboring under temporary aberration of mind. The effort made by the supplementary testimony was to show that the death was accidental, and not through any intentional act of the suicide. We think the effort fruitless, and that the evidence shows without any conflict that the death of the insured person was not accidental, but that he committed suicide or self-destruction with a pistol while temporarily insane. This being so, it becomes unnecessary to discuss any of the other points made, and we advise that the judgment and order be reversed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed.

34 Cal. 327

HAVEMEYER *et al.* v. SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO. (No. 13,709.)

(Supreme Court of California. June 7, 1890.)

WRIT OF PROHIBITION—JURISDICTION TO APPOINT RECEIVER.

1. Civil Code Cal. § 399, refers to both the voluntary and involuntary dissolution of corporations, and section 400 declares that, "unless other persons are appointed by the court, the directors or managers \* \* \* of such corporation, at the time of its dissolution, are trustees of the creditors and stockholders \* \* \* of the corporation dissolved, and have full power to settle the affairs of the corporation." By Code Civil Proc. § 565, on the dissolution of any corporation, the superior court, "on application of any creditor of the corporation, or of any stockholder or member

thereof, may appoint one or more persons to be receivers or trustees" thereof, etc. *Held* that, on an involuntary as well as a voluntary dissolution, the directors are the proper persons to wind up the corporation's affairs, unless a receiver is appointed on the application of a creditor or stockholder; and where the charter of a corporation had been declared forfeited because the company had entered into an illegal combination, known as a "trust," to control production and sustain prices, the state had no interest in its affairs whereby to sustain an application for a receiver, either as a punishment for the illegal use of its corporate privileges, or to see that its assets were properly distributed.

2. Code Civil Proc. Cal. § 946, provides that an appeal "stays all further proceedings in the court below, upon the judgment or order appealed from, or upon the matters embraced therein." *Held* that, where an appeal had been taken from a judgment abrogating the charter of a corporation because of abuse of its corporate privileges, the subsequent appointment of a receiver to sell its property and wind up its affairs was a proceeding upon the judgment, within the meaning of the statute, and was therefore void.

3. The appointment cannot be sustained upon the ground that to allow the directors to retain control of the assets would amount to a practical rehabilitation of the corporation, and thus defeat the purpose of the forfeiture.

4. A sale, in good faith, of part of the corporation's property to petitioners, who were among its stockholders, pending the proceeding to vacate its charter, was valid; and as purchasers they can sustain an application for a writ of prohibition to restrain the court and the receiver from interfering with their possession of such property.

5. An objection that the evidence in the *quo warranto* proceeding showed the sale to be a sham was not well taken, since the petitioners were not parties thereto in their character as purchasers, and no issue was or could have been made as to the good faith of the sale.

6. The fact that the petitioners, in their character of stockholders, contested the appointment of the receiver for the corporation's property, cannot be construed as a voluntary submission to the jurisdiction of the court in their character of purchasers, so as to estop them from questioning the validity of the appointment otherwise than by appeal.

7. The possession of the receiver is the possession of the court, and a writ of prohibition to the court, by its indirect action through the court upon the receiver, will stay his hand from further proceedings.

8. A writ of prohibition to a court which, in excess of its jurisdiction, has appointed a receiver, will not stay further proceedings under the receivership, but will restore the property to its owners, even though the receiver has gained complete possession.

9. A writ of prohibition will not lie when there is a plain, speedy, and adequate remedy at law; but the right of petitioners to move in the appointing court for the withdrawal of the receiver affords no such remedy, since, in case the motion were denied, irreparable injury might be caused by the delay.

10. Nor is such remedy afforded by the right of petitioners to apply to the appointing court for leave to sue the receiver in ejectment after he had gained possession of the property.

11. Where the receiver was ordered to close down a great sugar refinery, and sell its stock, machinery, and utensils, the right to appeal from the order of appointment affords no such remedy; especially when the appointing court has already decided that an appeal would not stay proceedings under the receivership.

12. Generally a writ of prohibition will not issue to restrain an inferior court from committing an act in excess of its jurisdiction, unless objection to the jurisdiction was made in such court; but since the applicants, as purchasers of the refinery, were not parties to the *quo warranto* proceeding, and no specific property was mentioned

in the application for a receiver, they had no opportunity to object, as purchasers of the refinery, until the receiver actually attempted to take possession.

13. The fact that they were parties as stockholders, and as such objected to the jurisdiction to appoint a receiver for the property of the corporation only, cannot be construed as a waiver of their right to object as purchasers of the refinery, since they could not know that it was to be made subject to the receivership.

14. The objection that a writ of prohibition will not lie to try a question of title is not applicable to this case, since the act of the court in taking the property from the possession of strangers, without giving them a hearing on the question of title, deprived them of property without due process of law. Possession should be restored irrespective of the actual state of the title.

15. Where a party in interest makes out a case for a writ of prohibition, it issues as a matter of right, and the court has no discretion to withhold it upon the ground that the applicants are members of the sugar trust monopoly, and enemies of the public weal.

In bank.

*Wilson & Wilson and Garber, Boalt & Bishop*, for petitioners. *William T. Wallace*, in pro. per., and *Wm. M. Pierson*, for respondent.

BEATTY, C. J. This is an original application for a writ of prohibition to the superior court of the city and county of San Francisco, department No. 6, WILLIAM T. WALLACE, Judge, commanding and directing said court and judge, and the receiver of said court, Patrick Reddy, Esq., to desist and refrain from proceeding or acting upon or in pursuance of a certain order appointing said receiver. The importance of the case, not only as regards the interests at stake, but also in respect to the questions of law and practice which it involves, will justify, if it does not require, a somewhat detailed statement of the facts out of which it arises.

It appears that in the month of November, 1888, the people of the state of California, on the relation of the attorney general, commenced an action in said superior court against the American Sugar Refinery Company, a California corporation, for the purpose of forfeiting its charter. The corporation appeared and answered the complaint, and after trial the judgment of said superior court was pronounced, declaring the forfeiture, and imposing upon the corporation defendant a fine of \$5,000 and costs of suit. The judgment was rendered January 8, 1890, and on the same day, at the instance of the attorneys representing the state, a rule was issued and served requiring said corporation and its attorneys to show cause on the 10th of January why a receiver should not be appointed "to take charge of the estate and effects of the said defendant corporation, and to distribute the same according to law, or to preserve the same pending an appeal herein, if such appeal be taken herein, on the ground that said defendant corporation has been dissolved, and has forfeited its corporate rights." On the return-day of the rule, the corporation appeared, and the hearing was continued until January 20th. Meantime, on January 18th, the corporation duly served and

filed its notice of appeal to this court from the judgment against it, and at the same time filed in due form a bond in the penal sum of \$12,000 to stay proceedings on said judgment. After hearing the motion for a receiver, the judge of the superior court held the matter under advisement until February 17th, on which day he made an order as follows, (after reciting the previous proceedings:) "It is ordered that Patrick Reddy, a resident of the city and county of San Francisco, state of California, be, and he hereby is, appointed receiver of the property and effects of the defendant, wherever the same may be situate, including the American Sugar Refinery, situate at the southwest corner of Union and Battery streets, in this city and county, and its appurtenances. It is further ordered that the defendant, its officers, agents, attorneys, servants, and employes, and all persons and corporations, associations or firms, holding any of the defendant's property in trust for said defendant or its stockholders, do immediately, upon the production of this order, surrender into the possession of said receiver all the said property, real, personal, and mixed, wherever situate, belonging to said defendant, including all its books, records, and papers. And it is further ordered that said receiver do immediately take into his exclusive possession all the books, records, and papers of said defendant, and all the said property, real, personal and mixed, of the said defendant, including the said American Sugar Refinery, so as aforesaid situate in said city and county, and hold the same pending the appeal from the judgment herein, and the final determination of the motion for new trial, and until the further order of this court; and that said receiver at once close the said refinery, and do not dispose of any of the said property of the said defendant until the further order of this court. It is further ordered, and I hereby direct, that the said receiver execute to the state of California an undertaking, with two sufficient sureties to be approved by me, in the sum of \$10,000, to the effect that he will faithfully discharge the duties of receiver in the above-entitled action. Dated February 17, 1890. WM. T. WALLACE, Judge."

On the same day a second order was made, which, after reciting the one above quoted, and the fact that the receiver had executed and filed a sufficient undertaking as therein required, and had taken the oath of office, concludes as follows: "Now, therefore, it is hereby ordered that said receiver be, and he is hereby, invested with all the power and authority mentioned and conferred in said order hereinabove recited, to the same extent as if the same were again here repeated and recited at length. Dated February 17, 1890. WILLIAM T. WALLACE, Judge."

Immediately upon the issuance of this order, Mr. Reddy proceeded to the sugar refinery therein mentioned, which he found in full operation under the direction and control of a superintendent, foreman, and others, in the pay and employment of the petitioners herein, who claim to have purchased the property, and to have re-

ceived a conveyance thereof from the American Sugar Refinery Company in the month of March, 1889, since which time they assert that they have been in full and complete possession, as absolute owners, in their own exclusive right. Mr. Reddy, however, demanded of those in charge that they should immediately transfer the possession of the premises, and everything connected with and contained in the refinery, to him, as receiver; and he claims that on the evening of the 17th he had succeeded in obtaining full and absolute possession and control of the entire establishment. This claim is disputed by the petitioners, and whether it is true or not is one of the principal questions in the case. The facts upon which its solution depends will be reviewed when the question is reached. Meantime, and for the purposes of this preliminary statement, it is sufficient to say that the petitioners and the receiver each claim to have had possession of the refinery on the 17th of February, and on the following day. The receiver claims that his possession was complete and absolute from and after the evening of the 17th. The petitioners contend that, at most, there was a mere scramble for possession by the receiver up to the time when he was served with notice of the alternative writ of prohibition herein, on the afternoon of February 18th.

The first notice that the petitioners or their employes had of the order appointing the receiver, and directing him to take possession of the sugar refinery, was Mr. Reddy's demand for possession, and proclamation of his authority. The agents in charge of the refinery, before yielding to his demands, asked to be allowed an opportunity of obtaining legal advice as to their rights and duties in the matter. This was conceded by Mr. Reddy, upon the understanding that the superintendent of the refinery would notify him at 10 o'clock next morning what course he had decided to take. Availing themselves of this respite, the agents of petitioners consulted counsel, and during the night of February 17th affidavits were prepared upon which to base an application to Judge WALLACE for a suspension or modification of his order. Prior to 10 o'clock on the following morning Mr. Reddy was notified of this intended application, and at about the hour of 10 o'clock he and his counsel, and counsel for petitioners, met Judge WALLACE at his chambers, where, at least, an informal application was made to the judge for a stay of proceedings pending a motion to set aside or modify his previous order directing the receiver to take possession of and close the refinery. What occurred at this interview is one of the principal points of controversy in the case, as involving a question of practice or procedure. The facts will be stated, so far as necessary, when we come to consider that question.

For the present, it is sufficient to say that Judge WALLACE refused to grant any stay of proceedings for even an hour, unless the petitioners would at once desist from all opposition to the receiver, and yield instant and absolute possession of the refinery and other property. This

condition was not assented to, and it was then agreed between Mr. Reddy and his counsel upon one side, and counsel for petitioners on the other, that at the hour of 12 o'clock on that day counsel for Mr. Reddy should be informed what further steps the petitioners had decided to take, and whether they would further oppose his claims as receiver to the possession of the refinery. At 12 o'clock counsel for Mr. Reddy was notified, in substance, that his right to the possession could not be admitted, and that his taking possession would be opposed, so far as it could be done without a resort to actual force or violence. Meantime, Mr. Reddy had again attempted to assert and enforce his possession and authority at the refinery, and had met with such resistance that he felt it necessary to resort to the court for its aid. He therefore made and filed an affidavit entitled in the action against the American Sugar Refinery Company, in which, after reciting the various proceedings and orders therein, including his appointment and qualification as receiver, he proceeded as follows: "That deponent, as such receiver, entered into possession of the American Sugar Refinery, and the property therein situate, in the city and county of San Francisco. That H. C. Mott and R. H. Sprague impede, hinder, and delay this deponent in the discharge of his duties as such receiver, and refuse to allow deponent to take into his possession and control certain property situate on the premises aforesaid. That said parties last above named, notwithstanding the receiver's possession of said premises, dispute his right to said possession, and resist the full enforcement of the order and judgment of this court, and especially of the order hereinabove set forth. Wherefore this deponent prays this honorable court to give its order and direction to the sheriff of said city and county of San Francisco to enforce the orders and direction of this court as duly given and made, in and by the order hereinabove set forth, and to do and perform all acts which may be necessary to place said receiver in complete possession of said American Sugar Refinery, and all and singular the property therein situated, and the property of said defendant of whatever character, and wherever situated."

Immediately upon the filing of this affidavit of the receiver, and at about the hour of 1:30 P. M. of February 18th, Judge WALLACE made and filed an order, which, after reciting the previous proceedings, concludes as follows: "Now, you, the said sheriff, are hereby required to execute and enforce each and every, all and singular, the matters in said order appointing a receiver contained, in so far as may be necessary to place said receiver in possession, and to do and perform all acts which may be necessary to place Patrick Reddy, said receiver, in exclusive, full, and complete possession of the land and premises known as the American Sugar Refinery, situated at the south-west corner of Union and Battery streets, in said city and county of San Francisco, and of all and singular the property, real and personal, of said American Sugar Refinery



Company, in said city and county of San Francisco. And you, said sheriff, are directed to make return of said order appointing a receiver, and of this order within ten days after your receipt hereof, with what you have done indorsed thereon. WM. T. WALLACE, Judge."

This order, which the superior judge and sheriff denominate a writ, was afterwards, on February 28, 1890, filed by the sheriff with the following return indorsed thereon: "I, C. S. Laumeister, sheriff of the city and county of San Francisco, state of California, certify that the annexed and accompanying orders and writs issued out of the superior court of the city and county of San Francisco, were placed in my hands at 1:45 P. M., on Tuesday, February 18, 1890. In obedience to the said orders and writ, I proceeded to the premises designated therein, and found Patrick Reddy, who had theretofore been appointed by said honorable court as receiver in said action, in possession of said premises in said orders and writ mentioned and described. That I found upon said premises certain persons who, I was informed, were interfering with the possession and enjoyment of said premises by said receiver. That I thereupon exhibited said order, and requested said persons to retire from said premises, and that said persons thereupon retired from said premises described in said writ and order, and thereupon left said Patrick Reddy in the peaceful and undisturbed and undisputed possession of the land and premises known as the American Sugar Refinery, situated at the southwest corner of Union and Battery streets in said city and county, with the appurtenances thereto belonging and the fixtures therein, and all property, real and personal, appertaining thereto. That I also found said receiver in possession of the office of the American Sugar Refinery Company at No. 220 California street, and I left him in possession thereof. That I also found said receiver in possession of an office and premises situated in the second story of a building, No. 124 California street, which said office and premises were designated with the name 'The American Sugar Refinery Company,' and I left said receiver in absolute possession of said premises last above described, and all of the premises and property hereinabove mentioned and described. That all of said actions and proceedings done, had, and performed by me, under and in obedience to said orders and writ, were done, had, and performed and completed at and before the hour of 3 o'clock P. M. of said eighteenth day of February, 1890."

While these proceedings, by and on behalf of the receiver, were in progress, the petitioners were applying here for a writ of prohibition, and about the hour of 2 o'clock P. M., February 18th, an order for the issuance of an alternative writ was made and filed. The writ issued in pursuance of our order was served on the receiver about 3:30 o'clock P. M., and upon Judge WALLACE about 6 o'clock P. M. In their petition for the writ, the petitioners set out the whole proceedings in the case of *People v. American Sugar Refinery Company* down to and including the order ap-

pointing the receiver, and the order supplementary thereto. They allege that ever since the 21st day of March, 1889, they have been the owners in fee-simple in their own right of the several tracts and parcels of land in San Francisco which they specifically describe, and upon which are situate the sugar refinery, and the various shops and offices appertaining; that ever since said date they have been carrying on in said buildings the business of refining sugars for sale in the markets of California and elsewhere; that they also have offices, furniture, books, and other personal property used by them in and about said business; that they do not use, hold, or possess said property, or any part thereof, in trust for the use or benefit of the American Sugar Refinery Company, the defendant in the action referred to, or any of its directors, trustees, creditors, or stockholders, but solely for themselves, and for their own exclusive use and benefit, and have ever since said 31st day of March, 1889, been in the quiet and peaceable possession of the same, claiming title thereto, and the exclusive ownership thereof; that since September, 1889, Henry C. Mott has been the general agent and attorney in fact of the petitioners, in actual charge and custody of all of said property, and duly authorized to conduct said business. They then allege the demands of Reddy to be let into the possession of said property, their refusal and resistance, the damage that would result from a stoppage of the works, and that Reddy is threatening to cause the arrest of said agent and the superintendent of the works for contempt of the superior court in resisting the said order. They further allege that they have, through their said agent, Henry C. Mott, respectfully presented the foregoing facts to said superior court, and called its attention to the excess of jurisdiction by it committed in making said order, and in directing said receiver to enter upon and take possession and control of their said property; and that they have requested said court to modify its said order so as to direct him to bring a proper action for the recovery of said property, instead of taking possession without action, which request they say said superior court has denied. They further allege that said orders, so far as they authorize the receiver to take the property in their possession and claimed by them, are beyond the power and jurisdiction of the court, and in violation of their rights; that they were not parties to said action of the People against said American Sugar Refinery Company, nor did they make any appearance or participate in any respect in said action. They further allege that, after said judgment against the Sugar Refinery Company, said company, on the 18th of January, 1890, had taken and perfected an appeal therefrom to this court, and had filed an undertaking sufficient to stay the execution thereof. And, averring that they have no plain, speedy, or adequate remedy against said proceedings of the superior court in ordinary course of law, they pray: "That a writ of prohibition herein may be issued to said superior court of the city and county of San Francisco, depart-



ment No. 6, and the judge thereof, commanding and directing said court, and said judge, and also its said receiver, Patrick Reddy, to desist and refrain from further proceedings upon the said order aforesaid appointing its said receiver, and from exercising any of the powers in said order granted with regard to any property in the possession of said Havemeyers & Elder, through their agents or employees, and especially said sugar refinery, and from interfering with or disturbing the possession and control of the said Havemeyers & Elder of the said sugar refinery, or any other property by them possessed and claimed in their own right."

The order made by us upon the filing of this petition directed the issuance of an alternative writ of prohibition to department No. 6 of the superior court of the city and county of San Francisco, and to Hon. W. T. WALLACE, judge of said court, in accordance with the prayer of the petition, "commanding said court and judge, either through said Patrick Reddy, receiver, or otherwise, from taking possession of or interfering with the possession or control by said Havemeyers & Elder, through their agents or otherwise, of any property, real or personal, in their possession, and claimed by them in their own right, and especially of the said property situate on the south-west corner of Union and Battery streets, in said city and county, and the refinery situate thereon, or from interfering with the agents and employees of said Havemeyers & Elder in the conduct of the business of the same, or from exercising any of the powers granted to said receiver in the order appointing him, so far as enforcing the same is concerned against said Havemeyers & Elder." Said order further directed said court and judge to show cause on March 3d why said prohibition should not be made absolute and perpetual, and that in the mean time, until further ordered, "all proceedings in said action upon the said order so appointing said receiver be stayed so far as the said Havemeyers & Elder and the property, real and personal, in their possession at the time said order was made appointing said receiver, are concerned." The writ issued in pursuance of this order in the name of the people and under the seal of the court, was, in substance, a repetition of the order, with some amplification of its terms, and not only the writ, but copies of the order and petition upon which it was founded, were served at the hours above mentioned on Judge WALLACE and Mr. Reddy.

On February 25th, which was prior to the day upon which the respondent was required to show cause against the prohibition, affidavits were filed on behalf of the petitioners, alleging that the respondent and the receiver had committed a contempt of this court in proceeding under said order appointing the receiver contrary to the injunction contained in our order for the writ of prohibition; whereupon we made and directed to be served upon Judge WALLACE and Mr. Reddy another order, in which, after reciting the substance of the charge contained in said affidavits, we commanded them to show cause on March

3d why they should not be adjudged guilty of contempt, and why the receiver should not be compelled to withdraw and retire from the sugar refinery, and make restitution of the personal property which he had taken into his possession. On March 3, 1890, Judge WALLACE and Mr. Reddy appeared and answered in both proceedings,—the prohibition and the contempt,—and they were heard, argued, and submitted together.

It is not necessary, in this connection, to set forth in detail the matters contained in the answers of the respondent and the receiver. It is sufficient to say that the answer of Judge WALLACE contains denials and averments upon which he claims that his power and jurisdiction to appoint a receiver of the property of the American Sugar Refinery is complete, and also that he had the like power and jurisdiction in the action against the corporation to command and authorize the receiver to take the specific property described in his order, notwithstanding it was in possession of the petitioners, under claim of exclusive ownership.

As to the matter of contempt, Judge WALLACE takes the position that the effect of our order for and writ of prohibition was simply to tie his hands and shut his mouth, so that he could not, without a violation of its terms, give any order or direction to the receiver whatsoever, or in any manner interfere with his proceedings; and he shows that he strictly adhered to this rule of inaction. Mr. Reddy says that he and his counsel construed our order and writ in the same way, so far as it affected Judge WALLACE, and therefore that he refrained from seeking any advice or direction from the superior court as to his own duties in the premises, relying in that matter wholly upon the advice of counsel, which he followed in good faith. He says that he was advised—and that such was his own opinion—that the effect of the writ and order upon him was to confine him to the exact position in which the found him at the moment they were served. He contends that when the writ and order were served on him he was in complete and absolute possession, to the exclusion of petitioners, of the sugar refinery, offices, shops, machinery, and supplies, books, papers, etc., engaged in working up about \$50,000 worth of sugar then in solution preparatory to shutting down the works, and that he did nothing except to retain the possession which he had, and to shut down the works as soon as possible.

From this general statement of the case, the nature of the questions to be decided is sufficiently shown. We have nothing whatever to do with any question as to the validity, correctness, or propriety of the judgment of fine and forfeiture pronounced against the American Sugar Refinery Company in the action instituted by the attorney general in behalf of the people of the state. For all the purposes of this case, that judgment is assumed to be absolutely just and valid, though suspended by the appeal. But, conceding the perfect validity of that judgment, the question remains whether the superior

court had any jurisdiction to make the order appointing the receiver, and directing him to take specific property from the possession of the petitioners, who were not parties to the action, and were claiming said property in their own right. Subordinate to this main question are a variety of others, which have been elaborately discussed by counsel, as, for instance, whether prohibition is the proper remedy when the court has exceeded its jurisdiction in appointing a receiver; whether, conceding it to be the proper remedy in such case, the petitioners have complied with the necessary conditions of its issuance; whether the court should not, in the exercise of its discretion, refuse its aid to these petitioners, even if they have proceeded correctly in the matter of practice, and this not only because they have other plain, speedy, and adequate remedies, in the ordinary course of law, but principally because they are *participes criminis* with the corporation in the misconduct for which its charter has been forfeited. There are still other questions involved in the matter of the prohibition, and then there are the questions arising in the proceeding for contempt.

We shall proceed to discuss such of these points as we deem material, in about the order in which they have been stated. And, first, as to the power of the superior court to make the order complained of. The appointment of receivers, and their powers and duties, are regulated by section 564 et seq. of the Code of Civil Procedure. It is therein provided that a receiver may be appointed by the court in which an action is pending, or by the judge thereof, in various cases, and, among others: "Five. In the cases where a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights." It is not necessary to refer to other grounds for the exercise of the power of appointment, because it is distinctly admitted by respondent and his counsel that the order here in question finds its sole support in the clause just quoted. The learned judge of the superior court, respondent here, in ruling upon the motion for a receiver, prepared and filed a written opinion, to which we have been referred as containing the essence of the argument on his behalf respecting the question under consideration, and we know of no better way to state the position for which he contends than to quote the opinion in full. It is as follows:

"It was lately decided here that the corporation defendant had grossly abused its corporate franchise,—united itself with 'The Sugar Refineries Company' in maintaining a monopoly of the article of refined sugar, destroying competition in its production, deteriorating its quality, and arbitrarily increasing its cost to consumers. Judgment of forfeiture of its corporate charter and the imposition of a fine of \$5,000 followed. The attorney general now applies for the appointment of a receiver of the corporate estate and effects.

"(1) It is to be observed, *in limine*, that the application for a receiver in a case of this impression is not to be dealt with as

one made to a court of equity in the exercise of its preventive jurisdiction. The proceeding is for a forfeiture. That circumstance would, of itself, be fatal to an application made to a court of equity for a receiver; for equity never, under any circumstances, lends its aid to enforce a forfeiture or penalty, or anything in the nature of either. As observed by Chancellor KENT in *Livingston v. Tompkins*: 'It may be laid down as a fundamental doctrine of the court that equity does not assist the recovery of a penalty or forfeiture, or anything of the nature of a forfeiture.' 4 Johns. Ch. 431. The proceeding is now, as in its inception, distinctively a law, and, as observed by the learned counsel for the defendant, 'without a single incident of a court of equity connected with it.' The information in the nature of *quo warranto* with which it began, the judgment which followed, and the present application for a receiver, are but the successive steps taken in an action at law, and therefore to be governed by rules of mere law, and wholly irrespective of equitable consideration. Whether the receiver shall be appointed is dependent upon a statutory condition of fact; the fact that the corporation has forfeited its corporate rights. The Code of Civil Procedure, (section 564,) so far as pertinent to the case, is as follows: 'A receiver may be appointed \* \* \* when a corporation \* \* \* has forfeited its corporate rights.' And that the defendant is precisely in that category is the purport of the decision already rendered. Under the New York Code, (sections 1798, 1801) a receiver is provided for in the judgment itself; under the California Code, by an order entered subsequent to judgment. The difference is practically but one of sequence. The principle common to both statutes is that an ascertained forfeiture implies a receiver. So it was substantially ruled in New York in 1865,—the statute of that state being then much the same as ours,—in *People v. Ice Co.*, that an application for a receiver made by the attorney general before forfeiture ascertained was premature, and not to be entertained by the court. 18 Abb. Pr. 383. Recurring, then, to the statute of this state, (section 564, *supra*.) the language is that upon forfeiture a receiver may be appointed, etc. Now, though the word 'may' is but permissive in ordinary signification, it here means 'must,'—a receiver 'must' be appointed, etc. That this is the settled rule of interpretation is pointed out in *Potter's Dwar. St.*, (text and note, p. 220.) It is there said as follows: "May" in a statute means "must" whenever \* \* \* the public have an interest in having the act done which is authorized by such permissive language." Again: 'Words of permission shall, in certain cases, be obligatory. Where a statute directs the doing of a thing for the sake of justice, the word "may" means "shall."' So in *Turnpike Co. v. Miller*, Chancellor KENT observed as follows: 'And in respect to statutes, the rule of construction seems to be that the word "may" means "must" or "shall" only in cases where the public interest and rights are concerned, and where the public

• • • have a claim *de jure* that the power shall be exercised.' 5 Johns. Ch. 113. That the public have an 'interest,' that the doing of a particular thing is 'for the sake of justice,'—change 'may' to 'must,' convert a word of permission to one of obligation. This principle is peculiarly applicable to the circumstances of this case. To guard the public interest and vindicate justice is the distinctive purpose of this proceeding by the attorney general; to maintain that a corporation, as being but a creature of the law, must obey the law,—cannot be permitted to violate it with impunity; that its stockholders must respect the obligation they assume to the public when they sought and accepted their franchise at the hands of that public; that they must observe the policy upon which the commercial police power of the state proceeds,—the policy which, notoriously disfavoring restraint of trade, absolutely forbids corporations to embark in monopoly in an article classed among the necessities of human life,—these features characterize this as a case of grave public interest, and one in the vindication of which the court is bound to employ all the powers provided by the law, one of which is the power to appoint a receiver of the estate and effects of the delinquent corporation.

"(2) Nor is this conclusion, founded, as it is, upon the text of the Code of Civil Procedure, already referred to, inconsistent with the Civil Code, (section 400,) to the effect that stockholders in a dissolved corporation may, in the discretion of the court, be permitted to administer and wind up its business affairs. In my judgment, this provision has reference only to cases of voluntary corporate dissolution. A similar provision is found in the Revised Statutes of the state of New York, (5th Ed., vol. 3, p. 769, § 77,) and is there limited to cases of voluntary dissolution, as in the nature of things it ought to be here, under the true construction of our statute. In cases of voluntary corporate dissolution the stockholders are without fault, or may be. Therefore, the court has a discretion to permit them to hold and distribute the corporate assets. But this is not such a case. Here the corporate franchise has not been voluntarily surrendered, but has been forfeited because of the misconduct of the entire body of the stockholders, already ascertained,—in fact become the distinct ground upon which the forfeiture proceeds. For, as pointed out in my opinion heretofore filed in this case, the judgment in this action, though in form one against the corporation, is in fact against the stockholders, who, as there said, were the actual owners of the corporate franchise a forfeiture of which was adjudged. The misconduct by which the corporate charter was lost was therefore the misconduct of the stockholders sued, and making defense here by their corporate name, 'American Sugar Refinery Company.' As observed by Mr. Chief Justice NELSON in *People v. Turnpike Road Co.*: 'Though the proceeding by information be against the corporate body, it is the acts or omissions of the individual corporators that are the subject of the judgment

of the court. The powers and privileges are conferred and the conditions enjoined upon them; they obtain the grant, and engage to perform the conditions,' etc. 23 Wend. 205. Upon this view, it would indeed have been somewhat singular had the Civil Code conferred upon stockholders, thus convicted of the breach of one important trust, the immediate exercise of another trust, and one in itself of no slight importance,—the trust of administering and distributing the assets of the dissolved corporation. Such inconsistency is not to be attributed to that Code. Besides, it will be seen, upon looking into the decisions at large, that such a practice has never been pursued by the court. Stockholders whose ascertained misconduct has already operated a forfeiture of the corporate franchise have never been permitted to assume the administration of the corporate assets, even in cases of voluntary dissolution,—cases in which no malfeasance of the stockholders appeared. Inquiry has often been made by the court as to whether the dissolution had in point of fact been brought about by the misfeasance or mismanagement of the particular person seeking to become a trustee of the corporate affairs. I must therefore decline to permit the offending stockholders here, or their nominees, to become the trustees of the corporate assets.

"(3) But one other question remains to be considered, which will now be stated: An appeal from the judgment of forfeiture has been taken,—taken and perfected in such a form as to stay the judgment, pending the appeal, if that be possible. The judgment was rendered here on the 6th day of January. On the 8th, this application for a receiver was made, and set down for hearing on the 10th; was actually heard on the 20th day of January; the appeal was taken on the 18th, while the application was yet pending, and some two days before it was submitted for decision. It is now claimed that the judgment is stayed by the appeal, and that, as a consequence of such stay, the power of the court to appoint a receiver has ceased. But, in my opinion, no appeal, in whatever form it be taken, can operate a present stay of a judgment of the character of the one rendered in this case. To hold that it can is to imply that a corporation already dissolved for ascertained corporate abuses may, by this means, practically rehabilitate itself at pleasure,—resume its proper corporate existence,—despite the judgment, and so continue its misemployment of its franchise for an indefinite period of time. The correctness of a construction leading to such results may well be doubted.

"But, waiving this, and assuming that the judgment has been stayed by the appeal taken, it would not follow that the authority to appoint has been superseded because of the appeal. The subject of appeals, as well as their effect when taken, is governed by the Code of Civil Procedure, (section 946.) An appeal 'stays all further proceedings \* \* \* upon the judgment, \* \* \* or upon the matters embraced therein, \* \* \* but the court below may proceed upon any other matter embraced

in the action,' etc. That the appointment of a receiver is a matter 'embraced in the action' has already been pointed out in connection with section 564 of the same Code. The appeal from the judgment does not suspend the power to appoint, unless the appointment be a matter embraced in the judgment, which it is not, (as upon inspection of the judgment will appear,) or is itself distinctively a proceeding 'upon the judgment.' That the appointment of a receiver in a cause is not a proceeding upon the judgment in that cause, but is merely ancillary in character, is understood to have been often ruled in our courts. It is not necessary for me, however, to cite the cases, nor to enter now upon an analysis of the text of the statute, because I consider the recent ruling in *Baughman's Case*, 72 Cal. 572, 14 Pac. Rep. 207, as directly in point in support of the power. An appeal from the judgment had been taken in that case, yet the authority of the court over the general subject of receivership appears to have been upheld, notwithstanding the pending appeal from the judgment. In that case it was the power to remove which was immediately in question; here, it is the power to appoint. But these powers must co-exist; any construction of the statute which would uphold either must necessarily uphold the other. The conclusion reached is that the application must be granted, and a receiver appointed. An order to that effect will now be entered. WM. T. WALLACE, Judge.

"Dated February 17, 1890."

As we cannot accept the conclusions reached in this opinion, we will state as briefly as possible in what we think their unsoundness consists. The assumption which forms the basis of the entire argument is that the appointment of a receiver to administer its assets is one of the penalties designed, and in effect prescribed, by the legislature as part of the punishment to be visited upon the stockholders of a corporation which by any misconduct of its own has incurred a forfeiture of its charter. There is, in our opinion, little to justify this assumption, even in the statutes of New York, upon the supposed construction of which so much reliance is placed. But, if such were the declared or plainly implied policy of that state, the significant fact remains that our statutes not only contain no semblance of such a declaration, but that our legislature, in framing the law of this state, while looking to the Statutes and Codes of New York for a model and guide, has deliberately rejected every provision from which such an implication might arise, and in place thereof has substituted one of opposite import. In order to a due appreciation of the force and meaning of these statutes, it is necessary to consider, for a moment, the subject with which they deal.

When a corporation ceases to exist from whatever cause, whether from lapse of time, voluntary dissolution, or judgment of forfeiture for neglect or abuse of its powers, it necessarily results that its property is left to be disposed of according to law. Even in those times when the doctrine prevailed that such of its property

as did not revert to its grantors was forfeited or escheated to the crown, some officer exercising a general authority under the common law or statutes, or invested with a special authority for the occasion, was charged with the duty of collecting the assets for the benefit of the king or his donee; and since it has come to be recognized everywhere that upon the dissolution of a trading corporation its property neither reverts to its grantors nor escheats to the state, but belongs, after payment of its debts, to those who were stockholders at the date of dissolution, the appointment of some officer, with the same or more minutely defined authority, is a recognized necessity. Some means must be provided for winding up the corporation and distributing its assets according to the equitable rights of those interested. In the absence of any statute regulating the matter, a court of equity would have the undoubted right, in a proper proceeding instituted by a creditor or a stockholder, to appoint a receiver to administer the property. But in many of the states statutes have been passed expressly providing for the appointment of receivers, or trustees exercising the same function, though sometimes called by other names. In all cases it is made their duty to collect the assets, pay the debts, and distribute the surplus *pro rata* to the stockholders. As this is precisely what a court of equity would have done in the absence of a statute, it is to be inferred that the motive of such legislation has been to accomplish some other object,—some object, that is to say, for which express legislation was necessary. This inference is fully justified and amply borne out by reference to the different statutes. They seem to have been enacted with the object, in some instances, of abrogating the old law of forfeiture and reversion; in others, of committing the administration to other courts than courts of equity; in others, to provide general and uniform rules of procedure, as to giving notice to creditors, etc., to take the place of rules of court and specific orders to be made by the chancellor in each particular case; in others, to keep the matter out of the courts altogether, as by allowing the dissolved corporation to continue its existence for a term for purposes of liquidation, but for no other purpose. The whole mass of this legislation seems to be pervaded by the one idea of simplifying, expediting, and cheapening the means of accomplishing the one object of transferring to the stockholders of a defunct corporation their full share of its surplus assets. There is from beginning to end no suggestion of added penalties or punishment after death.

Now, to revert to the New York statutes in force at the date of the decision in *People v. Ice Co.*, cited in the opinion of Judge WALLACE. They provided, as ours do, for both voluntary and involuntary dissolution of corporations, and in express terms directed the appointment of receivers in all cases, whether voluntary or involuntary. They also contained minute and specific directions as to the duties of receivers, notice to creditors, fees and commissions, settlement of accounts, etc., very

similar to our statutes regulating the proceedings of executors and administrators. The object of such legislation is apparent, and clearly it is not the infliction of penalties, but merely the conservation of rights. In view of these provisions of the New York statute, it is difficult to see how the general principle can be deduced from the decision referred to, that "an ascertained forfeiture implies a receiver." That was not the question litigated in the case, and was not decided. The point decided was that, in an action to forfeit a charter, a receiver could not be appointed until after judgment dissolving the corporation; in other words, that there is no forfeiture, in the sense of the statute, until the judgment of dissolution is entered. All that this implies is that after judgment a receiver may, not that he must, be appointed, and therefore the implication falls short of what the statute under consideration expressly enjoined, viz., that it should be "the duty of the attorney general, immediately after the rendition of such judgment, (of forfeiture,) to institute proceedings for that purpose," (the appointment of a receiver.) Voorh. Code, § 444. Nothing, therefore, can be gained for the argument by reference to this decision. It merely construes the New York statute on a point not in controversy here. And, even if it had been otherwise, the question would have remained whether our law is the same, in substance, as the law of New York. The opinion of the superior court assumes that it was "much the same as ours." We think, on the contrary, that the points of difference between our law and that of New York are much more striking and manifest than the points of resemblance. The laws of New York, it is true, recognize, as our laws do, and as in the nature of things every law on the subject must, the necessity of providing some means of administering the assets of a defunct corporation, and the propriety in the absence of other provision of appointing a receiver for that purpose; but there the resemblance ends. In New York, as we have seen, there was no other provision, and the appointment of a receiver was made obligatory in all cases of dissolution, whether voluntary or involuntary. That was the rule, to which there was no exception. Under our Codes, on the contrary, the rule is not to appoint a receiver, but to leave the whole matter of liquidation and distribution to the exclusive control of the directors of the corporation in office at the date of dissolution. The appointment of a receiver is the exception, not the rule, and is not to be made unless some party interested, either a creditor or a stockholder, can show that, for the protection of his rights, the appointment of a receiver, and the administration of the assets under the control and superintendence of a court of equity, is necessary; and, even then, no receiver will be appointed upon his *ex parte* application without requiring ample security by his undertaking, with sufficient sureties for all damages that may be caused by the appointment, if it shall turn out that it was made without sufficient cause.

In support of this statement, we refer to  
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the following provisions of the Codes: Sections 399 and 400 of the Civil Code are as follows: "Sec. 399. The dissolution of corporations is provided for: (1) If involuntary, in chapter 5 of title 10, part 2, of the Code of Civil Procedure. [Sections 802-810.] (2) If voluntary, in title 6, part 3, of the Code of Civil Procedure. [Sections 1227-1233.] Sec. 400. Unless other persons are appointed by the court, the directors or managers of the affairs of such corporation at the time of its dissolution are trustees of the creditors and stockholders or members of the corporation dissolved, and have full power to settle the affairs of the corporation." Sections 565 and 566 of the Code of Civil Procedure are as follows: "Sec. 565. Upon the dissolution of any corporation, the superior court of the county in which the corporation carries on its business, or has its principal place of business, on application of any creditor of the corporation, or of any stockholder or member thereof, may appoint one or more persons to be receivers or trustees of the corporation, to take charge of the estate and effects thereof, and to collect the debts and property due and belonging to the corporation, and to pay the outstanding debts thereof, and to divide the moneys and other property that shall remain over among the stockholders or members. Sec. 566. No party or attorney or person interested in an action can be appointed receiver therein without the written consent of the parties, filed with the clerk. If a receiver be appointed upon an *ex parte* application, the court, before making the order, may require from the applicant an undertaking with sufficient sureties, in an amount to be fixed by the court, to the effect that the applicant will pay to the defendant all damages he may sustain by reason of the appointment of such receiver and the entry by him upon his duties, in case the applicant shall have procured such appointment wrongfully, maliciously, or without sufficient cause; and the court may, in its discretion, at any time after said appointment, require an additional undertaking."

It will be observed that section 399 of the Civil Code refers to those parts of the Code of Civil Procedure which provide for involuntary as well as voluntary dissolutions, and that section 400 by its terms applies as well to one kind of dissolution as to the other. By its own unaided force, without the intervention or any necessity for the intervention of a court, it makes the directors managers of the affairs of the corporation, and trustees for the creditors and stockholders, with full power of settlement. These trustees, like trustees in general, are, of course, amenable to the jurisdiction of a court of equity, and may be called to account there for any neglect of duty or abuse of power. But, until they are so called to account in an independent action or proceeding by a party in interest, no court has any excuse for interference; and if they are sued and brought into court without sufficient cause, even by a creditor or stockholder, they will recover costs.

But in the opinion of the superior court these provisions of our statutes are, upon

their true construction, to be limited to cases of voluntary dissolution. It seems to us that the terms of the law are too plain in an opposite sense to admit of construction, and, even if it were otherwise, that the reasons given for the construction adopted are wholly insufficient. In section 899 of the Civil Code, separate reference is made—*First*, to cases of involuntary dissolution; and, *second*, to cases of voluntary dissolution. Then right on the heels of this reference follows the provision for the settlement of the affairs of "such corporation." If it was the intention of the legislature to limit this provision to cases of voluntary dissolution, nothing could have been easier or more natural than to say so. And if it were true that this section of our Code is similar to the section cited from the Revised Statutes of New York, (volume 3, p. 769, § 77,) and that that section is limited to cases of voluntary dissolution, the fact that our legislature has adopted the provision, without the limitation, would be a strong circumstance indicative of an intention to make its operation general.

But, in truth, the two sections are not substantially the same. Section 400 of our Civil Code, as is apparent, provides a means of a settlement of the affairs of a dissolved corporation without the intervention of a court, unless such intervention is specially invoked, and that is its whole scope. The section cited from the Revised Statutes of New York is part of a scheme in which the rule is to appoint a receiver in all cases; and it merely provides that any of the directors, trustees, or other officers of such corporation, or any of its stockholders, may be appointed receivers. It is not by any means clear, moreover, that this provision was limited to cases of voluntary dissolution. It is true that it is found in an article relating to voluntary dissolutions, but that article is by reference made part of the law of involuntary dissolution. The very section of the New York Code of Procedure (section 444) which enjoins upon the attorney general the duty of applying for a receiver whenever the charter of a corporation has been forfeited at the suit of the state makes the article relating to voluntary dissolutions the measure and limit of the power of the court "to restrain the corporation, to appoint a receiver of its property, and to take an account, and to make distribution thereof among its creditors;" from which it is perfectly evident that the legislature of New York intended no discrimination against the stockholders of a corporation which had forfeited its charter by misconduct; for, if they were to enjoy every advantage in the management and distribution of their property that the law afforded to stockholders in corporations voluntarily dissolved, how can it be claimed that the law was framed with a view to punishment in one case, unless that was its object and effect in all cases? It is therefore plain that, if any foundation exists for the motion that the appointment of a receiver in case of a forfeited charter is part of the punishment prescribed for the offenses of the corporation, that foundation must be sought elsewhere

than in the statutes and decisions of the state of New York. Where, then, is it to be found?

The first general consideration suggested in the opinion of the superior court is that "it would, indeed, have been somewhat singular had the Civil Code conferred upon stockholders, thus convicted of the breach of one important trust, the immediate exercise of another trust, and one in itself of no slight importance,—the trust of administering and distributing the assets of the dissolved corporation; such inconsistency is not to be attributed to that Code." We admit that no inconsistency should be attributed to the law, but, before we construe a section of the Code contrary to its obvious meaning, we should be very certain that such construction is necessary in order to prevent a conflict with some other provision of controlling force, or some legal principle of general application. It is not pretended that the literal purport of section 400 of the Civil Code, and section 565 of the Code of Civil Procedure, conflicts with any other statutory provision; but the idea seems to be that it is absurd to suppose that the legislature would have left to the directors of a corporation convicted of violating their duty to the people of the state, the power and discretion to pay their own debts and divide their own property, subject to the right of a court of equity to interfere and compel them to proceed properly, if any occasion for such interference should arise. We confess that there does not appear to us to be any absurdity in this supposition. Because a corporation has violated its duty to the public, it does not follow that its members cannot be trusted to look out for their own interests. Quite the contrary, for it is usually a too exclusive regard for their own interests that constitutes their dereliction to the public. As to creditors, their interests must in most cases be opposed to the appointment of a receiver. They will be paid more quickly and more certainly without a receiver than with one. If there is any one thing more certain than another, it is that the appointment of a receiver implies a material diminution of the fund out of which creditors are to be paid: for, in the first place, the fees of the receiver, his counsel and assistants, are to be subtracted. Then the estate must in many cases, as it has been in this case, be condemned to unproductive idleness and disuse, and exposed to danger of loss and dilapidation from rust and decay during the long and tedious progress of the legal proceedings that are necessarily entailed. And all this time the creditors must wait and look on while the fund upon which they rely for payment is being depleted by the processes above referred to. On the other hand, supposing the affairs of the defunct corporation to be under the control of its late directors as trustees for its creditors and stockholders, the creditors have nothing to do but present their demands and receive payment in the ordinary course of business, or, if payment is refused or delayed, they may proceed to enforce their demands. How much better this is for the creditors than to have to wait upon the motions of a receiver and

the court, under whose order he acts, every one knows who has had any experience of the two methods of settling the business of a partnership or a corporation. And then it is, as we have seen, always at the option of a creditor or stockholder to have a receiver, if they can allege facts showing that a receiver is necessary.

So far, therefore, as the rights and interests of the sole beneficiaries of the trust are concerned, there is no need to construe section 400 of the Civil Code and section 565 of the Code of Civil Procedure contrary to their express terms, in order to rescue the legislature from the imputation of having enacted an absurdity. On the contrary, the rule which they prescribe, according to their natural and obvious construction,—by which they apply as well to cases of forfeiture of charter as to cases of voluntary dissolution,—is most salutary, so far as the beneficiaries are concerned, and such construction must prevail, unless, indeed, it be true that the paramount interests of the people of the state demand a different construction.

This proposition, that the people of the state have an interest in the appointment of a receiver whenever the charter of a corporation has been forfeited, was decided adversely to the contention of the respondent at an early stage of these proceedings, in ruling upon a preliminary objection made by counsel for the state, who appeared specially for that purpose,—an objection founded upon a clause of the twenty-eighth rule of this court, which reads as follows: “\* \* \* In case any court, judge, or other officer, or any board or other tribunal, in the discharge of duties of a public character, be named in the application as respondent, the affidavit or petition shall also disclose the name or names of the real party or parties, if any, in interest, or whose interest would be directly affected by the proceedings; and in such case it shall be the duty of the applicant obtaining an order for any such writ to serve or cause to be served upon such party or parties in interest a true copy of the affidavit or petition, and of the writ issued thereon, in like manner as the same is required to be served upon the respondent named in the application and proceedings, and to produce and file in the office of the clerk of this court the like evidence of such service.” Neither the petition nor the writ herein was served upon the state or its attorneys, and the objection made in behalf of the state was that the hearing could not proceed, and that the alternative writ must be quashed, for the reason that it appeared on the face of the petition that the state was the real party in interest, or whose interest would be directly affected by the proceedings. The court, however, were unanimously of the opinion, and so decided, that the state had no interest to be affected, and that the only persons interested were the creditors and stockholders of the corporation. It must be confessed, however, that when this ruling was made we did not understand, and, of course, did not consider, the real position of respondent with respect to this matter. It did not occur to us, and if the point was suggested in the course of the

argument upon this preliminary objection it failed to impress us at the time, that any person could have an interest in the appointment or removal of a receiver except those who would be entitled to share in the distribution of the fund committed to his control; and, as it was conceded that the state had no interest in the fund, we naturally concluded that the interests of the state could not possibly be affected by any result of these proceedings, and ruled accordingly. But, in the light of the fuller argument made at and since the hearing, we perceive that the real claim of the state remains to be stated and considered.

Before, however, proceeding to this discussion, we take occasion to say a few words as to the proper construction of the rule of court above cited. It does not, as counsel seem to suppose, require that the state should have been made a formal party to this proceeding, by being named as a defendant in the petition or writ, but only that the names of the parties really interested should be disclosed by the petition, and that service of a copy of the petition and writ should be made upon them. *Baker v. Superior Court*, 71 Cal. 533, 12 Pac. Rep. 685. The effect, therefore, of a failure to serve such parties, would not be an abatement of the whole proceeding, but, at most, to require a postponement of the hearing or trial until they could be served, and have a reasonable time to appear. On the face of the petition in this case, it did not seem to us that the state could have any interest in the controversy over the appointment of the receiver. If it had been otherwise, it would perhaps have been our duty in advance to order service of the petition and writ upon the representatives of the state, and certainly we should have been bound, of our own motion, to require proof of such service before proceeding with the hearing of the rule to show cause; or if, on the hearing, the fact had been developed that a party not named or served had an interest to be affected, it would have been our duty to suspend the proceeding until such party was served and brought in. As it was, however, we were proceeding properly with the hearing when the objection of the state was interposed. The motion made to quash the alternative writ was not sustainable upon any view of the state's rights or interest in the matter, and after listening to the argument then advanced in support of the state's claim of interest, and its right to the benefit of the rule, we decided that the claim was unfounded, and that the rule did not apply. But if we had then understood, as we now understand, the ground upon which the state bases its claim of interest, we should probably have ordered service of the petition and writ on the attorneys of the state, and should have allowed them in that capacity to take part in the subsequent proceedings. No harm, however, has resulted from our misconception of the state's position. Although there was no service of notice upon its attorneys *eo nomine*, such service was made upon the judge of the superior court, who has been formally represented throughout



these proceedings by one of the attorneys of the state, and actually by both of them. The whole object of the rule, therefore, has been fulfilled so far as the state is concerned; the only difference being that its attorneys have had only one copy of the writ and petition instead of two, and that they have been compelled to speak in the name of the superior judge, instead of that of the state. But in his name, and upon his behalf, they have presented every argument and raised every issue which could have been made in behalf of the state if it had even been a formal party to the proceedings, which, as we have seen, the rule does not require.

We will now return from this digression to consider what those arguments are. It will be seen, by reference to the opinion of the superior court above quoted, that the provision of section 564 of the Code of Civil Procedure, to the effect that a receiver may be appointed when a corporation has forfeited its charter, is construed to mean that in such case a receiver must be appointed, and this because the public has an interest that the power should be exercised. To our minds, it is perfectly clear that the true construction of this clause of section 564 is found in the very next section of the Code, wherein it is specifically enacted that "upon the dissolution of any corporation, the superior court of the county in which the corporation carries on its business, or has its principal place of business, on application of any creditor of the corporation, or of any stockholder or member thereof, may appoint one or more persons to be receivers," etc. Here is an express enumeration of the parties, and the only parties, (*expressio unius est exclusio alterius*), whose interest demands that "may" should be read "must," and, considering this language in connection with section 400 of the Civil Code, which, as we have seen, provides that the directors in office at the date of its dissolution shall settle the affairs of a corporation, unless some other persons are appointed, we should never have thought of looking further for a definition of the circumstances under which a receiver could be appointed. In terms, both sections apply as well to cases of involuntary as to cases of voluntary dissolution, and they do in fact provide a most salutary rule for the protection of all persons interested in the property. But it is held that they must be construed out of their obvious sense, and limited in their application to cases of voluntary dissolution, because, and only because, in cases of forfeiture for corporate misconduct, the stockholders cannot be adequately punished or restrained without the intervention of a receiver, and, consequently, that the interest of the public, in the imposition of such punishment and restraint, requires the conversion of "may" into "must," thus making the appointment of a receiver obligatory in all cases of forfeiture.

This proposition, which is, in effect, stated in the opinion above quoted, is much more plainly and directly put in the argument made by the respondent here. He asks if it is possible that this controversy between the state and a con-

cern with millions of capital is limited to the imposition of a fine of \$5,000, and the cancellation of a charter, the duplicate of which can be obtained while we are talking here; and he answers his own question as follows: "I understand the great interest of the state is to break down the monopoly. To do that it seizes the means and utensils—the business—with which the monopoly has been proceeding. It scatters it. It divides it up. A receiver is appointed for that purpose. That is part of the penalty. That is a part of the penalty provided by law, because they have forfeited their corporate rights,—no other reason." Translated into terms specifically applicable to the case before us, the meaning of this is that, if a corporation organized for the purpose of refining sugar enters into a combination with other corporations, through the medium of what is called a "trust," for the purpose of limiting the production and keeping up the price of refined sugar, the courts will not only forfeit its charter and impose the utmost fine which the law prescribes for such offenses, but they must go further, and, by the hands of a receiver, seize into their possession all the property of the defunct corporation, and especially its sugar refining plant, not for the purpose of preserving and protecting it, and as speedily and economically as possible distributing it to those who are equitably entitled, viz., creditors and stockholders, but for the quite opposite purpose, of shutting it up and condemning it to rust and idleness, until such time as it can be unfitted completely for the purpose to which it is best adapted by dividing it up and scattering it. We confess that this is to us a novel doctrine, and one which does not, upon any ground, commend itself to our judgment. It may not be the rule in this state to construe penal legislation strictly, but even here, when a court is asked to impose a penalty for infraction of a law, the first inquiry is, what penalty does the law prescribe? The answer to this question is sought, not in labored construction of other statutes, but in the express term of the act defining the offense.

Now, what is the case here? In section 803 of the Code of Civil Procedure, the legislature has enjoined upon the attorney general the duty of bringing actions for the forfeiture of corporate franchises whenever he has reason to believe that they are unlawfully held or exercised. This was his sole authority for bringing his *quo warranto* against the American Sugar Refinery Company, and it is upon this chapter of the Code that the judgment of forfeiture depends. Section 809, in the same chapter, defines the character of the judgment that must be rendered when the defendant is found guilty, viz., that the defendant be excluded from the franchise it has abused; and "the court may also, in its discretion, impose upon the defendant a fine not exceeding \$5,000, which fine, when collected, must be paid into the treasury of the state." This is absolutely all the punishment that the legislature has in terms prescribed, and, if any other was intended,—especially if such other punishment was designed to be severe beyond

comparison with that expressly defined,—it is passing strange that the courts should have been left to work it out by a doubtful construction of other parts of the Codes.

But, to our minds, the gravest objection to the doctrine lies in the consequences which it involves. Obviously, there is no measure or limit to the punishment which may be inflicted in the manner indicated, except in the discretion of the court and the moderation of its receiver. The duty of the receiver is not conservation, but destruction. In whatever business the offending corporation may have been engaged, his first step must be to shut up its works; however vast the capital invested, it must be condemned to lie idle and unproductive until it can be divided up and scattered. It must not be sold as a whole, complete and adapted to the work for which it was designed, and for which alone it possesses any considerable value. To do so would defeat the whole object of the receivership; for not only would the offending stockholders get off without adequate punishment, but there would be nothing to prevent them from buying in their own property, and again putting it into the combination. It must therefore be divided up and scattered, and its value in great measure destroyed. The stockholders, when they finally realize upon their property, must be content to receive, not the proceeds of a well-appointed manufactory, in complete running order, but the price of a lot of old iron and second-hand machinery, sold in lots according to the discretion of a receiver acting with a view, not to their interest as stockholders, but solely with a view to the interest of the public in punishing them. We cannot assent to a doctrine involving such consequences. If it is really true that our laws, as they are written, provide no adequate punishment for corporate transgressions, let the legislature take the matter in hand. It is no part of the function of a court to supply the want of penal legislation. Its judgments in such case, besides being wholly unauthorized, would always operate as bills of attainder or *ex post facto* laws, both of which are not only abhorrent to our ideas of justice, but are expressly forbidden by our charters of government.

But perhaps it is not fair to regard the doctrine under discussion as implying that the primary object of the laws, as it construes them, is the punishment of the stockholders. It may be said that the real purpose is only to break up the monopoly, and that the punishment involved is merely incidental and unavoidable; that it is right to break up the monopoly, and if, unfortunately for them, the stockholders suffer in the process, they have themselves alone to blame. Regarded from this point of view, it seems to us that the doctrine is still wholly indefensible. When a corporation is dissolved, its property, as we have seen, vests in its stockholders subject only to the claims of creditors, and is thereafter held upon the same tenure, and subject to the same conditions, as similar property owned by other natural persons. What others may do, they may do. They owe no further or

higher duty to the public, and are under no other restraints. Therefore, unless some ground can be shown upon which the state can take a sugar refinery away from a private citizen who has inherited it, or bought it, or built it, and can shut it up, preparatory to dividing and scattering it, upon the ground that he has entered into an agreement with some other private citizen, owning another refinery, to limit the output of both establishments with a view to keeping up the price of the refined product, no ground can be shown which will warrant the state in taking similar property from natural persons who have succeeded thereto on the death of a corporation. Confessedly, there is no warrant to be found for such a proceeding in case of a natural person. That contracts in restraint of trade are unlawful, or at least opposed to the policy of the law, is conceded, but the only penalty they entail is that courts refuse to enforce them, just as they refuse to enforce any contract which is opposed to public policy or good morals; but no one ever heard of a proceeding to confiscate or destroy, either wholly or partially, the property which is the subject of such a contract. So far the legislature has seen fit to attach no other punishment to contracts of natural persons in restraint of trade than to make them non-enforceable; and, where the legislature has stopped, it is not only becoming but necessary that the courts should stop. As to the property of a corporation, the legislature has given no indication of an intention to forfeit it or take it away from the stockholders, except to the extent of a fine of \$5,000, which the court is authorized, in its discretion, to impose. What is forfeited to the state, and all that is forfeited, is the charter,—the right to be a corporation; and this is resumed solely upon the ground that the condition upon which it was granted has been violated. The doctrine is that corporate charters are granted upon the implied condition that the privileges conferred will be used for the advantage, or at least not to the disadvantage, of the state. If this condition is broken, the charter which the state has given is taken back by the state; but the property which the corporation has acquired, with its own means, goes to those who have paid for it, and they have the right to deal with it just as others similarly situated may deal with their property. Whatever the law prevents other natural persons from doing, they are prevented from doing; nothing more. This doctrine is plainly enough indicated in the case of *People v. Refining Co.*, 22 Abb. N. C. 164, 3 N. Y. Supp. 401, cited and relied upon by respondent, and in the cases therein referred to; and it is shown, moreover, in those cases, that the privileges and powers of a corporation are essential to membership of the trust, and to any effective monopoly. To become a member of the trust, the sugar refiner must be a corporation; and, the corporation being dissolved, it is impossible that its stockholders should keep up the arrangement. And so, as to monopolies in general, they are only dangerous when corporations are the parties to the

agreement by which they are attempted. *Leslie v. Lorillard*, 110 N. Y. 519, 18 N. E. Rep. 363. At least this is the opinion of some courts, and it suggests a reason why the legislature has omitted to prescribe any penalty beyond non-enforcement in case of such agreements between natural persons. But we need not speculate upon these matters. The law being plain, we are not concerned with its expediency.

The conclusion which inevitably follows from these views is that, in an action under section 802 et seq. of the Code of Civil Procedure, the rendition of the judgment authorized by section 809 ends the proceedings so far as the superior court is concerned, and that no receiver of the corporate property can be appointed unless a new and distinct proceeding is commenced by a creditor or stockholder of the corporation. Code Civil Proc. § 585. Such new and distinct proceeding upon the part of the beneficiaries, or some of them, is the essential condition of any jurisdiction in the court to take the property out of the control of the trustees designated by law. Civil Code, § 400. An order appointing a receiver without such application is therefore void, not only as to strangers to the *quo warranto*, but is even void as to the corporation and its stockholders and vendees. We have no doubt of the correctness of this conclusion; but, if we were wholly mistaken in our views, and if it were true, as held by the respondent, that the appointment of a receiver for the purpose of inflicting one of the penalties designed by the law, and essential to its efficacy, is obligatory, we cannot see how it is possible to avoid the conclusion that the enforcement of this as well as other parts of the penalty was suspended by the appeal from the judgment. According to the plain and unambiguous terms of the statute, proceedings upon any appealable judgment or order may be stayed by the filing of a sufficient undertaking except in a few enumerated cases, of which this is not one. Code Civil Proc. § 949. Confessedly a sufficient undertaking was filed in this case to stay the judgment, if that was possible. Opinion of Judge WALLACE, *supra*.

But it is held, in the face of the statute, that a stay was not possible; and this, again, upon the plea of necessity, in order to prevent an apprehended abuse. We do not think the reason suggested is sufficient to override the law. The allowance of an appeal in such cases implies the right of the corporation to question the validity of a judgment of forfeiture until it has been affirmed here, and it is not correct to say that a stay of proceedings would operate a rehabilitation of a dissolved corporation when the sole object of the appeal is to determine the question whether there has been a valid judgment of dissolution. But evidently the respondent was unwilling to stand upon the proposition that a stay was not possible. Waiving that, and assuming that the judgment has been stayed, he concludes that the power to appoint a receiver is nevertheless not suspended, because the order of appointment is not embraced in the judgment, and is not a proceeding upon the judgment. It is true that

the order of appointment is not embraced in the judgment, but that is not the test. An execution is not embraced in the judgment, but an appeal duly perfected stays execution. In truth, it is not correct to say that a judgment, or matters embraced in a judgment, are stayed by the appeal, and the statute does not say so. What it says is that proceedings upon the judgment and matters embraced therein are stayed by the perfecting of an appeal. Id. § 946. That is to say, the execution—the enforcement—of the judgment is suspended. Now, here it is conceded that no receiver of the corporation could be appointed until after judgment, and that the only purpose of his appointment is to carry the judgment into effect, by taking away the property of the corporation, and scattering and dividing it. How, then, is it possible that this is not a proceeding upon the judgment? According to the argument, the things to be done by the receiver constitute the only substantial and effective punishment which it is in the power of the state to inflict. The rest is a mere trifle. But it is nevertheless held that this ruinous penalty which follows the judgment, and but for the judgment could never be inflicted, is not a proceeding upon the judgment, and therefore is not stayed by the appeal; and this conclusion is rested upon the authority of rulings which, it is said, have often been made by our courts. Undoubtedly, it has often been held that the appointment of a receiver is merely ancillary, and undoubtedly his appointment often is merely ancillary; that is to say, he is appointed before judgment for the purpose of protecting, pending the litigation, property which is the subject of the litigation. But sometimes he is appointed after judgment for the purpose of carrying the judgment into effect, in which case his appointment, and his proceedings thereunder, are not merely ancillary. In the former case, his functions are not necessarily suspended during the appeal, and neither is the power of the court to remove him or control him suspended by the appeal. But in the latter case—as, for instance, where a receiver has been appointed to sell mortgaged premises under decree of foreclosure—his proceedings are suspended by the appeal.

The only case cited by respondent—a case supposed to cover the whole ground, and to conclude the question—is that of *Baughman v. Superior Court*, 72 Cal. 572, 14 Pac. Rep. 207, which was of the former class. There the litigation was about the right to certain grain described in the pleadings. Upon the filing of the complaint, and upon the *ex parte* application of the plaintiff, the court appointed a receiver to take charge of the grain, pending the action, to preserve it for the benefit of the party who might prove to be entitled to it. The defendant demurred to the complaint. His demurrer was sustained, and final judgment entered in his favor, from which plaintiff appealed to this court. After the appeal was perfected the superior court discharged the receiver, and this court decided that the power of the superior court to do so was not suspended by the appeal. We do not doubt the correctness of that decision; but we are un-

able to see the resemblance between the case where a receiver is appointed before judgment to preserve property pending the litigation, and one in which he is appointed after judgment to dispose of the property in order to make the judgment effective. We know of no case that comes nearer supporting the proposition to which it was cited than this case, and we feel certain that there is as little to support it in the rulings of our courts as in the text of the Codes. As to considerations of expediency, they should not weigh when the law is plain, but, if we were to look to the consequences of the doctrine contended for, we should find therein nothing to commend it.

We assume, for every purpose of this decision, that the judgment of forfeiture in this case was not only just but legal—correct not only in substance but in form—free from error. But it does not follow that all similar cases will be equally well decided. It is possible—the constitution and the laws assume the possibility—that some case may arise in which the judgment of forfeiture will be not only erroneous, but unjust, and that it will be reversed on appeal. But the rule applied in this case must also be applied in that case. If this judgment must be executed in the manner indicated, so must that. A receiver must be appointed. He must seize all the property. He must shut up the factories, discharge the employes, prevent the fulfillment of contracts, subject the corporation to every sort of loss and damages that can be inflicted by the stoppage of a great and complicated industry having its ramifications throughout the business centers of the entire coast. And not only this; for, if he must go to this extent,—if nothing the corporation or its stockholders can do will stop him,—then nothing but the forbearance of the superior judge will prevent the completion of the process. For this injury caused by an erroneous judgment, a reversal on appeal affords no redress, for no security has been given, by the undertaking of sureties or otherwise, to indemnify the corporation or its stockholders. The sureties of the receiver merely undertake that he will faithfully execute the orders of the court; and, according to the precedent in this case, they are bound in a trifling amount. If the receiver obeys orders, they are exonerated; and, if his orders contemplate the infliction of punishment by the indirect and partial destruction of the property, the more completely they are exonerated, the greater the damage inflicted for which there is no redress. Unless it is to be assumed that such results as these comport with the justice and policy of a great state, the inevitable consequences of the doctrine contended for utterly condemn it. If, therefore, the state could demand the appointment of a receiver upon the ground and for the purposes stated, the appeal operated as a stay of such proceeding, and for that reason the appointment in this case would have been an excess of authority. But we do not rest our decision on this ground. We rely upon the proposition that a receiver of a dissolved corporation is only to be appointed when neces-

sary for the purpose of preserving and distributing the property, and only upon application of a party interested, viz., a creditor or stockholder. This conclusion relieves us of the necessity of dwelling at length upon other objections to the validity of the order of the superior court. If it was totally void as to all the world, it was, of course, void as to these petitioners, without regard to the special manner in which they were affected by it.

It is proper, however, to add that we think these objections urged by petitioners in their character as purchasers of the refinery are well founded. They were not parties to the *quo warranto*, in their character of purchasers. It may be true that the stockholders of a corporation are in a certain sense parties to an action to forfeit its franchise, but they are not parties in any other sense than that they are bound by the consequences of such judgment as the court in that action has power to give. If the court goes outside of the issues in the action, and renders a judgment or makes an order embracing matters entirely foreign to such issues, certainly the stockholders are not bound by such judgment or order. Even conceding, then, for the sake of the argument, that the order of the superior court would have been valid if confined to property of the corporation, it cannot be claimed that it was valid if it embraced the property of vendees of the corporation. There does, indeed, seem to be a sort of claim, hinted at rather than directly asserted, in one of the briefs, that a purchase *pendente lite* is in fraud of the rights of the state in such cases as this, and therefore void. But there appears to be no foundation for this claim. The state, by its action, acquired no lien on any of the property of the corporation, and it is difficult to understand upon what ground it can attack a sale *pendente lite*. Up to the date of its dissolution, the corporation had the same power of disposing of its property honestly and in good faith that any corporation has, and, like any other corporation, it could sell to its stockholders. It matters not, therefore, that these petitioners were stockholders. They had the right to purchase; and if they did so, and entered into possession of the property, they had the same rights in their character of purchasers that any stranger would have had.

It is claimed by respondent that the evidence in the *quo warranto* case showed that the transfer to the petitioners was a sham. This may be so, but the petitioners were not parties to that proceeding for the purpose of defending their purchase. Its validity was not in issue in that action, and could not by any legal possibility have been tried and determined therein. If any evidence came out in relation to the transfer, it was but incidental to other issues, and the petitioners could have no opportunity of rebutting it. If the *bona fides* of their purchase was to be attacked, and the validity of the transfer drawn in question, they were entitled to their day in court, and an opportunity of adducing testimony to sustain their claim of ownership. But it is said these petitioners did appear, did submit themselves to the juris-

diction of the court, and did have an opportunity to contest the making of this order, and consequently that the order, even though erroneous, is binding on them until reversed. The foundation for this assertion is that, in response to the rule to show cause why a receiver should not be appointed, these petitioners, in common with all the other stockholders of the corporation, filed an affidavit showing that there were no creditors, and a request that the trustees of the corporation might be allowed to settle its business. In other words, they opposed the appointment of a receiver upon the ground that no party in interest asked or desired a receiver. This is all that can be said. They opposed the appointment of a receiver of the property of the corporation. There was not a word in the pleadings or judgment in the original action, or in the rule to show cause, about any specific property, and of course no issue or opportunity to try the validity of the transfer of the refinery to the petitioners. The order, therefore, assumed to determine a question that was never tried, and never anywhere put in issue. But the form of the order is defended on the ground that "the rule is well settled that the order should describe with sufficient certainty the property which the receiver is to take, and unless this is done he cannot hold it." Of course the property must be described with sufficient certainty; but it is sufficient, in appointing the receiver or assignee of an insolvent or a corporation or partnership, or the executor or administrator of a decedent, to mention generally all the property of the insolvent, the corporation, the partnership, or the decedent. If a specific description was necessary, what would justify the receiver in this case, or in any of the cases supposed, in taking property not specifically described? The truth is, in all such cases the receiver justifies and defends his possession by showing title in the person under whom he claims. Of course, when a litigation concerns some specific property described in the pleadings, it is proper, in appointing a receiver, to so describe the property in the order. But such is not the case here; and, even in cases where a specific description is appropriate, it gives the receiver no right to take the property from the possession of a stranger to the action.

The case of *In re Cohen*, 5 Cal. 494, is cited to sustain the proposition that the court had power and jurisdiction to decide whether the petitioners herein were in possession as agents or trustees of the corporation. The case does not sustain the proposition. It merely holds that a court may in a proper case order not only the party, but his agents and servants, to deliver property to a receiver. But it does not decide that when a third party is in possession, claiming to be owner in his own right, a court may determine without a hearing that he is a mere agent or servant. To say that a court may make an order binding upon the servant or agent of a party to the action does not mean that a court or the receiver may take property out of the possession of a stranger claiming it as a purchaser in good faith, and

throw upon him the burden of proving that he is not an agent or servant.

Another objection urged by counsel for respondent is that these petitioners, having tried the *quo warranto* case in the superior court on the theory that the corporation was carrying on the business of the refinery, are estopped from asserting here that they are the owners. There are many answers to this objection, but we deem it sufficient to say that we can look only to the pleadings, findings, and judgment in the *quo warranto* case to find what was tried, or what was the theory of the trial. The issues in that case all related to the conduct of the corporation prior to the filing of the information by the attorney general, while the claim of the petitioners is that they purchased the property after all the pleadings were filed, and just before the trial. Besides, the evidence to which we have been referred shows very clearly that the transfer to petitioners was disclosed on the trial, and it cannot be said that they practiced any concealment or deception as to their claim, even if their purchase, pending the action, had been material. We do not see how it was material; but, whether it was or not, it cannot be doubted that the superior court was fully advised of their claims before the receiver was appointed. How else, indeed, could it have been concluded that the transfer was a sham?

We have thus gone cursorily over the propositions most strongly pressed by counsel in the attempt to sustain this order. They all rest upon the assumption that the court was authorized, without any application by a creditor or stockholder, to appoint a receiver. That assumption being shown to be unfounded, all the propositions resting upon it necessarily fall; but nevertheless we thought it proper to notice them. We also desire, before taking leave of this branch of the case, to say a word as to the decision in *Railroad Co. v. State*, 12 S. W. Rep. 690, cited in an *addendum* to respondent's brief as "decisive of the whole question raised by petitioners." We cannot see that it decides anything in point. It merely holds that a Texas statute which directs the appointment of a receiver in cases of forfeiture of corporate franchises is constitutional. There is no question here as to the constitutionality of a statute. We have no such statute.

We come now to the questions as to the remedy. Prohibition arrests the proceedings of an inferior judicial tribunal or officer when such proceedings are without or in excess of the jurisdiction of such tribunal or officer, and the writ issues in all cases where there is not a plain, speedy, and adequate remedy in the ordinary course of law. Code Civil Proc. §§ 1102, 1103. We have shown that the superior court, in appointing the receiver, exceeded its jurisdiction, and there is no question that the petitioners are seriously injured by the enforcement of the order. If, then, they have no plain, speedy, and adequate remedy in ordinary course of law, they are clearly entitled to the benefit of the writ of prohibition to arrest the proceedings under the void order. It is claimed, how-

ever, that, so far as the superior court is concerned, there is nothing to arrest, that its order was made and executed before the alternative writ was issued, that the receiver alone is now acting, and that the writ does not run against him. It is true the writ does not run against ministerial officers, and it is also true that its operation is preventive, rather than remedial. But property in the hands of a receiver is in the hands of the court. The receiver is the mere instrument of the court, and what he does the court does. It is the court, therefore, and not the receiver which holds, administers, and disposes of the property in his hands; and, so long as the property remains undisposed of, action by the court is necessary. In such case there is judicial action to be arrested, injury to be prevented, and a writ of prohibition is appropriate for that purpose. The writ runs to the court, and operates directly upon the court, but indirectly upon the receiver. If it is served upon the receiver, it is only that he may have timely notice that the proceedings of the court are arrested, and may stay his hand, as he is bound to do, having no power to act independently of the court, from which he derives all his authority. In this case, when the petition was filed, and our alternative writ directed to issue, the receiver, as we shall see, was still striving to gain complete possession of the refinery and other property claimed by the petitioners; and, even if he had been in complete control, that would have been but the first of a series of steps to be taken in carrying out the purpose of his appointment. The keeping of the property in such a case is a continuous wrong. The closing down of the works is an independent wrong. The use of a portion of the property to preserve the rest is an unlawful interference with the rights of those lawfully in possession. Besides all this, there remained to be carried out the sale and final distribution of the property. By the very terms of the order appointing the receiver, he is to hold the property subject to the further orders of the court concerning it; and the necessity of such further orders would be implied, if it had not been expressly indicated. As we understand the authorities on this point, the operation of the writ of prohibition is excluded only in cases where the action of the inferior tribunal is completed, and nothing remains to be done in pursuance of its void order. If its action is not completed and ended, its further proceedings may be stayed; and, if it is necessary for the purpose of affording complete and adequate relief, what has been done will be undone. If this were not so, the inferior court, by proceeding expeditiously and arbitrarily, could defeat the remedy.

Great reliance is placed by counsel for respondent upon the decisions of this court, such as *Chester v. Colby*, 52 Cal. 517, and *Railroad Co. v. Superior Court*, 59 Cal. 476, to the effect that, when an inferior court or tribunal is proceeding, or threatening to proceed, in excess of its jurisdiction, the objection to its want of jurisdiction must be first submitted to such inferior court or tribunal, and by it over-

ruled, before resort is had to a higher court for a writ of prohibition; and, undoubtedly, such is the established rule of practice in this state. But, if this is the law, it must inevitably happen in every case, as it would probably happen in many cases under any rule, that the lower court will make its ruling on the question of jurisdiction before any prohibition can be sued out; and, if it holds that it has jurisdiction, and makes orders in consonance with that view, the writ of prohibition will be of no avail unless it affords the means, not only of arresting future action, but of undoing past action. In other words, the two positions contended for would practically abolish the remedy. No better illustration of the working of this theory can be found than is afforded by the present case. When the order to show cause why a receiver should not be appointed was served, neither these petitioners, nor the defendant corporation, nor its stockholders, could have got a writ to prohibit the appointment of a receiver without first objecting in the superior court to its want of jurisdiction. Such objection, as we have seen, was made. It would have been sufficient to have objected that there was no application by a creditor or stockholder for a receiver, and no grounds alleged for such appointment; but the defendant corporation, or its stockholders, went further. They showed affirmatively that there were no creditors, and that all the stockholders desired the statutory trustees to settle the business of the corporation. They showed everything, in short, necessary to sustain their objection to the jurisdiction; and the opinion of the superior judge, *supra*, shows that their objections were strenuously argued and maturely considered. But what happened? After holding the matter under advisement for nearly a month, the respondent filed an opinion overruling the objections to his jurisdiction, and on the same day appointed a receiver, who on the same day qualified by taking the oath and filing his bond, procured an order approving his bond and confirming his powers, and actually, according to his own views, had possession of the vast property in controversy, before the agent of the petitioners or their attorneys had any notice that their objections to the jurisdiction had been overruled. If such proceedings, conducted with such precipitate haste, can deprive the injured party of a remedy to which he is clearly entitled, then our law must be lame and impotent indeed. But happily there is no foundation for the claim that an inferior court can, by mere haste and precipitancy, defeat the appropriate remedy for excesses of jurisdiction, at least in a case where it may be intercepted before its action is fully completed.

We are referred by counsel for respondent to a number of decisions of this court which are supposed to sustain their position on this point, but we do not find them at all in conflict with our views. Not one of them related to a case like this, and the general expressions to be found in the opinions must of course be construed with reference to the facts of the particular case. In *Hull v. Superior Court*, 68 Cal.

179, it was said that prohibition was not available to prevent the acts of a *de facto* ministerial officer, nor to prevent judicial acts already done. The attempt in that case was to try the right to the office of sheriff. It was decided that this could not be done by prohibition, and what was said as to judicial acts already done had reference to the acts of the superior judge recognizing the official character of the incumbent *de facto* of the office. Such acts must of necessity have been complete, and ended past remedy. In *More v. Superior Court*, 64 Cal. 345, it was held that the order of the superior court was not in excess of its jurisdiction, which was a sufficient reason for dismissing the proceeding, and it was in fact dismissed on that ground. What else was said in the opinion seems to have been in answer to a claim that the court had power to undo something that the receiver had done in excess of his authority. It ought not to be necessary to point out the distinction between that case and this. Here the order of the court is in excess of its jurisdiction, and the court, through its receiver, is doing and continuing to do, and threatening to complete, a series of proceedings which are a wrong and injury to the petitioners. In that case the order of the court was regular and valid. The court, to which the writ alone runs, had done nothing in excess of its jurisdiction; but the receiver, as was claimed, was doing or had done something which as a receiver he had no right to do. Of course the writ of prohibition was not the proper remedy in such a case. The case of *Coker v. Superior Court*, 58 Cal. 177, does not touch the point; the decision being that the superior court had not exceeded its jurisdiction. Other decisions, cited from the reports of other states, are equally inapplicable, but we have no time to review them. We will, however, refer to the language quoted by counsel from High, Extr. Rem. § 766. He quotes the following: "Another distinguishing feature of the writ is that it is a preventive rather than a corrective remedy, and issues only to prevent the commission of a future act, and not to undo an act already performed." To show what this means, he should have quoted what follows in the next sentence: "When, therefore, the proceedings which it is sought to prohibit have already been disposed of by the court, and nothing remains to be done either by the court or the parties, the cause having been absolutely dismissed by the inferior tribunal, prohibition will not lie," etc. This is really the whole extent of the rule. Where the proceeding in the lower court has ended, and the court has nothing further to do in pursuance or in completion of its order, or where it has dismissed the proceeding, prohibition is no remedy; but, where anything remains to be done by the court, prohibition not only prevents what remains to be done, but gives complete relief by undoing what has been done. See forms of writs cited, 2 Chit. Pr. 354, 355. Ex parte Morgan Smith, 23 Ala. 94; Jones v. Owen, 5 Dowl. & L. 669; Marsden v. Wardle, 3 El. & Bl. 695, and cases therein cited; *Serjeant v. Dale*, L. R. 2 Q. B. 558. In

*White v. Steele*, 12 C. B. (N. S.) 383, the court says (page 412:) "The writs in the register and elsewhere which conclude with a *mandamus* to the Court Christian to recall an excommunication already erroneously fulminated, or a sequestration wrongly issued, are all, as to the prohibitory part, peremptory, and the *mandamus* to revoke the unauthorized proceeding only accessory to the peremptory prohibition, and necessary to give it effect." Here is a clear indication of the extent of the remedial office of the writ. It is primarily and principally preventive. Its office is to arrest proceedings; but, when a case arises in which there are proceedings to be stayed or prevented, it will also annul such prior proceedings as may be necessary to make the remedy complete. The principle is that which prevails in equity. When there is jurisdiction the court will afford complete relief. A party will not be compelled to resort to more than one proceeding, or more than one court, for redress of one injury. See, also, *French v. Noel*, 22 Grat. 454. Many other cases are cited in the brief of counsel for petitioners to this point, and might be cited here, but it is unnecessary. In the nature of things, it must be true that when a receiver has got possession of property under a void commission, and the future acts of the court, i. e., the sale of the property and distribution of its proceeds, are arrested by prohibition, the writ will also require a restoration of the property to the petitioner; for otherwise prohibition would be worse than no remedy at all. It would prevent the owner from getting either the property or its proceeds. The receiver would continue to hold it discharged of the duty of accounting for it.

We will next consider the objection that prohibition will not lie because the petitioners had other plain, speedy, and adequate remedies in due course of law. It is suggested that they might have moved the court below to withdraw its order for a receiver. But suppose the court insisted that everything should be absolutely given over to the possession of the receiver before he would listen to any application for a revocation or modification of his order. Can it be said that a motion only to be considered on such conditions afforded an adequate remedy, or any remedy? And suppose the motion had been heard and denied. Would that have helped them? After all, it would have been necessary to appeal to some other court for relief. But surely counsel can scarcely be serious in contending that, because a party can move a court to set aside an invalid order, therefore he cannot have a writ of prohibition; for, if this were so, there never could be a writ of prohibition. Such a motion would always be possible. The most that can be claimed is that an application should be made to the lower court before moving for the writ. But this is another point to which we shall refer hereafter.

It is also suggested that the petitioners might have bowed to the authority of the receiver, given him possession of everything, and then obtained leave from the superior court to sue him in ejectment, or



that they might have sued him in forcible entry. It is true the petitioners might have done this, but the remedy would have been neither speedy nor adequate. They had the right, not merely to get their property back after a long and expensive litigation, they had a right to keep it. The wrong with which they were threatened when they applied for the writ, and when the writ issued, was the deprivation of the possession and the use of their property. To give the property up in the hope of being allowed by the superior court to sue for it, and recover it after years of litigation, was neither an adequate nor a speedy remedy. It would be as reasonable to say that an injunction should never issue to restrain a threatened injury, because the party injured may always have his action for damages. But there is a distinction affecting this question which counsel seem to have wholly overlooked,—a distinction, that is to say, between acts of the receiver and acts of the court. When a receiver holds by a valid appointment containing no directions in excess of the jurisdiction of the court, so long as he acts in pursuance of the orders of the court, he cannot ordinarily invade the rights of parties or strangers to the litigation. If he does an injury, he does it by exceeding his authority. In such case the fault is his, and his alone. If he attempts to take property lawfully in the possession of another, and to which he is not entitled, his attempt may be resisted just as any other trespasser may be resisted, and the person defending his lawful possession is not brought in conflict with the court. If he by any means gains possession of the property claimed by a stranger, the court will either order him to restore it, or, if the title is in doubt, permit an action to be brought against him to try the title. But, when the court has exceeded its jurisdiction in appointing a receiver, or in directing him to take specific property out of the possession of a stranger, the injury that results is directly due to the action of the court. The wrong is in the order of the court, not in the receiver's transgression of the order. In such case, it seems clear that the appropriate remedy is in some writ or proceeding which operates upon the court, as such, to restrain its judicial action, and not in the sort of resistance that may be opposed to an ordinary wrong-doer, or in such an action as may be brought against a private person who has committed a trespass. However confident he may be of his right to resist, no prudent man will take the risk of resisting the plain terms of an order of court; and no rule of practice should be laid down which will compel a man in that situation to defend his possession by force in order to avoid the necessity of resorting to an action to recover it. On the contrary, all men should be encouraged to avoid forcible resistance to orders of courts, no matter how plainly in excess of jurisdiction, by firmly upholding and freely administering the remedies provided for the summary correction of such excesses.

But it is said that the order appointing the receiver was appealable, and therefore

prohibition will not lie. The statute does not say that the writ will not issue in any case where there is an appeal. There must not only be a right of appeal, but the appeal must furnish an adequate remedy, in order to prevent the issuance of the writ. A number of cases have been decided in this court in which writs of prohibition have been refused because there was a right of appeal, but in all of those cases the appeal afforded a complete and adequate remedy for the threatened excess of jurisdiction. In *Childs v. Edmunds*, 10 Pac. Rep. 130, the petitioner had a right to appeal, and by his appeal he could stay the enforcement of the writ of assistance. More than this, it does not appear that any excess of jurisdiction had been committed in ordering the writ of assistance; and, if so, appeal was the only remedy. In *Mancello v. Bellrude*, 11 Pac. Rep. 501, and *Levy v. Wilson*, 69 Cal. 105, 10 Pac. Rep. 272, appeal was a complete and adequate remedy. In *Clark v. Superior Court*, 55 Cal. 199, and *Wreden v. Superior Court*, Id. 504, there was no excess of jurisdiction, and appeal was the only remedy. The same is true of the case of *Powelson v. Lockwood*, 82 Cal. 613, 23 Pac. Rep. 143. The difference between this case and all those referred to is that here an appeal would have afforded no remedy for the wrong with which the petitioners were threatened. By means of an appeal, at the end of about a year and a half, in the ordinary course, they could have procured a reversal of the order,—if, indeed, as strangers to the action in which it was made they had any right to appeal; but in the mean time they would have been irreparably damaged, unless upon the taking of the appeal the court would have suspended action under the order. But the court had already decided that no appeal could by possibility stay the appointment of a receiver, and the seizure of the property by him; and so it would have been necessary to make a motion to suspend the order, and for a restoration of the property or a withdrawal of the receiver,—wait until that order was overruled, and a bill of exceptions settled, and take another appeal from that order, as was done in *Lee Chuck v. Quan Wo Chong*, 81 Cal. 222, 22 Pac. Rep. 594. Or some other proceeding would have been necessary, involving ruinous delay; for in the mean time the receiver would have gained complete possession of the refinery and other property, the refinery would have been closed, stock injured, contracts broken, employees discharged or kept in idleness, and every possible damage inflicted, without any security for the loss. In such a case, there was no adequate remedy except by a proceeding which would prevent the receiver from taking possession of the property; and the writ of prohibition was, as has been shown, the appropriate remedy for that purpose. It has, it is true, been in great measure shorn of its efficacy by the precipitate haste of the receiver in proceeding under the order of the superior court; but the propriety of the course pursued by the petitioners is to be judged, not by the consequences of what the receiver has done, but by the case upon which their

petition was founded, and our writ awarded. The fact, therefore, if it be a fact, that the petitioners could have appealed from the order appointing the receiver, does not preclude them from having the writ of prohibition.

The case of *Halle v. Superior Court*, 78 Cal. 418, 20 Pac. Rep. 878, so much relied on by counsel at the oral judgment, and cited again with emphasis in the briefs since filed, is, as we pointed out at the hearing, radically different from this case. There the order of the superior court was in no respect in excess of its jurisdiction. The receiver was regularly appointed, in a proper case, to take charge of the estate of a voluntary insolvent. He was not directed to take any specific property. The court had decided nothing against the claims of the petitioner, and was not assuming to decide anything with respect to his claims. The court, in short, had done nothing which could have been prohibited. But it was feared by the petitioner that the receiver might sell property previously assigned to him by the insolvent, and he wanted such action by the receiver restrained. He feared, in other words, that the receiver would exceed his authority, and commit a trespass. We said, in vacating the alternative writ, that, if the receiver had taken any property belonging to the petitioner under the order of the superior court, he had done so without authority, and was a mere trespasser, for which plaintiff had a remedy by action, and that he could not resort to the extraordinary remedy of prohibition. What bearing this decision can be supposed to have upon a case where the order of the court is in excess of its jurisdiction, and where the object of the proceeding is primarily to restrain the court in its judicial action, and only indirectly affects the receiver, who has done nothing except what the court has commanded him to do, we have thus far failed to comprehend. We have pointed out in another connection the reasons for allowing a summary remedy to arrest judicial action in excess of jurisdiction, and the difference between the situation of a person wronged by such action and one threatened by a private trespasser. In the one case the party threatened has a right to resist the trespass by force, if necessary. In the other, though he may have the right to resist, it is against the policy of the law to encourage such resistance, and a summary remedy is given to arrest the proceeding.

It is next urged in behalf of respondent that prohibition will not lie to try title to property, which means, in its application to this case, that the petitioners cannot be allowed to show in this proceeding that they are the owners of the refinery. But we think counsel have misapprehended the bearing of the proposition which they lay down, and to which we assent. It is true the title to the property cannot be tried in this proceeding; but what this means is that when a court, by its order, has taken property out of the actual possession of a stranger to the proceeding, who claims it as his own, the order is in excess of jurisdiction, irrespective of the actual state of the title. Whether the

party in possession really held the title or not, the order is void, because no man can be deprived of his property without due process of law. A court cannot take property from his possession without a hearing, and compel him to prove title in order to regain it.

It is next suggested that the writ of prohibition does not issue *ex debito iustitiæ*, but is to be granted or withheld in the sound discretion of the court, and that in this case it ought not to be allowed in favor of these petitioners, because they are members of the sugar trust, monopolists, and are the tempters who seduced the American Sugar Refinery into the combination. There is no competent proof before us of these facts; but, assuming them to be so, the law is not such as counsel claim it to be. A decision may be found here and there saying in a loose way that the issuance of the writ is in the discretion of the court, and a statement in general terms to the same effect may be cited from text-writers who merely echo the decisions; but it never was the law that a court having jurisdiction to issue the writ had any discretion to refuse it when demanded by the real party in interest bringing himself clearly within the law. If such an idea has obtained anywhere, it has been in consequence of a misunderstanding of the English cases. In England the practice in prohibition was analogous to the practice in other actions at law. An original writ (of prohibition) issued for the purpose of securing an appearance, and after appearance the pleadings followed; that is, the plaintiff declared, the defendant pleaded or demurred, and so on. But there was this difference between the writ of prohibition and other original writs; that, whereas the writs in ordinary actions issued of course on application of the plaintiff, the writ of prohibition did not issue of course, but only upon affidavit showing grounds for its issuance. Another difference was that not only the party injuriously affected by the proceedings of the inferior court, but any subject of the king, was allowed to interfere to prevent an excess of jurisdiction; and, in case of suit by a stranger to the proceeding to be stayed, the superior courts exercised a discretion in granting or withholding the writ, but never when the party affected was the plaintiff. This whole subject is reviewed exhaustively in the case of *Mayor v. Cox*, L. R. 2 H. L. 278, 280. The following quotation from an opinion of Lord Chief Justice Cockburn therein cited (page 280) shows what the law on this point is: "I entirely concur in the proposition that, although the court will listen to a person who is a stranger, and who interferes to point out that some other court has exceeded its jurisdiction, whereby some wrong or grievance has been sustained, yet that it is not *ex debito iustitiæ*, but a matter upon which the court may properly exercise its discretion, as distinguished from the case of a party aggrieved, who is entitled to relief *ex debito iustitiæ* if he suffers from the usurpation of jurisdiction by another court." In *re Forster*, 4 B. & S. 187. In this state, it is always the party aggrieved who sues;

and, if he shows a case for the issuance of the writ, the court cannot refuse it on the ground that he is a bad man, and deserves the punishment he is threatened with, or upon any other consideration which appeals to the mere discretion of the judge.

We come finally to the proposition upon which counsel for respondent insists most strenuously, viz., that the jurisdiction of the court to grant a peremptory writ of prohibition depends absolutely upon the allegation and proof by petitioners that, before filing their petition here, they had pleaded to the jurisdiction of the superior court, and that their plea had been overruled. To sustain this proposition, they cite the decisions of this court above referred to, (*Chester v. Colby*, 52 Cal. 517, and *Railroad Co. v. Superior Court*, 59 Cal. 476,) and they cite a number of decisions from the courts of other states. It is clear that the California cases do not support the contention of respondent. In each of them a party to the proceeding in the lower court was the petitioner for the writ, and all that was held in the first case was that, an objection to the jurisdiction of the lower court having been taken by demurrer, and being undecided there, this court would not interfere by prohibition before that court had overruled the objection. In the second case, it was held that the party must in some form object to the want of jurisdiction of the lower court before the writ of prohibition would issue. In neither case was the failure to make such objection held to be jurisdictional, but the refusal to issue the writ was put upon the ground that prohibition is a prerogative writ, and consequently that the court had, and ought to exercise, the right to make its issuance, subject to reasonable conditions, and that it was reasonable to give the lower court an opportunity to correct itself before calling the judge to answer here. We have no doubt that both decisions are correct in all that they decided, and in all that was said in the opinions on this point. To the extent that its issuance may be made subject to reasonable conditions, applicable equally to all cases and all suitors, the writ of prohibition is no doubt a "prerogative" writ, though it may be doubted if that is a correct term of description; for, in the same sense all writs may be called prerogative writs. And we are satisfied that the rule of practice established by these decisions is a proper and wholesome rule, recommended by important considerations of expediency. When a party has an opportunity of objecting in the lower court that it is proceeding, or is asked to proceed, in a matter without, or in a manner exceeding, its jurisdiction, he ought to make the objection there. It is only fair to the court that the objection should be brought to its attention in some proper form. If no objection is made, the party having every opportunity to object, the court may reasonably infer that no ground of objection exists; and not only is the court entitled to the advice and suggestions of the party with reference to objections apparent on the record,—there are many cases in which the ground of objection would not appear un-

less set forth by plea in some form, and it is to be presumed that any valid objection, properly brought to the attention of the court, would generally prevail, and that all necessity for a writ of prohibition would be obviated; therefore the interest of the public in preventing unnecessary litigation, as well as consideration for the judge of the lower court demand that the objection should be made at the first opportunity. These are the reasons of the rule, and they indicate its scope and the extent of its application, as the authorities very fully show.

We have not time to review the cases, other than those cited from the reports of the state; but we refer to the case of *Mayor v. Cox*, supra, in which the learning of the subject is exhausted. That was a case appealed from the court of exchequer to the exchequer chamber, and finally to the house of lords. Before deciding it, the lords requested the opinion of the justices of the queen's bench on two questions; the second being as follows: "Whether the garnishees in the lord mayor's court could maintain an action for a prohibition without having pleaded in the lord mayor's court;" to which the justices unanimously responded that they could. This was in accordance with the unanimous decision both of the court of exchequer and exchequer chamber, which was accordingly affirmed in the house of lords. The answer of the justices, prepared by Justice WILLES, contains a full review of all the cases, showing that even in England the subject had not been clearly understood, and that some inconsistent and erroneous decisions had been made. It is not surprising, therefore, that in some of the United States the same confusion has arisen, and that some cases have been erroneously decided, to the effect, for instance, that the issuance of the writ is in the discretion of the court, and that a formal plea to the jurisdiction of the lower court is an essential prerequisite to its issuance. Fortunately, no such decisions have been made in this court, though, in deciding *Chester v. Colby*, supra, an Arkansas case (*Ex parte City of Little Rock*, 28 Ark. 52) is cited with approval which apparently does go to the extent claimed by respondent. But we are fully at liberty, without questioning the authority of any case decided in this court, to adopt the correct rule and doctrine as expounded and laid down in the case of *Mayor v. Cox*. Without going into the niceties of the subject, it may be said that the following propositions applicable to this case are fully supported by the decision in that case: (1) If a want of jurisdiction is apparent on the face of the proceeding in the lower court, no plea or preliminary objection is necessary before suing out the writ of prohibition. (2) If the proceeding in the lower court is not on its face without the jurisdiction of such court, but is so in fact by reason of the existence of some matter not disclosed, such matter ought to be averred in some proper form in order to make the want of jurisdiction appear. (3) But this is not essential to the jurisdiction of the superior court to grant prohibition. It is only laches, which may or may not

be excused, according to circumstances. Accordingly, we find that frequently a failure to plead in the lower court was excused for the reason that it appeared that the plea would have been rejected if made. The whole question, in fact, was one of practice merely, not of jurisdiction; and the objection which most frequently prevailed to the granting of the writ was not that the application came too early, but that it came too late. The rule which we have adopted is founded upon the same considerations, and directed to the same end. Our jurisdiction is ample to arrest by prohibition any proceeding without or in excess of the jurisdiction of the superior court, but by statute we are forbidden to do so when there is a plain, speedy, and adequate remedy in ordinary course of law; and, by the practice which we have adopted and prescribed for ourselves, we will not issue the writ until the objection to its want or excess of jurisdiction has in some form been made in, and overruled by, the lower court; the whole foundation of the rule being the respect and consideration due to the lower court, and the expediency of preventing unnecessary litigation.

Applying these principles to the present case, we find that the petitioners were not, in their character of purchasers of the specific property described in the order appointing the receiver, parties to the *quo warranto*, or the rule to show cause why the receiver should not be appointed, and in that character they had no opportunity to object until after Mr. Reddy appeared at the refinery armed with an order of court authorizing him to take it into his possession. As stockholders of the corporation, however, it is contended and may be conceded that they were virtually defendants in the *quo warranto*, and parties affected by the rule to show cause. But it clearly appears that, in that character, they made every objection that could be made to the order asked, which did not refer to any specific property. They filed an affidavit showing that there were no creditors of the corporation, and a certificate showing that all the stockholders had requested the directors to close up the business of the corporation. They also brought to the attention of the court the fact that an appeal from the judgment of forfeiture had been taken and perfected. All these objections went to the jurisdiction. They were all argued, all maturely considered, and all overruled in a carefully prepared opinion in writing. What more could possibly be necessary in order to authorize us, under any rule prevailing anywhere, to examine and decide upon the objections so made and so overruled? Certainly, nothing that has ever been decided by this court, and nothing in the reason of the rule. Even as to the objections to the order as made, upon grounds peculiarly affecting the petitioners as purchasers of the specific property therein described, they did everything which the reason of the rule requires. It is objected that they did not file a formal plea, make a formal motion, and await a decision of the superior court, before moving here. But what opportunity were they allowed

to take these steps? The first notice they had of the order empowering the receiver to take the property claimed by them was his appearance at the refinery, demanding immediate possession, and asserting his authority and control. In the short respite of one night which was granted them, they prepared affidavits setting forth their claims upon which to base an application for such a stay as would enable them to move for a suspension or modification of the order. Their attorney sought the respondent at his chambers at the earliest possible moment, stated to him the substance of the affidavits, and the nature of his application. He also stated that there was a scramble for the possession of the refinery between the receiver and the agents and employees of the petitioners. Thereupon the respondent distinctly informed him that his application would not be considered unless full and complete possession of the property was first delivered to the receiver. To have yielded to this condition would have been to give up the whole controversy, and submit to the very wrong which it was their object to prevent. They were not bound, therefore, to move upon such terms; and being advised, and fully believing—what the event proved to be the fact—that the respondent and the receiver would proceed with all expedition to enforce the invalid order, they were justified in filing their petition without further delay.

It is unnecessary, in this view, to determine whether the affidavit of Mr. Mott was actually read to Judge WALLACE or not; and we shall not attempt to reconcile the conflict in the testimony upon that point. In any event it is certain that our jurisdiction to issue a peremptory writ is complete, and equally certain that the respondent has no reason to complain that objections to his order were not submitted to his decision before this proceeding was instituted. It is also unnecessary to enter into any detailed discussion of the testimony as to the extent or completeness of Mr. Reddy's possession at the time the writ was served. It is the time when the writ is ordered, not the time when it is served, that fixes the extent of our power to interfere with the proceeding in the lower court. But even this is immaterial in this case; for we have shown that so long as property in the hands of a receiver remains subject to further judicial action which may be arrested by the prohibition, the remedy will be made complete by ordering its restoration. So far, therefore, as the prohibition is concerned, it makes no difference if we assume that Mr. Reddy had complete possession at the time we ordered the alternative writ. It is only with respect to the proceeding for contempt that the facts relating to the possession of the receiver are material. In considering the question of contempt, it will be necessary to examine with some care the evidence on this point; and, as this will necessarily occupy some time, and as it is important that the petitioners should have as speedy relief as possible, we will make that matter the subject of a separate opinion to be filed at our earliest convenience. In the mean

time an absolute and peremptory writ of prohibition will issue, in accordance with the views herein expressed.

We concur: SHARPSTEIN, J.; MCFARLAND, J.; PATERSON, J.; WORKS, J.; FOX, J.

Mr. Justice THORNTON, being absent from the state, did not participate in the decision.

84 Cal. 449

PEOPLE v. SANSOME. (No. 20,618.)

(Supreme Court of California. June 10, 1890.)

CRIMINAL LAW—PRIOR CONVICTION—EVIDENCE.

1. Under Pen. Code Cal § 1093, providing that where one indicted for felony is also charged with a prior conviction, which he confesses, the clerk, in reading the indictment to the jury, shall omit all that relates to such former conviction, it is prejudicial error to direct the clerk, reading an indictment for robbery, to read that part charging a prior conviction for burglary, which was confessed, and permit him to announce that "the defendant confessed the same, and was guilty."

2. Such an error is not waived by the introduction in evidence of a pardon for such prior offense, nor is it cured by an instruction to the jury that they "have nothing to do with the prior conviction of burglary. All you have to do is—*First*, to determine whether the alleged robbery was committed; and, *second*, if it was, whether the defendant committed it. Of course, if no robbery was committed, you will acquit the defendant."

3. The defendant, on trial for robbery, was arrested, at a place far distant from the scene of its commission, 41 days thereafter. *Held*, that evidence that, at the time of his arrest, burglars' tools were found on his person, was incompetent, it not appearing that like tools were used in aiding the commission of the offense charged.

Commissioners' decision. In bank. Appeal from superior court, Placer county; B. F. MYERS, Judge.

L. L. Chamberlain, for appellant. Geo. A. Johnson, Atty. Gen., for respondent.

BELCHER, C. C. The defendant was convicted of the crime of robbery, and sentenced to imprisonment in the state-prison for life. He appeals from the judgment, and an order denying him a new trial. The indictment under which defendant was tried charged him with the crime of robbery, and also with a prior conviction of the crime of burglary. On being arraigned, he pleaded not guilty to the charge of robbery, and confessed the prior conviction of burglary. When the case came on for trial, a jury was impaneled and sworn; and thereupon the court directed the clerk to read to the jury the indictment, and state defendant's pleas thereto. The defendant objected to the reading of that part of the indictment which charged a prior conviction, and to the statement of his plea thereto. The court overruled the objection, and the defendant reserved an exception. The clerk then, by the direction of the court, read to the jury the whole indictment, and stated, "that, to the said charge of prior conviction, the defendant confessed the same, and he was guilty."

This ruling is complained of by the appellant, and we think it clearly erroneous. The Code provides: "If the indictment or information be for felony, the clerk must read it, and state the plea of the defend-

ant to the jury; and, in cases where it charges a previous conviction, and the defendant has confessed the same, the clerk in reading it shall omit therefrom all that relates to such previous conviction." Pen. Code, § 1093, subd. 1. And see *People v. Meyer*, 73 Cal. 548, 15 Pac. Rep. 95.

It is, however, contended for respondent that the error was rendered harmless by the subsequent proceedings. The facts relied upon are these: In the progress of the trial, counsel for defendant asked one of his witnesses if he had assisted the defendant in procuring a pardon from the state-prison, and the witness answered that he had. He was then asked if he had the pardon, and answered that defendant left it with him, and that he had it in court. On cross-examination the witness was asked where the pardon was, "and he took it out of his pocket, and it was offered and admitted in evidence without any objection by defendant or his counsel. The pardon was then read without objection, and proved to be the pardon of the defendant for the very offense, the prior conviction of which had been charged against him in the indictment;" and the court, of its own motion, instructed the jury as follows: "The defendant is charged with the offense of robbery, and also with a prior conviction of burglary. Now, you have nothing to do with the prior conviction of burglary. All you have to do is—*First*, to determine whether the alleged robbery was committed; and, *second*, if it was, whether the defendant committed it. Of course, if no robbery was committed, you will acquit the defendant." The argument is "that the error, if any, was waived by defendant himself bringing to the attention of the jury the fact of such prior conviction," and "that the error, if any, was cured by the court's instruction to the jury." We do not think the argument sound. The rule is that every error is presumed to work injury to the party against whom it is committed, unless it clearly appears from the record that no injury could have resulted from it. This does not appear here. The evident purpose of the provision of the Code above quoted was to keep from the jurors all knowledge that the person on trial before them had been previously convicted of a criminal offense, and this is based upon well-settled and familiar principles of law and right. In the first place, it is elementary law that every one accused of crime is presumed to be innocent until proved to be guilty, and is entitled to a fair and impartial trial before an unbiased jury. In the next place, it is well known that ordinary jurors are more ready to believe the accused guilty if it be understood by them that he has suffered a previous conviction for a similar offense. To hold, therefore, where, as here, the plain letter of the statute has been violated, to the manifest prejudice of the defendant, that he waived the error and is remediless because he vainly attempted to avoid its effects by showing that he had been pardoned, would not, in our opinion, be warranted either by law or justice. Nor was the error cured by the instructions of the court. The learned judge did not tell the jury that he had

erred in allowing the charge of a previous conviction, and the confession thereof, to be brought to their attention, and that, in determining as to defendant's guilt, they should wholly discard this knowledge from their minds, but only that they had nothing to do with the prior conviction, and were only to find whether defendant was guilty of robbery or not. This left the jury to infer that the ruling complained of was proper, and that they were rightfully informed of the previous conviction, but were simply not required to make any finding in regard to it. Under such circumstances, we cannot say that the information of the prior conviction thus wrongfully imparted to the jurors did not exercise its baneful influence upon their minds.

It is urged for appellant that several other prejudicial errors were committed, but one of them only, we think, need be noticed. The robbery charged against the defendant was committed on the 11th day of August, 1887, near Michigan Bluff, in Placer county, and consisted in stopping a stage-driver, and taking from Wells, Fargo & Co.'s express box, which he was carrying, the sum of \$265 in gold coin. The defendant was arrested for the offense on the 21st day of September following, at Elk Grove, in Sacramento county, and was taken thence to Sacramento city. The officer who made the arrest was a witness, and was asked by counsel for the prosecution if he searched defendant in the city prison. He answered that defendant was searched in his presence, and that certain articles were found upon him there. Counsel then exhibited to the witness and jury a number of articles taken from the person of defendant, and "proceeded to examine said witness as to the character of said articles, and the uses to which they were supposed to be adapted." To this examination, counsel for defendant objected on the ground that the articles had no bearing on the case, and had nothing to do with the commission of the crime charged. The court overruled the objection, and the defendant duly excepted. The witness then proceeded to testify as follows: "There are some of these things I recognize. This bit I remember. There are two bits and a knife I remember distinctly, and the putty-knife. Those drills, in the right man's or men's hands, are called 'safe drills,' and used as such, and then they would drill most anything else. This is a putty-knife, I should presume, and a whetstone and watch-spring. The whetstone, I presume they would use that to sharpen a knife or tool. This, I presume, could be used for unlocking some lock,—a skeleton key for a padlock. This would possibly be used in blowing up a safe, and this is used for picking open a window sash. This would open a handcuff, if in the right shape. I don't know whether you could use it for anything else. This is an old key, and would make a skeleton key. This is used for sharpening tools, and it would make a saw out of that spring. That is an ordinary skeleton key,—not exactly a skeleton key, but could be used for it. That might be used for a blow-pipe, or something of that kind, used sometimes for blowing powder

into a safe." Counsel for defendant moved the court to strike out all this testimony on the ground that the tools exhibited and described had no connection with the offense charged, but the court denied the motion. In *People v. Winters*, 29 Cal. 659, the defendant was convicted of burglary, and the only question on appeal related to the admission and exhibition as evidence to the jury of certain burglarious tools which were found in the defendant's carpet-bag at the time of his arrest. It was held that burglarious tools found in the possession of the defendant soon after the commission of the offense may be offered in evidence whenever they constitute a link in the chain of circumstances which tend to connect the defendant with the commission of the particular burglary charged in the indictment. But, before such tools can be received in evidence, it must be shown that the burglary charged was in fact committed, and that it was committed with the aid of burglarious tools like those proposed to be shown in evidence, and that the defendant was in the vicinity at or about the time the offense was committed; and, if it appears that the burglary was not committed by means of burglarious tools, as where the burglar entered by an open door or window, the possession of burglarious tools cannot be shown.

The defendant here appears to have been convicted upon evidence wholly circumstantial. James Murray was called as a witness for the prosecution, and testified: "I was the driver of the stage running between Michigan Bluff and Forest Hill on the morning of August 11, 1887. I was stopped by a man, after going fifteen or twenty minutes, at a tree near the ditch, about 4:30 A. M. The man had a gun, and had something over his face that looked like barley sacks. Did not notice his feet. I was not much excited. I thought at the time I recognized the man by his voice as Steve Robinson, of Michigan Bluff, as I had been acquainted with Steve Robinson several years, and knew him well. I made a statement to the justice of the peace at Michigan Bluff—and made affidavit that it was correct—that Steve Robinson was the man that stopped and robbed the stage August 11, 1887, also swore at the preliminary examination that Robinson was the man. The only occupants of the stage were a Chinaman and myself." Now, how the articles found on defendant in Sacramento, 41 days after the robbery was committed, can be said to constitute a link in the chain of circumstances which tend to connect the defendant with the commission of the robbery is more than we can understand. It does not appear that the robbery was committed by the aid of articles like those shown in evidence, nor that defendant was in the vicinity at or about the time the offense was committed. The only evidence, so far as the record shows, as to where the defendant was at any time prior to his arrest, was, on the part of the prosecution, that he was at or near Forest Hill on the 18th of August, and, on the part of the defense, that he was at Grass Valley, in Nevada county, between 1 and 2 o'clock in the afternoon of August 11th.

distant more than 30 miles from the place of the robbery.

We think the court erred in admitting the evidence objected to, and in refusing to strike it out after it was admitted. We therefore advise that the judgment and order be reversed, and the cause remanded for new trial.

We concur: FOOTE, C.; GIBSON, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed, and the cause remanded for a new trial.

McFARLAND, J. I concur in the judgment, and in the opinion of Commissioner BELCHER; but I wish to add that some of the instructions given at the request of the prosecution, and not noticed in the opinion, were clearly wrong. For instance, the jury are told, that "when direct evidence cannot be produced, minds will form their judgments on circumstances, and act on the probabilities of the case." This would probably be understood by the jury as instructing them that their minds must "act on probabilities" in determining the guilt of the defendant, which would clearly be erroneous. But the instruction proceeds as follows: "As absolute certainty is seldom to be obtained in human affairs, reason requires that the jury, in forming an opinion of the truth of the facts, should be governed by the superior number of probabilities on the side of the people or the defendant." This is not only against the settled rule as to the amount of proof necessary to convict in criminal cases, but is against the express language of the Code. Code Civil Proc. § 2061; Pen. Code, § 1096. The instruction was also given that, "in order to convict, the circumstantial evidence should be such as to produce nearly the same degree of certainty as that which arises from direct testimony." This, in my judgment, is a doubtful and dangerous proposition. I do not mean to say that it would be sufficient to reverse a judgment; for I am aware that somewhat similar language was held not to be erroneous in *People v. Cronin*, 84 Cal. 191, and in at least two subsequent cases. But the doctrine has never been satisfactory to the profession, and can be upheld only by the most stringent use of the rule of *stare decisis*. In my judgment, it had better be abandoned by prosecuting officers, for its use in the future may put just convictions in peril.

84 Cal. 618

PEOPLE v. WILLIAMS. (No. 20,627.)

(Supreme Court of California. June 24, 1890.)

#### CRIMINAL LAW—APPEAL.

Where defendant moves to set aside the information on the ground that a certain person by whom he was committed for trial had no jurisdiction, but the record does not show that such person ever committed defendant for trial, it will be presumed on appeal that defendant was so committed by a duly qualified magistrate.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; LUCIEN SHAW, Judge.

v.24P.no.3—10

*Hugh J. & Wm. Crawford*, for appellant.  
*Frank P. Kelly*, for respondent.

FOOTE, C. The defendant, Harry Williams, was convicted upon an information for robbery. From the judgment rendered in the premises, and an order refusing a new trial, he appeals. The ground apparently relied on for a reversal of the judgment and order is that the defendant was committed for trial after a preliminary examination before M. T. Owen, assuming to act as a committing magistrate by virtue of his being a judge of the police court in and for the city of Los Angeles, at a time when there were two justices of the peace or magistrates in and for said city, who had jurisdiction to act in the premises, which it is claimed the police judge had not; that consequently the court erred in denying the defendant's motion to set aside the information, based on the claim that he had never been legally committed by a magistrate. The record does not show by any evidence whatever that M. T. Owen, claiming to be such police judge, ever committed the defendant for trial. We must presume, in the absence of anything showing the contrary, in favor of the action of the court below, that some duly-qualified magistrates had, previous to the trial in the superior court, properly committed the defendant for such trial, but who he was does not appear; for it will not be taken for granted that the facts set up in the defendant's motion are true, without any proof as to the matter. It follows, therefore, that the judgment and order should be affirmed, and we so advise.

We concur: BELCHER, C. C.; GIBSON, C.

PER CURIAM. For reasons given in the foregoing opinion the judgment and order are affirmed.

84 Cal. 590

VACA VAL. & C. L. R. CO. v. MANSFIELD *et al.* (No. 18,384.)

(Supreme Court of California. June 14, 1890.)

#### FRAUDULENT DEED—ESTOPPEL—ANSWER—EVIDENCE.

1. Where the signature of a railroad president, together with the corporate seal, was procured to a blank deed by false representations, and the deed was subsequently filled out by the grantee with a description of lands not sold, the deed was void, and the mortgagee of the grantee, who took without notice, acquired no interest thereunder, and the company was not estopped from proving the facts by the apparent regularity and validity of the deed.

2. Where, in an action to quiet title, the answer averred that defendants had an interest in the land, they were not entitled to a nonsuit because plaintiff's evidence failed to show a cloud upon the title, as the answer constituted an admission of that fact.

3. Where the statute of limitations was not pleaded, evidence as to possession of land during 10 years preceding the action was properly excluded, especially when it only tended to show that no one was in possession.

Commissioners' decision. Department 2. Appeal from superior court, Yolo county; C. H. GAROUTTE, Judge.

Defendant D. E. Allison appeals.



*Matt F. Johnson*, for appellant. *R. Craig and Craig & Harding*, for appellant.

BELCHER, C. C. The plaintiff brought this action to quiet its title to two blocks of land (4 and 11) in the town of Winters, Yolo county. The defendants answered separately. Defendant Mansfield alleged that in 1878 the plaintiff sold and conveyed the two blocks to him, and that under his conveyance he took possession, and had ever since held possession of the same. Defendant J. Allison filed a disclaimer. Defendant D. E. Allison alleged that on the 25th day of July, 1878, defendant Mansfield was the owner in fee of the premises in dispute, and that on that day he executed a mortgage upon the premises to defendant J. Allison to secure the payment of his promissory note for the sum of \$5,000; that the mortgage was duly recorded, and afterwards the note and mortgage were assigned and transferred to him, (D. E. Allison,) who thereupon became, and had ever since continued to be, the owner and holder thereof; and that shortly after executing the note and mortgage defendant Mansfield departed from this state, and had since continuously remained outside of its boundaries. Upon the trial it was proved that the plaintiff was a corporation duly organized under the laws of this state, and that in February, 1877, it became the owner of the premises in question. A. M. Stephenson was then called as a witness for plaintiff, and testified that he was the president of the plaintiff corporation, and had been for more than 12 years; that he knew the two blocks of land described in the complaint; that "the corporation never sold the land to any person. Plaintiff never intended to sell this land, as we wanted it for railroad purposes. It never parted with its title to the land. I have heard that defendant Mansfield claimed these two blocks, but no person has been in actual possession, or asserted a distinct claim to it. During all the time mentioned it has lain as an open common, unused, though the plaintiff may at times have unloaded some scraps of iron or old lumber upon it. I have heard that Mansfield claimed the land, and there was a cloud on the title in that way. He mortgaged it to Allison." The plaintiff then rested its case, and the defendants moved for a nonsuit, on the ground "that the evidence failed to show that defendant possessed any title or interest in the premises that would constitute a cloud upon plaintiffs' title, and the evidence disclosed no facts which would require defendants to go on with their defense." The motion was denied and an exception reserved. Stephenson was then called as witness for defendants, and testified that he was president of the plaintiff in 1878. He was then shown a deed, and asked if the name "A. M. Stephenson," signed thereto, was his signature, and said it was. The deed was then offered in evidence. It was dated July 17, 1878, and purported to be a deed from the plaintiff to T. Mansfield and to convey the two blocks of land in question. The last clause of the deed was as follows:

"In witness whereof the said party of

the first part have hereunto set their hand and affixed the corporate seal the day and year first above written.

"VACA VALLEY AND CLEAR LAKE RAILROAD COMPANY.

[Seal.] "By A. M. STEPHENSON.

[Seal.] "By F. ALLISON, Secretary."

[Corporate Seal.]

Attached to the deed was a certificate of a notary public that Stephenson, president, and Allison, secretary, etc., personally appeared before him and acknowledged that they executed the same. The defendants next offered in evidence the mortgage and note set up in the answer of defendant D. E. Allison, with the assignments thereof to him. They then called a witness and asked him: "Who has been in possession of these blocks for the last ten years prior to 1886?" The question was objected to as irrelevant and immaterial, and the objection sustained. They then offered to prove by two witnesses, who had known the land in dispute for the last 12 or 14 years, "that no one has occupied that land during the ten years just prior to the commencement of this suit." This was also excluded by the court, and exceptions were reserved to both rulings. The defendants here rested their case, and A. M. Stephenson was recalled by the plaintiff. He testified: "The way my signature happened to be to that deed [the deed above referred to and set out herein] is this: Mansfield came over to Vacaville to get my signature to some deeds to land that had been sold. He was a notary, and I acknowledged them before him. He then said if I would sign my name to a blank deed he could sell some other lots at a bigger price than the others sold, and that he would fix it up afterwards when I came to Winters. I did so with the understanding that he was to sell some different lots. The blocks 4 and 11 the railroad never expected to be sold to anybody. The railroad needed them, and would not sell them for any money. This deed [the deed in evidence] is entirely in the handwriting of T. Mansfield, where it is written, except the signature. The acknowledgment, with the exception of the notary's certificate, is in his handwriting. At the time I signed this deed it was a blank deed, and I never went before any notary public and acknowledged this deed. The directors of plaintiff never, by any resolution, authorized the president and secretary to sell this land. Defendant Mansfield was treasurer of the corporation on the day said deed was executed. He was also a director of the company." The defendants objected to all this testimony in rebuttal, on the ground that it was irrelevant and immaterial, but the court overruled the objections, and they excepted. The foregoing is in substance all the evidence introduced in the case, and upon it the court gave judgment for the plaintiff. The defendant D. E. Allison then moved for a new trial, and his motion was denied. He appeals from the judgment and order.

1. It is argued for appellant that the court erred in denying the motion for nonsuit. It is said: "The respondent failed absolutely to show that there was any

cloud upon its title. On the contrary, it showed, so far as its side of the case was concerned, that it had a clear and unobstructed title to the premises, and does not show that either of these defendants, and especially appellant, had any claim, title, or interest in the same." The obvious answer to this argument is that the complaint alleged, and the answers admitted, that the defendants claimed and asserted an interest in the property. It was not necessary, therefore, for the plaintiff, in opening its case, to offer any proof upon this subject. Besides, if such proof had been necessary, and the defendants were entitled to a judgment of nonsuit for the want of it, the error was cured when they afterwards introduced in evidence the deed, mortgage, and note, on which they relied to defeat the action. *Smith v. Compton*, 6 Cal. 24, *Perkins v. Thornburgh*, 10 Cal. 190.

2. It is claimed that the court erred in refusing to allow the defendants to prove who had been in possession of the premises in controversy during the 10 years prior to the commencement of the action. But the statute of limitations was not pleaded, and, as shown by their offer, the defendants sought only to prove that no one had actually occupied the land. The evidence, if admitted, could not in any way have aided the defendants or strengthened their case, and there was no error in its exclusion.

3. Finally, it is urged that the evidence was insufficient to justify the decision of the court, because the deed was regular on its face, had the corporate seal attached to it, and was therefore presumptively valid, and, so far as appellant is concerned, must be treated as valid and binding. The argument is that when the corporate seal is found attached to the deed of a corporation it is *prima facie* evidence that it was placed there by proper authority, and that the deed was duly delivered; that, everything appearing to be regular when appellant acquired his mortgage interest, the plaintiff had no right to attack the conveyance made by its officers under its corporate seal, and the evidence introduced in rebuttal was therefore inadmissible. The proposition above stated as to the corporate seal, and the presumption arising from its being affixed to the deed, is undoubtedly correct, and well supported by authority. See *McCracken v. San Francisco*, 16 Cal. 639; *Association v. Bustamente*, 52 Cal. 192. But *prima facie* evidence is that which suffices for the proof of a particular fact, until contradicted and overcome by other evidence. It may, however, be contradicted, and other evidence is always admissible for that purpose. It was competent, therefore, for the plaintiff to prove all the facts and circumstances connected with the deed in question, and to show whether it was a valid deed or not. Now, the uncontradicted testimony shows that the directors of the corporation plaintiff never sold or authorized a sale of, the two blocks in controversy, nor did its president ever agree to sell them, and that the deed, when signed, was a blank, and was never acknowledged. Under these circumstances,

the deed was as absolutely void and as ineffectual to convey any title as it would have been if an entire forgery. There was no ground, therefore, for the application of the doctrine of estoppel. In our opinion the judgment and order appealed from were proper, and we advise that they be affirmed.

We concur: FOOTE, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

84 Cal. 7

DENNERY v. SUPERIOR COURT OF SACRAMENTO COUNTY *et al.* (No. 13,635.)  
(*Supreme Court of California*. May 3, 1890.)

INSOLVENCY—APPEAL—STAY.

Under Insolvent Act Cal. 1880, § 67, which provides that an appeal from an order in involuntary insolvency shall be governed by the general laws relating to appeals, and Code Civil Proc. Cal. § 946, which provides that the filing of notice of appeal and an undertaking stays all further proceedings in matters embraced in the order appealed from, after a compliance with such provisions, the court can take no further proceedings, except such as may be necessary to take and preserve the property of the debtor through a receiver.

In bank. Application for a writ of prohibition; JOHN W. ARMSTRONG, Judge.

Grove L. & Albert M. Johnson, for petitioner. *Naphtaly, Friedenrich & Ackerman* and *Add C. Hinkson*, for respondent.

McFARLAND, J. This is an application for a writ of prohibition to restrain respondent from continuing certain proceedings in a case of involuntary insolvency, after an appeal to this court by petitioner from a decree declaring him an insolvent. From the petition and answer it appears that certain creditors of petitioner filed a petition in the court of respondent, praying to have petitioner herein (Dennery) adjudicated an insolvent debtor. After a contest on the issue of insolvency, the court, on November 22, 1889, rendered a judgment and decree adjudging that petitioner was an insolvent debtor, directing that he file his inventory and schedules within five days, and fixing a day, viz., January 3, 1890, for the meeting of creditors to choose an assignee. On December 2, 1889, petitioner filed and served a notice of appeal from said judgment, and on the next day filed a sufficient undertaking on appeal in the sum of \$300. The petition avers that notice of the day for the meeting of creditors to choose an assignee is being published, and that an assignee will be chosen unless the writ prayed for herein issue; that petitioner has been cited for contempt for not filing his inventory, and will be held for such contempt; and that respondent is pursuing said insolvency proceeding in other respects as though no appeal had been taken. Respondent practically admits these averments, and asks to be advised in the premises. It further appears that prior to the judgment of insolvency the respondent had appointed George C. McMullin receiver of the property and estate of the petitioner, with direc-

tions to take and keep possession of said property, and to "do such other acts in relation thereto as the court from time to time should authorize and direct;" that said order "is still in full force and effect;" and that said McMullin has "qualified and entered upon the discharge of his duties as such receiver." Section 67 of the state insolvent act of 1880 provides that "an appeal may be taken to the supreme court in the following cases: (1) From an order granting or refusing an adjudication of insolvency." And the section further provides that "the notice, undertaking, and procedure on appeal shall conform to the general laws of this state regulating appeals in civil cases."

The general laws regulating appeals are found in the Code of Civil Procedure, from section 936 to section 980. The general provision is that an appeal is perfected by serving and filing a notice of appeal, and filing an undertaking in the sum of \$300. By several sections immediately preceding section 946, it is provided that in several enumerated cases the appeal shall not stay the judgment or proceedings unless an additional bond be given in an amount either fixed by the Code or to be determined by the court. And by section 946 it is provided that "whenever an appeal is perfected, as provided in the preceding sections of this chapter, it stays all further proceedings in the court below upon the judgment or order appealed from, or upon the matters embraced therein; \* \* \* but the court below may proceed upon any other matter embraced in the action, and not affected by the order appealed from." We think it clear that the appeal in the case at bar does not come within any of the enumerated cases in which an additional undertaking is required to stay the execution of the judgment; and, the appeal having been "perfected" in accordance with the requirements of the Code, it stays all further proceedings upon the judgment appealed from, and "upon the matters embraced therein." To afterwards compel the petitioner to prepare and file his inventory and schedules, and to proceed to the selection of an assignee, would be to proceed to execute the judgment appealed from. If that could be done during the pendency of the appeal, we see no reason why the estate could not be conveyed to the assignee, and why the latter could not "as speedily as possible convert the estate, real and personal, into money," and proceed to distribute it, under the order of the court, *pro rata* among the creditors.

It is argued by respondent that it is the right and the duty of the court to protect and preserve the property of the alleged insolvent during the litigation, and that this cannot be done without proceeding to the selection of an assignee. The pendency of the appeal would not prevent the court from preserving the property, but that can readily be accomplished through the receiver, whose functions are not suspended by the appeal.

It is contended by respondent that the receiver could not maintain an action for property or assets which had not come into his possession, or which had been fraud-

ulently transferred by the alleged insolvent. In this contention respondent is, we think, mistaken. The functions of a receiver depend very much upon the powers conferred by statute. Section 63 of the insolvent act provides for the appointment of a receiver where there is danger of the property being lost, removed, etc., and "in all other cases where receivers are appointed by the usages of courts of equity. And thereupon the appointment, oath, undertaking, and powers of such receiver shall, in all respects, be regulated by the general laws of the state applicable to receivers." And the general laws of the state provide that "the receiver has, under the control of the court, power to bring and defend actions in his own name, as receiver; to take and keep possession of the property; to receive rents, collect debts; to compound for and compromise the same; to make transfers; and, generally, to do such acts respecting the property as the court may authorize." Code Civil Proc. § 568. This provision clears the way of all former niceties as to the questions whether a receiver could sue in his own name, and whether he could recover property which had not once been in his actual possession. The power of a receiver to maintain necessary actions in insolvent cases was expressly recognized in *Re Real Estate Associates*, 58 Cal. 356. See, also, *Ex parte Hollis*, 59 Cal. 416; *Adams v. Woods*, 15 Cal. 207. Moreover, it has been held that a receiver in insolvency may apply for the examination of an insolvent concerning his affairs. *Goodday v. Superior Court*, 65 Cal. 580, 4 Pac. Rep. 626. By means of the receiver, therefore, the court can fully preserve the property of the insolvent, and protect the rights of creditors. We are of opinion, therefore, that the writ of prohibition should issue substantially as prayed for in the petition, but not to interfere with the power of the court, through the receiver, to take, by suit or otherwise, and to safely keep, the property and assets of the insolvent.

Petitioner has also instituted another proceeding (No. 13,643, post, 149) in this court for the purpose of obtaining a *superseas* upon the supposition that perhaps prohibition would not be considered the proper remedy; but as respondent makes little objection to the form of the remedy, provided that it be held that the right exists, we shall assume that prohibition is the proper proceeding. The statements in respondent's answer concerning certain litigation between petitioner's wife and the receiver are not necessary to be considered here, as that litigation is not affected by this proceeding. It is ordered and adjudged that a writ of prohibition issue to the respondent,—the said superior court and the said judge thereof,—prohibiting and restraining said court and judge, during the pendency of the appeal herein, from continuing to publish said order for the meeting of creditors; and from ordering said petitioner to file his inventory or schedules; and from proceeding against him for contempt for not doing so; and from proceeding to the choice of an assignee by said creditors; and from doing any further thing in the said proceeding in

insolvency against said petitioner, except only such things as may be necessary to be done through the receiver for taking and preserving the property of said petitioner.

We concur: BEATTY, C. J.; PATERSON, J.; SHARPSTEIN, J.; FOX, J.; THORNTON, J.

*In re DENNEY.* (No. 18,648.)

(*Supreme Court of California.* May 3, 1890.)

In bank. Application for a *supersedeas*; JOHN W. ARMSTRONG, Judge.

Grove L. & Albert M. Johnson, for petitioner. Naphthal, Friedenrich & Ackerman and Add C. Hinkson, for respondent.

PER CURIAM. This is an application for a *supersedeas*; but as the object here sought was accomplished by the writ of prohibition in *Denney v. Superior Court*, ante, 147, (No. 18,635,) this proceeding is dismissed, without costs.

34 Cal. 240

CALANCHINI v. BRANSTETTER. (No. 12,627.)

(*Supreme Court of California.* June 2, 1890.)

SPECIFIC PERFORMANCE—MUTUALITY OF CONTRACT—LIMITATION—LACHES.

1. The boundary between two tracts of land was uncertain, and the owners agreed that a certain east and west line was the true one, believing it to be such, but with a proviso that if by subsequent survey it was found to be too far north, then either the southern owner was to buy the part between the temporary and the true line at its value in its then uncleared state, or the northern owner was to pay for the clearing of the strip, at the election of the latter; and if the line was too far south these conditions were to be reversed. *Held*, the contract was not incapable of enforcement for want of mutuality.

2. Where both parties and their respective grantees, after taking possession to the line fixed, allowed the matter to stand thus for several years, the fact of mutual acquiescence prevented the statute of limitations from running against the contract.

3. The delay was not such laches on the part of plaintiff as to estop him from asking specific performance.

4. That a vendee of lands under a parol contract actually took possession, and made valuable improvements thereon, was sufficient to take the contract out of the statute of frauds, and enable him to maintain an action for specific performance.

Commissioners' decision. Department 1. Appeal from superior court, Humboldt county; J. J. DE HAVEN, Judge.

P. F. Hart and J. D. H. Chamberlin, for appellant. S. M. Back, for respondent.

BELCHER, C. C. This is an action to enforce the specific performance of an oral agreement for the sale of land. The land in controversy is a strip containing about 8 acres, which lies along the south side and is a part of a certain 40-acre government subdivision of land in Humboldt county. The facts of the case, as found by the court, and undisputed, are as follows: One Baldwin owned the 40-acre tract above mentioned, and one Chamberlin owned the 40-acre tract adjoining it on the south. The line dividing their lands was undetermined and uncertain, and they disagreed as to where the true line should be located. Thereupon, in the month of July, 1882, they entered into an oral agreement that a line, commencing at an agreed

point on the east, should be extended west through their lands, and that each owner should hold, possess, and improve up to that line, and if it should be determined by a subsequent survey that the said line was not the true line, dividing their respective tracts, but was too far north, then Chamberlin was to pay Baldwin the then value, at its uncleared state, of all the land lying between the temporary and the true line, or Baldwin was to pay Chamberlin the cost of clearing the same, as the latter might elect; and, if the said line should be too far south, then Baldwin was to have the same option in regard to purchasing or receiving pay. Immediately after making this agreement Chamberlin took possession of the land in controversy, claiming a right to its possession under the agreement, and also claiming that it was a part of his 40-acre tract, and that the temporary line agreed upon was the true line. Under such claim of ownership, and also relying upon the said oral agreement, he cut the brush from the land, and constructed a small ditch thereon, at a cost of about \$25 per acre. Subsequently, Baldwin conveyed his tract to Rachael Branstetter, who thereafter conveyed it to the defendant, and both took with notice of the before-mentioned agreement; and in July, 1884, Chamberlin conveyed his tract to the plaintiff, and placed him in possession of all the land in controversy here.

At no time did Baldwin or defendant or his grantor tender to Chamberlin or plaintiff a deed of the land in controversy, or call upon Chamberlin or plaintiff to exercise the option of paying for the land, or receiving pay for clearing the same; nor did Chamberlin at any time, or plaintiff, prior to December 27, 1886, ever elect to pay for the land and receive a deed therefor; nor did the parties mutually determine, or attempt to determine, by agreement, the true boundary line dividing their tracts. The defendant never admitted that the agreement between Baldwin and Chamberlin was as above stated, and always claimed that Baldwin only agreed to pay for clearing the land; while Chamberlin and the plaintiff at all times prior to September 26, 1886, always insisted that the temporary line established in July, 1882, was the true line, and that the land in dispute was a part of their 40-acre tract. In September, 1885, the defendant, after first offering to pay both Chamberlin and the plaintiff the cost of clearing and improving the land in controversy, but without requesting either of them to make, or join in making, a survey to determine the true line, commenced an action of ejectment against the plaintiff for the recovery thereof. In that action the defendant (plaintiff here) appeared by Chamberlin as his attorney, and for a defense denied that the land sued for was any part of the plaintiff's tract, and for a further defense set up and claimed a right to the possession of the land under and by virtue of the oral agreement now sought to be enforced. It was found by the court that the defendant in the action had not succeeded to the rights of Chamberlin under the agreement, and therefore had no equitable claim to be enforced thereunder. Judgment was entered in the

action in favor of the plaintiff therein, on the 25th of September, 1886, and the true boundary line, dividing the said two tracts of land, was thereby first adjudicated and determined. Thereafter, on the 20th of December, 1886, Chamberlin assigned all his rights under the oral agreement to the plaintiff herein, and on the 27th of the same month the latter gave defendant notice that he had succeeded to the rights of Chamberlin under the agreement, and that he elected to pay the value of the land in controversy in pursuance thereof, and he then offered to pay the same, and tendered to defendant a bargain and sale deed of the land, and requested him to execute the same, but defendant refused to receive such payment or to execute the deed. From the date of the agreement down to the time when the judgment in the action of ejectment was entered, Chamberlin and plaintiff, as his successor, remained in possession of the land in controversy, and neither of them ever attempted to ascertain whether the line temporarily agreed upon as the boundary line between their respective tracts was the true line or not. Upon these facts the court found as conclusions of law: *First*, that the plaintiff was not entitled to a judgment requiring the defendant to specifically perform the oral agreement; *second*, that plaintiffs' cause of action was barred by the provisions of section 343 of the Code of Civil Procedure; and, *third*, that plaintiff and his grantor were guilty of laches in not earlier electing to purchase the land in dispute. Judgment was then given for defendant, from which, and from an order denying a new trial, plaintiff appealed.

1. It is settled law that a verbal contract for the sale of land is taken out of the operation of the statute of frauds, and may be specifically enforced, when there has been a part performance of the contract; and the taking of actual possession of the land by the vendee, with the consent of the vendor, is held to be a sufficient act of part performance. So the making of valuable improvements upon the land, on the faith of the contract, is held to be a part performance. The ground upon which this doctrine is based is that the vendee might be treated as a trespasser, and thus placed in a situation which would be a fraud upon him, if he could not invoke the protection of the contract. *Arguello v. Edinger*, 10 Cal. 150; *Pom. Spec. Perf.* §§ 115, 126.

2. It is contended for respondent that the contract involved in this case was not mutual, and that it cannot, therefore, be enforced. The general rule undoubtedly is that contracts must be mutual, or courts of equity will not enforce them. But there are many exceptions to this rule, one of which only need be noticed. It is stated by the text-writers, and fully sustained by the authorities, that "a contract for the sale of real estate at the option of the vendee only, upon election and notice, may not only be specifically enforced, but the refusal of the vendor to accept the purchase money will not destroy the mutuality, though the vendee could thereupon withdraw his election." *Wat. Spec. Perf.* §

200; *Pom. Spec. Perf.* § 169; *Hall v. Center*, 40 Cal. 63; *Ballard v. Carr*, 48 Cal. 74. In view of the authorities upon the subject, the agreement under consideration here was not, in our opinion, incapable of enforcement for want of mutuality.

3. It is further contended that the court below rightly found that the action was barred by the statute of limitations. But when did the statute begin to run? The agreement was made in July, 1882, and this action was commenced a little more than four years thereafter. The parties were evidently induced to make the agreement, because the dividing line between their lands was unknown, and they wished to avoid disputes and complications in consequence thereof. By the agreement it was provided that each party should exercise his option to pay for the land or take pay for the improvements placed on it when it should be determined by a subsequent survey that the temporary line agreed upon was not the true line. No time was fixed for making the survey, and the burden of making it was not cast upon either of the contracting parties, and, so far as appears, no survey was ever made. Chamberlin took possession of the land in controversy with the consent and approval of Baldwin, and he and his grantee so held it until the action of ejectment was commenced. In the mean time, so far as appears, neither party made any efforts or took any steps to determine the true line, or did any act to prevent such determination or called upon the other to make the election provided for in the agreement, or gave any notice that the agreement was terminated or would be terminated at any given date. Both parties seem to have acquiesced in the delay. When the judgment in the ejectment suit was rendered, it was first ascertained that the temporary line was not the true line, and thereupon the assignee of Chamberlin, within a reasonable time, served notice that he had succeeded to Chamberlin's rights under the agreement, and that he had elected to take the land, and he then offered to pay for the same. Now, until the true line was determined, how could it be known which one of the contracting parties owned the land in controversy, or which one of them was called upon to make the election provided for? And, under such circumstances, how could a cause of action accrue, so as to put the statute of limitations in motion, until the true line was determined, and one or the other of the parties was called upon to exercise his option? It seems to us that the statute did not begin to run before the action of ejectment was commenced, if it did then, and, if we are right in this, the action was clearly not barred.

4. Had the plaintiff and his grantor been guilty of such laches as should deprive plaintiff of the relief which he would otherwise be entitled to? In *Weber v. Marshall*, 19 Cal. 459, it is said: "It is incumbent upon the party asking specific performance to show that he had used due diligence; or, if not, that his negligence arose from some just cause, or had been acquiesced in. It is not necessary for the party resisting the performance to show any par-

ticular injury or inconvenience. It is sufficient if he has not acquiesced in the negligence of the other party, (citing authorities.) Nor does possession by the party seeking performance make the rule different." And in *Fowler v. Sutherland*, 68 Cal. 417, 9 Pac. Rep. 674, the same rule is declared. Here, as we have seen, the duty of making the survey and determining the true line rested as much upon Baldwin and his grantee as upon Chamberlin and his grantee, and the delay was acquiesced in by both sides. The delay on the part of Chamberlin and his grantee may be accounted for by the fact that they claimed and believed, until the judgment in ejectment was rendered, that the temporary line was the true line, and that the land in controversy was a part of their tract. It seems to us, therefore, that the case, under the circumstances shown, does not come within the rule as to laches, and that to deny the plaintiff any relief because he did not sooner act would be inequitable and unjust. We therefore advise that the judgment and order be reversed, and the cause remanded for a new trial.

We concur: VANCLIEF, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed, and the cause remanded for a new trial.

84 Cal. 85

MCMILLAN v. HAYWARD et al. (No. 13,073.)

(Supreme Court of California. May 7, 1890.)

APPEAL—FORECLOSURE—BOND—STAY.

The possession of real property of the deceased by his widow and children, pending the administration of the estate, is, in the absence of homestead rights, in subordination to the administrator; and, on appeal from a judgment of the foreclosure of a mortgage thereon, wherein all were made parties upon an allegation that their interests were junior to the mortgage, an order for the stay of execution will be refused, unless a bond is filed under Code Civil Proc. Cal. § 945, which provides that, where defendants are in possession, a stay of execution pending appeal may be obtained by filing a bond conditioned against waste, for the payment of the value of the use, and any deficiency upon the sale, in case the appeal is affirmed or dismissed.

Commissioners' decision. In bank. Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

Motion by appellants for stay of proceedings pending appeal.

R. Percy Wright, for appellants. W. B. Tyler, for appellee.

HAYNE, C. This is a motion, made in the appellate court, for an order staying proceedings upon the judgment in the court below. The suit was to foreclose a mortgage made by one Frank Scherf in his life-time. He died leaving a will by which all of his property was devised to his widow, Annie Scherf, who was appointed executrix, and qualified as such. Pending administration, she married one Raschke, and the defendant Hayward was appointed administrator with the will annexed. This administrator, the surviving wife, the three minor children of the deceased, and the second husband were made

defendants in the suit, upon the allegation that they had or claimed some interest which was subsequent and subject to the lien of the plaintiff's mortgage. The complaint expressly waived all claim to a judgment for a deficiency, and no judgment for a deficiency was rendered. All of the defendants (except the second husband) appeal, and an undertaking in the sum of \$300 was given.

The argument for the stay is that, if any one of the appellants be entitled to a stay, the whole judgment must be stayed, because it does not command the sale of the interest of any particular defendant, but of the whole property; and that the defendants, other than the surviving wife, are entitled to a stay on their \$300 bond, because, as it is alleged, they are not in possession, and hence are not within any of the sections providing for a special stay-bond. It is true that, if the case does not fall within any of the sections providing for a special bond, the \$300 bond effects a stay; and the only section that can be claimed to provide a special stay-bond is as follows: "If the judgment or order appealed from direct the sale or delivery of possession of real property, the execution of the same cannot be stayed unless a written undertaking be executed on the part of the appellant, with two or more sureties, to the effect that, during the possession of such property by the appellant, he will not commit or suffer to be committed any waste thereon, and that, if the judgment be affirmed or the appeal dismissed, he will pay the value of the use and occupation of the property from the time of the appeal until the delivery of possession thereof, pursuant to the judgment or order, not exceeding the sum to be fixed by the judge of the court by which the judgment was rendered or order made, and which must be specified in the undertaking. When the judgment is for the sale of mortgaged premises, and the payment of a deficiency arising upon the sale, the undertaking must also provide for the payment of such deficiency." Code Civil Proc. § 945.

It is contended that the contents of such an undertaking apply only to an appellant who is in possession, and, that, therefore, one who is not in possession is not required to give it. And this seems to have, in effect, been held. See *Root v. Bryant*, 54 Cal. 182. But, if such be the proper construction, a large meaning must be given to the word "possession." In the first place, it must be held to apply to any person who is actually residing on the premises. If such a person appeal, and desires a stay, he must give the specified bond. He cannot have a stay without it, upon the plea that he is only an agent, or that he occupies in subordination to or in connection with somebody else. And, in the second place, the word must be held to include the persons in subordination to whom the property is held. If such persons appeal, and desire a stay, they cannot have it without the required undertaking, on the ground that another is in the actual occupation of the property, if such other holds in subordination to them. Now, the affidavits upon which the motion

is based do not, in our opinion, show that the case does not fall within the section as above construed. The affidavit of the surviving wife states that "she is now, and has been ever since the death of her former husband, Frank Scherf, on the 31st day of October, 1875, in the sole possession of said real property, and the whole thereof." And the affidavit of the administrator states that "he has not, either as such administrator or individually, at any time been in the possession or occupation of said real property, or had any tenant or other person in possession of the same for him, either as such administrator or individually; that the defendant and appellant, Anna Raschke, is now, and has been, ever since the commencement of said action, in the sole possession and occupation of said real property, and the whole thereof." This is all that the affidavits show concerning possession. Nothing is said concerning the children, who, being minors, must be presumed to reside with their mother. And it is obvious that the statements quoted are mere general conclusions, which, in one sense, would be true if the surviving wife resided on the property, with her minor children, with permission of the administrator. If there is no homestead, the administrator has the right to the possession, and it is his duty to take it, and in the very common case, where he acquiesces in the occupation of the residence by the widow and children pending administration, such occupation must be held to be in subordination to him. Certainly the statute of limitations would not run in favor of such occupants. There is nothing to show that the widow and the administrator are not in perfect accord on the subject, and that there is no conflict between them is to be inferred from the fact that both in the trial court and upon appeal they appear by the same attorney, who certainly would not undertake to represent conflicting interests. Upon the case presented, we are clearly of opinion that there is no sufficient showing that any of the appellants are entitled to a stay without giving the bond required by section 945, Code Civil Proc., construed as we have indicated, and we therefore advise that the motion be denied.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the motion is denied.

33 Cal. 643

GIBSON v. THE SUPERIOR COURT. (No. 13-642.)

(Supreme Court of California. May 2, 1890.)

PLEADING—TIME—APPEAL.

1. Code Civil Proc. Cal. § 1054, provides that extensions of time to file pleadings granted by the court shall not exceed 30 days beyond the time fixed by statute, without the consent of the adverse party. *Held*, that the pendency for 54 days of an *ex parte* motion filed by the defendant to strike out the complaint and dismiss the action does not justify the court in extending the time for filing a demurrer or answer until after the decision of such motion. THORNTON, J., dissenting.

2. The error in so doing is reviewable on *certiorari*.

In bank. Writ of review of the action of the superior court, city and county of San Francisco; J. P. HOGE, Judge.

*Welcker & Welcker*, for petitioner. *Smith & Moore*, for respondent.

PATERSON, J. This is an application for a writ of review. The petition shows that an action was commenced by the petitioner in the superior court of the city and county of San Francisco against the Sterling Furniture Company, for damages in the sum of \$25,000, on the 29th of August, 1889, and on the same day summons was served upon the defendant therein; that on August 31, 1889, the defendant therein served upon the plaintiff a notice that on the 6th day of September, 1889, it would move the superior court to strike out the complaint and dismiss the action; that on the 10th day of September, 1889, the court extended the time for the defendant to demur or answer 20 days from that date; that on the 30th of September the court granted the defendant a further extension of time within which to answer, namely, until 10 days after the decision of said defendant's motion to dismiss the action; that said orders were made on *ex parte* application, and without the consent of the plaintiff therein; that on the 14th day of October, 1889, no answer or demurrer having been filed by the defendant therein, the plaintiff, petitioner herein, filed proof of service of summons, and moved the court for an order directing the clerk to enter the default of the defendant, which motion was granted; that on November 1, 1889, the court made an order opening the default, and allowing the defendant therein to file a demurrer and answer; that on November 15th petitioner moved the court for a judgment, as prayed for in his complaint, on the ground that the orders extending the time and setting aside the default were in excess of the jurisdiction of the court, and void, which motion was denied.

The respondent has demurred to the petition on the ground that it does not state facts sufficient to entitle petitioner to the writ. The order setting aside the default is an appealable order, and is not reviewable on *certiorari*, there being a plain, speedy, and adequate remedy by appeal. The effect of the orders made by the court was to extend the time in which the defendant might demur or answer from 54 days from the date of the service of the summons. These orders, so far as they attempted to extend the time to plead more than 30 days, were an excess of jurisdiction, (section 1054, Code Civil Proc. ;) and, there being no plain, speedy, and adequate remedy, the petitioner is entitled, if the facts stated be true, to have them annulled by this proceeding. *Baker v. Superior Court*, 71 Cal. 583, 12 Pac. Rep. 685. The demurrer is overruled, with leave to answer the petition within five days after notice of this decision.

We concur: BEATTY, C. J.; MCFARLAND, J.; SWARPSTEIN, J.; FOX, J.

THORNTON, J. I dissent. The rule in this case will so limit the power of the



court as to interfere very injuriously with the orderly and proper dispatch of the business. Why should the defendant be compelled to file his answer until the motion to strike out the complaint and dismiss the action is passed on? *Non constat* that he may ever be called on to answer. The court may dismiss the action by granting his motion, and the labor and expense of preparing an answer might thus be avoided. In my judgment, section 1054 of the Code of Civil Procedure has no application to the case presented here. It only applies to the case where the court makes such an order when there is no case or proceeding pending in his court which authorizes the court to exercise its discretion in granting time. The statute never was intended to limit the discretion of a court to the extent ruled in this case. I am of the opinion that the court had ample power and jurisdiction to make the orders attacked in this case.

34 Cal. 23

PEOPLE v. LUNDQUIST. (No. 20,614.)

(Supreme Court of California. May 8, 1890.)

## DEPOSITIONS IN CRIMINAL CASES.

1. On a trial for murder, where the defense was insanity, it was shown by affidavits of defendant and his counsel that, by agreement with the prosecution, there were admitted at the former trial informal depositions of certain witnesses residing in Sweden, to the effect that defendant's mother was subject to epilepsy, and died insane, and his brother was an idiot, and that the prosecution had notified the defense that such depositions would be objected to at the next trial. *Held*, that this showing entitled defendant to the issuance of a commission to take the depositions of such persons in proper legal form.

2. The issuance of such a commission is expressly authorized by Pen. Code Cal. § 1354; and it was error to refuse the application for want of jurisdiction.

In bank. Appeal from superior court, city and county of San Francisco; EUGENE R. GARBER, Judge.

*John Flournoy*, for appellant. *Geo. A. Johnson*, Atty. Gen., for the People.

WORKS, J. The defendant was tried for murder, convicted of murder in the second degree, and sentenced to imprisonment in the state's prison for the term of 34 years. It appears from the record that the defendant, some time before the case was set down for trial, applied to the court below for a commission to take the depositions of witnesses out of the state, and in support of his application filed the following affidavits:

"John Flournoy, being duly sworn, says: I am an attorney at law. I was, on the 7th day of August, 1888, appointed by Hon. D. J. TOOHY, judge of said court, to defend the above Carl Albert Lundquist. Carl Albert Lundquist, the defendant, is now confined in the county jail of said county, awaiting his second trial on a charge of murder. The said defendant was first tried in this court upon this charge on and from the 14th day of May, 1888, to the 23d day of May, 1888. At the first trial of defendant the jury disagreed. J. N. E. Wilson, an attorney at law, was counsel for defendant at his first trial, but

has now withdrawn from this case. The defense in this case is insanity produced by epilepsy, which was inherited from the mother of defendant. At the first trial of said defendant the following part of an informal deposition made by Minnie Midland, Louis Lundberg, Minnie Hanson, and August Burquist, all residing in the city of Stockholm, Sweden, was admitted in evidence: 'We state that the mother of Albert Lundquist [meaning defendant] was subject to epileptic fits, which fits occurred several times in our presence, and that his brother was insane at times, and always an idiot.' No objection was made to the introduction of this part of said deposition on the first trial of said case, and the above part of said deposition was admitted in evidence by agreement and consent of counsel for the prosecution. On the 5th day of September, 1888, J. J. Dunn, Esq., assistant district attorney of said city and county, who conducted the prosecution at the first trial of this case, and who is to conduct the prosecution of this case at the second trial thereof, notified me that he would not, at the second trial of this case, consent to the admission in evidence of said part of said deposition. That said deposition, and said part thereof, are not in proper legal form, and cannot be put in evidence unless objections thereto are waived by counsel for the prosecution. The facts stated in said part of said deposition, and the proof thereof, are material and essential and necessary to the defense of this case. I desire to obtain the testimony of said witnesses upon facts in a proper legal form, and I cannot safely proceed to the trial of said case without such testimony. All of said witnesses now reside in the city of Stockholm, Sweden."

"Carl Albert Lundquist, being first duly sworn, says: I am the defendant above named. I am now confined in the county jail of the city and county of San Francisco, awaiting my second trial on a charge of murder. I have entered my plea of not guilty to this charge, and an issue of fact has been joined in this case. My defense is insanity, produced by epilepsy. Minnie Midland, Louis Lundberg, Minnie Hanson, and August Burquist are material witnesses for my defense, without whose testimony I cannot proceed to trial. By the testimony of these witnesses I will prove that my mother, Sophie A. Lundquist, was subject to epileptic convulsions, and died insane, and that my brother, Philip Lundquist, was an idiot, and died insane. All of these witnesses reside out of the state of California, to-wit, in the city of Stockholm, Sweden."

It further appears from the bill of exceptions that the court refused to grant the order for such commission "on the ground that the court had no jurisdiction to make such order." We think the court erred in this ruling. Jurisdiction to make the order asked for is expressly given by Pen. Code, §§ 1349, 1354. The only question is, therefore, whether the showing made was sufficient to entitle the defendant to an order for a commission to take the depositions of these witnesses. Section 1354 of the Penal Code provides that, "if the court

to whom the application is made is satisfied of the truth of the facts stated, and that the examination of the witness is necessary to the attainment of justice, an order must be made that a commission be issued to take his testimony."

It is contended on the part of the people that, as the court below must be satisfied by the showing, the matter of ordering the issuance of a commission rests in its discretion, and that no abuse of discretion appears in this case. But, if we concede that the matter rested in the discretion of the court below, it affirmatively appears from the record that no such discretion was exercised. The order was refused on the sole ground that the court had no jurisdiction to make the order. If the court had not been of this opinion, the order would probably have been made. That it should have been made, we have no doubt. The evidence sought to be elicited was material and important to the defense interposed by the defendant. The showing made contained all that the statute requires, and the reason for not having procured the order and the evidence before was sufficient. The informal depositions of these witnesses having been used on a former trial with the consent of the district attorney, the defendant had the right to rely upon the fact that they would be allowed to go in evidence at the second trial until he was notified to the contrary. The record shows that he offered them in evidence, but they were objected to and excluded. By these rulings, he was deprived of competent and material evidence which might have changed the result. He had been once tried, and with this evidence in the jury failed to convict, and without it a second jury found him guilty of a lesser offense than the one with which he was charged, which tends to show the materiality and probable effect of the testimony of which he was deprived. For this ruling the cause must be reversed.

Certain of the instructions given by the court are objected to, but they are not set out in a bill of exceptions, or authenticated in any way, and for that reason cannot be considered. Judgment and order reversed.

We concur: Fox, J.; SHARPSTEIN, J.; THORNTON, J.

84 Cal. 263

NORTON v. WHITEHEAD *et al.* (No. 12,-875.)

(Supreme Court of California. June 2, 1890.)

POWER OF ATTORNEY COUPLED WITH AN INTEREST  
—REVOCATION BY DEATH.

1. A contractor borrowed from plaintiff, his foreman on the work, various sums of money to enable him to carry on the contract. Afterwards he executed to plaintiff an assignment of all moneys due, or to become due, "for any work I may perform," the assignment "to remain good and in full force until all notes due, or which are to become due, \* \* \* from me are paid." Later he gave plaintiff a power of attorney reciting that "whereas I am now desirous that all moneys that have become or may become due to me by reason of my performance of said contract shall be paid" to plaintiff, and giving him power to collect such moneys. These instruments were deposited with the other parties to the contract. The contractor died, and the work was finished by his adminis-

trator. *Held*, plaintiff had such an interest in the moneys due on the completion of the contract as to prevent a revocation of the power by the contractor's death, and he is entitled, as against the administrator, to a warrant therefor.

2. It is not necessary that plaintiff should receipt for such moneys in the name of the decedent. The assignment is sufficient authority for receipting in his own name.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; T. K. WILSON, Judge. *W. C. Burnett and T. C. Coogan, (W. H. H. Hartland and Aylett R. Cotton, of counsel,)* for appellants. *H. M. McGill and D. H. Whittemore*, for respondent.

VANCLIEF, C. On the 9th day of June, 1885, the deceased, D. Finley, entered into a written contract with the board of state harbor commissioners whereby he agreed to repair (reface) two sections of the seawall on the water front of the city of San Francisco, the work to be commenced within 20 days, and to be completed within 150 days, from date of the agreement. The work was to be paid for by drafts on the harbor improvement fund, upon monthly estimates of the value of the material used and of the work performed, at the rates agreed upon; 75 per cent. of such value to be paid monthly, and the remaining 25 per cent. to be paid when the work should be completed. The contract contained the provision that it should not be assignable without the written consent of the board, party of the first part. During the progress of the work, Finley, for the purpose of obtaining money to carry on the work, borrowed from the plaintiff at different times considerable sums of money, for most of which he gave plaintiff his promissory notes. Plaintiff was employed a portion of the time as assistant foreman on the work, for which he was to be paid what his services were reasonably worth. On February 8, 1886, Finley executed to plaintiff a writing of which the following is a copy: "San Francisco, Feb. 8, 1886. To all whom this may concern: I hereby assign, transfer, and set over to W. H. Norton or assigns all moneys due me, or which may become due to me, on any work I may perform, and this assignment to remain good and in full force until all notes due, or which are to become due, to W. H. Norton, or his assigns, from me are paid, and, when said notes are paid, this instrument to be null and void. DAVID FINLEY." On March 27, 1886, Finley executed to plaintiff a power of attorney, of which the following is a copy: "Whereas, I, David Finley, of the city and county of San Francisco, state of California, did, on the 9th day of June, A. D. 1885, enter into a contract with the board of state harbor commissioners of the state of California to reface the outer slope of sections one (1) and two (2) of the sea-wall on the water-front of the city and county of San Francisco, state of California; and whereas, I am now desirous that all moneys that have become or may become due to me by reason of my performance of said contract shall be paid to W. H. Norton of said city and county: Now, therefore, to carry out my said desire, I appoint said W. H. Norton my true and lawful attorney, irrevoca-

ble, for me and my name, place, and stead, to collect and receive all sums of money which are or shall be due, owing, or payable to me by reason of my performance of said contract made by me with said board of state harbor commissioners as aforesaid, giving and granting unto my said attorney full power and authority in and about the premises, and in my name, to make, execute, and deliver all and every receipt and instrument required to the secretary of said board, or to said board, hereby ratifying, confirming, and holding valid all that my said attorney shall lawfully do by virtue of these presents. In witness whereof, I have hereunto set my hand and seal this 27th day of March, A. D. 1886. DAVID FINLEY. [Seal.]" On October 4, 1886, Finley gave plaintiff the following letter of introduction: "San Francisco, Oct. 4, 1886. George Tilgham, Esq., Secretary Board of State Harbor Commissioners—Sir: This will introduce to you Mr. W. H. Norton, whom I hereby empower, and of whom I have given a special power of attorney, to receive and receipt for all warrants for money due me on my contracts with the board of state harbor commissioners for facing up sections 1 and 2 of the sea-wall with rocks. DAVID FINLEY."

On November 9, 1886, before the work was completed, Finley died intestate, and the defendant Whitehead was appointed administrator of his estate, and as such administrator Whitehead completed the work on the sea-wall according to the contract, and to the satisfaction of the board of harbor commissioners. At the time of the commencement of this action 25 per cent. of the contract price of the work remained unpaid, amounting to \$3,225. The plaintiff claims that Finley was indebted to him at the time of his death, and at the time the work was completed, on account of said loans, in a sum more than equal to the \$3,225 balance due for said work; and the principal object of this action is to compel the board of state harbor commissioners to draw their warrant for said balance directly in favor of the plaintiff, as the estate of Finley is alleged to be insolvent. The defendants contended that plaintiff was not entitled to this relief, and that the warrant for the unpaid balance due on the contract should be drawn in favor of the administrator of Finley's estate. The court gave judgment for the plaintiff, and the defendants appeal from the judgment, and from an order denying their motion for a new trial.

Among the findings of fact by the court are the following: "That during the progress of said work said Finley, for the purpose of obtaining money to complete said contract, borrowed from the plaintiff the sum of \$2,111.46, and gave plaintiff the promissory notes mentioned in the amended complaint herein, and in May and June, 1886, the further sum of \$239.40, for which no note was given; that said Finley employed the said plaintiff as foreman of said work, and agreed to pay the reasonable value of said services, and that the reasonable value of said services is the sum of \$768.75; that, to secure the said sums of \$2,111.46 and \$768.75, said Finley assigned to plaintiff all the moneys due,

or to grow due, on said contract, and made, constituted, and appointed said plaintiff his attorney in fact by a power of attorney irrevocable, and coupled with an interest to collect and receive the money due, or to grow due, on said contract, and that there is due plaintiff for the performance of said contract, for money so advanced, and for labor so performed, the sum of \$2,880.15, together with interest on the said sum of \$1,572 from May 2, 1886, at the rate of 1 per cent. per month, and on said sum of \$300 from June 21, 1886, at the rate of 1 per cent. per month, making a total interest of \$346.96, no part of which principal or interest has been paid, and that there is due from the said board of state harbor commissioners on said contract the sum of \$3,225; that on the 9th day of October, 1886, the said Finley agreed that the said sum of \$3,225 should be paid to plaintiff to reimburse said plaintiff for the amount so due to plaintiff from said Finley, and assigned said sum to plaintiff, but did not assign said contract; that at all the times subsequent to the 31st day of March, 1886, said board of state harbor commissioners knew of said assignment and power of attorney."

The only attack worthy of consideration made upon these findings is based upon the ground that the evidence does not justify the finding of the assignment by Finley to plaintiff of the former's right to the money to become due on the sea-wall contract, and particularly of the last installment of 25 per cent. thereof as security or otherwise. To sustain this finding, it is necessary to show that the power of attorney from Finley to plaintiff was so coupled with an interest as to prevent its revocation by the death of Finley; and whether it was so or not is the pivotal question in the case. I think the assignment of February 8, 1886, the power of attorney, with its recitals, of March 17, 1886, and the letter of introduction to the secretary of the board, of October 4, 1886, construed in the light of the circumstances under which they were executed, and the subsequent conduct of the parties in relation thereto, as proved by J. M. Polk, A. C. Paulsell, J. C. L. Wadsworth, and John H. Wise, are sufficiently evincive of an assignment, legal or equitable, giving plaintiff an "interest in the subject-matter over or concerning which the power was to be exercised." *Frink v. Roe*, 70 Cal. 309, 11 Pac. Rep. 820; *Hunt v. Rousmanier*, 8 Wheat. 175. The subject-matter upon which the power was to be exercised was "all moneys that have become or may become due to me [Finley] by reason of my performance of said contract," which I desire "shall be paid to W. H. Norton, [plaintiff,] of said city and county." At the time this power of attorney was executed the plaintiff held Finley's written assignment of all such moneys due or to become due for any work he might perform, dated February 8, 1886, which assignment was "to remain good and in full force until all notes due, or which are to become due, to W. H. Norton or his assigns, from me, are paid," and to become null and void when said notes are paid.

It is contended by appellants' counsel that the security by this assignment was limited to notes in existence at the time it was made, and that all such notes had been paid before the execution of the power of attorney. But the language seems broad enough to embrace notes thereafter to be made; and, in view of the circumstances under which it was made, and the subsequent conduct of the parties, I think the trial court properly so construed it. It was deposited with the secretary of the board of harbor commissioners as evidence of plaintiff's right to all moneys to become due to Finley, and it was allowed to remain there after the power of attorney was executed, and until after the death of Finley; and the evidence strongly tends to show that the power of attorney was in like manner deposited with the secretary of the board. If the assignment had fully discharged its functions, or was to be superseded by the power of attorney, why was it not delivered up or canceled when the power of attorney was executed? At the time the assignment was made, plaintiff was on Finley's bond for the performance of the contract, and was "backing him" with money to enable him to perform it; and the defendant Whitehead testified that Finley was indebted to Norton all the time during the year 1886. It is to be fairly inferred from the evidence that it was the continuous understanding between plaintiff and Finley that the former was to furnish from time to time all money necessary to carry on the work until it was completed, and that he did so; and it appears that plaintiff was never fully paid at any time while the work was being done. The power of attorney itself indicates more than that plaintiff was empowered to receive the money merely as Finley's agent. The second recital indicates that the object of the power was to enable plaintiff thereby to obtain payment of money due him. The language of this recital is out of place, and entirely superfluous, if nothing more was intended than to empower plaintiff to receive the money as Finley's agent. The power of attorney also provides that it is irrevocable; and, although this is not conclusive, it nevertheless tends to prove that the parties understood that plaintiff had an interest in the subject-matter upon which it was to operate.

Counsel for appellants further contend, on the authority of *Hunt v. Rousmanier*, supra, that, conceding that plaintiff had such an interest in the subject-matter of the power of attorney as would have deprived Finley of the power to revoke it during his life-time, yet, inasmuch as plaintiff, in receiving and receipting for the warrants and money, must have acted in the name of Finley, he could not have done so after Finley's death. I think the learned counsel mistaken in assuming that it was necessary that plaintiff should receive or receipt for the warrants or the money in the name of Finley. Upon the construction of the assignment, power of attorney, and letter of October 4th, properly, as I think, given by the trial court, the plaintiff was entitled to receive and receipt for the warrants or money in his

own name both before and after the death of Finley; and such receipt in his own name, in connection with the papers above named, would have protected the board of harbor commissioners and the state against all demands of Finley or his administrator for the same warrants, or the money for which they were drawn. It is true that the power of attorney expressly authorized the plaintiff to act in Finley's name, but this detracted nothing from plaintiff's right to act in his own name as the assignee of Finley. In the case of *Hunt v. Rousmanier*, supra, there was no sale nor assignment of any interest in the subject-matter (vessels at sea) of the power of attorney, by way of mortgage or otherwise. The bill shows that the complainant intentionally and expressly declined to take a mortgage of the vessels. There was, however, a proviso in the power of attorney reciting that it—the simple power of attorney—was intended to secure certain promissory notes, and was to be void on their payment; but the court held that this proviso did not have the effect of a sale, assignment, or mortgage of any interest in the vessels, and, having no such interest, the complainant could do nothing except to exercise his simple power of attorney to sell, which could only be done in the name of his constituent, who was dead, and therefore could not be done at all, as he could not sell in the name of a dead man. In the case at bar the court has found, upon evidence substantially tending to prove the finding, not only that Finley executed to plaintiff an irrevocable power of attorney, but also that "said Finley assigned to plaintiff all the moneys due, or to grow due, on said contract," to secure the payment of the money found due the plaintiff, with interest, amounting at the date of the judgment to \$3,225.

By no possibility could the appellants have been injured by the overruling of their objection to admitting in evidence plaintiffs' letter of November 16, 1886, to the board of harbor commissioners. The only effect that letter could have had was to show that, by waiving his right to warrants numbered 64 and 65, dated November 4, 1886, Finley did not waive his right to warrants thereafter to be drawn. There was and is no pretense of any such waiver. I think the judgment and order should be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

84 Cal. 168

*In re HONG YEN CHANG.*

(*Supreme Court of California.* May 17, 1890.)

NATURALIZATION OF CHINAMEN—ADMISSION AS ATTORNEYS.

1. Under Rev. St. U. S. § 2165, providing for the naturalization of aliens, as amended by Act Feb. 18, 1875, limiting such right to free white persons, and aliens of African nativity or descent, and Act May 18, 1882, forbidding the naturalization of Chinamen, a certificate of naturalization issued to a Chinaman is void.

2. By Code Civil Proc. Cal. § 279, only persons who are citizens of the United States, or who have declared their intention to become such in the manner provided by law, are entitled to be admitted to practice as attorneys in the supreme court, on presentation of a license to practice in the highest court of a sister state. *Held*, that a motion for the admission of a Chinaman will be denied, although he presents a license to practice in the supreme court of New York, and exhibits naturalization papers issued by the court of common pleas of the city of New York.

Fox, J. Motion made in due form for the admission of Hong Yen Chang to practice as an attorney and counselor of this court, and his moral character duly vouched for. Upon the motion there is exhibited to us a license admitting him to practice as an attorney and counselor at law in all the courts of the state of New York, issued by the supreme court of that state at a general term held at the city of Poughkeepsie, May 17, 1888; also a certificate of naturalization issued by the court of common pleas of the city of New York, November 11, 1887.

Title 90 of the Revised Statutes of the United States provides for the naturalization of aliens. The first section of that title (section 2165) reads: "An alien may be admitted to become a citizen of the United States," etc.; and that and subsequent sections provide how, and the conditions of such admission. As the statute originally stood, there was no express language to indicate a limitation upon the class of aliens who might be so admitted; but by "An act to correct errors and supply omissions in the Revised Statutes of the United States," passed February 18, 1876, this provision was amended so as to limit the right of naturalization to "aliens, being free white persons, and to aliens of African nativity, and to persons of African descent." Under this statute it was held by the federal courts that persons of the Mongolian race are not entitled to be admitted as citizens of the United States. In re Ah Yup, 5 Sawy. 155; In re Look Tin Sing, 21 Fed. Rep. 905. We have no doubt about the correctness of this ruling. Then, by section 14 of the act of May 6, 1882, (22 St. U. S. p. 61,) courts are expressly forbidden to issue certificates of naturalization to any native of China. Under the constitution of the United States, congress alone has the power to determine who shall and who shall not be entitled to the privileges of the naturalization laws. We are therefore of opinion that the certificate of naturalization presented in this case was issued without authority of law, and is void; it being conceded that the holder of it is a person of Mongolian nativity. Only those who are citizens of the United States, or who have *bona fide* declared their intention to become such in the manner provided by law, (and we hold that this requires that they shall be persons eligible to become such, as well as to have declared their intention,) are entitled to be admitted to practice as attorneys and counselors of this court, on presentation of license to practice in the highest court of a sister state. Code Civil Proc. § 279. Holding, as we do, that the applicant is not a citizen of the United States, and is not eligible under the law to become

such, the motion must be denied. So ordered.

We concur: BEATTY, C. J.; MCFARLAND, J.; SHARPSTEIN, J.

83 Cal. 491

FRESNO NAT. BANK v. SUPERIOR COURT,  
SAN JOAQUIN COUNTY. (No. 13,473.)

(Supreme Court of California. March 31, 1890.)

VENUE—JURISDICTION OF COURTS—PROHIBITION.

1. By Rev. St. U. S. § 5198, providing that a national bank may be sued in any state or county court in the county in which it is located having jurisdiction of similar cases, and section 5186, providing that such bank may be sued in any court of law and equity as a natural person, jurisdiction of an action on contract against a national bank is not prohibited to a state court of a county other than that in which it is situated.

2. Const. Cal. art. 13, § 16, provides that corporations may be sued in the county where the contract is made or to be performed, or where the liability arises or breach occurs, or where its principal place of business is, subject to the power of the court to change the place of trial as in other cases. Article 6, § 5, provides that the superior courts shall have jurisdiction in all cases in which the demand exceeds \$300, and their process shall extend to all parts of the state. *Held*, in an action against a national bank, commenced in a county other than those mentioned in section 16, to recover \$6,000 on a contract for building it a house in the county of its principal place of business, that the court had jurisdiction of the person of defendant as well as the subject-matter of the action.

3. In such case the action is improperly commenced, and the proper remedy for defendant is a motion for change of venue under Code Civil Proc. Cal. § 397, providing that it may be granted when the county designated in the complaint is not the proper one for the commencement of the action; and prohibition will not lie.

Commissioners' decision. In bank. On application for a writ of prohibition.

Const. Cal. art. 6, § 5, provides that the superior courts shall have jurisdiction in all cases at law and in equity in which the demand, exclusive of interest, exceeds \$300. Code Civil Proc. Cal. § 397, provides that a change of venue may be granted when the county designated in the complaint is not the proper county.

Nourse & Short, for petitioners. Baldwin & Campbell, for respondents.

VANCLIEF, C. This is an original application to this court for a writ of prohibition commanding the superior court of San Joaquin county to desist from further proceeding in an action by White and Thomas against the petitioner to recover a balance of \$6,000 upon a building contract. The petitioner is a banking corporation incorporated under the laws of the United States, having its principal place of business in the county of Fresno, in this state. The contract was for the building of a house for the petitioner in Fresno county, and was performed on the part of the plaintiffs in that county; but the contract, which is in writing, does not state where payment for the work was to be made. The summons in the action was served on the petitioner in Fresno county. Without appearing for any other purpose, the petitioner—defendant in that action—moved to dismiss the action on the ground that the superior court of San

Joaquin county had no jurisdiction of the person of the defendant. This motion was denied. A bill of exceptions by the defendant on the denial of this motion, and a copy of the complaint, are set out in the petition as the basis of this application. It appears that, after the denial of the motion to dismiss, the defendant filed a demurrer and answer to the complaint, and demanded a change of the place of trial to Fresno county, and gave notice of motion for that purpose; but it does not appear that the court ever acted, or was moved to act, upon the demurrer, or the matter of the change of venue. There is nothing, however, in the demurrer, answer, or demand for change of venue, having the effect to waive any right that the defendant ever had to a dismissal of the action.

1. It is admitted by counsel for petitioner that, by virtue of section 5 of article 6 of the constitution, the court had jurisdiction of the subject-matter of the action; but they contend that section 16 of article 12 deprives the court of jurisdiction of the person of the defendant, for the reasons that the defendant is a corporation having its principal place of business in Fresno county; that the contract upon which the suit was brought was not made, and was not to be performed, in San Joaquin county; and that no obligation on that contract arose, or breach thereof occurred, in San Joaquin county. Whether these are sufficient reasons or not, it appears that they are true as matters of fact. The section of the constitution relied on is as follows: "A corporation or association may be sued in the county where the contract is made, or is to be performed, or where the obligation or liability arises or the breach occurs, or in the county where the principal place of business of such corporation is situated, subject to the power of the court to change the place of trial as in other cases." It is claimed that this section, though not mandatory in form, is made so by section 22 of article 1, which is as follows: "The provisions of this constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise." But the express words "may be sued," in section 16 of article 12, are, expressly, merely permissive; and by these express words that section is "declared to be otherwise" than mandatory, if mere permission is different from a command. No other express words were necessary to indicate that a command was not intended, or to declare that something different from a command was intended. It will not be contended that section 22 of article 1 has the effect to make the first clause of section 9 of the same article mandatory, viz., "Every citizen may freely speak, write, and publish his sentiments on all subjects;" or the clause in section 16, art. 4, "He [the governor] may object to one or more items, while approving the other portions of the bill;" or the following clauses of section 2 of article 6, "Any four justices may, either before or after judgment by a department, order a case to be heard in bank," and "the chief justice may sit in either department;" yet there is no ex-

press word, except the word "may," in any of these clauses, declaring or indicating that it is "otherwise" than mandatory. It therefore seems plain that in these instances the word "may" was used and intended expressly to "declare" that these clauses are not mandatory, and no reason is perceived why it was not so used and intended in section 16 of article 12. It is not questioned that the proviso in section 5 of article 6 is mandatory, viz.: "That all actions for the recovery of the possession of, quieting the title to, or for the enforcement of liens upon, real estate, shall be commenced in the county in which the real estate, or any part thereof, affected by such action or actions, is situated." It can hardly be presumed that the framers of the constitution failed to foresee that there might be just occasion for suing a corporation to recover, quiet the title to, or enforce a lien upon real estate not situated in any of the counties enumerated in section 16 of article 12; yet upon the occurrence of such an occasion, if this section is to be deemed mandatory, there would be a square conflict between it and the proviso above quoted, in which one or the other must yield, or there would be no remedy against the corporation. Surely no extraordinary meaning, resulting in such a conflict or failure of remedy, should be attributed to the words of section 16 of article 12, if their ordinary meaning would give any effect to the section without conflict. Without leading to any conflict, this section has the effect to permit a corporation to be sued in certain counties other than that of its residence or principal place of business, at the option of the plaintiff, and to deny to corporations the absolute right to a change of venue when sued in such other counties. This effected an important change in the law as it existed before the adoption of the present constitution, in so far as it denies the absolute right of the corporation to a change of venue to the county of its principal place of business when sued in any one of the other counties named in the section; and this seems to be the only effect intended.

It is suggested that the expression of certain counties in which a corporation "may be sued" is exclusive of all other counties. But the maxim cited in support of this excludes only what is not expressed. Here it is expressed in the same instrument (section 5, art. 6) that all superior courts have jurisdiction of the subject-matter of the action in question, and that "their process shall extend to all parts of the state." The whole and exclusive subject-matter of section 5, art. 6, is jurisdiction of superior courts, whereas the only expressed subject-matter of section 16, art. 12, is venue of actions against corporations. To extend the ordinary meaning of the words of the latter section by the application of the maxim cited, would be to bring it into direct conflict with what is clearly expressed in section 5 of article 6. The very question under debate is, does section 16 of article 12 exclude what is expressed in section 5 of article 6? Section 1243 of the Code of Civil Procedure, relating to judicial proceedings to con-

demn private lands for public use, provides that "all proceedings under this title must be brought in the superior court of the county in which the property is situated. They must be commenced by filing a complaint, and issuing a summons thereon." There are two cases reported in 65 Cal.—one at page 394, (California S. R. Co. v. Southern Pac. R. Co., 4 Pac. Rep. 344,) and the other at page 409, (Same v. Same, 4 Pac. Rep. 388)—in which the Southern Pacific Railroad Company was sued to condemn a portion of its land. In the first case the land was situated in San Diego county, and in the other case in San Bernardino county. In each case the defendant moved for a change of venue to San Francisco,—its principal place of business. In each case the motion was denied on the ground that section 1243 of the Code of Civil Procedure required the action or proceeding to be brought in the county where the land was situated. As neither of these cases was founded upon contract nor upon tort, it would seem, if section 16 of article 12 is mandatory, that the defendant had an absolute, constitutional right to a change of venue to the county of its principal place of business, and that section 1243 of the Code of Civil Procedure (enacted April, 1880) is unconstitutional so far as corporations are concerned. It is true that this constitutional question does not expressly appear to have been considered in either of these cases, yet it is not therefore to be presumed that the court unwittingly disregarded a constitutional requirement, but rather that, being aware of section 16 of article 12 of the constitution, neither court nor counsel considered it inconsistent with section 1243 of the Code of Civil Procedure. If section 1243 of the Code of Civil Procedure is constitutional, no reason is perceived why section 396 of the same Code should be considered unconstitutional. It was said in one of these cases, overruling *Jenkins v. Stage Co.*, 22 Cal. 537, that a corporation has no place of residence in the sense of section 395 of the Code of Civil Procedure, but section 16 of article 12 says nothing about residence. It simply provides that a corporation may be sued in the county where it has its principal place of business. But, as to the point of residence of a corporation, these cases were overruled in *Cohn v. Railroad Co.*, 71 Cal. 488, 12 Pac. Rep. 498, wherein *Jenkins v. Stage Co.* was reaffirmed, and wherein it was also decided that, as the suit was not commenced in any one of the counties designated in section 16, art. 12, of the constitution, the defendant was entitled, upon its motion and a proper showing, to have the place of trial changed to the county of its principal place of business; and this decision is expressly based upon section 16 of article 12 of the constitution, and the authority of the case of *California S. R. Co. v. Southern Pac. R. Co.*, 65 Cal. 394, 4 Pac. Rep. 344, and therefore furnishes a sufficient answer to the point made by counsel for petitioner to the effect that the remedy by motion for change of venue was not available to the petitioner, for the reason that the superior court had no jurisdiction even to hear or

determine such motion, or any other except his motion to dismiss. In *Lewis v. Railroad Co.*, 66 Cal. 209, 5 Pac. Rep. 79, the defendant corporation, whose principal place of business was in the city and county of San Francisco, was sued in the county of Santa Clara for damages on account of a personal injury, and moved for a change of venue to San Francisco. It was held that this motion was properly denied, because section 16 of article 12 authorizes such a suit to be commenced in the county where the liability arose, as well as in the county of the principal place of business of the corporation, and is not limited to actions *ex contractu*; and, for the purpose of ascertaining the meaning of this section, the court considered the reported proceedings of the constitutional convention. By this decision it is settled that, where a corporation is sued in any one of the counties mentioned in this section, it cannot demand a change of venue as matter of absolute right, but only "as in other cases," and for other reasons than that the county in which the action is commenced is not the proper county.

2. It is contended by counsel for petitioner that, inasmuch as the petitioner is a national banking association incorporated under the law of congress, a state court, outside of the county or city in which it is located, has no jurisdiction of an action against it of the character of the action in question here. Rev. St. U. S. § 5198. I do not think this point should be sustained. An able discussion of all the points involved in it may be found in the analogous case of *Clafin v. Houseman*, 93 U. S. 130, wherein the conclusions seem to be adverse to the position of the learned counsel for the petitioner here. In *Casey v. Adams*, 102 U. S. 66, the defendant objected to the jurisdiction of a state court of the state of Louisiana "upon the ground that a national bank cannot be sued in a state court, except in the county or parish in which it is located." There was no question as to the truth of the alleged facts constituting the grounds of the objection. The state court overruled the plea, and the supreme court of the United States affirmed the judgment. It is true that the supreme court remarked that it thought section 5198, Rev. St., "relates to transitory actions only, and not to such actions as are by law local in their character;" but this remark was not necessary to the decision, and there is nothing in section 5198 relating to the distinction between local and transitory actions. So far as it relates to the courts in which national banks may be sued, this section is as follows: "That suits, actions, and proceedings against any association under this title may be had in any circuit, district, or territorial court of the United States held within the district in which such association may be established, or in any state, county, or municipal court in the county or city in which said association is located, having jurisdiction in similar cases." The only other part of the national banking law touching this question is the fourth division of section 5136, which provides that such associations "shall have power— \* \* \* Fourth, to sue



and be sued, complain and defend, in any court of law and equity, as fully as natural persons." This of itself would authorize suits by and against them in any state court having jurisdiction of the subject-matter. *Bank v. Deveaux*, 5 Cranch, 61. It seems probable that it was the intention of congress, by sections 5136 and 5198, to confer jurisdiction of all actions and proceedings by and against national banks upon state courts having jurisdiction, by state laws, in similar cases; and this must be the result, according to the principles laid down in *Clafin v. Houseman*, supra, since such jurisdiction is not excluded by any express provision. After noticing the elaborate discussions of this question, Mr. Justice BRADLEY (page 136) says: "But the result of these discussions has, in our judgment, been, as seen in the above cases, to affirm the jurisdiction [of the state courts] where it is not excluded by express provision, or by incompatibility in its exercise arising from the nature of the particular case. When we consider the structure and true relations of the federal and state governments, there is really no just foundation for excluding the state courts from all such jurisdiction." After illustrating this principle at considerable length, the learned justice arrives at the conclusion "that the assignee in bankruptcy, under the bankrupt act of 1867 as it stood before the Revision, had authority to bring suit in the state courts wherever those courts were invested with appropriate jurisdiction suited to the nature of the case."

Nor is there anything in the distinction between transitory actions and local actions which should affect the application of sections 5136 and 5198 of the United States Revised Statutes, or of the principles announced in *Clafin v. Houseman*, except, perhaps, when local actions are purely *in rem*, and therefore require no actual service of process upon any person, natural or artificial. Actions to enforce mortgages and other liens upon real property, and actions to condemn real property for public use, are actions against the owners of the property, of whose persons the court must acquire jurisdiction by actual service of process before it can render any judgment affecting their property rights. Beside, in the United States generally, and particularly in this state, the distinction between local and transitory actions, so far as any consequence attends it, depends entirely upon statutory law, which is not necessarily nor actually uniform throughout the states, and does not coincide with, or depend upon, the distinction between actions *in rem* and actions *in personam*. Then, again, all those large classes of actions which are said to be *quasi in rem* require jurisdiction of the individual persons interested, and most of them are prosecuted without any seizure of the thing.

From the foregoing considerations I conclude (1) that the superior court of San Joaquin county had jurisdiction of the person of the defendant, having acquired it by service of summons; (2) that, upon the showing made here, San Joaquin county was not the proper county in

which to commence the action of White & Thomas against the petitioner; and (3) that a motion by the petitioner for a change of venue according to the provisions of the Code of Civil Procedure was a plain, speedy, and adequate remedy, in the ordinary course of law, for the error and wrong of commencing the action in an improper county. I therefore think that the writ should be discharged.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the writ is discharged.

84 Cal. 299

KNOTT V. PEDEN. (No. 13,264.)

(Supreme Court of California. June 7, 1890.)

TAXATION—ASSESSMENT—APPEAL—ASSIGNMENT OF ERRORS.

1. Const. Cal. art. 13, § 4, provides that mortgaged property, less the value of the mortgage, shall be assessed to the property owner, and the value of the mortgage to the mortgagee. Pol. Code Cal. § 3650, provides that the assessor must specify in his assessment book, "in separate columns, under appropriate heads," the value of the mortgage, and deduct the same from the value of the property, and then enter the remainder in another column as the amount to be assessed to the property owner. *Held*, that where the assessor enters the value of the mortgaged property in the appropriate column, but fails to enter the value of the mortgage in the property owner's assessment, and to deduct it from the value of the property, the assessment and all subsequent proceedings thereunder are void, and a sale for the non-payment of the taxes so assessed will not divest the property owner's title.

2. Code Civil Proc. Cal. § 650, subd. 3, which requires one who appeals, because the evidence does not sustain the decision, to specify wherein the insufficiency consists, is sufficiently complied with by an allegation that there is no evidence to support the decision appealed from.

Commissioners' decision. Department 1. Appeal from superior court, Tehama county; CHARLES P. BRAYNARD, Judge.

Action to quiet title by Knott against Peden and others. There was judgment for plaintiff, and defendant Peden appeals. Code Civil Proc. Cal. § 659, subd. 3, provides that, where an appeal is taken because of "the insufficiency of the evidence to justify the verdict or other decision, the statement shall specify the particulars in which such evidence is alleged to be insufficient."

John F. Ellison, for appellant. Chipman & Garter, for respondent.

GIBSON, C. Plaintiff brought this action against appellant, Peden, and two others, to quiet his title to a certain tract of land in Tehama county. A joint answer was filed, in which the co-defendants of Peden disclaimed any interest in the land, and the latter admitted that prior to the 16th day of March, 1885, the title thereto was in plaintiff, but averred that such title was on that date transferred to his grantor, one Gale, by virtue of a sale of the land for delinquent taxes, upon which Gale, in due course, received a certificate of sale of and a tax-deed to the premises. The trial court, with other facts, found the assessment upon which the sale and deed rested to be void, and gave judgment for plaintiff.

This appeal is from that judgment and an order denying a new trial. Insufficiency of the evidence to sustain the findings is the only reason presented for a reversal of the judgment.

In the statement 12 findings are specified as being unsupported by the evidence, but none of the specifications, as required by subdivision 3 of section 659 of the Code of Civil Procedure, shows wherein the evidence is insufficient, except the first, in which it is stated that there is no evidence to support the finding assailed; for, if there is no evidence to support a finding, such a specification would, of course, be sufficient. And, as it has been repeatedly held that such requirement cannot be dispensed with, we could properly confine our examination to this one finding; but as respondent's counsel have not objected upon this ground, and have treated the specifications as sufficient, we have examined the evidence, and find that it is sufficient to support the findings. The main fact disclosed by it, and upon which the case turns, is that the assessment made by the county assessor of Tehama county for the year 1884 is invalid.

The assessment roll for that year shows that in addition to the property in controversy, which is valued at \$2,340, two town lots and the improvements thereon, valued at \$325, and certain personal property of the value of \$70, were assessed to the plaintiff. The town lots were subject to a mortgage interest of the value of \$300 in favor of one Potts, and the land in question to a mortgage interest of the value of \$2,000 in favor of one Dowling. The assessment and taxation of property subject to a mortgage, and the mortgage itself, are governed by the following rule, established by the constitution of the state: "A mortgage, deed of trust, contract, or other obligation by which a debt is secured, shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby. Except as to railroad and other *quasi* public corporations, in case of debts so secured, the value of the property affected by such mortgage, deed of trust, contract, or obligation, less the value of such security, shall be assessed and taxed to the owner of the property, and the value of such security shall be assessed and taxed to the owner thereof in the county, city, or district in which the property affected thereby is situate." Article 13, § 4. A complete listing by the assessor of all the taxable property of each tax-payer, including the manner in which property subject to mortgage liens shall be assessed, is provided for in section 3650 of the Political Code. It prescribes: "The assessor must prepare an assessment book with appropriate headings, alphabetically arranged, unless otherwise directed by the state board of equalization, in which must be listed all property within the county, and in which must be specified, in separate columns, under the appropriate head, the name of the person to whom the property is assessed, together with a proper description and valuation of each parcel or article of property assessed, exclusive of money; the amount of

money; the school, road, and other revenue districts in which each piece of property assessed is situated; the total value of all property; the poll-tax, if the person assessed is liable to pay one; and by subdivision 15: "When any property except that owned by a railroad or other *quasi* public corporation is subject to or affected by a mortgage, deed of trust, contract, or other obligation by which a debt is secured, he must enter in the proper column the value of such security, and deduct the same. In entering assessments containing solvent credits subject to deductions, as provided in section 3628 of this Code, he must enter in the proper column the value of the debts entitled to exemption, and deduct the same. In making the deductions from the total value of property assessed, as above directed, he must enter the remainder in the column provided for the total value of all property for taxation. \* \* \*

The assessment of the property in question here was not made in conformity with either the constitution or the Code. It is entered at \$2,340 in the column of the assessment roll designed to show, "Value of real estate other than town and city lots;" while on the same page, in a different assessment, viz., that of Dowling, appears a mortgage interest in the same land, entered at \$2,000, in a column with this heading: "Total value of all property after deductions." If the amount of this mortgage interest were deducted from the value of the land, as required by the constitution, the value of the land assessable to the plaintiff as owner would be but \$340. This value is all the plaintiff could be properly assessed for under the constitution, and it nowhere appears separately in his assessment. The value of the mortgage interest in the land held by Dowling is not shown in the assessment. It is only found in the separate assessment of Dowling, and seems to have been, together with the mortgage interest of Potts in the town lots, which is also only found in the separate assessment of the latter, carried to the assessment of plaintiff, and entered in the column headed, "Deductions on account of mortgages, deeds of trust, contracts, or other obligations by which a debt is secured by a lien on property," and deducted from the gross value of all the property of the latter, leaving the sum of \$435 as the amount assessable to him, after all deductions. This amount, however, can only be ascertained by taking the three separate assessments of plaintiff and his two mortgagees together as one, and deducting the value of the two mortgage interests as above shown.

It is apparent, then, that the assessor not only failed to comply with the constitution, but ignored the plain object of section 3650 of the Political Code, which requires the assessment of each tax-payer to be complete within itself. Furthermore, the assessment of plaintiff is defective in another particular. The court found that at the time the assessment was made the land in dispute was in the "Tehama road district;" yet the district is not shown upon the roll. There is no entry in the column headed, "Road-District." The con-

clusion we have reached renders it unnecessary to consider the other points made, and for the reasons given we advise that the judgment and order be affirmed.

We concur: VANCLIEF, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

83 Cal. 621

SOMERS v. SOMERS. (No. 13,636.)

(Supreme Court of California. May 1, 1890.)

APPEAL—DISMISSAL.

An appeal will not be dismissed because the transcript was not filed within the required time after the appeal was perfected; a rule of court providing that, if there be a statement which may be used in support of the appeal, the time limited does not commence to run until such statement is settled, and it appearing that appellant prepared and served such a statement to be used on the motion for a new trial, but that it has never been settled because of the refusal of the trial judge to act upon it.

In bank. Appeal from superior court, city and county of San Francisco; JAMES G. MAGUIRE, Judge.

*Matt. I. Sullivan*, for appellant. *R. B. Mitchell*, for respondent.

BEATTY, C. J. This is a motion to dismiss an appeal from the judgment in the action above entitled upon the ground that no transcript has been filed here notwithstanding more than 40 days have elapsed since the appeal was perfected. But it will be seen, by reference to rule 2 of this court, that the time within which a transcript must be filed does not in all cases commence to run from the date of perfecting the appeal. If there be a bill of exceptions or statement which may be used in support of the appeal, the 40 days allowed by the rule for filing the transcript does not commence to run until such bill or statement is settled. In this case it appears that the appellant is moving for a new trial; that he prepared and served a statement to be used on that motion within due time, but that it has never been settled, owing to the refusal of the trial judge to act upon it. He is still endeavoring to procure the settlement of this statement, and makes affidavit that it will constitute a material part of the record on his appeal. That it may be used in support of his appeal from the judgment is clear. Code Civil Proc. § 950. Such being the case, the motion to dismiss must be denied, and it is so ordered.

We concur: PATERSON, J.; THORNTON, J.; FOX, J.

83 Cal. 636

BROWN v. STARK. (No. 12,778.)

(Supreme Court of California. May 2, 1890.)

DEDICATION—RECORD OF PLAT—SALE OF LOTS.

1. In an action for trespass, it appeared that the owner of certain land had it surveyed and platted with a street 50 feet wide running north from a highway, which street was marked on the plat "Hester Avenue." This plat was shown to purchasers, and a copy thereof posted on the premises. The lots sold to defendant were described as

bounded on one side by this avenue. Prior to this sale the avenue was thrown open to public travel, and the deed to defendant was recorded before the balance of the property was sold to plaintiff. Held, that defendant had a right to remove a fence in said avenue, and that there was no need of showing that the avenue was a necessity.

2. The owner of the land having dedicated the avenue, and it having been accepted and used not only by defendant, but by the public, the deed to plaintiff conveying said avenue could not operate as a revocation of the offer.

3. The court properly refused to allow the owner of the land to state whether she intended to dedicate any street when she sold the lots.

Commissioners' decision. Department 2. Appeal from superior court, Santa Clara county; FRs. E. SPENCER, Judge.

*W. C. Kennedy*, for appellant. *Thomas H. Laine*, for respondent.

VANCLIEF, C. This is an action in the nature of trespass for entering upon the plaintiff's land, a five-acre lot, and removing and destroying a fence, and for a perpetual injunction restraining defendant from repeating the trespasses complained of. The answer of the defendant confesses the entry upon the lot described, and the removal of a portion of the fence, and seeks to justify these acts by averring that the portion of the fence removed was an obstruction to a public road or way through said lot; and specially alleges the facts, and acts of the plaintiff and his grantor claimed to constitute a dedication of the way to public use, and an acceptance and use thereof by the public and by the defendant; and further alleges that the entry of the defendant upon the way, and the removal of that portion of the fence obstructing it, were the acts complained of as trespasses. In response to the issues made by the pleadings, the court found the facts and law as follows:

"(1) On the 12th day of October, 1871, Craven P. Hester was the owner in fee of the land described in the plaintiff's complaint, consisting of five acres, fronting 263 4-12 feet on the Alameda road, referred to in the complaint, and running back 830 3-12 feet; that on said day said Craven P. Hester conveyed to his daughter, Sallie P. Maddock, for the consideration of natural love and affection, said tract of land, which thereupon became and was her separate property. (2) Afterwards, and prior to the 19th day of April, 1878, said Sallie P. Maddock, the said owner of the whole of said land, caused the same to be surveyed and laid off into lots of convenient size for the purposes of sale, with a street or road fifty feet wide running through it about the center, and extending from the Alameda road to the opposite or northern end thereof, and caused a plat of said survey to be made showing said road or avenue, which was called and laid down on said map as 'Hester Avenue,' which plot was exhibited to buyers, and a copy thereof posted up on the premises, offering the lots for sale. (3) That afterwards, and in the year 1878, Sallie P. Maddock sold three of said lots by said plat, and made, executed, and delivered (with her husband) deeds of conveyance thereof; describing said lots as bounded on one side by said Hester

avenue. Two of these were sold in one parcel to S. A. Bishop, which fronted 100 feet on said Hester avenue, and ran back 110 feet, and is the same property conveyed by said S. A. Bishop, by deed dated May 11, 1881, to Maggie Stark, wife of the defendant, which lots Mrs. Maggie Stark has continuously owned and improved, and are located about 235 feet north of said Alameda road. The other lot was sold and conveyed as aforesaid to Mrs. Mary Pillot in December, 1878, and fronts 50 feet on said Hester avenue, and lays just north of the said Bishop lot. Said 'Hester Avenue' was thrown open to public travel by said Maddock and wife prior to the sale of said lots, and was by them fenced off 50 feet wide as far north as the north line of the Pillot lot prior to the purchase by the plaintiff, as hereinafter found, with the whole width left open to the Alameda road, or northern end. All of said deeds were recorded in the office of the county recorder of said Santa Clara county prior to plaintiff's said purchase. (4) That after said sales and the recording of the deeds as in the last finding stated, to-wit, on the 6th day of December, 1882, the plaintiff purchased the remainder of said 5-acre tract from Maddock and wife, obtained their conveyance therefor, and went into possession. Soon after his said purchase he extended the fence on the north line of the Alameda road fifteen feet further west, and ran a fence north therefrom, so as to include in his inclosure a strip of land, fifteen feet wide, running north as far as the north line of the Pillot lot, now owned by W. S. Clark, which reduced the width of said Hester avenue to thirty-five feet for said distance, which fence still remains there. (5) The only road-way available to reach the lots sold as aforesaid to Bishop and Mrs. Pillot from any public road is the said 'Hester Avenue,' there being no other road by which they can be reached; and said 'Hester Avenue' has been used continuously by all persons having occasion to go to or from said lots, as far as the north line of said Pillot lot, ever since they were sold as aforesaid, until the same was fenced up by plaintiff, as herein-after stated. (6) About the 14th day of February, 1887, the plaintiff, intending to close up said Hester avenue, and prevent travel thereon, erected a fence entirely across it at the point where it joins the Alameda road. The defendant removed said fence as a nuisance and obstruction to his free use of said avenue. The plaintiff restored it several times, and the defendant as often tore it down, and threatened to continue to tear down and remove the same as often as it should be erected. Said acts of defendant are the acts of alleged trespass complained of by the plaintiff herein, and none other. (7) Said Hester avenue was by the said Sallie P. Maddock intentionally laid out fifty feet wide, and dedicated to the public as a highway for travel in the year 1878, through her said 5-acre tract of land, as far north as the said north line of the Pillot lot. Beyond that I make no finding, as it is not involved in this contest."

"Conclusions of Law: From the foregoing facts, I find as conclusions of law: (1)

That Hester avenue, as above set forth, is a public road for travel, fifty feet wide, for all persons having occasion to go that way, as far north as the north line of the Pillot lot, and beyond that I make no decision, as it is not involved in this case. (2) The defendant has a right to remove all obstructions from said road as far north as the north line of said Pillot lot, and is entitled to a judgment for costs, and it is so ordered.

"FRS. E. SPENCER, Superior Judge."

The plaintiff appeals from the judgment, and from an order denying his motion for a new trial. That the findings of fact are sufficient to support the conclusions of law is not questioned; but it is claimed that some of the findings of fact are not justified by the evidence. Of these, only those which are specified in the statement on motion for new trial can be considered.

1. It is specified that "there was no evidence to show the authority or agency of J. K. Maddock to dedicate, or lay out, or authorize a public street or way on behalf of Mrs. Sallie P. Maddock, and does not sustain finding 2." There is no finding of any such "authority or agency of J. K. Maddock in finding 2, or elsewhere."

2. It is specified that the evidence fails to show any width, length, or termination of the proposed way. F. Brown, plaintiff's son, testified of it as "a lane from the Alameda back to the north end of Pillot's lot," and further said: "This lane was fifty feet wide when father bought it." Other witnesses testified that a map or plat of the 5-acre lot was posted up on the property within a few feet of Mrs. Maddock's dwelling, showing this way, 50 feet wide, through the entire lot, and naming it "Hester Avenue." This "Hester Avenue" is mentioned as a boundary in two deeds and one mortgage from Mrs. Maddock. This evidence strongly tends to prove the finding and is quite sufficient to sustain it.

3. It is specified that "there is no evidence to show that said road-way was required as a necessity, and does not sustain finding 5." There is no finding that said road-way was required as a necessity; nor was such a finding necessary to sustain the judgment, the voluntary dedication and acceptance of it being sufficient. Finding 5 consists of two distinct propositions, neither of which is touched by this specification.

4. Nor is there any finding that the "road of necessity should be fifty feet wide."

5. The evidence substantially tends to prove that the 5-acre lot was subdivided and plotted into lots; and that "Hester Avenue" was a part of the plat, and was dedicated as a public way, to induce purchasers to buy the lots. Therefore the fifth specification, if it may be so-called, is not sustained.

6. Counsel for appellant contends that the court erred in sustaining the objection of defendant's counsel to the following question asked Mrs. Maddock: "Did you intend to dedicate any public street when you sold these premises?" Waiving the indefiniteness of this question as to time, and as to what sale of "these premises" was referred to by the question, it is a suf-

ficient answer to the objection to say that the acts and deeds of Mrs. Maddock enumerated in the findings numbered 2 and 3, to which there is no exception, plainly indicate that she intended to dedicate, and did dedicate, to public use "Hester Avenue," as laid down on the plat, at or before the dates of her deeds to Bishop and Pillot; that she intended it to be so understood by purchasers of lots fronting on that avenue; and that Bishop and Pillot purchased three lots fronting upon it with that understanding, induced by such acts and deeds. She does not deny that she caused the tract to be subdivided into lots and platted, and the plat to be posted on the lot, as stated by other witnesses, and only says: "It [the avenue] was not to be a public street, but simply a private right of way." This is only her construction of the acts and deeds properly construed by the trial court as being an accepted offer to dedicate to public use. Under these circumstances her unexpressed intention, called for by the question ruled out by the court, was of no material consequence.

7. The deed of Mrs. Maddock to the plaintiff of December 6, 1882, did not, and could not, operate as a revocation of an offer to dedicate, which had been accepted before the date of that deed. The court having found an acceptance of the offer to dedicate, and a user by the public as well as by the purchasers of lots, the cases of *People v. Reed*, 81 Cal. 70, 22 Pac. Rep. 474, and *City of Eureka v. Croghan*, 81 Cal. 524, 22 Pac. Rep. 693, cited by appellant's counsel, are not in point. I think the judgment and order should be affirmed.

We concur: GIBSON, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

84 Cal. 400

MITCHELL v. CLINE *et al.* (No. 12,940.)  
(Supreme Court of California. June 9, 1890.)

#### ILLEGAL CONTRACTS—PARTITION.

1. Where plaintiff's intestate, defendants' testator, and others, for the purpose of locating, as mineral land, a tract of land larger than they were entitled to under Rev. St. U. S. § 2331, providing that "no such location shall include more than twenty acres for each individual claimant," entered into an agreement to use the names of sham locators with the understanding that the latter would afterwards convey to the real locators, and the sham locators accordingly did convey, without consideration, their interests to plaintiff's intestate, and a patent was issued upon the title so obtained, defendants had no claim upon the land so conveyed which a court of equity would enforce.

2. Any equities which defendants' testator may have obtained by mining upon a portion of the tract located prior to such location were surrendered by his subsequent agreement with his associates, and by his application for a patent based upon such location.

3. Under Code Civil Proc. Cal. § 763, providing that, if it appears to the satisfaction of the court that a partition of property cannot be made without great prejudice to the owners, the court may order a sale thereof, a decree ordering partition will not be disturbed where the evidence, as to whether a partition would be prejudicial to the owners in any degree, is substantially conflicting.

In bank. Commissioners' decision. Appeal from superior court, Calaveras county; C. V. GOTTSCHALK, Judge.

*Ira H. Reed and Reddick & Sollinsky*, for appellants. *W. H. H. Hart, Aylett A. Cotton, and T. W. Nowlin*, (*Thomas B. Bishop*, of counsel,) for respondent.

VANCLIEF, J. A. M. Mitchell died intestate in February, 1882, seised of undivided parts of two placer mining claims, situated in Calaveras county, adjoining each other. The plaintiff, Sarah Mitchell, is the widow, administratrix, and one of the heirs of A. M. Mitchell, and individually and as administratrix brought this action for a partition of said mining claims, making the other heirs—the children of A. M. Mitchell and the other tenants in common, the devisees of John Batten, deceased—defendants. One of the claims sought to be partitioned is known as the "Bowling Green Placer Mine," containing 152 acres, and the other is called the "Dashaway Placer Mine," and contains about 154 acres. The complaint alleges that Mitchell died seised of seven-twelfths of the Bowling Green claim, and of five-twelfths of the Dashaway claim, and that the devisees of John Batten own five-twelfths of the Bowling Green, and seven-twelfths of the Dashaway. The prayer is that the whole body of land constituted of these two claims be partitioned into two parts, giving to the heirs of Mitchell one part, equal in value to their alleged undivided interest in both claims, and to the devisees of Batten the other part, equal in value to their alleged undivided interests in both claims.

It appears that the Bowling Green claim was located upon public mineral land, in January, 1873, by and in the names of John Batten, Thomas Batten, George Batten, A. M. Mitchell, Edward Thomas, William Thomas, A. B. Preston, and W. D. Newton; eight persons being necessary to locate the 152 acres of which it was composed. Upon this location a United States patent was issued June 15, 1883, to John Batten and the heirs of A. M. Mitchell; John Batten and Mitchell having acquired the titles of all the other locators. It also appears that the Dashaway claim was located upon public mineral land, on March 23, 1876, by and in the names of Joseph Pownell, W. Mansfield, G. Wing, W. G. Long, D. McLean, A. M. Mitchell, John Rolls, and John Batten. Upon this location a United States patent issued March 17, 1884, to John Batten and the heirs of A. M. Mitchell; the other locators having conveyed their interests to Batten and Mitchell, or to one of them, before the patent was issued. There is no question that it appears from the conveyances of the other locators to John Batten and to A. M. Mitchell that the heirs of Mitchell are entitled to seven-twelfths of the Bowling Green, and five-twelfths of the Dashaway, as alleged in the complaint. But in their cross-complaint, the devisees of John Batten allege that Mitchell acquired the interests of some of the original locators in such manner, and under such circumstances, as that he should be adjudged an involuntary or constructive trustee of those interests for the use and benefit of the dev-

isees of John Batten, who are defendants and cross-complainants herein. The result of this claim, if sustained, would be to give to these devisees three-fifths of the Bowling Green, and two-thirds of the Dashaway. The trial court found the interests of the respective parties to be as alleged in the complaint, and also found all other material issues in favor of the heirs of Mitchell, and rendered an interlocutory decree, accordingly, ordering a partition of said claims so as to give to the heirs of Mitchell a portion of the Bowling Green equal in value to the undivided seven-twelfths thereof, and a portion of the Dashaway equal in value to the undivided five-twelfths thereof, and giving to the devisees of Batten the remainder of each claim, and appointing referees to make the partition. The devisees of Batten appeal from the interlocutory decree, and also from an order denying their motion for a new trial.

1. Counsel for appellants contend that the court erred in not finding and decreeing that, at the time of his death, Mitchell held the legal title to three-twentieths of the Bowling Green mine in trust for John Batten, and one-twelfth of the Dashaway mine in trust for John Batten and John Rolls. The principal grounds upon which counsel rest this point, as stated in the cross-complaint, and as the evidence on the part of the appellants' tends to prove, are substantially as follows. In January, 1873, John Batten, his two sons,—Thomas and George Batten,—A. M. Mitchell, and Edward Thomas came to an understanding and agreement to make a location of a portion of the mineral land which they and others afterwards located as the Bowling Green claim. After examining the ground, they concluded to locate 160 acres, which was 60 acres more than five persons were entitled to locate under the act of congress of 1872. It was thereupon suggested, probably by Mitchell, and agreed to by all the others, that they should use the names of three additional persons as locators, who would voluntarily convey their interest to the company of five after the location should be completed. For this purpose, Mitchell proposed the names of Preston and Newton, and Edward Thomas proposed William Thomas; and it was agreed by all that these names should be used as they were used. Between August 20, 1873, and November 10, 1874, George and Thomas Batten conveyed their interest to their father, John Batten. In October, 1873, William Thomas conveyed his interest to John Batten, Ed. Thomas, and A. M. Mitchell without any consideration. In November, 1875, Preston and Newton, without consideration, conveyed their interests to Mitchell. In November, 1879, Edward Thomas, for a valuable consideration, conveyed all his interest to Mitchell. Thus, John Batten and Mitchell acquired the title of all the other locators, and upon this title the patent from the government was obtained. It is upon the conveyances from Newton and Preston to Mitchell that the constructive trust as to the Bowling Green claim is alleged to have arisen. In the location of the Dashaway

claim a similar state of facts existed, with the difference that the names of five dummy locators were used, viz., Joseph Powell, William Mansfield, G. Wing, W. G. Long, and D. McLean; the real locators being John Batten, A. M. Mitchell, and John Rolls. Of these sham locators, one of them, W. G. Long, conveyed all his interest to Mitchell on the 30th day of March, 1880, without any valuable consideration. Hence it is claimed that Mitchell held two-thirds of the title thus acquired from Long, equal to one-twelfth of the whole, in trust for Batten and Rolls; and that, as Batten afterwards purchased the entire interest of Rolls, his devisees are equitably entitled to this one-twelfth part of the Dashaway claim. It is not claimed by counsel for appellants that there was any express trust either as to the Bowling Green or the Dashaway claim; but they contend that it was understood and agreed in both cases, by and between the real locators, that the names of the dummy locators were to be used for the equal benefit of the real locators, and that the taking of conveyances to himself, for his individual benefit, by Mitchell, from Newton, Preston, and Long, in violation of this understanding and agreement, was such a breach of confidence and good faith as that he should be adjudged a trustee for his associates. As to the original understandings and agreements in regard to the division of the land to be acquired through the sham locators, and in regard to whether Mitchell took the conveyances in question in violation thereof, and thereby acquired an unfair advantage of his associates, the evidence is mostly circumstantial, and more or less conflicting; but there is no conflict and no question that as matter of fact none of the three locators of the Bowling Green, or of the five locators of the Dashaway, above named as sham locators, had, or pretended to have, any interest whatever in either of those locations. They merely permitted their names to be used as locators to enable their friends to obtain possession of, and patents for, more mineral land than they were entitled to by law; and they executed conveyances to such friends without any valuable or lawful consideration therefor.

Section 2331 of the United States Revised Statutes provides that after the 10th day of May, 1872, "no such location [of placer claims] shall include more than twenty acres for each individual claimant." The policy and object of this law are to limit the quantity of placer mineral land which may be located by one person to 20 acres; and, although one person may obtain a patent for more than 20 acres, he can do so only by representing to the government that he is a purchaser of the excess from one or more *bona fide* locators, whose locations were made in conformity with the above statutory limitation as to quantity. For this purpose he is required to present, with his application for a patent, an authenticated abstract of his title, showing its derivation from lawful locations. The alleged agreements and understandings relied upon by the appellants are contrary to the express provision of the Revised

Statutes above quoted, and contrary to the policy of the express laws of the United States regulating the occupation, possession, and sale of the public mineral lands. The avowed purposes of those agreements were that, by false and fraudulent representations, the parties thereto should obtain from the government the title to about 150 acres of mineral land in violation of express provisions of law, and that they should make an equal division of the land thus obtained among themselves. Now that they have succeeded in thus obtaining the land, will a court of equity stoop to investigate and enforce those parts of the agreements and understandings relating to a division of that land among the conspirators? I think not. Civil Code, § 1667; *Damrell v. Meyer*, 40 Cal. 186; *Huston v. Walker*, 47 Cal. 484; *Snow v. Kimmer*, 52 Cal. 624. The following language of this court in *Beard v. Beard*, 65 Cal. 356, 4 Pac. Rep. 229, is applicable to this case: "The entire transaction between the parties is tainted by fraud, and the plaintiff must content himself with so much of the benefit of it as he has already secured unchallenged. The reason why the common law says such contracts are void is for the public good, and we think that the public good requires that this transaction should be held to be void in all its parts. It was a contract which contemplated the perpetration of a fraud upon a court of justice, and we think it the duty of courts to discountenance and discourage such transactions to the utmost limit of their power." In the case at bar, a fraud upon the government was not only contemplated, but was actually and successfully perpetrated; and the appellants are shown to have "secured unchallenged" about one-half of the benefits thereof, with which they should content themselves. See, also, 1 Pom. Eq. Jur. § 401, where, among other things in point here, it is said: "Where two or more have entered into a fraudulent scheme for the purpose of obtaining property in which all are to share, and the scheme has been carried out so that all the results of the fraud are in the hands of one of the parties, a court of equity will not interfere on behalf of the others to aid them in obtaining their shares, but will leave the parties in the position where they have placed themselves."

Counsel for appellants further contend that John Batten was in possession of, and had mined upon, a portion of the Bowling Green claim prior to the location thereof upon which the patent was obtained, and that this should be considered as an equity in favor of his devisees. It appears that he had inclosed by fencing about 50 acres, for agricultural purposes, several years before the location of the Bowling Green claim, and that he had mined in portions of the field thus inclosed. It also appears that a considerable portion of this field was taken into the location of the Bowling Green claim, and forms a part of it; but there is not sufficient evidence to prove that Batten ever located any part of the inclosure as a mining claim, or that he claimed possession by virtue of any such location prior to the location of the Bowling Green claim. It

seems to have been understood by all the locators that all the mineral land within Batten's inclosure was open and subject to location for mining purposes by any person qualified to locate; and one of the express reasons for locating the Bowling Green claim was to prevent others from locating mining claims within Batten's field. But, whatever may have been the prior rights or equities of Batten, he voluntarily surrendered them to the locators of the Bowling Green claim; and, by his application for a patent upon the Bowling Green location, he represented to the government that that location was valid and lawful, which implied that the land was vacant mineral land, unoccupied by any valid location prior to that of the Bowling Green. Under these circumstances the patent itself is conclusive as against the devisees of Batten, that the location upon which it was founded was a valid location upon unappropriated mineral land. The appellants also claim a similar equity in the Dashaway mine, founded upon alleged prior rights or equities of John Rolls. But these are quite as destitute of merit as those of John Batten in the Bowling Green claim, and may be disposed of in the same way. John Rolls was one of the three real locators of the Dashaway claim, and on March 10, 1882, conveyed all his "right, title, and interest," in and to that claim, as afterwards described in the patent, to John Batten. There is no evidence tending to prove that Rolls, after the location of the Dashaway claim by the three real and five dummy locators, claimed any right or interest therein as thus located other than such as he acquired by virtue of that location, nor does his deed to Batten purport to convey any other or prior interest; and it was upon that location that Batten and Mitchell applied for and obtained the patent for the Dashaway claim, thereby representing to the government that the location was lawful and valid.

2. It is contended that the court erred in decreeing a partition of the property and in refusing to order a sale and division of the proceeds. As a rule, the Code of Civil Procedure requires partition, but, as an exception to this rule, provides for a sale, "if it appear that a partition cannot be made without great prejudice to the owners." Section 752. Section 763 provides that, "if it appear by the evidence, \* \* \* to the satisfaction of the court, that the property, or any part of it, is so situated that partition cannot be made without great prejudice to the owners, the court may order a sale thereof; otherwise, upon the requisite proofs being made, it must order a partition according to the respective rights of the parties as ascertained by the court." Whether or not a partition can be made without great prejudice to the owners is a question of fact, the decision of which is not to be aided by judicial notice of any fact or circumstance not proved. Under the Code rule, the party asking for a sale instead of a partition has the burden of proving that a partition cannot be made without great prejudice to the owners. The appellants assumed this burden, but, in the opinion of the trial court, failed



to sustain it. The evidence on this point is substantially conflicting as to whether or not a partition would be prejudicial to the owners in any degree. On the part of the devisees of Batten, Rolls, Joy, and George Batten testified that in their opinion a partition would be prejudicial to the interests of the owners, and that a sale would be preferable. On the part of the heirs of Mitchell, Livingston, Preston, and Sarah Mitchell testified that in their opinion a partition would not be prejudicial to the owners, and would be preferable to a sale. The witnesses on both sides stated the reasons for their opinions. I therefore think the finding that partition can be made without great prejudice to the owners is justified by the evidence.

3. It is contended that the court erred in overruling the demurrer to the complaint on the ground of misjoinder of Sarah Mitchell, administratrix, as a party plaintiff with Sarah Mitchell in her individual capacity. While I am inclined to the opinion that the court did not err in overruling the demurrer, I think it unnecessary to a proper and just disposition of this appeal to decide the question, since it appears that the alleged error, admitting it to be such, did not injure the appellants. The decree as to the appellant's interest in the land is the same as it must have been if the administratrix had not been a party. No relief to which appellants have a right to object was granted to the administratrix. The decree limits the right of the administratrix to sell land for the payment of debts of the estate to the portion allotted to the heirs of Mitchell by the partition, which is certainly not to the prejudice of the appellants. With this exception, the joinder of the administratrix as a party had no effect upon the trial or upon the decree. I think the decree and order appealed from should be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the decree and order appealed from are affirmed.

84 Cal. 95

*In re BAIRD.* (No. 12,774.)

(*Supreme Court of California.* May 8, 1890.)

RES JUDICATA—FRAUDULENT CONVEYANCE—  
INSOLVENCY.

1. An insolvent's petition to be discharged from his debts was opposed because he had executed a certain fraudulent deed of lands. To this he answered, setting up a prior adjudication in an action brought by his assignee to set the deed aside, wherein it was adjudged not fraudulent, but valid. *Held*, the answer was sufficient, and a demurrer thereto was improperly sustained.

2. It was error to exclude the judgment roll in said action when offered in evidence.

Department 2. Appeal from superior court, San Benito county; JAMES F. BREEN, Judge.

*N. C. Briggs*, for appellant. *McCroskey & Hudner*, for appellee.

SHARPSTEIN, J. On August 17, 1886, said insolvent filed in the superior court of San Benito county his petition and schedules praying to be discharged from his debts as

provided by the insolvent act of 1880. Thereafter, in due course of procedure, the creditors named in the schedules appeared, and on September 5, 1887, filed their written opposition to such discharge. The specified grounds of such opposition were: *First*, the execution of a deed dated August 10, 1886, by the insolvent to Elsie Briggs, of a tract of land; *second*, the statement in his schedules of his indebtedness to one G. H. Briggs for a greater sum than he owed said Briggs. During the trial before a jury, against the insolvent's objection and exception, the court permitted the creditors to amend the grounds of their opposition by adding a third, to-wit: *third*, that said insolvent on August 10, 1886, made a fraudulent gift, transfer, and conveyance of personal property to said G. H. Briggs. To this amendment the insolvent demurred and objected—*First*, because the charge is not an amendment, but an original charge, and was not filed within the time permitted by law; *second*, that the charge did not state facts sufficient to constitute grounds of opposition. The demurrer was overruled, and the insolvent excepted. Insolvent then, by leave of the court, filed an amendment to his answer to the first charge of said creditors. The amendment set up a former adjudication in an action brought by the assignee of the insolvent to set aside said deed from insolvent to said Elsie Briggs on the ground that the same was fraudulent and void, by which it was adjudged that said deed was not fraudulent, but was valid. This was demurred to by the creditors on the grounds—*First*, that it did not state facts sufficient to constitute a defense; *second*, that it did not state that said alleged judgment had not been appealed from, or that it had become final; *third*, that it did not appear therefrom that the parties are identical, or that the subject of the litigation is identical, in the action referred to in said answer, and in this action or proceeding. The demurrer was sustained, and insolvent excepted. The court erred in sustaining said demurrer.

Afterwards insolvent offered in evidence the judgment roll in said action, to the admissibility of which the court sustained an objection of the creditors. In so ruling, we think the court erred.

After a careful examination of the evidence introduced by the respective parties, we are forced to the conclusion that it does not tend to prove any of the alleged grounds of opposition to the discharge of the insolvent. Judgment and order reversed, and cause remanded for a new trial.

We concur: THORNTON, J.; MCFARLAND, J.

84 Cal. 168

BUNTING v. SALTZ *et al.* (No. 12,241.)

(*Supreme Court of California.* May 24, 1890.)

SALE—CHANGE OF POSSESSION—EVIDENCE—INSTRUCTIONS.

1. In an action for the wrongful attachment and sale of plaintiff's wagon, to satisfy the debt of plaintiff's vendor, her right to recover depends not only on a transfer to her, but on her "actual" possession at the time of the taking, under Civil Code Cal. § 3440, providing that a transfer of per-

sonality, unaccompanied by an immediate delivery, and followed by an actual and continued change of possession, is conclusively presumed to be fraudulent, and therefore void, as against creditors of the vendor.

2. Plaintiff's vendor, who was her son, executed to her a conveyance of his homestead, which was void because of the non-joinder of his wife. On the homestead was the wagon. Plaintiff was never near it personally. After the conveyance the vendor visited the premises occasionally only, but his wife and her father remained there, and they were made plaintiff's agents to look after her interests in the premises, and the property, including the wagon, transferred to her. The vendor's children also continued to live on the place. *Held*, that the jury were not warranted in finding that the sale was "accompanied by an immediate delivery and followed by an actual and continued change of possession." *PATKINSON, J.*, dissenting.

3. In no conceivable case would it be proper to instruct that "if you think there is some evidence in favor of the plaintiff's side of the case, whether it be little or great, it is your duty to find in her favor."

4. It was error to refuse to instruct that "the possession which the law requires the vendee to have after a transfer to him of personal property is not sufficient if it amounts simply to constructive possession or the mere possession which the law attaches to the ownership of land. Therefore, if the personal property so sold is located on land to which the vendee obtains a title, then or thereafter, the mere transfer of ownership to the land is not sufficient to constitute a change of possession of the personal property so sold. The possession of the personal property must be in some way so changed as to indicate by the change that the former owner no longer owns it."

5. Defendants were also entitled to an instruction that a conveyance of a homestead by the husband alone, if his wife be living, passes no title even to an innocent purchaser for value.

6. An appeal from a judgment which is not taken within a year after its entry, as required by Code Civil Proc. Cal. § 937, will be dismissed.

In bank. On rehearing. For former report, see 22 Pac. Rep. 1132.

*Thos. C. Huxley*, for appellants. *Moore & Reed* and *F. B. Ogden*, for respondent.

**SHARPSTEIN, J.** This is a case in which the plaintiff's right to recover depends not only upon a transfer to her of the property which, she alleges, was wrongfully and unlawfully taken from her possession and converted by the defendants to their own use, but likewise upon her actual possession of it at the time of such alleged taking and conversion. If the transfer was not accompanied by an immediate delivery, and followed by an actual and continued change of possession, it is conclusively presumed to be fraudulent, and therefore void as against the creditors of the vendor. Civil Code, § 3440. "Actual" means existing in act, and truly and absolutely so; really acted or acting; carried out; opposed to potential, possible, virtual, or theoretical. If there is no evidence of an actual change of possession of the property claimed to have been transferred by the plaintiff's vendor to her, then the verdict of the jury was not justified by the evidence, and the defendant's motion for a new trial should have been granted on that ground, and the order denying said motion must be reversed. The plaintiff resides in the state of New York, and is not shown to have been ever in this state. Whatever right she had in the wagon in controversy she acquired from

her son, John A. Bunting, who, at the time of and before the transfer of it to her, resided with his family upon a small farm in Alameda county, in this state. In the month of October, 1883, Fleda O. Bunting, wife of John A. Bunting, duly filed a declaration of homestead upon said farm. There is no evidence that said homestead has ever been abandoned. In December, 1883, John A. Bunting made a conveyance of said farm to his mother, plaintiff herein, but Fleda O. Bunting, his wife, did not join in the execution of said conveyance. There is evidence tending to prove that after the execution of said conveyance John A. Bunting ceased to carry on farming upon said farm, and spent most of his time elsewhere, occasionally returning to the farm where his wife and children remained. There is also evidence tending to prove that his wife and her father, one Overacker, were authorized by the plaintiff to act for her, as her agents, in regard to the interests acquired by her from the conveyance and transfer of property to her by her son, John A. Bunting. The deed of John A. Bunting, purporting to convey to plaintiff the premises upon which a homestead had been impressed, was wholly inoperative as a conveyance of such homestead, and did not constitute any evidence of a change of possession of the premises, either actual or constructive. "The possession by the plaintiff of the farm upon which the personal property was when it was purchased by him, provided it was an actual and exclusive possession, would be strong evidence of the like possession of such personal property." *Cahoon v. Marshall*, 25 Cal. 201. "If the actual and exclusive possession of the farm by the plaintiff would be strong evidence of his like possession of the personal property, then the possession of the farm by the vendors, or the concurrent possession of it by the vendors and vendee, would at least tend very strongly to show that the plaintiff had not that actual possession of the personal property necessary to place it beyond the reach of the creditors of the vendor." *Id.* Aside from the deed of John A. Bunting to the plaintiff, which did not convey any right, title, or interest in the premises, the transaction, taking the view of it most favorable to the plaintiff, amounted to nothing more than an authority from him to her to take actual possession of the wagon, which she failed to do. Therefore the transfer is conclusively presumed to be fraudulent and void as against the defendants, who were creditors of the vendor while he remained in possession. The language of section 3440 of the Civil Code is too plain to admit of construction. It means what the Statutes of 13th and 27th Elizabeth were construed to mean in *Edwards v. Harben*, 2 Term R. 587, and in *Hamilton v. Russell*, 1 Cranch, 310.

We think the opinion of this court in *Engles v. Marshall*, 19 Cal. 320, quite as applicable to this case as to that. In that case the court said: "Upon examining the record in this case, we think the judge below did not err in instructing the jury that the facts showed no valid sale for want of such change of possession of the

property in controversy as is required by the statute of frauds. The property seems to have remained, to all external appearances, in the same condition in which it was before the sale, with nothing to notify third persons of the sale or of the claims of the new owner. In *Stevens v. Irwin*, 15 Cal. 506, we said: 'Delivery must be made of the property. The vendee must take the actual possession. That possession must be open and unequivocal, carrying with it the usual marks and indications of ownership by the vendee. It must be such as to give evidence to the word of the claims of the new owner. He must, in other words, be in the usual relation to the property which owners of goods occupy to their property. This possession must be continuous; not taken to be surrendered back again; not formal, but substantial. But it need not necessarily continue indefinitely when it is *bona fide* and openly taken, and it is kept for such a length of time as to give general advertisement of the *status* of the property and the claim of it by the vendee.' An application of these principles to the evidence shows that the case of the plaintiff is within the statute of frauds."

One of the instructions given to the jury contains this clause: "If you think there is some evidence in favor of the plaintiff's side of the case, whether it be little or great, it is your duty to find in her favor." This was excepted to, and the exception must be sustained. In no conceivable case would such an instruction be proper. The defendants requested the court to give the following instructions, which the court refused to give, and defendants excepted to that ruling. They should have been given. The following are copies of them: "The possession which the law requires the vendee to have after a transfer to him of personal property is not sufficient if it amounts simply to constructive possession, or the mere possession which the law attaches to the ownership of land. Therefore, if the personal property so sold is located on land to which the vendee obtains a title then or thereafter, the mere transfer of ownership of the land is not sufficient to constitute a change of possession of the personal property so sold. The possession of the personal property must be in some way so changed as to indicate by the change that the former owner no longer owns it. A conveyance of homestead property by the husband alone, if his wife be living, passes no title to the property so conveyed. The law requires both the husband and wife to unite in such conveyance. Even an innocent purchaser for value acquires no right whatever to a homestead so conveyed to him by the husband alone." There are many more exceptions to rulings of the court which, in our opinion, did not affect the substantial rights of the parties, and we therefore disregard them. There is in this case an appeal from the judgment as well as from the order denying the motion for a new trial. The appeal from the judgment was taken more than a year after its entry, and is therefore dismissed. The order denying the motion for a new trial is reversed, and the cause remanded for a new trial.

We concur: BEATTY, C. J.; MCFARLAND, J.; FOX, J.

PATERSON, J. I concur, but cannot say that the evidence was insufficient to warrant the jury in finding that the sale was "accompanied by an immediate delivery, and followed by an actual and continued change of possession," within the meaning of the phrase as explained and illustrated in the decisions. I cannot see that any harm was done by the refusal to give instruction numbered 15. As to other matters I concur in the opinion of Justice SHARPSTEIN.

84 Cal. 544

MADDEN v. OCCIDENTAL & ORIENTAL S. S. Co. (No. 12,799.)

(Supreme Court of California. May 26, 1890.)

Department 2. Appeal from superior court, city and county of San Francisco; JOHN F. FINN, Judge.

Taylor & Craig, for appellant. W. H. L. Barnes, for respondent.

PER CURIAM. The motion to dismiss the appeal is denied. We remark that the respondent's attorney admitted service of a copy of the interlined transcript without objection. The objections to the transcript, which are very technical, we regard as of little or no weight. At any rate, we do not think the appeal should be dismissed.

84 Cal. 205

BEAMER v. FREEMAN. (No. 13,260.)

(Supreme Court of California. June 14, 1890.)

ATTACHMENT—CHATTEL MORTGAGE—ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. An attachment is good as against a prior mortgage which was not recorded until after the attachment.

2. Where an attachment lien, superior to a recorded mortgage because levied before the recording thereof, was dissolved by an assignment made less than a month after the levy, as provided in section 17 of the insolvency act of California of 1880, the title to the chattel vested in the assignee for the benefit of all the creditors alike, since the attachment prevented the subsequent recording of the mortgage from vesting the title in the mortgagee.

Commissioner's decision. Department 2. Appeal from superior court, Yolo county; C. H. GAROUTTE, Judge.

Hudson Grant, for appellant. R. Clark, for appellee.

GIBSON, C. Action of replevin. Judgment passed for defendant, from which the plaintiff appeals. November 4, 1882, Jeans executed and delivered to defendant a chattel mortgage of a portable steam-engine, then in Yolo county, to secure the payment of a promissory note for \$1,150. This mortgage was not recorded until August 13, 1886, when it was placed of record in Yolo county, and on the 16th day of the same month it was recorded in San Joaquin county; Jeans having on the 1st of the same month, in the same year, removed the engine to the latter county. August 11, 1886, Baker & Hamilton, creditors of Jeans, attached the engine in San Joaquin county; Jeans having retained the possession of it until that time. On

the 20th of the same month, nine days after the attachment was levied, Jeans was adjudged an insolvent debtor, and the plaintiff was by his creditors elected as his assignee; and, after having qualified as such, the clerk of the superior court of Yolo county, as required by law, executed and delivered to plaintiff an assignment of all the property of the insolvent debtor, Jeans. Thereupon the sheriff of San Joaquin county, who held the engine under the attachment levy already referred to, delivered it to the plaintiff as such assignee. The engine, which is of the value of \$800, was then taken from plaintiff's possession by defendant, Freeman, who claimed it by virtue of the terms of his chattel mortgage upon it, and, upon demand of the assignee therefor, refused to return it to him. Between the date on which the mortgage was made, and that on which it was recorded in Yolo county, three years and nine months had elapsed, during which time Jeans incurred numerous liabilities, among which was the one upon which Baker & Hamilton obtained their attachment, who with other creditors have filed their claims against the insolvent's estate. It thus appears that the contest is between the creditors of the insolvent and his mortgagee under the chattel mortgage.

A mortgage of personal property is void against the creditors of the mortgagor unless it is recorded in the same manner as grants of real property. Civil Code, § 2957. This law substitutes the record of the mortgage for the actual delivery and continued change of possession made essential to effect transfers in other cases by section 8440, *Id.* *Martin v. Thompson*, 63 Cal. 3; *Berson v. Nunan*, *Id.* 530. Appellant contends that the effect of the first-mentioned provision of the Code is to make an unrecorded chattel mortgage absolutely void as to creditors, and all other persons except the parties to it, and that whether the creditors secure liens by attachment, judgment, or execution before the mortgage is recorded makes no difference. The position assumed regarding the creditors is not free from doubt. In *Jones, Chat. Mortg.* § 237, it is stated: "The only effect of delay in recording or filing a mortgage is to render it void as against intervening purchasers or mortgagees or creditors obtaining liens by attachment, judgment, or execution." But, from the view we take of this case, which will let the property in dispute inure to the benefit of all the creditors of the insolvent in the insolvency proceedings, we deem it unnecessary to resolve this doubt. We think it clear, however, that, as Baker & Hamilton acquired a lien by attachment upon the engine before the mortgage upon it was recorded, that as to them the mortgage is void under section 2957 of the Civil Code, and prevented the title of the mortgagor from passing to the mortgagee. See *Shipman v. Insurance Co.*, 29 Conn. 254. The lien so acquired by them was within one month prior to the commencement of the insolvency proceedings, and was, by force of the provisions of section 17 of the insolvency act of 1880, dissolved when the assignment of all the property of the in-

solvent was made pursuant to that section, which reads as follows: "As soon as an assignee is appointed and qualified, the clerk of the court shall, by an instrument under his hand and seal of the court, assign and convey to the assignee all the estate, real and personal, of the debtor, with all his deeds, books, and papers relating thereto; and such assignment shall relate back to the commencement of the proceedings in insolvency, and by operation of law shall vest the title to all such property and estate, both real and personal, in the assignee, although the same is then attached on mesne process as the property of the debtor, and shall dissolve any attachment made within one month next preceding the commencement of the insolvency proceedings. Such assignment shall operate to vest in the assignee all the estate of the insolvent debtor not exempt by law from execution." What was the effect of the dissolution of the attachment? Assuming, without deciding, in accordance with the views of the trial court, that, when the mortgage was placed of record, it became operative against all the creditors whose right to the property of the insolvent did not attach until he was adjudged to be such, still the fact remains that, before the recording of the mortgage, Baker & Hamilton acquired a valid lien upon the mortgaged chattel. This lien, though, was acquired subject to the provisions of section 17 of the insolvent act, which, when brought into operation, deprived them of their special lien. Now, to hold that the release of the lien thereby made was absolute, and deprived them of all right to pursue the property in the insolvency matter, would give an advantage to the mortgagee, to their detriment, which he (the mortgagee) failed to acquire in the first place by his laches in not recording his mortgage, and in effect convert the insolvent act, which is designed to protect creditors, into an instrument of wrong against them. It must receive a reasonable construction in order to effectuate its object and promote justice. Applying this rule to it convinces us that the dissolution of the attachment made by it was not absolute, so as to let the record of the mortgage intervene, and cut off the right of Baker & Hamilton, and leave them with other creditors, who might have been up to that time without recourse against the chattel, but only released the lien and transferred the title to the property to the assignee as part of the assets of the insolvent under section 17 of the above act; and, as the title of the mortgagor was prevented from passing to the mortgagee by the attachment of Baker & Hamilton, it remained in the mortgagor until it was by operation of law transferred to the assignee as the representative of all the creditors. Such transfer made him the owner of the chattel, but in trust for the creditors of the insolvent, and as such owner he is entitled to recover either it or its value in order to execute his trust. Insolvent Act 1880, § 21. The engine, then, having become a part of the assets of the insolvent, is it there for the benefit of Baker & Hamilton alone, or are all the other creditors entitled to a *pro rata* share

of its proceeds? "All creditors," declares section 31 of the same act, "whose debts are duly proved and allowed, shall be entitled to share in the property and estate *pro rata*, without priority or preference whatever other than as provided in this act and in section 1204 of the Code of Civil Procedure." None of the exceptions referred to embrace this case. We therefore think it apparent that, as the assignee has no other power to discriminate between the creditors of the insolvent, the chattel in dispute must be regarded as a portion of the general assets, which must be disposed of for the common benefit of all the creditors.

The complaint, which is excepted to by the respondent, states a complete cause of action in replevin. In it is set forth the making of the mortgage on the engine; the failure to record it until after the attachment of the engine by Baker & Hamilton; the subsequent adjudication of the insolvency of the mortgagor; the appointment of plaintiff as assignee in the insolvency proceedings; the assignment to the latter of all the property of the insolvent; the taking of such property, including the engine, into the possession of the assignee; the value of the engine; the taking of the same by the defendant from the possession of the assignee; the demand of the assignee for the return of the engine; the defendant's refusal to restore it, and the damages sustained by its detention; together with a prayer for the restitution of the property or its value, and for damages. As the findings show all the facts first above stated, and cover all the issues except as to the one relative to damages for the detention of the engine, and the appellant seems willing to waive such damages by requesting that judgment in his favor be ordered upon the findings, we therefore advise that the judgment be reversed, and the trial court directed to enter judgment in favor of plaintiff upon the findings in accordance with this opinion.

We concur: FOOTE, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the court below directed to enter judgment in favor of plaintiff on the findings in accordance with the above opinion.

(84 Cal. 235)

SCRIVNER v. DIETZ. (No. 12,750.)

(Supreme Court of California. June 7, 1890.)

MORTGAGES—MERGER—INTERVENING LIENS.

A land-owner, to secure money borrowed from a bank, executed a mortgage to the bank's manager. Subsequently, certain of the land-owner's creditors caused an attachment to be levied on the mortgaged property, and thereafter, but before rendition of judgment in the attachment proceedings, the land-owner, with the consent of the attaching creditors, conveyed the property to a trustee to sell, and apply the proceeds (1) in payment of the bank's mortgage, (2) judgment liens, and (3) unsecured creditors. *Held*, that a subsequent conveyance of the land, subject to the same trusts, by the owner and the trustee, to the bank's manager, in whose name the mortgage to the bank had been executed, would not merge the bank's mortgage lien in the legal title so as to enable a subsequent purchaser under the judgment in the attachment

proceedings to hold the land freed from the lien of the mortgage, as equity will not permit the acquirement of the legal title by the mortgagee to operate as a merger of the mortgage where there are intervening liens.

Department 1. Appeal from superior court, Alameda county; W. E. GREENE, Judge.

*Davis & Hill* and *E. C. Robinson*, for appellant. *Winans, Belknap & Godey* and *J. B. Harmon*, (*D. P. Belknap*, of counsel,) for respondent.

Fox, J. Action for foreclosure of mortgage. Decree for plaintiff, from which the defendant, Dietz, holding under a conveyance subsequent to the mortgage, appeals. The case comes up on the judgment roll. The only question in the case is whether the mortgage lien was extinguished by merger into the legal title. The facts, briefly stated, are: The entire tract covered by the mortgage was conveyed by Blaise to Grant for the sum of \$25,000. Of this sum, \$6,000 was paid down, and a deed executed, and placed in escrow to be delivered upon payment of the balance. Before the balance was paid, Grant became involved. Mechanics' liens were filed upon the property. Other creditors were pressing, and among the rest the London & San Francisco Bank, to which Grant was indebted in the sum of \$5,000. To secure this last indebtedness, and a further advance of \$1,000, Grant gave his note to the bank for \$6,000, and executed a mortgage of the property to Latham, the then manager of the bank. The property was in one body; but we infer, from the manner in which it is referred to in the briefs, it was used or handled as three parcels differing in character, and differently occupied. In the briefs they are designated as parcels 1, 2, and 3; and a specific description is given of each. Subsequent to the date and record of the mortgage, and before any further conveyance of the premises had been made, the entire mortgaged premises were attached at the suit of McAfee and Spiers; and, under judgment recovered in that case, after the legal title of the property had passed into Latham as hereinafter stated, parcel No. 3 of the mortgaged premises was sold by the sheriff, and bid in by McAfee and Spiers, who in due course received the sheriff's deed therefor, and subsequently conveyed the same to the defendant Dietz. After the levy of the attachment, but long before the judgment, Grant, the mortgagor, conveyed the entire mortgaged property to Taylor in trust to sell the same, and use the proceeds of the sale, which he was authorized to make either at public or private sale, in paying off the debts of Grant in the following order: (1) the balance of the purchase money due to Blaise; (2) amounts due under mechanics' liens; (3) the debt secured by the mortgage here in suit; (4) judgment liens; and (5) unsecured debts of Grant *pro rata*. Very shortly after this conveyance and the creation of this trust, Grant and Taylor united in a conveyance of the whole property to Latham. The court finds that at the time of this conveyance there was a verbal agreement between Grant, Taylor, and Latham that the latter take the title sub-

ject to the same trust, and with the same powers, as Taylor held it. Respondent claims that this fact could not be proved by parol, and the trust could not be created by parol. The answer to this is that the trust was already created by the deed to Taylor, which was of record, and of which Latham had full notice. That trust could not be revoked without the consent of all the persons for whose benefit it was created,—the creditors of Grant. Latham, therefore, necessarily took subject to the trust, and the title which he received was charged in his hands with the same trust as it had been in the hands of Taylor. No agreement on the subject was necessary, and none could have been made by the parties acting in the matter which could have released the trust. Without the consent of the beneficiaries, the trust could only be extinguished by the entire fulfillment of its object, or by such object becoming impossible or unlawful. Civil Code, § 2279. Latham having taken with knowledge of the trust, he occupied the same position as the original trustee. *Price v. Reeves*, 38 Cal. 457. Equity would enforce the trust against him as it would have done against the original trustee. *Lathrop v. Bampton*, 31 Cal. 17. We should have stated before that McAfee and Spiers, the attaching creditors, consented at the time to the conveyance to Taylor and the creation of the trust, and that the property should be sold for the purposes named in the trust. Afterwards, and before the recovery of judgment by McAfee and Spiers, Latham, upon due notice, sold at public auction, in execution of such trust, that part of the property designated as "parcel No. 1." The sale realized, over and above expenses, \$19,792.62. After the sale, and pending the receipt of the money, the bank advanced the money to pay off the balance of the purchase price due to Blaise, amounting, with interest, to \$20,186.30. Upon receipt of the money on the sale a few days later, Latham paid the same into the bank on account of the money so advanced on the purchase price paid Blaise. The land so sold was formally released by the proper parties from the lien of both the mortgage and the attachment. Subsequently Latham assigned the mortgage to the plaintiff, his successor in the management of the bank, in trust as he had held it, as security for the payment of the debt due the bank, and also made a conveyance of the land which remained unsold to the plaintiff. This conveyance is described in the findings as one made to the plaintiff as trustee for the bank; but, under the authorities cited, the title so conveyed was of course charged with the same trust as in the hands of Latham. After all this had transpired, judgment was recovered in the Case of McAfee and Spiers; and under such judgment sale was made of parcel No. 3, and the title thus acquired came down to defendant Dietz. The decree of foreclosure is for the sale of parcels 2 and 3, described in the decree as "parcels 1 and 2." Dietz claims that his title relates back to the date of the attachment, and that, the mortgage having been extinguished, as he claims, by the merger of the same into

the superior title, he now holds the parcel purchased by him released from any claim of plaintiff. Merger is always a question of intent when the question is as to whether a mortgage lien is merged in the fee, upon both being united in the same person. *Jones, Mortg.* §§ 848, 856, 857, 870, 872, 873. Equity will keep the legal title and the mortgagee's interest separate, although held by the same person, whenever necessary for the full protection of the person's just rights. *Carpentier v. Brenham*, 40 Cal. 221. If there is an intervening mortgage, the acquirement of title will not operate as a merger. *Brooks v. Rice*, 56 Cal. 428. The same rule would apply as to an intervening attachment or other lien. The same rule as to merger is laid down in *Rumpp v. Gerkens*, 59 Cal. 496. The rule would apply with still greater force in this case, where the mortgage was held in trust for one person, and the title in trust for another. This being the only question in the case, the judgment is affirmed.

We concur: PATERSON, J.; WORKS, J.

86 Cal. 500

WATSON V. SUTRO. (No. 12,596.)

(*Supreme Court of California.* June 7, 1890.)

VENDOR AND VENDEE—BONA FIDE PURCHASERS—  
CONSTRUCTIVE NOTICE—TRUSTS—ESTOPPEL—  
LIMITATIONS.

1. Tenants in common of land conveyed it to a trustee by a deed absolute on its face, which was duly recorded; the trustee executing a declaration of trust, which was not recorded, reciting that the deed to him by the parties, naming them, had been made to facilitate the perfecting of title. Subsequently one of the tenants in common was substituted as trustee, and he also executed a declaration of trust to the same effect as the first, but omitting the name of one of the tenants in common, owning an undivided five acres, and crediting his share to one of his co-tenants. *Held*, that a purchase of this five acres by the substituted trustee from the co-tenant did not constitute him an innocent purchaser, as it was his duty, when he accepted the position of trustee, to know for whom he was acting.

2. In an action by the owner of the undivided five acres to charge the substituted trustee as a purchaser with notice, it appeared that the co-tenant who sold them had acted as administrator of the estate of plaintiff's father-in-law, and had acquired 15 acres, as tenant in common, during such administration. Long before the conveyance in trust, he had conveyed the five acres now in dispute to plaintiff, whose deed was duly recorded. After the conveyance in trust, plaintiff, with his wife and other heirs, in settlement of the administration, executed to the co-tenant a written instrument reciting that the latter, during the course of his administration, had acquired land, "the legal and equitable title to which is now in him," and empowering him to sell such land. *Held*, that this instrument conferred no authority on the co-tenant to sell the five acres previously conveyed to plaintiff, as the co-tenant had neither the legal nor the equitable title thereto; the legal title being in the trustee, and the equitable title in plaintiff.

3. The distinct statement in the power of sale that it embraced only such lands, "the legal and equitable title to which is now" in the co-tenant, will limit a subsequent general description of such land as "15 acres or thereabout," and these general words will not enlarge the power of sale previously conferred.

4. Where the attorneys for a purchaser from the substituted trustee have examined all the various conveyances under which he claims the five acres now in dispute, their knowledge is the pur-

chaser's knowledge, and he is chargeable with constructive notice of all that appears on the face of the instrument; and the fact that the attorneys made a mistake of law in interpreting the power of sale, and advised the purchaser that it embraced the five acres now in dispute, does not constitute him an innocent purchaser thereof.

5. As plaintiff deceived neither the substituted trustee, nor the purchaser from him, the power of sale, which was accessible to both, and which was actually examined by the attorneys for the latter, does not estop plaintiff from asserting his title to the land.

6. Code Civil Proc. Cal. § 752, which permits an action of partition to be brought by a tenant in common having an estate of inheritance, does not confine the right of action to the holder of the legal title, but a tenant in common having an equitable estate of inheritance may establish his right to the land, and have a partition thereof, in one and the same action.

7. As plaintiff was ignorant of the omission of his name from the second declaration of trust, and of the conveyance by his co-tenant to the substituted trustee, the possession of the substituted trustee, who was also plaintiff's co-tenant, must be deemed to have been for his benefit; and hence Code Civil Proc. Cal. § 319, which provides that plaintiff in an action affecting the title to land must have been in possession thereof within five years of bringing the action, and section 322, which provides that the possession of land by one entering under a written instrument purporting to convey it shall be deemed to be adverse, have no application to the case.

McFARLAND, J., dissenting.

In bank. Appeal from superior court, city and county of San Francisco; JAMES G. MAGUIRE, Judge.

Action by W. C. Watson against defendant, Sutro, to charge defendant as purchaser of land with notice of plaintiff's title. There was a judgment in plaintiff's favor, and defendant appeals. Code Civil Proc. Cal. § 319, provides: "No cause of action \* \* \* arising out of the title to real property can be effectual unless it appears that the person prosecuting the action \* \* \* or grantor of such person, was seised or possessed of the premises in question within five years before the commencement of the act in respect to which such action is prosecuted." Section 322 provides: "When it appears that the occupant, or those under whom he claims, entered into the possession of the property under claim of title exclusive of this right, founding such claim upon a written instrument as being a conveyance of the property in question \* \* \* and that there has been continued occupation and possession of the property included in such instrument, \* \* \* or of some part of the property, under such claim, for five years, the property so included is deemed to have been held adversely."

Lloyd & Wood, for appellant. Stanley, Stoney & Hayes, for respondent.

THORNTON, J. On the 12th day of January, 1870, John H. Baird, the plaintiff, W. C. Watson, E. L. Sullivan, and nine other persons, tenants in common of the tract hereinafter mentioned, conveyed to David W. Connolly, by deed, bearing date the day just named, a certain parcel of land, situate in the city and county of San Francisco, known as the "Byfield Tract." The consideration named in the deed was one dollar. It was acknowledged and recorded on the 29th of the month and year

above mentioned. Subsequently other deeds were executed to Connolly of interests in this tract, which, as they do not figure in the controversy, need not be mentioned further. The Byfield tract is in that portion of the city and county of San Francisco affected by the provisions of the act of congress of March 8, 1886, entitled "An act to quiet the title to certain lands within the corporate limits of the city of San Francisco." On the 25th of January, 1870, Connolly executed to the parties above mentioned and referred to an instrument in writing, reciting the conveyance to him by the parties (naming them) of their several interests in the Byfield tract, and further reciting that such conveyance was made for the purpose of facilitating the settlement of the title to the same, by deed to the city and county of San Francisco the reservations made for public purposes by the outside land committee of the board of supervisors of the city and county, and for the procurement of the title of the city and county to the said tract to him. This instrument then sets forth that Connolly binds himself, his heirs and assigns, as soon as the objects above stated shall have been accomplished, to reconvey to his grantors their respective proportions of the tract as shall remain in it after deducting the reservations made by the committee. This instrument, called the "Connolly Declaration of Trust," was acknowledged on the day it bears date, but was not recorded until the 25th day of June, 1880. The above instrument clearly sets forth a trust, in which Connolly was the trustee, and the other persons named in it were the *cestnis que trustent*. On the procurement of the title of the city, the tract so acquired was to be conveyed to the proper claimants, as above set forth. Connolly was to look to the matter referred to for all the beneficiaries of the trust, adjust all matters necessary to procure the title from the city and county of the lands referred to, execute the necessary conveyances to the city of the portions reserved, and then to reconvey, as above stated. Of these beneficiaries, the plaintiff, Watson, was one expressly named in the instrument executed by Connolly on the 25th day of January, 1870. Deeds were subsequently executed to Connolly by the city and county, of the land to which he undertook to procure title. These deeds were three in number, executed in the months of March, April, and September, 1870, and were recorded on the day of their date. The lands thus conveyed to Connolly include the parcel in controversy here. Afterwards, on the 2d day of December, 1871, Connolly executed to John H. Baird, who was one of his grantors, and one of the beneficiaries under his declaration of trust, a deed absolute in form, and purporting to convey to the grantee the Byfield tract. This deed was recorded on the 20th day of August, 1872.

It is found as a fact that the deed just above mentioned was executed by Connolly, and accepted by Baird, without consideration, and subject to, and in furtherance of, the trusts upon which Connolly was then holding title to the premises, and with full knowledge of the trusts un-



der which Connolly held the property which he conveyed to him. In fact it seems that Baird was but a substituted trustee substituted in place of Connolly,—and, from what subsequently occurred, so substituted with the consent (of what may have appeared to Baird) of all the beneficiaries; for on the 3d day of January, 1872, Baird executed a declaration of trust in which it is set forth that the Byfield tract, less a portion reserved for a public park, had been conveyed to him in trust, and was held by him in trust, for the persons named in this declaration. In this declaration the share of each is specifically set forth, Baird's own share is stated to be 41-160, Sullivan's 15-160, and others in like manner sufficient to cover the aggregate 160 shares. It should be remarked here that this tract was supposed to contain 160 acres, and the proportion of each was designated by a fraction, in which the supposed number of acres was taken as the denominator. Among the names of the owners or beneficiaries in Baird's declaration of trust, the plaintiff's name does not appear. E. L. Sullivan's name appears in it as the owner of 15-160, as above stated. The controversy in regard to the land involved herein turns in great part on the disappearance of Watson's name from the list of beneficiaries, and the appearance of Sullivan's name for a share or proportion which seems to include both his share and that of Watson's. Watson's share had been conveyed to him by Sullivan on the 10th day of December, 1862, which specified as the portion conveyed 5-160 of the Byfield tract. This conveyance purported to be for value, and was properly recorded on the 4th day of December, 1865. All the parties to the Connolly deed claimed under mesne conveyance from one John K. Moore, which conveyance had been properly recorded prior to the date of the deed to Connolly. The findings show that at the date of the deed just mentioned to Connolly, the 12th day of January, 1870, Sullivan held 15-160 of the Byfield tract after his conveyance to Watson. He subsequently conveyed 5-160 to another beneficiary, Sharpstein, by deed dated the 7th day of May, 1868, leaving in him 10-160 of the tract, when, on the 12th day of January, 1870, he joined in the execution of the deed to Connolly. On the 1st day of February, 1879, Sullivan executed to Baird a deed, purporting to be in consideration of \$10,000, which conveyed to Baird certain lands by the following description: "All the interests of the first party in and to the tract of land situate in the city and county of San Francisco, state of California, known as the 'Byfield Tract,' the interest of said first party in said tract of land being about thirteen acres, more or less," which deed was duly acknowledged on the 18th of February, 1879, and on the same day recorded in the proper office of the city and county of San Francisco. It is found that, at the date of this deed, Sullivan had no greater interests than he had on the 12th of January, 1870, the date of the deed to Connolly of his 10 undivided 160th parts. In June, 1880, the defendant, Sutro, purchased of Baird the interest which Baird claimed to own in the Byfield

tract, which Baird represented was 55-160 of the tract. This quantity was made up of his (Baird's) 40-160, and the 15-160 which he claimed had been sold and conveyed to him by Sullivan. This 15-160 was represented by Baird to Sutro as embracing the 5-160 which Sullivan in 1862 had conveyed to Watson. The negotiation for the purchase by Sutro commenced in 1880, and was consummated by a deed from Baird to him, bearing date the 28th of that month. This deed purported to convey 15-160 of the property described in the complaint, which was the same proportion of the Byfield tract, after the deduction of the reservation above mentioned. This deed was for a valuable consideration, and was executed by Baird, and accepted by Sutro, as a conveyance of the 10-160 of Sullivan, and the 5-160 of Watson. About the same time, Sutro acquired and received conveyances from other beneficiaries of their interests to the Byfield tract; but, as they do not bear on the questions to be determined herein, they need not be further adverted to. This action was brought by the plaintiff to charge Sutro as purchaser with notice of his interest, 5-160, in the tract above mentioned, as described in the complaint, and for a partition. The court below found that Sutro was a purchaser with notice of Watson's equitable rights, and charged him as a trustee for Watson to the extent above mentioned. The question to be here passed on relates to the sufficiency of the evidence to justify the above finding of the court.

Pending the negotiations between Sutro and Baird for the purchase of this land, Sutro employed able and distinguished attorneys to examine and pass on the asserted title of Baird. These attorneys did examine and pass on that title; and, on their representation, Sutro paid the purchase money, and took a conveyance from Baird. Baird and the defendant had notice by the record of the deed from Sullivan to Watson conveying to the latter his interest in the Byfield tract. This deed had been regularly recorded in the proper office in December, 1865. He also had like notice of the deed of the 12th of January, 1870, made to Connolly by his tenants in common, of whom Watson was one, which was recorded on the 29th of January, 1870. The registry of deeds then showed that the title had passed from Watson to Connolly. The registry further showed that Connolly had received deeds for the land held by him in trust from the city and county of San Francisco. At the time of the negotiation for the purchase from Baird the record showed that the title to this interest was in Baird. In the progress of the examination the declarations of trust executed by Connolly and Baird, which had never been recorded, were furnished to Sutro's attorneys. The Connolly declaration showed plainly that he was trustee for Watson, as well as for Sullivan. The extent of Watson's interest did not appear on this paper, nor did the amount of the interest held by either of the beneficiaries. The Baird declaration did not mention Watson's interest. It showed the interests of the other owners, but Watson's was omitted. The above

attracted the attention of the attorneys, and their inquiry was at once directed to this interest, to ascertain what had become of it,—whether it had been acquired by some other of the co-owners, and, if so, by whom. In pursuing their investigation in regard to this interest, application was made to Baird and Sullivan. One of the learned gentlemen called upon Baird. He gives in his testimony a full account of the interviews with both Baird and Sullivan. After stating, in regard to his investigation of the title, that he had found the Connolly declaration of trust, the deed of Connolly to Baird conveying the property known as the "Byfield Tract," and the Baird declaration of trust mentioning the proportions of the several co-owners,—among others, Sullivan's, stating his interest at 15-160, omitting Watson's altogether, the proportions named making up 160 acres,—he proceeds: "I proceeded to inquire what became of Watson's interest, and why he was left out. I called upon Baird, and he said: 'Why, that is all right. That declaration of trust embraces the parties who are now in interest.' I said I do not see what has become of Watson there. He said: 'There is a family arrangement between Watson and Sullivan.' He then told me that Watson was related to Sullivan by marriage, which I didn't know before. I didn't know who he was at all. He said: 'You had better go and see Sullivan yourself.' He said: 'There was an arrangement that was satisfactory between them, as I understood it always, in regard to this.' He said, furthermore: 'It has been in my name, as you see, for a long while.' I did not, I think, take the paper to him in the first instance. I did afterwards, and he says: 'It has been ten years or so; and, if it is wrong, he has been very patient about it. But you had better go and see Sullivan, and he will explain it all to you.'" The attorney then went to see Sullivan, and told him his errand: "That Baird was about conveying property, and I find that he [Sullivan] had conveyed 15-160 of it, and I wanted to know where Baird got his title; and he told me there was an arrangement between him and Watson in respect to this little interest which he had. And he mentioned, also, that he had spent, or that Watson had cost him,—I think that was his expression,—a good deal of money, and that he had an arrangement by which he could take this property, treat it as his own, sell it, and dispose of it in any way he chose. I asked him if that was in writing. 'Yes,' he said, that it was all in writing. He says: 'Hadh't you seen it?' I say: 'No.' And he says: 'It is on record.' I said: 'No, it is not. It is not in my abstract at all.' He said: 'There were several copies of it. I thought it was recorded.' Well, I asked him if he had a copy. He said: 'Yes.' I asked him if he would not find out where he could get it. He said he would look it up, and asked me to come the next day; or he said: 'I'll call on you.' I said I wished him to call on me at the office, which he did, and then he had a paper which I have identified on the stand about as nearly as I can. I don't know who had charge of Sullivan's papers.

Since his death, I asked Watson, and he said he finds it very difficult to get any knowledge at all about Sullivan's papers. I had it in my hand, and read it, but it was not in my possession. I spoke to Mr. Sullivan about it. He produced it either the next day or the day after, and I found it had not been recorded. I told him that it ought to be recorded; that it was explanatory of the title of Baird. I made no inquiries about Watson's interest after that." This witness afterwards testified that "Sullivan said, also, that the conveyance to Watson did not cost him a cent; that it was a gift, but, in consequence of the cost which he had been put to on Watson's account, he intended this to be used for the benefit of the family, and the instrument between them evidenced his right to use it."

On the trial the original of an instrument in writing, and executed by Sullivan as a party of the first part, and George J. Bucknall, his wife, William C. Watson, the plaintiff, Elizabeth Anne, his wife, and John C. Davis, parties of the second part, was produced by Watson, and was put in evidence by Sutro. This paper, in our judgment, was the paper, a copy of which was shown by Sullivan to Sutro's attorney at the interview between Sullivan and the attorney, an account of which is given above. We think it was sufficiently identified by the attorney when giving his testimony. Much stress is laid on this paper by counsel for appellant as bearing on the question of notice, and it becomes necessary to examine and consider it. It bears date on the 25th day of April, 1870, soon after the execution of the deed to Connolly, and his trust declaration, and was executed in quadruplicate. Watson had a copy. This paper, after stating the parties of the first and second parts as above set forth, proceeds to witness and declare that, whereas the parties of the second part have, by an indenture executed before this paper, and bearing date the same day, granted, bargained, sold, and conveyed to the party of the first part, Sullivan, all their right and title to three lots in the city and county of San Francisco, bounded southerly by Washington street, easterly by Montgomery street, and westerly by Kearny street, and northerly by a line parallel with Washington street, and distant from it northerly 137½ feet, and the money consideration expressed in said indenture is merely nominal, and it is considered proper, prudent, and just to set forth and declare these considerations referred to in said indenture as good, valuable, and sufficient, moving the parties of the second part to the execution of that indenture; now, this instrument is intended to set forth and declare not only the true nature of the considerations last above mentioned, but also the respective relations of the parties hereto to the above-named lot and other real estate hereinafter described. The instrument just named sets forth the respective interests of the parties named—E. L. Sullivan, Mary Eliza, Elizabeth Anne, and John C. Davis—in the lots aforesaid, describing Mary as the wife of Bucknall and Elizabeth as the wife of the plaintiff, Watson. It recites that the

interests of Mary and Elizabeth and John C. Davis are claimed and owned by devise from their father, John C. Davis, and, falling this devise, by descent, and also by devise, from their mother, Elizabeth Davis, and that any additional title acquired by possession, and by any act of the legislature, or by act of congress, by Sullivan, shall inure to the parties hereto according to their several interests as set forth herein. It is further declared that Sullivan had administered the property aforementioned from 1850 to the date of this instrument, first as agent of Elizabeth Davis, next as executor of her will, and afterwards in his own behalf to the extent of his interest, and as guardian of the said Mary, Elizabeth, and John C. Davis until they attained majority, and since that time as the agent, and throughout that time has rendered his services gratuitously, moved thereto by his love and affection to the parties to the second part, and especially to the said Mary, Elizabeth, and John C. Davis, regarding them as his own offspring, and has improved the said property, and maintained possession thereof, during this administration, has incurred large indebtedness, amounting to about \$350,000, resulting from the expenses of administration of said real estate, the purchase of certain real estate hereinafter mentioned, the education and maintenance of said Mary, Elizabeth, and John C. Davis, the greater part of which indebtedness is secured by a mortgage of the three 50-vara lots above described in said indenture, which mortgage was executed by all the parties to this instrument except John C., who did not join in the execution by reason of his minority; that said John, having become of age, subjects, as between himself and the other parties hereto, his title to the said property to the said mortgage to the same extent as if, being of age, he had joined in its execution, and each one of the parties hereto waives and releases all claim as against each other which either might have or set up against the others by reason of having received more or less of the proceeds of said property heretofore mentioned. The instrument then proceeds to declare that the party of the first part, Sullivan, has acquired during the period of said administration, of the city and county of San Francisco, certain other valuable real estate, described hereinafter, the legal and equitable title of which is now in Sullivan, the party of the first part; and all parties hereto have agreed that all the real estate last above mentioned, so acquired as above stated, and all the said 50-vara lots, shall be deemed to be the property of Sullivan, and of the said Mary, Elizabeth, and John C. Davis, each to have an undivided fourth part thereof, subject to the indebtedness in like proportion, and that the legal title to the same shall be and remain in the party of the first part to facilitate the administration thereof, the sale and other disposal of portions of the whole thereof, the payment and extinguishment of said indebtedness, and finally the partition and division of the same, or the proceeds of the same, or the remainder thereof, at some future day. The foregoing basis of judg-

ment is declared by the instrument as being deemed by all the parties equitable and just, and is the true consideration for the said indenture, and this agreement and said indenture has been executed in pursuance and part performance thereof. The instrument then further states and witnesses, and the parties do hereby declare, that Sullivan "holds" the following described property in trust, and to administer, bargain, sell, convey, mortgage, or otherwise incumber and dispose of the same, or any estate or interest therein, and to discharge out of the rents, issues, and profits, or other proceeds thereof, the aforesaid indebtedness, and all incumbrances now or hereafter to be a lien on the same, and afterwards to make partition or division among all the parties to these presents of all and singular the remainder of said property,—that is to say, to each of the said Mary Elizabeth Bucknall, Elizabeth Anne Watson, and John C. Davis, one-fourth in severalty of said remainder, reserving to himself the other fourth likewise in severalty; and it is expressly declared that all authority and power for the execution of, all and singular, the said trusts, and for the purpose of doing and performing all of the acts and things necessary for the carrying out of the same, is hereby delegated to the said party of the first part by the parties of the second part, and that the authority and power so conferred and delegated, coupled as it is with an interest, is irrevocable. A general power of attorney, irrevocable so far as the property hereinafter described is concerned, and bearing even date herewith, has been executed and delivered by the parties of the second part hereto to the party of the first part, for the purpose of aiding him in executing the power and authority herein and hereby conferred and delegated, and carrying out the intents and purposes thereof." The instrument then sets forth by description the real property "so as aforesaid held in trust by the party of the first part." The three 50-vara lots, and the several parcels of outside lands, are described, and among these a parcel of outside lands is described in the following words: "An interest in another tract of outside lands, known by the name of the 'Byfield Tract,' amounting to fifteen acres or thereabout." This instrument was executed in quadruplicate, and was under seal. It is clearly a deed of conveyance.

The foregoing sets forth all the facts ascertained by the learned gentlemen retained by Sutro in their investigation of the title which the latter desired to acquire by his purchase from Baird. It appears, and is found as a fact, that Sutro had no actual knowledge of any of the foregoing facts on which the question of notice turns. The only notice which he had was that which the law attributes to him from its having been brought to the knowledge of his attorneys. Knowledge, by notice to attorney or counsel or agent, acquired during the negotiation for a purchase, is constructive notice to their principal. If it were otherwise, it would cause great inconvenience, and notice would be avoided in every case by employ-

ing agents. See cases cited in 2 Lead. Cas. Eq. pt. 1, pp. 133, 134. That notice to an agent is notice to the principal has been held in this state ever since *Connelly v. Peck*, decided in 1856, and reported in 6 Cal. 348; followed in *May v. Borel*, 12 Cal. 91; *Stanley v. Green*, Id. 148; *Hunter v. Watson*, Id. 363. See other cases referred to in *Gear's California Index-Digest*, on page 97. Notice to counsel or attorney is constructive notice to client. *Bierce v. Hotel Co.*, 31 Cal. 161, (decided in 1866.) and *Donald v. Beals*, 57 Cal. 399. All these cases in regard to an agent apply to an attorney or counsel, for they are a species of agent. Justice BRADLEY, in the *Distilled Spirits Case*, 11 Wall, 368, states the principle on which the rule rests. "The general rule," says the learned judge, "that a principal is bound by the knowledge of his agent, is based on the principle of law that it is the agent's duty to communicate to his principal the knowledge which he has respecting the subject-matter of negotiation, and the presumption that he will perform that duty." It will be of no avail to the purchaser that the agent omitted to communicate what he ascertained to his principal. *Williamson v. Brown*, 15 N. Y. 359. In other words, one who acts through another will be presumed to know all that the agent learns during the transaction, whether it is actually communicated to him or not. There is no difference in this respect between actual and constructive notice; for, if there were, an agent would be employed whenever it was convenient to remain in ignorance. *Bank v. Davis*, 2 Hill, 451-461. Or, as the reason of the rule was stated by Lord BROUGHAM: "Policy, and the safety of the public, forbid a person to deny knowledge while he is so dealing, as to keep himself ignorant, or so that he may keep himself ignorant, and yet all the while let his agent know, and himself profit by that knowledge." *Kennedy v. Green*, 3 Mylne & K. 699-719. It is plain that the ordinary dealings of men could not be carried on without imperiling the rights of property to a degree which could hardly be conceived, and infinite wrong done to innocent persons, unless the rules above pointed out were established canons of law.

Now, if Baird was an innocent purchaser, Sutro, though he had notice, could not be charged. Equity acts on and charges a person by reason of the obligation which rests on his conscience, and in regard to the duties he owes to others. Baird could only be innocent by reason of the fact that he had no knowledge or notice of Watson's rights which bound him to regard them; and, if he was innocent, his conscience could not be charged, and, through his innocence, Sutro, though aware of Watson's rights, would be discharged. Was Baird, then, an innocent purchaser? We think it is plain he was not, unless he was made so by the provisions of the instrument of the 25th of April, 1870, above fully set forth. It is too plain to admit of argument that he bought with notice of the equity of Watson. He had at least constructive notice, imparted by the record of Watson's deed from Sullivan, executed in

1862, and regularly recorded in December, 1865. When he took the deed from Connolly, in 1871, he must be held to have been aware of the conditions of the title which Connolly had. Connolly was a trustee, and Baird was nothing more when he received the conveyance from the former. As a matter of ordinary prudence, he would have ascertained from Connolly for whom he was trustee, and to whom, as Connolly's grantee, he assumed that relation. He was tenant in common with others. This he must have known. It would be inconceivable to conclude that Baird did not know the purpose of the transaction with Connolly, and that purpose as set forth in a paper executed by Connolly for the benefit of his (Connolly's) grantees, of which Baird was one. Baird was co-tenant with the other grantors, and the transaction with Connolly was made in the interest of himself and his co-tenants. In the transaction, Connolly became a trustee to carry out a desired and declared purpose and intent. It will be the height of fatuity to conclude and hold, when Connolly conveyed to Baird, and put him in his place as trustee, that he did not tell Baird, and Baird did not seek to know, for whom he was to undertake the duties and responsibilities of a trustee. If he did not know, it was his duty to know this when he accepted the position; and certainly it was his duty to inquire when he executed his declaration of trust, in 1872. It cannot be held that he did not know that his trust was co-extensive with Connolly's, and that he became trustee for the same persons. When he accepted the trust, no doubt, he knew that some question might arise as to Watson's title; for the gap here was plainly discernible. That he knew that there was no conveyance from Watson to any one but Connolly, one of the co-owners and *cestuis que trustent*, when he executed his declaration of trust, and put in Sullivan for 15-160 of the trust property, may be justly inferred from what he stated to Sutro's attorney, above quoted. Reference is here made to the conversation with Baird in relation to the declaration of trust, and that Sullivan was the true party in interest when the declaration of trust was made, in consequence of a family arrangement, to which Sullivan and Watson, who was related to Sullivan by marriage, were parties. In any event, Baird, when he assumed the position of trustee instead of Connolly, was bound to know, as a matter of law, that he was trustee for the same parties as Connolly, and that he could not displace one beneficiary, and substitute another in his place, by ignoring the right of the former, and recognizing another as holding his interest. Neither Sullivan nor Baird, nor both together, could so deal with Watson's equitable title as to acquire it from him, and transfer it to another person, without Watson's consent. That Watson could have compelled Baird to convey to him would not have been questioned, and it would have been no defense to Baird that he had recognized Sullivan as the owner of Watson's interest, unless Baird was protected by the instrument above particularly set forth, ex-

executed by Watson and wife with others to Sullivan. On this depends the fact, too, whether Sutro is protected; for neither, though they paid value, is an innocent purchaser, or acquired Watson's title, unless under the provisions of the instrument. If this instrument vested in Sullivan the full legal title to the property in controversy, with power to use and sell it as his own property, and divide the proceeds, giving Watson his share thereof,—that is, with accountability only to Watson for the proceeds,—both Baird and Sutro acquired this title through Sullivan's conveyance to Baird, which would end this litigation. Did this instrument, then, which had all the requisites of a conveyance, pass such a title to Sullivan? Let it be conceded that the words used are operative to carry Watson's interest in the litigated property, if the instrument shows an intent by him to convey, still these words must be limited to the property described in it.

Now, as to this Byfield tract, in which Watson was only individually concerned, (as to other property, it is clear it was owned by his wife,) the words employed confine it to such interest the legal title to which was at the date of the instrument in Sullivan. The paper sets forth that Sullivan, (see the language fully set forth above) during his administration of the property mentioned and described in it, had acquired in the city and county of San Francisco certain other real estate therein described, the legal and equitable title to which was then in him. The fair construction of these words is that they include the real property described in it, in which he held the legal and equitable title, and exclude that in which he did not hold such title. This designates the property with particularity, to which reference is made. As seen above, Sullivan held the equitable title, when this instrument was executed, only to 10-160 of the Byfield tract. Connolly had held by conveyance from him to this extent. By conveyances previous to the conveyance to Connolly, he had transferred to other persons (Watson and another) all except the 10-160. He held this interest under the Connolly trust, which was made in January, 1870; the instrument we are here considering having been made the April following, before any change had been made by the transfer of Connolly to Baird. Sullivan did not have in April, 1870, the legal title to any part of the Byfield tract. It was in Connolly, or more properly in the city and county of San Francisco, under the act of congress of March 8, 1866. If the words are restrained to the property of which he had both the legal and equitable title, this instrument did not transfer any of the Byfield tract, for he had neither the legal nor the equitable title to any portion of it. But the rule to construe deeds, *ut magis valeat quam pereat*, compels the holding that it would pass such interest in this tract of which he held the equitable title. If this is not so, then it may be conceded for the argument that it passed the portion of which the equitable title was vested in him. Then this deeded to Sullivan only 10-160 and not 15-160, and did not

include Watson's interest, of 5-160. Nor is this quantity enlarged by the description of the interest in the Byfield tract given in a subsequent portion of the instrument, where it is spoken of as containing 15 acres or thereabouts. The distinct statement in the instrument referring to certain property acquired by Sullivan during the course of administration, commencing in 1880, the legal and equitable title of which was then in Sullivan, limits the general and indefinite words of description as to the Byfield tract, and the interest which Sullivan had in it. The description of quantity expressed in acres, qualified by the words "more or less," has always been regarded indefinite and general. A purchaser by such description can get no relief on that feature only unless the disparity is so great between the generally declared number of acres, and the actual number, as to be evidence of intentional fraud. That general words in a deed may be restrained by the particularity of recital is an established canon of construction. *Jackson v. Stevens*, 16 Johns. 110; *Shurtz v. Thomas*, 8 Pa. St. 359; *Barnard v. Martin*, 5 N. H. 536; *Woods v. Manufacturing Co.*, Id. 467; *Payler v. Homersham*, 4 Maule & S. 423; *Simons v. Johnson*, 3 Barn & Adol. 175. And the effect of general words confined where the intention to confine it can be collected from the context. *Munro v. Alaire*, 2 Caines, 320; *Wilkes v. Ferris*, 5 Johns. 335; *Smith v. Strong*, 14 Pick. 128; *Woodman v. Lane*, 7 N. H. 241; 2 *Smith, Lead. Cas.* (8th Ed.) 529, notes to *Roe v. Tramarr*. A clear and distinct limitation in a grant is not controlled by other words less clear and distinct. Civil Code, § 1067. Again, the circumstances in which the parties stood, and their knowledge at the time of the state of the title, should be considered in arriving at their intent. When he affixed his signature and seal to this instrument, Watson knew that he had never parted with his equitable title, and Sullivan must be held to have known the same thing. Connolly was then Watson's trustee. Watson was cognizant that his legal title was then in his own selected trustee, and it should be noted that this paper was executed long before the deed was made by Connolly to Baird, or the execution of Baird's declaration of trust.

A purchaser must be held to have notice of everything which appears on the face of the deeds under which he buys. He has constructive notice of what is contained in them, or which is a necessary inference from what is contained in them. 2 *Lead. Cas. Eq. pt. 1*, p. 125. It cannot be limited to the recorded deeds and instruments, for notice is equivalent to registration. Id. 37, 98, 149, 213, 299. Surely no such limit can exist where the deeds and documents relating to the title are shown him. The recitals in a deed, however, to bind the conscience of a purchaser, must be sufficiently clear and certain to convey the requisite information or put him on his guard. A vague, general statement will not operate as notice, whether in a deed or elsewhere. Assaid by WALWORTH, Ch.: "The recital must be such as to explain itself by its own terms, without reference to some deed or circumstance which explains

it, or leads to its explanation." Here the deed refers to property to which at the time Sullivan had the legal and equitable title. This is sufficiently certain. A purchaser was certainly put on inquiry when he and others executed the deed of the 25th of April; and, on seeking information in regard to it, it would have appeared to have been then in Connolly, and limited to 10-160 of the Byfield tract, and included no part of Watson's. This deed was produced to Sutro's attorney. He testifies that he had it in his hands, and read it. He had notice of what was in it; and, though it was constructive notice to Sutro, it bound him. As stated above, notice to an agent in course of a transaction is constructive notice to the principal, and it will not avail the latter to show that the agent failed to communicate to him what he was told. *Williamson v. Brown*, 15 N. Y. 359. This constructive notice, when it exists, is irrebuttable. It is not merely *prima facie* evidence, for then it could be rebutted. It is conclusive against the truth of the fact, as said by GIBSON, J., in *Weidler v. Bank*, 11 Serg. & R. 134: "Constructive notice is not *prima facie* evidence of actual knowledge of the fact; the presumption of notice, when it arises at all, being conclusive even against the truth of the fact."

The cases cited by counsel for defendant as to constructive notice lay down no rule in conflict with those set forth. In the case from 6 Wallace, (*Wilson v. Wall*), it was attempted to charge a purchaser under a patent issued by the United States government in the execution of a treaty made with the Choctaws. The rule approved in the case referred to as to notice, as stated in *Sugd. Vend.* 622, coincides with the rule acted on in this case. "When a person has not actual notice, he ought not to be treated as if he had notice, unless the circumstances are such as enable the court to say not only that he might have acquired, but also that he ought to have acquired, it but for his gross negligence in the conduct of the business in question. The question, then, when it is sought to affect a purchaser with constructive notice, is not whether he had the means of obtaining, and might by prudent caution, have obtained, the knowledge in question, but whether not obtaining was an act of gross or culpable negligence." 6 Wall. 91. In *Carrier v. Town of Shawangunk*, 10 Fed. Rep. 220, an attempt was made to defeat a recovery in an action brought by the holder on certain negotiable bonds purchased for value before maturity. The issuance of the bonds depended on the consent in writing of a majority of the taxpayers of the town. As stated by the court, and as fairly to be gathered from the statute, certain commissioners were invested with the power to decide whether the proper number of taxpayers had consented. No infirmity appeared on the face of the bonds. They recited that they were issued in pursuance of an act of the legislature, and by duly-appointed commissioners. The court held that the purchaser of municipal bonds is charged with notice of the laws of the state which authorized their issue, and of a want of power in the

municipality or its officers to issue them, and that the recitals in the bonds, when held by a *bona fide* purchaser, are conclusive. The recitals protected such a purchaser. To this point the court (United States circuit court, S. D. New York) cites *Coloma v. Raves*, 92 U. S. 484; *Humboldt Tp. v. Long*, Id. 642; *Walnut v. Wade*, 103 U. S. 683. The gist of the judgment is in these words, which conclude it: "Knowledge by the purchaser of municipal bonds before maturity of their invalidity, when there are no marks of infirmity on the face of the instrument, and there is no want of power in the municipality or its officers to execute and issue the bonds, is a question of fact. It being admitted that the purchaser before maturity, for value, had no actual notice or suspicion of any defect, and the bonds in substance reciting a compliance with the conditions precedent which were required by the statute, the arbitrary rule claimed by the defendant, which declares that he did have constructive notice of a defect, does not exist."

In this case it may be said that the marks of infirmity are on the face of the deed. The question is whether Sullivan acquired by the deed of 1870 the equitable title of Watson. A just interpretation of the language of the deed shows that he did not. Sullivan did not have it when he sold to Baird, and Baird could not transfer it to Sutro. A vendor cannot convey that which he has not, nor can a grantee take anything beyond what is conveyed to him. *Caveat emptor* is the rule in all purchases as to the title, unless stipulated to the contrary. The purchaser must see that his grantor has the title which he seeks to acquire. He has the right to call on his vendor to show that he can sell and convey what he proposed to sell and convey, and to which the vendee seeks to acquire an unincumbered legal title in fee; and, if the vendor cannot make such a title, the purchaser has the right to decline the purchase. Whether the attorney turned away, and with gross negligence failed to make inquiry of facts of which he was put on inquiry, need not be considered here. The notice and information of the infirmity of Sullivan's title was given on the face of the papers, and the failure of the attorney to inquire of Watson could not make Sutro an innocent purchaser when the papers furnished him gave him notice of Watson's interest in the land he desired to purchase. The rules as to notice adopted in this case are in accord with the judgments in the two cases referred to above, as cited by counsel. The epithets used as qualifying negligence in the two cases cited are not applicable here, for the reason that the notice was given on the papers furnished to Sutro's attorney. The error fallen into here by the attorney was not one involving negligence in making inquiry as to facts. It was in misinterpreting a written instrument, which is a question of law.

We see nothing in the instrument (the deed of the 25th of April, 1870) which can work an estoppel against Watson. Watson did not deceive Baird or Sutro. This paper was accessible to both of them before they

purchased. If Baird did not see it, it is because he took Sullivan's word for its contents,—that it was a family arrangement which allowed him to do with the land as he chose. Baird had a right to have Sullivan produce it for his inspection. If he did not see it, it was because he did not care to see it on account of Sullivan's representation of its contents. Sutro's attorneys saw it, and read it. Watson did not intend to deceive, and did not deceive, either Baird or Sutro. Without the element of deceit, there can be no estoppel. *Davis v. Davis*, 28 Cal. 40, 41, etc., and cases there cited. Neither party was deceived or injured by the conduct of Watson. Under these circumstances, there can be no estoppel. *Davis v. Davis*, supra.

Some other points raised by counsel for appellant remain to be considered. The contention is made that the plaintiff had not a right to maintain this action; and it is said that this is an action under section 752, Code Civil Proc., which provides that when several co-tenants hold and are in possession of real property as parceners, joint tenants, or tenants in common, in which one or more of them have an estate of inheritance or for life or lives, this action may be brought by one or more of such persons for the partition thereof, according to the respective rights of the persons interested therein. It must be further stated, to present properly the contention of counsel, that the plaintiff in this action must himself hold a legal title to whatever interest he claims in the land of which partition is sought; that, in this case Watson must have a legal title to his estate which he seeks to recover in order to maintain the action. But, if the party has an estate of inheritance, it is sufficient. An equitable estate at common law was an estate of inheritance. The estate is held in trust for the *cestui que trust* will descend, and may be sold and transferred by conveyance. Blackstone, in his second book, (page 337,) uses this language: "The trust will descend, may be aliened, is liable to debts, to executions on judgments, statutes, and recognizances (by the express provision of the statute of frauds,) to forfeiture, to leases, and other incumbrances, nay, even to the curtesy of the husband, as if it was an estate at law." An equitable estate in land is real property, and must descend as in case of intestacy as legal estates. This has been so by the statute ever since this state had an existence. See section 1 of the act of 1850, to regulate descents, etc. Civil Code, § 1384. "Where any person having title to any estate \* \* \* shall die testate as to such estate, it shall descend," is the language of the first section of the Act of 1850. By section 1384, Civil Code, all property, real and personal, shall descend, etc. That equitable estates descend, see *Grover v. Hawley*, 5 Cal. 486; *Everson v. Mayhew*, 57 Cal. 144. In fact, in most cases in this state the difference between equitable and legal estates is of no practical importance. They are both estates originating by law and held under law, and in that sense are legal estates; and, where a court is at liberty to rely on the rule of equity of considering that as done which ought to be done, the differ-

ence between an estate so regarded, and an estate at law, is not worthy of consideration. The mode of administering law in this state, under our jurisprudence, is clearly and admirably stated by CROCKETT, J., in *White v. Lyons*, 42 Cal. 279, in these words: "Under the Code, there is but one form of action in this state; and, if the complaint states facts which entitle the plaintiff to relief, either legal or equitable, it is not demurrable on the ground that it does not state facts sufficient to constitute a cause of action. If the facts stated are such as address themselves to the equity side of the court, the appropriate relief will be granted by the court, sitting as a court of equity. On the other hand, if the facts alleged are purely cognizable in a court of law, the proper relief will be administered in that form of proceeding; but a complaint which states a sufficient cause of action, either at law or in equity, is not demurrable as not stating facts sufficient to constitute a cause of action." See also, *Wiggins v. McDonald*, 18 Cal. 126. In note 3, page 102, of Pomeroy's *Remedies and Remedial Rights*, that learned and able jurist says, in discussing the union of legal and equitable remedies in the same action: "In *White v. Lyons*, Mr. Justice CROCKETT states the general doctrine in a very accurate and comprehensive manner." The object of the Code being to permit but one form of action, in which either or both legal or equitable remedies may be sought, it would be unwarrantable to hold that this did not apply to actions of partition. When a court of equity has once obtained jurisdiction, it will do complete justice by deciding the whole case. As legal and equitable remedies may be sought and had in the same case, especially where they relate to the same subject-matter, we see no reason why the owner of the equitable title may not sue to establish his right, and when so established, if he is a tenant in common, ask for and have a partition of the common estate. As, where the reformation of a deed from mistake or fraud is sought, the plaintiff, he succeeds in procuring the reformation, may sue for and obtain the possession of the land to which the deed relates in the same action, why have two suits when one is sufficient? Equity will not permit litigation by piecemeal, but will determine the whole controversy, so as to prevent future litigation. *Irwin v. Phillips*, 5 Cal. 144; *Ord v. McKee*, Id. 515; *Kile v. Tubbs*, 28 Cal. 431; *McPherson v. Parker*, 30 Cal. 456; *Wilson v. Castro*, 31 Cal. 420; *Quivey v. Baker*, 37 Cal. 472; *Kraft v. De Forest*, 53 Cal. 556; *Cross v. Zellerbach*, 63 Cal. 643; *Dorland v. Cunningham*, 66 Cal. 484, 6 Pac. Rep. 135. The contention we have been considering is not maintainable.

It is urged that the action of the plaintiff is barred by sections 319 and 322 of the Code of Civil Procedure; but, as there has been no adverse possession, this cannot be. There has been no adverse possession by any one of the tenants in common. *Love v. Watkins*, 40 Cal. 569; *Unger v. Mooney*, 63 Cal. 586. Watson was as much in possession as any of the co-tenants; or if possession was had by the trustee, it



was as much the possession of Watson as of the other co-tenants. There was no possession such as to put Watson in inquiry. There was no open repudiation of any trust by Baird, and certainly none ever known to Watson. Watson was certainly ignorant of Baird's declaration of trust, and of Sullivan's conveyance to Baird, until a short time, which was less than five years, before the commencement of this action. The evidence discloses nothing which in any way barred Watson's cause of action.

The court below committed no error in ruling on the admissibility of testimony. We have examined the points in this record made on behalf of defendant, and are of opinion that they are not well taken.

In regard to the motion to dismiss the appeal from the order denying a new trial, from the conclusion reached, it is unnecessary to decide it. We will say, however, that we are inclined to think that this appeal was regularly taken, and the motion should be denied; but we do not wish to be understood as deciding the point.

The power of attorney executed by Bucknall and wife, the plaintiff and wife, and John C. Davis, to Eugene Sullivan, was offered in evidence, on which some stress is laid as authorizing Sullivan's conveyance to Baird; but, as Sullivan does not assume to have acted under this power of attorney in his conveyance to Baird, we do not see that any effect can be given to it in this action. It appears that Sullivan conveyed the property as his own, and not as agent for any one. He claimed to own Watson's interest when he sold and conveyed to Baird. We cannot see anything in this paper to change the conclusion arrived at in this case. Nor does it make any difference that the power of attorney is stated to be coupled with an interest, and irrevocable. If he had acted under it, it should appear that he acted by the procuration of Watson. The record is without error. Order affirmed.

We concur: SHARPSTEIN, J.; Fox, J.

WORKS, J. I concur. An equitable estate may be one of inheritance. If so, and the title is one under which the party holding it is entitled to possession, I am of the opinion that he may maintain an action for partition.

McFARLAND, J. I dissent. I do not think that, under section 752 of the Code of Civil Procedure, an action for the partition of land can be maintained by one who has not title, but has a mere asserted right to compel some one who has title to convey it to the plaintiff. He should establish his claim against the one whom he asserts to be his trustee, and settle accounts with him, before bringing the other co-tenants into litigation. At least, he should be able to aver that he has title to an estate of inheritance for life or for years, in the land. And title, within the meaning of the said section of the Code, is "the means whereby one holds that which he hath" not the right to get that which he hath not. And it has never been held by this court, to my knowledge, that such

an action can be maintained. To allow it would be to invite complicated and unnecessary confusion. Of course, when the owner of an undivided estate rightfully commences an action for partition, all persons claiming liens or equitable rights on or in the estates of other co-tenants are properly made defendants, from necessity; otherwise, one tenant in common, by keeping his share covered by liens and trusts, could deprive his co-tenants of their right of partition. And to this extent only have the decisions gone. I think, also, that, on the merits of the contest between plaintiff and the defendant, SUTRO, the judgment should have been for the defendant, and therefore should be reversed.

VIERA V. DOBYUS. (No. 13,584.)

(Supreme Court of California. May 10, 1890.)

In bank. Appeal from superior court, Lassen county; M. MARSTELLER, Judge.

F. A. Kelley, for appellant. *Shinn & Masten, E. V. Spencer and C. McClaskey*, for respondent.

PER CURIAM. The appeal in this cause must be dismissed, and it is so ordered, for the reason that no properly certified transcript has ever been filed, and the time for filing the same has long since passed.

84 Cal. 165

Ex parte SING AH TONG. (No. 20,693.)

(Supreme Court of California. May 17, 1890.)

SENTENCE—FINES—IMPRISONMENT.

Pen. Code Cal. § 330, provides that any person convicted of gaming thereunder shall be "punishable by fine of not less than \$300 nor more than \$1,000, and shall be imprisoned in the county jail until such fine and costs of prosecution are paid; such imprisonment not to exceed one year." Petitioner, having been convicted thereunder, was sentenced to pay a fine of \$250, and in default of payment to "be imprisoned in the county jail \* \* \* at the rate of one day for each \$1 of fine until such fine is satisfied." Held that, although the sentence seems to be based upon Pen. Code Cal. §§ 1205, 1446, which provide for an imprisonment of not to exceed one day for each \$1 of the fine, which do not apply to convictions under section 330, yet it will be upheld, since it practically means an imprisonment until the fine is paid, not exceeding 250 days, and therefore conforms to section 330, under which a definite term of imprisonment must be fixed.

In bank. On petition for *habeas corpus* to release petitioner from imprisonment upon a judgment of the police court of San Francisco; JAMES LAWLER, Judge.

Joseph Coffey, for petitioner. *Dist. Atty. J. D. Page*, for respondent.

BEATTY, C. J. The petitioner was prosecuted under section 330 of the Penal Code, and convicted of the offense therein defined. It is provided that persons so convicted shall be "punishable by fine of not less than \$200, nor more than \$1,000, and shall be imprisoned in the county jail until such fine and costs of prosecution are paid; such imprisonment not to exceed one year." Pen. Code, § 330. It appears by the return to the writ that judgment was rendered against the petitioner in the following terms, (after reciting the convic-

tion:) "It is ordered and adjudged as a punishment therefor that the said Sing Ah Tong pay a fine of \$250, and in default of payment thereof that said Sing Ah Tong be imprisoned in the county jail of this city and county at the rate of one day for each \$1 of fine until said fine is satisfied." It is argued that this judgment is void because it is evidently based upon the provisions of section 1205 or of section 1446 of the Penal Code, which have been held not to apply to convictions under section 330. *Ex parte Harrison*, 63 Cal. 299. It is true that in the case cited those sections, and the judgment which they prescribe, were held to be inapplicable to convictions of the offense with which the petitioner was charged; and it certainly does appear that the court in pronouncing sentence upon the petitioner had in mind the provisions of section 1205 or section 1446, which are applicable to finable offenses generally, though not to this offense. But it does not follow that the judgment is void merely because it conforms to sections 1205 and 1446. On the contrary, it is only void if it fails to conform substantially to the requirements of section 330; and it happens in this case, in our opinion, that the police judge, though apparently intending to found his judgment upon section 1205 or 1446, has not transgressed the provisions of section 330. The fine imposed is the definite sum of \$250, which is within the minimum and maximum limits prescribed by that section; and imprisonment "at the rate of one day for each one dollar of fine, until said fine is satisfied," may be rationally construed to mean imprisonment until the fine is paid, (there are no costs, not exceeding 250 days. This satisfies all the requirements of the decision in *Ex parte Harrison*, wherein it was merely decided that a judgment in case of conviction under section 330 must prescribe a certain, a definite, term of imprisonment, not exceeding one year, during which the defendant must be confined unless before its expiration he pays the full amount of the fine and costs without any deduction or credit on account of the imprisonment already undergone. Read by itself, there is nothing in this judgment which implies—still less directs—that the petitioner is to be discharged before he has undergone 250 days' imprisonment, unless he pays the full amount of the fine. Read in connection with the statutes, its meaning is equally clear to the same effect. If the complaint of the petitioner was that the law had been strained against him by making his punishment more severe than the legislature intended, and if it appeared that his complaint in that particular was well founded, we should feel no inclination to uphold the judgment by any liberality of construction. But the objection which he urges to this judgment is that it is not severe enough; that whereas it ought to have plainly directed his imprisonment for a whole year unless prior to that time he paid the whole of his fine and costs, it, in fact, limits his imprisonment to 250 days at the utmost, and is so equivocally worded that if during that period he should pay as many dollars of his fine as there remained days of imprisonment to

be undergone, the sheriff might deem it his duty to discharge him. An objection so extremely technical, it seems to us, is fairly met by any construction which the judgment complained of will bear. Writ discharged, and prisoner remanded.

We concur: MCFARLAND, J.; FOX, J.; SHARPSTEIN, J.

#### TERRITORY V. DELINQUENT TAX-LIST.

(*Supreme Court of Arizona*. April 18, 1890.)

#### TAXATION—VALUATION—DEBT SECURED BY MORTGAGE.

1. Real estate must be assessed for purpose of taxation at its full value, and the amount of a debt secured by a mortgage thereon cannot be deducted therefrom.

2. A debt due a non-resident of this territory from a resident of this territory, although secured by a mortgage upon real estate situated in this territory, is not subject to taxation in this territory.

(*Syllabus by the Court.*)

Appeal from district court, Gila county; PORTER, Judge.

*Clark Churchill*, Atty. Gen., and *J. B. McCabe*, Dist. Atty., for appellant. *Baker & Campbell*, for appellees.

SLOAN, J. This is an appeal by the territory from the judgment entered in the district court of the county of Gila in the action to enforce the collection of the delinquent taxes of said county for the year 1888, so far as the judgment pertains to the taxes of L. J. Webster and E. P. Monroe, appellees herein. Webster was assessed the full value of lot 1, block 86, in the town of Globe, upon which lot there was a mortgage to secure a note held by E. P. Monroe as executor, the face value of which note was \$2,000. The court below, upon the objection of Webster, deducted the amount of the mortgage from his assessment. This is error, as the lot was properly assessed for its full value, and no deduction should have been made by reason of the mortgage. This error was confessed by counsel for Webster at the hearing of the case in this court. The note secured by the mortgage on Webster's lot was assessed to Monroe as executor. Monroe objected in the court below to any judgment against him upon the ground that he is a resident of the state of California, and upon the further ground that the estate, of which, as executor, he holds said note, is under the jurisdiction of the superior court of the city and county of San Francisco. The court found for objectant, and entered judgment in his favor. We find no error as to this part of the judgment. A mortgage has no existence independent of the debt which it secures. In this instance the thing sought to be taxed was a debt due from a resident of Arizona to a resident of California, and was evidenced by a promissory note. The note being of that species of property which pertains to and follows the person of the holder, its *situs* for the purpose of taxation could only be at the place of residence of the owner. This is so well settled that we need only to cite the following cases: *Commissioners v. Cutter*, 3 Colo. 350; *People v. Eastman*, 25 Cal. 602; *Railroad Co. v. Pennsylvania*,

15 Wall. 300. The judgment against the territory in favor of E. P. Monroe is affirmed, and the judgment in favor of L. J. Webster is reversed, with instructions that the court below enter its judgment against him for the full amount of taxes sued for.

WRIGHT, C. J., and KIBBEY, J., concurring.

TERRITORY v. MEYER.

(Supreme Court of Arizona. April 19, 1890.)

EMBEZZLEMENT—EVIDENCE—ADMISSIONS—INSTRUCTIONS.

1. The defendant was agent of an express company, and as such received into his hands money belonging to the company. It was his duty to send to the principal office weekly reports of the money-order business of his local office, accompanied by amount due the company. The defendant was indicted for embezzlement of \$5,800 of the funds of the company. The embezzlement was alleged to have occurred on 15th April, 1889. It appeared that defendant had correctly reported the money-order business up to that date. It appeared, however, that the reports were delayed by defendant. Evidence of the disposition by defendant of money-orders of the company for his own use prior to that date was admitted. *Held*, not error, as it tended to connect him with the subsequently discovered deficit.

2. Statements made out by clerk of the defendant, under his direction, in the usual course of the business of the office, relating to the business of the office, placed on defendant's desk, and his attention called thereto, are competent as admissions by the defendant of the contents of the statements.

3. Where an express agent uses money orders which, under his employment, he has authority to issue to customers upon receipt by him of the amount denoted on the face thereof, such receipt being expressed in the money order, for the payment of his individual debts, he will not be heard to say he did not receive such money; and it is not error to refuse to instruct the jury, upon the trial of a charge for the embezzlement of money, that in such case the defendant cannot be convicted.

4. The defendant asked the court to instruct the jury that, if defendant was agent of the express company, and was entitled to 10 per cent. of the proceeds of the office as compensation for his services, then in that event he was a part owner of such proceeds, and could not be convicted for a conversion even of the whole of such proceeds. *Held*, that the instruction was properly refused.

(Syllabus by the Court.)

Appeal from district court, Maricopa county; JOSEPH H. KIBBEY, Judge.

C. F. Ainsworth, Edwards & Buck, and Frank Baxter, for appellant. Frank Cox, Dist. Atty., and Mr. Street, for appellee.

SLOAN, J. The defendant, A. Leonard Meyer, was tried at the October term, 1889, of the district court of Maricopa county upon an indictment charging him with having, as the agent of Wells, Fargo & Co., embezzled from the company the sum of \$5,800. The jury returned a verdict of guilty. Defendant moved for a new trial, which was denied. From the judgment of conviction, and the order denying a new trial, defendant appeals. The proof shows that Meyer was the agent of Wells, Fargo & Co., a corporation, and as such agent had general charge of the express and money-order business of the company at Phoenix, Ariz. He was allowed a

commission upon the freight business of the office, and was entitled to the amount due him, no matter where collected, at the end of each month, when he settled with the company. He was also allowed a small commission upon the amount of money orders sold by him. He received no other compensation. It was his duty to send into the general office of the company at San Francisco weekly reports of the money-order business done, with the amounts due the company, and at the end of each month to make a report of the freight business done through the office, and send in the amounts of receipt therefrom after deducting his commissions. At the trial the prosecution was permitted to show that between March 12 and April 15, 1889, Meyer disposed of certain money orders of Wells, Fargo & Co. to various persons, some in payment of individual debts, and others for the purpose of raising money thereon for his personal use. Counsel for the defendant objected to the introduction of this evidence upon the ground that the same was immaterial and irrelevant, for the reason that these money orders had been disposed of prior to April 15th, when it was admitted that the money-order business had been correctly reported by Meyer up to said date. It appeared in proof, however, that the money-order reports up to and including the one for April 15th were not sent in when due, but were retained by defendant for days after they should have been forwarded; and for this reason we think the evidence was admissible as tending to connect defendant with any shortage in the office after April 15th.

Counsel for defendant urge that the court erred in admitting over objection certain statements not in the handwriting of defendant, showing the business of the office for the month of April and part of the month of May, being the time in which it is claimed by the prosecution that the shortage in Meyer's accounts with the company occurred. These statements were made out by one P. B. Yates, who was a clerk in the employ of Meyer. According to the testimony of Yates, it was his duty to make out the reports and statements of the business of the office, and that Meyer had always settled with the company from them; that the statements introduced in evidence were made out by him under Meyer's instructions, and were left by him upon Meyer's desk in the office, for Meyer's inspection; that these remained there until Meyer left Phoenix, in May, and that during this time Meyer was frequently in his office, and at his desk; that, just before Meyer left Phoenix, his attention was called to the fact by Yates that these statements had not been sent into the general office of the company. We think that the evidence is sufficient to show that Meyer had a knowledge of the contents of these statements; and, having been made out by his direction, they were properly admitted as admissions by defendant as to their contents. We have carefully considered the instructions given by the court; and, although one or two of them are open to criticism if considered apart from the others, the instructions as a whole are sufficiently ex-

plicit, and very fully state the law of the case.

A number of instructions were asked for by the defendant which were refused by the trial court. Two of these present questions of some interest and importance. The first of these, numbered 6, reads as follows: "The defendant is charged in the indictment with fraudulently appropriating and embezzling money, and under this indictment he cannot be convicted of embezzling money orders. If the jury should believe from the evidence that the defendant used certain orders in the payment of his private debts, and that he did not actually receive the money for them, then in that event he could not be convicted under this indictment for the embezzlement of those orders." The money orders referred to in the instruction were money orders of Wells, Fargo & Co. These were in form, and purported upon their face to be, receipts for money by Meyer, as the agent of the company, to be repaid to the holders by the company, at any of certain designated offices of the company, when presented. They were all paid by the company to the holders. In legal effect, the disposition of these money orders by Meyer in payment of his debts amounted to a payment to him of the money they called for, and he is estopped from denying its receipt.

The ninth instruction asked for by defendant is as follows: "The jury are instructed that, if they believe from the evidence in this case that the defendant was the agent of Wells, Fargo & Co.; that he received for his services a commission of ten per cent. of the net proceeds of the earnings of the office at Phoenix,—then in that event he would be a part owner of the net proceeds, and he could not be convicted of the crime of embezzlement should he convert the whole of the earnings to his own use." The indictment in this case was evidently drawn under section 788 of the Penal Code. This section was meant to apply to persons occupying fiduciary relations, such as public officers and officers and agents of corporations public and private. To sustain a conviction under this section, three facts must be shown: (1) The trust relation; (2) the possession or control of property by virtue of the trust; and (3) the fraudulent appropriation of the property not in the due and lawful execution of the trust. If an agent of a corporation authorized to carry on a business for his principal receives a commission upon the proceeds of the business, he is still a trustee for the use of his principal as to the remainder, and has in his possession property by virtue of his trust. In this case, Meyer was required to send at stated intervals the amount of the receipts of the office less his commission. These amounts, at least, he held in trust for the corporation, and it was these which constituted the subject-matter of the embezzlement.

The cases cited by appellant's counsel were cases applying to persons occupying different relations to that of Meyer, and were under different statutes, and hence have no bearing upon this case. The evidence is, we think, sufficient to sustain the

verdict. The judgment and order must be affirmed, and it is so ordered.

WRIGHT, C. J., and KIBBEY, J., concurring.

#### SATTERWHITE v. MELCZER.

(*Supreme Court of Arizona. April 18, 1890.*)

BANKS—CHECKS—EXECUTION—LEVY.

1. A bank is not liable to the holder of a check drawn upon it by a general depositor for its refusal to pay the check, though the bank has sufficient funds of the drawer wherewith to pay it.

2. Section 2, Act 1889, p. 37, provides that executions out of district court shall be directed to the sheriff of the county, repealing the provision of Rev. St. 1887, that it might be issued to a constable. Therefore, levy by constable of such execution is unauthorized and invalid. WRIGHT, C. J., dissenting.

3. To constitute a valid levy upon money, the officer must reduce same to possession. WRIGHT, C. J., dissenting.

(*Syllabus by the Court.*)

Appeal from district court, Pima county; WILLIAM H. BARNES, Judge.

Maxwell & Satterwhite, for appellant. Hereford & Hereford, for appellees.

KIBBEY, J. On the 24th of March, 1889, the appellees were copartners in the banking business at Nogales, Ariz., and had on general deposit, in the ordinary course of their business, \$1,233.91, the money of one Morgan R. Wise. On that day, James Speedy, a constable of district No. 18 of Pima county, had in his hands an execution issued on a judgment rendered in the district court of Pima county, in favor of J. C. Waterman, against F. M. Vernon, S. B. Wise, and Morgan R. Wise, for \$506, upon which there was due that amount, and accrued interest and costs. On the 25th of March the constable, as he testifies, levied upon \$1,233.91 belonging to Morgan R. Wise, the same being held under an injunction issued out of the district court for Pima county; also notifying Melczer & Co. that, if that injunction was dissolved, that execution would hold good. This the constable says, in response to a question asking him to detail all the circumstances of the service of the execution, was all he did. The officer did not take possession of the money. The constable indorsed upon the execution his return, which is as follows: "I hereby certify that I received the within execution on the 24th day of March, 1889, and served the same on the 25th day of March, 1889, by levying upon \$1,233.91 in the hands of Wm. Melczer & Co., at Nogales, Pima county, A. T., belonging to the within-named defendant, Morgan Wise; the above being amount under attachment and suit pending in district court, Pima Co., A. T. [Signed] JAMES SPEEDY, Constable, Precinct No. 18." The execution was dated 20th March, 1889, and was returnable within 90 days. Nothing more was done under the writ. On the 7th day of June, 1889, Morgan R. Wise signed and gave to the appellant a check upon appellees for \$642. On the 24th of June, 1889, the check was presented to appellees for payment, which was refused because of the levy, if levy it was, of the Waterman execution. Wise had at that

time a credit of \$642 with Melczer & Co. On the 26th of June, 1889, appellant began suit against appellees for \$642. There was a trial by the court, and finding and judgment for the appellees.

This case presents some anomalous features. The complaint alleges that on 24th of June, 1889, the appellees were indebted to appellant in the sum of \$642.50; that on said day said sum of money was on deposit in appellees' bank, subject to appellant's order, and was due the appellant, and unpaid; and that appellant on said day drew on appellees, and payment was refused. The complaint is insufficient to constitute a cause of action upon the theory of plaintiff. The only legal inference to be drawn from it is that appellant had deposited \$642.50 with appellees, and that appellees refused to honor his check for that sum. But the facts disclosed upon the trial, and before stated, negative any such inference. The trial proceeded upon the theory, without question, that appellant, as holder of a check drawn by Morgan R. Wise for \$642.50 upon appellees, had a cause of action against appellees for their failure to pay the check upon presentation. It is not pretended that appellees accepted the check, or did any act equivalent to an acceptance. A bank is not liable to the holder of a check drawn by a general depositor for its refusal to pay the check, though the bank has sufficient funds of the drawer to pay the amount called for. *Bank v. Millard*, 10 Wall. 152; *Bank v. Whitman*, 94 U. S. 343; *Aetna Nat. Bank v. Fourth Nat. Bank*, 46 N. Y. 82, and numerous other cases. And especially would the bank be not liable for its refusal to pay the check under circumstances, such as those that existed in this case, where it must determine between the rights of rival claimants. It is unnecessary for us to proceed further to consider the question raised and discussed by counsel in their briefs. Two points, however, we will notice, as they may again arise in subsequent proceedings. Appellant contends that the levy of the execution was insufficient (1) because it was addressed to, and served by, an officer unauthorized thereto by law; (2) that the money levied upon by the officer was not reduced to possession by him.

Section 2, Acts 1889, p. 37, prescribes specifically that the execution must be directed to the sheriff of the county where it is to be served. This repeals the provision in the Revised Statutes of 1887 that the execution might be directed to the sheriff or any constable of the county. Appellees argue that the mention of the "sheriff or other officer" in other parts of the act of 1889 evinces the intention of the legislature not to repeal the provision in Rev. St. 1887. The "other officer" referred to in the act of 1889, we think, refers to the provision of section 512, Rev. St. 1887, which designates other officers who shall perform the duties of sheriff in case of his disqualification by reason of interest. The attempted levy was insufficient. The money, to have constituted a valid levy, must have been reduced to possession by the officer. This is expressly required by statute. Clause 2, § 9, Acts 1889, p. 39. Appellees contend

that the acts of the officer constitute a levy upon a debt due Morgan R. Wise. We think clearly not. The fact that the bank was a simple debtor of Wise, and that Wise had no specific money in the hands of the bank as bailee, cannot now operate to give a different effect to the acts of the officer. It simply shows that the officer was mistaken either as to the facts, or in the matter of his duty.

There are other questions presented, but, for the reason first stated, the judgment must be affirmed; and it is so ordered.

SLOAN, J., concurs.

WRIGHT, C. J., (*disenting*.) On the 20th day of March, 1889, J. C. Waterman, obtained from the clerk's office of the district court of Pima county, Ariz., an execution against F. M. Vernon, S. B. Wise, and Morgan R. Wise, members of the firm of Vernon, Wise & Co. Said execution was directed to the sheriff or any constable of said county. Subsequently, and on the 25th day of March, one James Speedy, a constable, made a levy of said execution, and made thereon the following return: "Territory of Arizona, County of Pima—ss.: I hereby certify that I received the within execution on the 24th day of March, 1889, and served the same on the 25th day of March, 1889, by levying on \$1,233.91 in the hands of William Melczer & Company, at Nogales, Pima county, A. T., belonging to the within-named defendant, Morgan Wise; the above amount being under attachment, and suit pending in district court, Pima county, A. T. JAMES SPEEDY, Constable, Precinct No. 18." On the 7th day of June following, the said Morgan R. Wise drew a check in favor of the appellant on Melczer & Co. for the sum of \$642, which was presented at their bank in Nogales for payment on the 24th day of June, 1889. Payment thereof was refused, however, by the appellees, on the ground that the amount due Wise in their bank had been levied upon by virtue of Waterman's execution. Now, it is not disputed that James Speedy was a constable in Pima county; but it is contended that, as such, under our execution law of 1889, he could not make a valid levy on an execution issued from the office of the clerk of the district court of that county, although the execution was issued to the sheriff or any constable of the county. We do not think this position tenable. True, section 2 of the execution law of 1889 does provide that the writ of execution shall be in the name of the territory, shall be subscribed by the clerk, sealed with the seal of the court, be directed to the sheriff of the county where it is to be served, etc. The learned counsel for the appellant contend that this was clearly an intentional change of the law; the purpose of the legislature being to restrict the clerk to the sheriff only in issuing executions. But we think not. The whole act must be construed together, and, if possible, all the sections thereof be made to harmonize, and each be vital. Now, section 3 of the same act provides that "the execution may be made returnable, at any time not

less than ten nor more than ninety days after its receipt by the sheriff or other officer to whom directed, to the clerk of the court issuing it. When the execution is returned the clerk must note on the judgment book the amount made by the officer," etc. Again, section 12 of said act provides that "the sheriff or other officer must execute the writ against the property of the judgment debtor," etc. "The judgment debtor may point out to the levying officer such property as he may wish to be levied upon; and, if the officer deems the same sufficient," etc. If the legislature had intended that the sheriff only could levy an execution issued by the clerk of a court of record, would they have used the phrase "or other officer?" To say that the clerk can issue his execution to none but the sheriff is to make this phrase utterly meaningless. Chapter 2, Rev. St. 1887, was not repealed by the execution law of 1889. By that chapter, constables are empowered, and it is thereby enjoined upon them as an imperative duty, to serve and return all process in their counties directed or delivered to them by the justice, or any other competent authority. Ordinarily the sheriff occupies about the same relation to the courts of record that the constable does to the justice of the peace courts. Ordinarily the clerk would direct his execution to the sheriff, and ordinarily the justice of the peace would issue his to the constable; but it does not follow that the one might not also be directed to the sheriff, and the other also to the constable, as well. It is the validity of the execution that lends force to the levy, rather than the manner of making it. These statutes are held to be mostly directory. See *Blood v. Light*, 38 Cal. 649; *Smith v. Randall*, 6 Cal. 50; *Webber v. Cox*, 6 T. B. Mon. 110. Of course, we do not mean that the requirements of the law must not be substantially complied with. It is our opinion, however, that there was statutory authority for issuing the execution to the sheriff or constable, and that the constable was competent to make the levy.

In the next place, it is urged by the appellant that, as the 90 days had expired within which the execution had to be returned under the statute of 1889, it had become *functus officio* before appellant presented his check to the appellees' bank for payment, and that, as several months had elapsed after the return of said execution, without sale, before this cause was tried below, therefore, if there had ever been a valid levy on any property upon which said execution could have become a lien, it (the lien) would have expired by operation of law long before the trial. We are unable to concur in this view. In one sense, after the return-day of an execution, it does become *functus officio*,—i. e., the officer could not make a new levy under that writ, but otherwise the execution still has virtue; and though, if it ever had been, it would then cease to be a lien upon any property not levied on, still, if there had been a valid levy thereon, on property subject to execution, does not the lien created thereby continue vital notwithstanding the return-day may have

elapsed, and the execution have been returned without sale? And is it not true that after the return-day of the execution the officer could proceed to force the levy made by virtue of it, by making a valid sale of the property levied on, even without the assistance of a *venditioni exponas*? From its frequency, it was once supposed that this writ was necessary to authorize the officer to make the sale, but such was not the case. Such a writ was never essential to empower the officer to make the sale. It was, and may now sometimes be, requisite to compel him to do so. There are many reasons that make this a salutary rule. Suppose the officer receives an execution, and, though he uses the utmost diligence, he is unable to find property subject to its levy until five days before the return-day thereof. He cannot sell without giving 10 days' notice of sale. He would therefore be compelled to return his execution without sale, although he had made a levy when the execution was vital. Will it be seriously contended that he could not still proceed, and make a valid sale, with or without a *venditioni exponas*?

Mr. Freeman, in his work on Executions, says: "Notwithstanding the return of the *feri facias*, he [the officer] could sell the property levied on as well without as with a *venditioni exponas*. If he was willing to proceed, the issue of this writ was a clear superfluity." Section 58. And further the same learned author says: "The effect of a sale under a *venditioni exponas* is the same as though the sale had been made under the original writ before the return-day. The purchaser can obtain no better nor greater title than would have passed under the original writ; but, on the other hand, the lien of the original writ, and of the levy thereunder, continue under the *venditioni exponas*, and confer as ample a title as could have been transferred under and by virtue of the original liens." Section 60. "If a levy be made under an execution, the officer thereby obtains a special property in the goods levied upon. He may retain possession, and make a sale after the return-day of the writ." At common law a *feri facias* was a lien upon the personal property of the defendant from the time of its teste. This rule was modified by statute 29 Car. II. c. 3. This statute made the execution a lien from the time it was delivered to the officer, and he was required to note on the writ the time of its reception. Our statute also contains this requirement; but perhaps there is no good reason therefor, as, under the laws of this territory, an execution is clearly no lien upon the personal property of the defendant until the time of the levy thereof. Indeed it seems to us not quite accurate to say the execution is ever a lien. At least, it seems more logical to say that the function of an execution that has been levied upon personal property is to attach the lien of the judgment, upon which said execution is based, and without which it would have no virtue, to the property levied on. From the perishable and transitory nature of personal property, and other conditions attaching to it, the law contemplates that execution sales thereof be

brief and less formal than such sales of real estate; but there are many things that operate to excuse delay, or at least that will prevent the defeat of the levy. Where an injunction is served after levy and before sale, even though much time might elapse before dissolution of the injunction, yet when dissolved the original writ and levy would hold, and defeat any intermediate adverse levies; or where a party asserting an adverse right to the property levied on commences legal proceedings so immediately after the lapse of the return-day of the writ as to preclude a sale, and in this manner places the property again *in custodia legis*. In the case at bar the return-day of the writ was on the 24th day of June, and the appellant commenced his suit on the 26th of June; and hence we do not think that the presentation of appellant's check at the bank of appellees the day after, nor the commencement of the suit two days after, the return-day of the execution, defeated the lien attaching by virtue of the levy thereon. But the most earnest contention of appellant's learned counsel is that the levy herein was invalid because, being upon personal property, the same was not taken possession of by the officer levying. This was generally the common-law rule, but there are many exceptions and modifications innovated by statutes. Perhaps every state and territory in the Union has statutory provisions modifying this rule to a greater or less extent. Arizona has a statute of this kind; and we are quite willing to admit, after a careful examination, that it goes to the verge of extremity in authorizing the levy and sale of interests in personalty not in possession. Indeed, we think it goes further than any statute of the kind of which we have any knowledge, and yet we are not prepared to say it is not a wholesome and effective statute. It is far-reaching, and leads into some unbeaten tracks. It practically does away with the old mode of garnishment proceedings after judgment. Counsel say that the deposit of money by Wise in appellees' bank made them simply his debtor, and that the only way the debt thereby created could be reached was by garnishment proceedings. The statute of 1889 imports quite the contrary. Section 3 of that statute says: "Debts and credits, choses in action, and all other property, both real and personal, or any interests, legal or equitable, or either real or personal property not capable of manual delivery, may be levied upon and sold under execution." Subdivision 2 of section 9 of said statute then provides that a levy upon the interest of the defendant in personal property to which he is not entitled to the possession is made by giving notice thereof to the person entitled to the possession, etc. Then section 18 provides that "the officer making sale of any personal property not capable of manual delivery shall execute and deliver to the purchaser a certificate of sale, which certificate shall convey to such purchaser all the right which the debtor had in such property on the day the execution was levied." Why is this not preferable to the old mode of garnishment proceedings after judgment, in reach-

ing a debt due the defendant? It is certainly more speedy, direct, and less expensive. Besides, it has a lien more effectual and immediate. At all events, it is the law of this territory. Again counsel say: "There is but one way that a debt can be levied upon and taken for the satisfaction of a judgment, and that is by garnishment proceedings." But we have seen that our statute says there is another way,—by levying an execution upon the debt, selling it, and executing to the purchaser a certificate of the sale; and the statute says this certificate of sale conveys to the purchaser all the interest of the defendant in the debt. Suppose in this case there had been a sale; that A. had been the purchaser, and the officer had delivered to him the certificate of sale. Would not said certificate, by force of this statute, have subrogated him to all the rights and interests of Wise in the debt thus levied on and sold? And would not the same results follow if the sale should hereafter be made?

But there is another mode provided by statute for taking a debt in satisfaction of a judgment. This is found in paragraph 1950 of the Revised Statutes, (execution law of 1887, section 70,) which is not in conflict with the law of 1889; and it was not, therefore, repealed by it. That paragraph reads: "After the issuing of an execution, any person indebted to the judgment debtor may pay to the sheriff the amount of his debt, or so much thereof as may be necessary to satisfy the execution, and the sheriff's receipt shall be a sufficient discharge for the amount paid." And the concluding paragraphs of that statute provide still another mode of taking a debt in satisfaction of a judgment, viz., where, after the issuing or return of an execution, the judge is satisfied that any person is indebted to the judgment debtor in an amount exceeding \$50, he (the judge) may require such person to answer concerning the same, and then may order the amount found due the judgment debtor to be applied in satisfaction of the judgment. And it is to be observed that, after the return of the execution by the constable in the case at bar, the appellees filed their answer in court, admitting they had in their hands \$642 of money belonging to Morgan R. Wise, that the same had been levied on an execution against Wise, and that they had paid the same into court, and asked to be discharged, etc.

Something has been said about the return of the constable on the execution showing that it was money, and not a debt, that was levied upon; but we think the language of that return makes the legal inference inevitable that it was simply a debt due to Wise upon which the officer made his levy. He levied upon a debt due to Wise which had accrued by virtue of a deposit made by him in appellees' bank. That deposit created a debt, and nothing more. The return says the constable levied upon so much money in the hands of appellees belonging to Morgan R. Wise. The return may be inartistic, and may not very accurately express the facts as to what the officer did; but in this regard the return could be amended at any time. The law will not allow a mere de-



fective return, made by an officer unskilled in technical forms, to inure to the disadvantage of a plaintiff in an execution. We think, however, the return is in substance sufficient, its import being apparent. We are certain the facts are. The appellant ought not, therefore, to complain.

We are satisfied that substantial justice was done in this case. True, the record would seem to indicate that Morgan R. Wise was quite heavily indebted to appellant; and we infer from this record that Mr. Wise possessed the virtue of being quite liberal in the allowance and payment of attorney's fees, for the record also shows that appellant had received considerably over \$4,000 of that large indebtedness from the bank of appellees on checks drawn in his favor by said Wise. It was only the last check drawn by Wise in favor of appellant that appellees refused to pay, and this for the reason that what was due Wise from them then had been levied on the execution in favor of Waterman. This was a legal excuse, as we think that levy was valid. Let the judgment be affirmed.

#### LASHUS V. CHAMBERLAIN.

(Supreme Court of Utah. June 3, 1890.)

#### GOOD-WILL—BREACH OF CONTRACT—SPECIAL DAMAGES—EVIDENCE.

1. In an action for breach of contract not to engage in the hotel business, no special damage being pleaded, evidence may be received that the defendant did business in a manner calculated to divert trade from the plaintiff, who had been making large profits, and that after the opening of the new hotel his customers began to leave him, and from that time he carried on his house at a loss.

2. An objection on the ground of failure to plead special damages is waived if not made when the evidence is offered.

Appeal from district court, first district; H. P. HENDERSON, Judge.

M. M. Kaighn and E. M. Allison, for respondent. James M. Kimball and J. G. Sutherland, for appellant.

ANDERSON, J. This is an action for damages for breach of contract, whereby the defendant, in making a sale to plaintiff of a hotel in Ogden, known as the "Chamberlain House," agreed with the defendant not to engage in the hotel business again in Ogden as long as the plaintiff continued as proprietor of the Chamberlain House under that name and style; which contract, it is alleged, the defendant violated by opening another hotel, within a short time, in close proximity to the Chamberlain House, and directing custom and patronage therefrom to the hotel kept by himself. The cause was tried to a jury, and plaintiff obtained a verdict and judgment for \$5,000. There was a motion for a new trial, which was overruled, and the appeal is from the judgment and from the order denying a new trial. The only errors complained of in this court in argument are that the verdict is not supported by the evidence, and that the damages are excessive, or, to use the language of appellant's counsel in their printed brief: "The sum of the errors relied on is that the verdict, beyond nominal dam-

ages, is excessive." It is contended by counsel for appellant that the complaint does not state a cause of action for more than nominal damages; that no special damages are alleged; that the names of the persons whose patronage was lost to plaintiff by the act of the defendant are not given; and that as the proof cannot go beyond the allegations, nothing beyond nominal damages can be proved under it. The complaint alleges that on the 14th day of August, 1881, plaintiff purchased the hotel from the defendant, known as the "Chamberlain House," and has since then continually kept and operated the same in accordance with his agreement with the defendant, and has performed all the conditions of said agreement on his part to be performed, and that the defendant, as a condition of such purchase, agreed in writing not to again engage in the hotel business in Ogden City, Utah, as long as plaintiff should conduct said hotel under the name and style of the "Chamberlain House." The complaint then states that on or about the 1st day of September, 1882, "said defendant, acting by himself and in connection with others, did erect and furnish in said city of Ogden, and within one square of said original Chamberlain House, a large and commodious hotel building, and has continuously ever since conducted the same as an hotel, and therein lodged, entertained, and fed customers and boarders, and advertised the same, and solicited custom and patronage therefor at the trains, depot, and other places in and about said city of Ogden, and thereby diverted and drew away from plaintiff guests, customers, and patronage that would otherwise have come to plaintiff's hotel; that by reason thereof plaintiff has been injured and damaged in the sum of \$10,000." On a former appeal of this case this court used the following language in regard to the character of the evidence that might be offered in support of the claim for damages, to-wit: "Any legitimate evidence tending to prove or disprove such damage may be given. The plaintiff should not be required to name any particular person who may have been induced to withhold his patronage and to give it to the defendant; any diminution of receipts to plaintiff after the opening of the new house, and any diversion of patronage thereto; \* \* \* the extent of business done by each; and any competent fact or circumstance which may afford an inference of damage to plaintiff's business from defendant's breach." 13 Pac. Rep. 363. The district court instructed the jury in substantial conformity with the above rule. The evidence introduced by plaintiff, without objection by defendant, tended to show that the defendant had kept the Chamberlain House for a number of years before the sale; that, in about a year after the sale of the hotel to plaintiff, defendant begun the erection of a new hotel within less than a square of the Chamberlain House, and on the same street, and that he opened it for business about the last of November, 1882, a period of about 15 months after plaintiff took possession of the Chamberlain House; that within

that time plaintiff had done a thriving business, his net profits amounting to about \$10,000, and he had found it necessary to increase the capacity of the house; that immediately after the opening of the new hotel by defendant plaintiff's customers began to leave him and transfer their patronage to the defendant; that the defendant's hotel was named the "Central House," but he put no name on the building, nor any sign in front thereof, for about one year after he began business in it, and that those engaged in running hacks and carriages for him between the "Central House" and the railroad depot solicited patrons at the depot for the Central House by calling out to travelers and others, "New Chamberlain House," "The Chamberlain House," "Chamberlain Hotel," etc., and took the customers thus obtained to the Central House; that by reason of this wrongful conduct of the defendant the patronage of the Chamberlain House continued steadily to decrease until its business amounted to little or nothing, while the business of the Central House as steadily increased; that from the time defendant began keeping the Central House, in November, 1882, to April, 1888, when defendant quit keeping his hotel, plaintiff's loss in carrying on the hotel business in the Chamberlain House from loss of patronage amounted to \$6,150.

Special, as contradistinguished from general, damage is that which is the natural, but not the necessary, consequence of the act complained of, and generally must be specially alleged in order to entitle a party to prove the same, and in order that the defendant may be apprised of the claim and be prepared to meet the charge with any proper defense he may have. But proof of special damage, when only general damage is averred, if not objected to when offered, cannot be ruled from the jury by an instruction, after the evidence in the case is closed, and furnishes no ground for a new trial. Unless the objection is made when the evidence is offered, it is deemed to be waived. *Roberts v. Graham*, 6 Wall. 578; *Mosherv v. Lawrence*, 4 Denio, 421; *Lawrence v. Barker*, 5 Wend. 305; *Newberry v. Lee*, 3 Hill, 523. In *Roberts v. Graham*, above referred to, *Graham*, who was the plaintiff in the court below, sued *Roberts* on a contract whereby *Roberts* agreed to transport him and his wife and child, as first-cabin passengers, from New York to San Francisco, and to furnish them suitable accommodations, etc., on the way, which, it was alleged, he not only failed to do, but, on the contrary, overloaded the steamer which carried them from Panama to San Francisco with a greater number of passengers than she could suitably accommodate, and that by reason thereof "the plaintiff and his wife and child were subjected to great inconvenience and injury." The plaintiff testified that he became ill by reason of the exposure on the steamer in not having sufficient bedclothing; "that bedclothing had been furnished him, but that he was compelled to deprive himself of it in order to supply his child, which child had not been furnished with a berth or

bedclothing." After the evidence was closed, the defendant's counsel asked the court to instruct the jury that in assessing the damages, by reason of the sickness of the plaintiff during the voyage, they must exclude from consideration sickness arising from the want of sufficient bedclothing on the steamer, because there was no allegation in the complaint on which to base a recovery for such injuries. The court refused to give this instruction, and charged the jury that plaintiff was entitled to recover damages for his sickness if they found it was caused by such exposure and want of sufficient clothing or covering for his berth. On appeal this ruling was affirmed by the supreme court of the United States, that court holding that the sickness of the defendant, by reason of his exposure on the steamer, was not special damage within the rule of pleading on that subject, and that, if it was, the right of the defendant to object to a recovery on that ground was waived by his failure to object to the evidence when it was offered. The court, in its opinion, refers to the case of *Ward v. Smith*, 11 Price, 19, as a case directly in point, and of "undoubted and conclusive authority." That was a suit upon a lease, and the declaration averred that the defendant refused, "on request, to permit the plaintiff to take possession and have the use of the premises, whereby the plaintiff had sustained loss, and had been obliged to hire other premises at great cost and expense for rent and charges." The plaintiff proved on the trial that the premises had been taken for his wife's business, who was a milliner, were advantageously situated for trade, "and that by not being suffered to occupy them he sustained considerable loss by the passing by of a profitable part of the year for that business in the mean time." It was urged by defendant upon a motion for a new trial "that there was no special damage averred in the declaration, for that there were no particular customers named therein as having withdrawn their custom from the plaintiff; and, further, that there was no averment of the business of the wife, or that the plaintiff had sustained any loss in her business." Chief Baron *RICHARDS* said: "As to the objection of evidence of special damage having been admitted, there was in fact no special damage as such proved. The object of the witness' testimony was to show that the plaintiff had sustained inconvenience." Baron *GRAHAM* said that no special damage had been proved, and added: "Loss of customers, and general damage occasioned thereby, however, may have been given in evidence under this declaration; for it charges general loss, without specifying any particular individuals whose custom had been lost, and it was competent for the plaintiff to show certain damages sustained by breach of agreement in this action, without stating his loss more specially in the declaration." See, also, *Burrell v. Salt Co.*, 14 Mich. 34; 1 Suth. Dam. 763, 764; *Heiche v. Hamilton*, 4 G. Greene, 317.

We think there was no special damage, as such, proved in the present case, but, even if there was, the defendant should

have objected to the evidence when it was offered, and, having failed to do so, the objection was waived. Only general damage is averred in the complaint, and under this allegation it was proper to prove general loss, by the diversion of customers and patronage, without alleging in the complaint, or proving at the trial, the names of the particular individuals whose custom had been lost to plaintiff by the wrongful act of the defendant. The amount of damage awarded by the verdict is not so great as to indicate that the jury was actuated by passion or prejudice or other improper motives. The learned judge who presided at both trials of the case in the court below overruled a motion for a new trial, based on the claim that the damage given is unwarranted by the evidence, and excessive. We think there was no error in so doing. The defendant deliberately and flagrantly violated his contract with the plaintiff. He should make just compensation for the injury done. He should not be permitted to escape with the payment of merely nominal damage, because it is impossible to prove with exactness the full extent of the injury, or the names of the individuals whose custom was diverted from the plaintiff's hotel to that of the defendant. The damage, from the very nature of the case, could only be estimated. As was said in *Doyle v. Dixon*, 97 Mass. 208, a case similar to this, "the injury to the plaintiff by diverting his trade was not capable of exact proof or definite computation, but depended very much upon general estimate, which was peculiarly within the province of the jury." So it is in this case, and the defendant has no just cause of complaint in being required to sustain all the risks of loss resulting from the difficulty of ascertaining accurately the result of his own wrongful act. The case of *Heiche v. Hamilton*, supra, was very similar in its facts to the one before us. It is there said: "In cases of this kind it is difficult to fix upon a rule by which damages can be satisfactorily ascertained. It is not expected that a plaintiff can prove a precise sum abstracted from his profit by violation on the part of a defendant, but the jury should be careful to find sufficient damages to admonish the defendant that honesty is the best policy." See, also, *Allison v. Chandler*, 11 Mich. 552. The evidence showed large profits accrued to the plaintiff up to the time defendant opened the Central House, and that after that time there were no profits, but a continual loss, for a period of about five years. Only a slight attempt was made to account for plaintiff's loss of business and profits on any other ground than that of the diversion of his customers to the Central House by the defendant. We think the jury was justified from the evidence in finding, as it must have done, that the plaintiff's loss was the direct and necessary result of the wrongful act of the defendant in diverting plaintiff's customers away from the Chamberlain House to the hotel kept by himself. The judgment of the district court is affirmed.

ZANE, C. J., and BLACKBURN, J., concur.

TOLAND V. COREY *et al.*

(Supreme Court of Utah. June 2, 1890.)

RECORD—NOTICE—FALSE REPRESENTATIONS—MISTAKE.

1. Possession by one having a record title to a life-estate, and an unrecorded deed of the remainder, is sufficient to put a subsequent mortgagee of the remainder upon inquiry, and amounts to actual notice.

2. A tenant for life purchased the remainder, but did not record her deed. Subsequent mortgagees, who took with knowledge of her possession, induced her to convey the land in payment of their mortgages by telling her that her deed was worthless, and that unless she did so there would be a foreclosure, and she would lose her home, life-estate, and all. It appeared that the land was worth twice the amount of the mortgages, but she was made to believe that with the mortgages on it she could not sell; that she was poor, weak, and nervous; that her only adviser was either stupidly ignorant, or acting in the interest of the mortgagees, and told her to do as they wished; and that they were men of affairs, and were aided by legal counsel. *Held*, that the parties were not on equal terms, and the conveyance should be set aside.

3. In such case, though the plaintiff may have been misled as to the law only, her mistake was as to the effect of existing facts upon a private right, from which equity will relieve.

Appeal from district court, first district; HENDERSON, Justice.

*Thomas Maloney*, for appellant. *Kimball & White*, for respondents.

BLACKBURN, J. This action is brought by the appellant for the cancellation of a deed to the respondents to a part of a lot in Ogden City, Utah, on the ground of fraud and inadequacy of consideration. It appears by the complaint and answer that the appellant owned a life-estate in the premises, and her son, Isaac A. Crawford, owned the remainder; that he conveyed his interest to William Toland, the husband of the appellant, and he conveyed the same to her, but these deeds were not put upon record until the mortgages hereinafter mentioned were given and recorded, but they were made and delivered prior to the giving of these mortgages. It further appears that the said Crawford and appellant had given a mortgage on these premises to one Doon for \$350; and after that, without the knowledge of appellant, and after she acquired the fee in the premises, Crawford, without her knowledge or consent, gave two other mortgages on the premises to said Doon to secure, separately, \$150 and \$117.75; and after that Crawford, without appellant's knowledge, gave two other mortgages on the premises to the respondents, to secure debts due them from him. All these mortgages were duly recorded, and prior to the record of the deeds conveying the fee in the premises to the appellant. On the 10th day of August, 1885, Doon brought suit to foreclose his three mortgages against the appellant, and made the respondents parties; and, before judgment, appellant, to pay off these mortgages, and for no additional consideration, made the deed this action seeks to have set aside. The whole amount called for by the mortgages was \$1,236.60. The allegations of the complaint, which are denied by the answer, are to the effect that the mortgages given to

Doon, except the one for \$350, were given with notice of appellant's full ownership of the premises, and Crawford had no interest whatever to incur, and that the mortgages to respondents were taken with like notice; that the deed to respondents this action seeks to set aside was obtained by misrepresentation and other improper conduct by the respondents, and others associated with them in the transaction; that appellant was poor, in bad health, and without friendly advice, and thus was forced to sign the deed against her will; that the consideration was grossly inadequate; and that the deed was not voluntarily acknowledged, and not delivered on her authority, or by her.

The first question is, did Doon and the respondents have actual notice of the deed of Crawford to Toland, and Toland to appellant, at the time of making these mortgages by Crawford, these deeds being unrecorded? The appellant was in the possession of the premises, occupying them as a home, and this fact was well known to respondents and the agent of Doon, and it is not pretended that Doon or the respondents had ever heard of the deeds by which appellant claimed title; but the contention of counsel is that appellant's exclusive and notorious possession of the premises was actual notice to Doon and the respondents of her title. Our statute requires actual notice, and constructive notice is not sufficient. The demands of the statute are answered if a party dealing with the land has information of a fact or facts that would put a prudent man upon inquiry, and which would, if pursued, lead to actual knowledge of the state of the title; and this is actual notice. 2 Pom. Eq. Jur. §§ 597, 598, *et seq.* The appellant was in the actual occupancy of the premises, and actual occupancy is enough to put parties dealing with the premises upon inquiry. *Id.* § 616, note 3, and § 617. But the contention of the respondents is that the possession of the appellant was consistent with the title shown by the record, and therefore the mortgagees were under no obligation to look beyond the record, and were authorized to consider her possession as under her life-estate only. On this question the authorities are both ways. *Id.* § 616, note 3, and § 617. We think the better doctrine is that an occupant's possession is actual notice of his title, and all persons with notice of such possession must at their peril take notice of his full title in the premises, no difference what the record shows. Until the recording statutes were enacted, possession was notice of ownership, and a conveyance made by a party out of possession was void. The purpose of these statutes was not to change the rule that possession was evidence of title and notice to all the world of ownership, but to afford the means of preserving the chain of title, and give notice of the ownership of unoccupied lands. It would be an unwarranted application of the recording acts to say that they destroy the effect of occupancy as notice and evidence of ownership. We think, therefore, that a person at his peril deals with or purchases real estate of one, in the possession of another, although said pos-

session may be consistent with the record title. It is easy to find out the real situation by inquiry of the party in possession, and it is his duty to do so. The conclusion, therefore, is that none of these mortgages, except the one for \$350, were liens upon the premises of appellant.

It is also contended by respondents that appellant, well knowing these things, assumed these mortgages, and paid them off, and settled the foreclosure suit with her eyes open, by making the conveyance she now seeks to have canceled; that if she acted under a mistake of law, and not of fact, she is bound by it; that parties are bound to know the law, and a court of equity will not interfere to cancel a contract made under a mistake of law. This is true as a general proposition, but it is only applicable when the mistake is as to the general law, not to a case where a party is mistaken as to the effect of existing circumstances in relation to his private rights. *Id.* §§ 841-843, and notes. This case comes within the latter rule. The appellant made the deed under the mistaken belief that her premises were subject to these several mortgages, and that she had no remedy but to pay them off, or lose her land, life-estate, and home, and be turned out of doors, and by entering into this contract; and respondent, taking advantage of this mistake, procured the deed; and this is the character of mistake that equity will relieve against.

Again, appellant was not at arms-length with respondents. She was a woman not acquainted with the rules of business; was weak and nervous, and troubled because of the situation. The respondents were business men, aided by legal counsel, anxious to get their debt paid; and the agent of Doon was a lawyer, and pressing to get Doon's money. The respondents and Nelson many times visited appellant, and urged her to settle and pay these mortgages, telling her, in substance, that her deeds were not worth the paper they were written upon; that her property was liable; and that unless she paid them they would be foreclosed, and she would lose her home, life-estate, and all; pressed in this manner and worried by her helpless condition, and misled by the representations of the respondents and those acting with them, she yielded and made the deed. It is true, she had a friend, or pretended friend, to advise her; but he was stupidly ignorant, or was in the interest of the other party, for he counseled with them, and advised her to do what they wished, and so clearly against her interest that he must have acted in concert with them. When she signed the deed, she did it under strong protest, and she said, in making her acknowledgment, she did not do it voluntarily and willingly; that she was forced to it. Four men were present for and in the interest of the respondents, and her pretended friend, acting also in their interest. She was alone; no one to utter a word in her behalf; her pretended friend acting against her. In this situation, and influenced by the statement of all these men that to make the deed and cancel the debt was altogether the best thing she could do, and this in face of the

fact, as the uncontradicted evidence shows, she was parting with the property at less than half of its value, she executed the deed. Also, she labored under the impression that she could not sell the premises with these mortgages outstanding. Why did not this lawyer or these business men, or some one of them, tell her they would assist her in selling the property for its full value, and deduct out of the purchase money the amount of the mortgages, and give her the balance? The only fair conclusion from the evidence is that these respondents, and the lawyer aiding them, misled this woman as to her legal rights, and overpersuaded her to deed away her own property for less than half its value, to pay debts that neither she nor her property were liable for. This may have been a sharp business transaction, but it was not to the honor of those who participated in it. Every case in equity is determined on its own peculiar facts; on its own merits. Precedent and authority are only useful to prompt the judicial conscience of the chancellor, and aid him in arriving at an equitable decision. Therefore we think this contract was unconscionable, and ought to be set aside.

The \$350 is a lien upon the land, and the decree ought to be that the deed be canceled; that the appellant pay this mortgage and interest by a day to be named by the court, and in default of payment the premises be sold on the time and terms property is sold on the foreclosure of mortgages by the provisions of the statute, and out of the proceeds this mortgage and interest be paid, and the remainder be paid to appellant. This cause is reversed and remanded, with direction to the district court to have entered a decree in accordance with this opinion, and that the respondents pay the costs of this court and the costs of the court below up to date.

ZANE, C.J., and ANDERSON, J., concur.

#### PARKER V. DACRES.

(Supreme Court of Washington. March 7 1890.)

#### SERVICE OF PROCESS—EJECTMENT—EQUITABLE DEFENSE.

1. Civil Prac. Act Wash. T., as amended by Laws 1871, provides (section 2) all common-law forms of action shall be abolished, but the distinction between actions at law and suits in equity shall be preserved; and pleadings and proceedings in actions at law shall be as prescribed in the act; and pleadings and proceedings in suits in chancery shall be as prescribed by the laws of the United States, and by the rules prescribed by the supreme court of the United States for courts of equity of the United States. The writ of subpoena in chancery may also be served by the sheriff or his deputy, as well as by the persons authorized by the rules in equity, (section 66.) *Held*, in ejectment, that the sheriff of the county, as well as the United States marshal, was authorized to serve the subpoena to bring in defendant to answer the complaint, and that the return thereof could be by certificate, and need not be by affidavit.

2. In ejectment, where the complaint fails to set out the source of plaintiff's title, defendant may, under a general denial, introduce any equitable, as well as legal, defense.

3. The confirmation of a sale under a decree of foreclosure concludes inquiry into mere irregularities attending the sale which are not of such a nature as to oust the court of jurisdiction.

Error to district court, Walla Walla county.

Civil Prac. Act Wash. T., as amended by Laws 1871, provides: "Sec. 2. All common-law forms of action are hereby abolished, but the distinction between actions at law and suits in chancery shall be preserved; and pleadings and proceedings in actions at law shall be as prescribed in this act; and pleadings and proceedings in suits in chancery shall be as prescribed by the laws of the United States, and by the rules prescribed by the supreme court of the United States for courts of equity of the United States." "Sec. 66. The writ of subpoena in chancery may also be served by the sheriff or his deputy as well as by the persons authorized by the rules in equity."

B. L. & J. L. Sharpstein, for defendant in error.

HOYT, J. This was an action of ejectment. In his complaint plaintiff claimed title in fee without in any way derailing his title. Defendant for answer denied generally, and further pleaded that he held the premises in question by virtue of a sale thereof under a decree of foreclosure of a certain mortgage made by one Shiel, who at the time of the execution of said mortgage, and of the sale thereunder, was the owner in fee. Upon the trial plaintiff introduced certain deeds showing a chain of title ending in Shiel, the maker of said mortgage, and also a trust-deed made by said Shiel to him soon after the sale in said foreclosure proceedings, and a quitclaim deed from said Shiel made long after, and just before the commencement of this suit. Defendant, to meet the *prima facie* case thus presented, put in evidence the record and proceedings in said foreclosure suit to show title, and also proved certain acts and statements of said Shiel done and made at and after the sale under said decree of foreclosure, which in equity would estop said Shiel from afterwards asserting title adverse to said sale. Plaintiff in his argument here practically concedes that, if said record and proceedings were properly in evidence, they constituted a good defense. He likewise practically concedes that the acts and declarations of said Shiel, proved as aforesaid, were sufficient, if rightfully in the case, to constitute an *estoppel in pais*, and thus a perfect defense. Plaintiff, however, objected to the introduction of the said record and proceedings on various grounds, and the main contention here has been upon errors assigned upon exceptions to the ruling of the court below in admitting the same in evidence against such objections. He also objected to the admission of proof tending to establish said equitable estoppel, and has duly assigned error to the action of the court thereon.

Plaintiff's first objection to said record was that the subpoena to bring in the defendant to answer the complaint was served by the sheriff of the county, and not by the United States marshal, or his deputy, or by any person appointed by the court to make such service; and cites section 2 of the civil practice act as amended by the Laws of 1871. We think, however,

that the general provisions of said section were controlled by the special provisions of section 68 of the same act as thus amended, and that by virtue of said last-named section the sheriff was authorized to make the service in question. Nor can we agree with the further contention of the plaintiff, that, even although the sheriff was authorized to make the service, his certificate as to the facts of such service was not proof thereof, as such facts should have been shown by affidavit. We think that under said section the sheriff was not only authorized to make such service, but also that the return thereof could be by certificate, as in other cases. The service and proof thereof were sufficient, and the court obtained jurisdiction, and, having jurisdiction of the subject-matter and of the parties, most of the further objections urged by the plaintiff were clearly mere irregularities, which could only be taken advantage of by appeal. See *Freem. Judgm.* (3d Ed.) § 126; *Peck v. Strauss*, 33 Cal. 678.

Plaintiff further urges that there was such a departure from the terms of the decree, and from the course and practice of the court in making the sale under said decree, as to make such sale void. But we think there were no such errors as would oust the court of jurisdiction, and, this being so, it follows that the order confirming the sale concluded inquiry into the irregularities attending the same, if any there were. See *Ror. Jud. Sales*, §§ 113, 115; *Voorhees v. Jackson*, 10 Pet. 449. The record and proceedings were properly admitted in evidence, and the errors assigned thereon are not well taken.

The grounds of the plaintiff's objection to the proof of the equitable estoppel were that the defendant could not be permitted to introduce evidence of this kind without having pleaded it in his answer, and cites several cases holding that, in an action at law, equitable defenses must be set up in the answer. This is perhaps true as a general proposition, and, under the circumstances of the cases cited, it was doubtless correctly so ruled. Had the plaintiff in this action set out fully his chain of title, so that it would have appeared that he claimed under said Shiel, it might have been necessary for defendant, in order that he might show acts of said Shiel, to have set out the same in his answer. But when, as in this case, a defendant is not at all advised as to the source of the plaintiff's title, he can content himself with a general denial, and thereunder introduce any legal evidence that tends to defeat the title of the plaintiff, as shown by his proofs. Any other rule would work great hardship to a defendant, while the enforcement of said rule cannot work hardship to a plaintiff, as he can, if he so desires, so shape his complaint as to compel defendant to fully disclose his defense in his answer. Said rule is not only in accord with our ideas of propriety and justice, but is also abundantly sustained by the authorities. *Kirk v. Hamilton*, 102 U. S. 68, was a case of ejectment like the one at bar, and was brought in a court where the distinction between legal and equitable defenses is more clearly defined than in this state;

yet in that case evidence of an equitable estoppel, much like the one proved in this case, was admitted under the plea of not guilty, and the action of said court in thus ruling was sustained by the supreme court of the United States in an exhaustive opinion by Justice HARLAN, concurred in by the entire court. See, also, *Mather v. Hutchinson*, 25 Wis. 27. The court below properly admitted proof of the equitable estoppel, and the record and proceedings in the foreclosure case were also properly in evidence; and as one constituted a complete legal defense, and the other estopped plaintiff from asserting any title that he might have had, the court had double warrant for directing a verdict for the defendant, and entering judgment thereon; and its action in so doing must be affirmed, and it is so ordered.

ANDERS, C. J., and STILES, SCOTT, and DUMBAR, JJ., concur.

#### WYOMING LOAN & TRUST CO. v. W. H. HOLLIDAY CO.

(*Supreme Court of Wyoming*. June 14, 1890.)

##### BILL OF EXCEPTIONS—MATTERS REVIEWABLE.

1. The sufficiency of the evidence to sustain the finding will not be reviewed on appeal, where the bill of exceptions only purports to contain "all the testimony offered by either party."

2. The reviewing court will consider no matters which were not made the basis of a motion for a new trial.

Error to district court, Albany county.

This was an action brought by the plaintiff in error against the defendant in error to recover the sum of \$1,149.44 upon an account for certain glass alleged to have been sold by the plaintiff to the defendant. The case was tried without the intervention of a jury, and resulted in a finding and judgment for the plaintiff in the sum of \$213.63. The plaintiff now prosecutes this proceeding in error to reverse that judgment.

*Brown, Blake & Arnold*, for plaintiff in error. *I. P. Caldwell and Corlett, Lacey & Riner*, for defendant in error.

VAN DEVANTER, C. J. In its petition in error the plaintiff makes eight assignments of error, seven of which relate to alleged errors occurring upon the trial. These can only be preserved in the record through a motion for a new trial in the court below, and, if not so preserved, they are waived. When such matters have been made the basis of a motion for a new trial, they are sufficiently questioned in this court by assigning error in the overruling of that motion. *U. S. v. Trabing*, (Wyo.) 6 Pac. Rep. 721; *Wolcott v. Bachman*, (Wyo.) 23 Pac. Rep. 72. The eighth assignment complains of the overruling of the motion for a new trial, and this is the sole question presented by the record. The only matters complained of in the motion for a new trial which are relied upon by the plaintiff in its brief are that the decision is not sustained by sufficient evidence, and is contrary to law, and that there is error in the assessment of the re-

covery. To determine either of these questions in this case, it is necessary that the record shall contain all of the evidence given upon the trial, and this should be made clearly to appear in the bill of exceptions. When error does not affirmatively appear in the record, the presumption is in favor of the decision of the trial court; and, unless the record contains all of the evidence, this court cannot determine any question, the decision of which necessarily requires an examination of all the evidence. It is contended by the defendant in error that the record does not purport to contain all of the evidence. The statement of the bill of exceptions is: "And this was all the testimony offered by either party upon the trial of the said cause." Testimony embraces only the declarations of witnesses made under oath or affirmation, (Rev. St. Wyo. §§ 2609, 2610; Bouv. Law Dict. tit. "Testimony;") while "evidence, in legal acceptation, includes all the means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved," (1 Greenl. Ev. § 1.) Testimony is but one of the several instruments of evidence, and cannot be considered the equivalent thereof; for evidence embraces not only testimony, but also private writings and public documents. Abb. Law Dict. tit. "Testimony;" Thomp. Trials, § 2784; Telephone Co. v. State, 12 N. E. Rep. 136. Even if the word "testimony" were as broad in its meaning as the word "evidence," the record in this case is subject to the further objection that the bill of exceptions only purports to contain "all the testimony offered by either party," and does not show how much or what portion of the testimony so offered was in fact admitted and heard by the court. "It is not enough that it should have been offered; it should also have been admitted." Thomp. Trials, § 2784; Garrison v. State, 11 N. E. Rep. 2. The authorities are uniform in holding that the statement should be, in effect, that the bill contains all the evidence given upon the trial of the cause. We think the statement in this case falls far short of that requirement. An examination of the record discloses no error in the decision of the court below. The judgment is therefore affirmed.

CORN and SAUFLEY, JJ., concur.

AYRES *et ux.* v. SHIELDS.

(Supreme Court of Colorado. May 16, 1890.)

APPEAL—OBJECTIONS NOT RAISED BELOW.

Where joint and several demands were commingled, and the evidence was admitted without objection, and it was conflicting, and the record fails to show what items went to make up the judgment, it will not be disturbed.

Appeal from La Plata county court.

D. W. Ayres, for appellants. H. Garbaniti, for appellee.

HAYT, J. In the month of March, 1883, appellee made a written lease with appellant D. W. Ayres of a certain dairy ranch, with fixtures, belonging to appellee, and situate in La Plata county, in this state.

By the terms of this lease the said D. W. Ayres was to pay the sum of \$50 per month for the period of five months for the use of said property, the rent to be paid monthly at the end of each month. Ayres went into possession under the lease upon the 1st day of the following month of May, and continued to hold such possession until some time in the following month in July, at which time, the rent not having been paid as per the terms of the written agreement, Shields declared the lease forfeited, and again went into possession; the property having been returned to Shields by a son of Ayres during the absence from the ranch of the latter. For the rent for the months of May and June, appellant executed and delivered to appellee written obligations, signed by himself and wife, in which the faithful carrying out of the agreements of said lease by Shields was expressly made a condition to the payment thereof. One of these instruments, by its terms, fell due upon the last day of May, and the other on the last day of June, 1883. Upon June 19th, appellants paid \$10 upon the first of these instruments, and upon July 3d made a further payment of \$14. These were the only payments that had been made at the time suit was brought. Appellee instituted this suit for the balance due upon these written instruments, also including in his demand certain other sums claimed to be due him from D. W. Ayres for various articles which he claimed to have furnished the said D. W. Ayres at the latter's special instance and request. Defendants claimed a breach in the conditions of the lease on the part of appellee, and damages therefor. The case was commenced before a justice of the peace. The trial before that officer resulting in a verdict for appellee, appellants brought the case into the county court by appeal. A jury having been expressly waived in the latter court, the case was tried to the court. This trial resulting in a judgment for Shields in the sum of \$76, the case is brought here by appeal.

Upon the trial in the county court, both parties were allowed, without objection, to introduce testimony concerning a number of unsettled transactions between them. By the testimony of appellee, it was shown that D. W. Ayres was indebted to him in the sum of \$35 for ice, \$2.50 for wagon hire, \$8.64 for milk bottles, \$14 for a butter-worker; making a total of \$60.14 for those items, in addition to the amount claimed to be due upon the written instruments, which were also introduced without objection. On the part of appellants, evidence was received tending to show that appellee had not complied with the terms of the written lease, and going to show that appellant had been greatly damaged by such failure, all of which was disputed by witnesses called by appellee, and by appellee himself, who was sworn as a witness in his own behalf. Upon the evidence the trial court rendered judgment in favor of appellee for the sum of \$76, but we are not advised by the record, and have no means of ascertaining, what items went to make up this sum. Appellants did not object at the trial to the commingling of joint and several demands, and do



not do so now. All the evidence offered by either party was admitted without objection; and, upon the record presented, we cannot say that the judgment is not warranted by the evidence. It must therefore be affirmed.

### BEEKMAN v. HAMLIN.

(Supreme Court of Oregon. June 18, 1890.)

#### JUDGMENT—PRESUMPTION OF PAYMENT—REBUTTAL.

1. In this state, a judgment upon which no execution has been issued, nor attempt made to enforce the same for 20 years, is presumed to have been paid.

2. In such case, it is a presumption of law, and can be rebutted only by some positive act of unequivocal recognition like part payment, or a written admission, or at least a clear and well-identified promise, intelligently made, within the period of 20 years.

(Syllabus by the Court.)

Appeal from circuit court, Jackson county; R. S. BEAN, Judge.

This is a proceeding to revive a judgment under section 295, Hill's Code. The plaintiff alleges in his motion for leave to issue execution that on the 5th day of February, 1861, he recovered a judgment against the defendant in the circuit court of Jackson county, Or., in an action at law in which said C. C. Beekman was plaintiff, and said James Hamlin was the defendant, for the sum of \$751.43, with interest thereon from said date at the rate of 1½ per cent. per month; and also for the further sum of \$756.32, with interest thereon at the rate of 2½ per cent. per month, and the costs and disbursements of said action; which judgment was duly entered on the journal record of said court on the 5th of February, 1861; and on the 28th day of February, 1861, was duly entered on the judgment lien docket of said court. That no payments have been made on said judgment, and that the whole amount of principal and interest, as therein stated, is now due to the plaintiff. That no execution has been issued on said judgment for more than 20 years. Then follows a prayer for leave to issue an execution for said sums, with interest at the rate specified in the motion. The defendant's answer contains some denials, but they are not full or specific, leaving it somewhat uncertain what the defendant intended to deny. The answer alleges that the defendant was not served with notice of the filing of the amended complaint in the original action. After alleging some other argumentative matter that has no relevancy whatever, the answer contains this allegation: That said alleged judgment has been allowed to remain dormant for about 28 years, during all of which period the defendant has owned property, both real and personal, in his own right, which property was subject to execution, and which was amply sufficient to have satisfied said judgment; and the defendant avers that for about the period of 26 years he was absolutely ignorant that the said alleged judgment appeared of record against him, and that during that period of time he had several settlements with the plaintiff, had money

and other articles of value deposited with him and in his care, and withdrew the same from his care at defendant's pleasure; and that during all that period of time, and not until the last settlement was had between the plaintiff and defendant, did the plaintiff mention the fact that he held the alleged judgment against the defendant. Some other facts are alleged, which need not be specially noticed. The record recites that the court sustained a demurrer to subdivisions 3 and 5 of the defendant's answer, but the demurrer nowhere appears in the transcript, nor does it anywhere appear on what ground said demurrer, if any was filed, was sustained. On the trial the defendant offered evidence tending to prove the matter in his answer, all of which was objected to and excluded, and exceptions taken. At the trial, the plaintiff introduced a certified copy of the judgment roll in the case of Beekman v. Hamlin, and rested. The defendant sought to introduce evidence tending to prove facts showing that said judgment had been paid: that is, that several times after the rendition of the judgment said parties had various business transactions and full settlements; but all of this evidence was excluded, and exceptions taken. The court then directed a verdict for the plaintiff.

*Francis Fitch*, for appellant. *P. P. Prim*, *H. K. Hanna*, and *C. W. Kahler*, for respondent.

STRAHAN, J., (after stating the facts as above.) The judgment sought to be revived in this case was rendered on the 5th day of February, 1861, and the record does not show that any execution was ever issued thereon. This proceeding was commenced on the 19th day of March, 1889, so that more than 28 years intervened between the date of the entry of judgment and this attempt to enforce it. The only question I have thought it necessary to consider is, what effect has the lapse of time upon the right to enforce this judgment, independent of the statute of limitations? In other words, what would be the rights of the parties in this case if no statute of limitations were in force in this state? And this presents the question, what effect has the lapse of time, in this state, upon the right of a party to have a judgment renewed by the statutory proceedings? Does the common-law presumption of payment after 20 years arise in such case, and what is its effect? Section 172, Wood, Lim., says: "In all those states where sealed instruments or 'specialties,' as they are technically called, are expressly brought within the statute, the statute begins to run from the time when a cause of action arises thereon, and the bar is complete at the expiration of the statutory period; while, in those states where this class of instruments are not provided for, the common-law presumption of payment attaches from the time when the cause of action arises and becomes complete as a presumptive bar at the expiration of 20 years from that time; and the mere lapse of 20 years, without any demand of itself, raises a presumption of payment." And the same author

says, in section 30 of the same work, that "a judgment obtained in the United States court, or in the courts of the state, where the remedy is sought, is a specialty within the provision of the statute;" that is, the statute in relation to specialties, —20 years. "The rule of presumption, when traced to its foundation," is said to be "a rule of convenience and policy, —the result of the necessary regard to the peace and security of society. No person ought to be permitted to lie by whilst transactions can be fairly investigated and justly determined, until time has involved them in uncertainty and obscurity, and then ask for an inquiry. Justice cannot be satisfactorily done, when parties and witnesses are dead, vouchers lost or thrown away, and a new generation has appeared on the stage of life, unacquainted with the affairs of a past age, and often regardless of them." After stating the inconveniences which necessarily result from a contrary rule, the court in the same case says: "In a word, the most solemn muniments are presumed to exist in order to support a long possession; the most solemn of human obligations lose their binding efficacy, and are presumed to be discharged after many years." *Foulk v. Brown*, 2 Watts, 216. So in *Tilghman v. Fisher*, 9 Watts, 441, the court said: "Such a lapse of time, in the absence of repelling evidence, is sufficient in law, without more, to raise a presumption of payment that would be binding upon both court and jury, so as to entitle the defendant, under a plea of payment, to a verdict and judgment in his favor. But being merely a presumption of the defendant's having made payment, it may be rebutted by proof of intervening circumstances, such as a demand of payment, payment of part by the obligor, his admission that the debt is still due, or his inability to pay it within the twenty years." And in *Rhodes v. Turner*, 21 Ala. 210, the principle under consideration was directly applied to a judgment, the court saying: "If a final judgment had been rendered, according to the principles of the common law, it would be presumed to have been paid after the expiration of twenty years; and, if the parties allow this period to elapse without taking any steps to compel a settlement, we think the presumption of payment arises, and the executor or administrator should be exempted from the necessity of hunting up evidence to prove accounts and vouchers which ordinarily enter into such settlements, and which, after such a lapse of time, it would perhaps, in most cases, be impossible for him to obtain." So in *Sims v. Aughtery*, 4 Strob. Eq. 103, the court applied the same principle, after a very careful examination of the subject. After adverting to the statute of limitations as one of the means of giving repose to stale subjects of litigation, the court remarked: "We have another system of rules, founded upon what is called the 'doctrine of legal presumptions,' which prevail alike in courts of law and equity, and which are eminently subservient to the quieting of titles, and the prevention of litigation arising upon obscure and antiquated transactions. If

these legal presumptions require a longer period than statutory bars to acquire force and effect, they are more general in their operation. They are highly conducive to the peace of society and the happiness of families, and relieve courts from the necessity of adjudicating rights, so obscured by time and the accidents of life that the attainment of truth and justice is next to impossible. \* \* \* These legal presumptions, by which conflicting claims and titles are set at rest, I have endeavored to show are natural and necessary. They spring spontaneously out of the institution and relations of property. As to the precise time at which they arise, each independent community must judge for itself. We have adopted the law of the mother country. In South Carolina, as in England, by the lapse of twenty years without admission, specialties and judgments are presumed to be satisfied, and trusts discharged." And *McArthur v. Carrie's Adm'r*, 32 Ala. 75, is a very carefully considered case, and to the same effect. And this is followed by *Goodwyn v. Baldwin*, 59 Ala. 127. Many other authorities are to the same effect. *Ray v. Pearce*, 84 N. C. 485; *Olden v. Hubbard*, 34 N. J. Eq. 85; *Lyon v. Adde*, 68 Barb. 89. In this latter case the court states what we conceive to be the correct rule, thus: "In the case of an obligation which can be extinguished by an act *in pais*,—such as payment,—there is an absolute presumption of payment after twenty years. It is a presumption of law, and can be rebutted only by some positive act of unequivocal recognition, like part payment or a written admission, or, at least, a clear and well-identified verbal promise or admission intelligently made, within the period of twenty years." And in *Olden v. Hubbard*, supra, it was expressly averred in the bill that no payment had been made on the mortgage which was sought to be foreclosed for more than 23 years, and that the principal and interest were then due and owing, and, on demurrer to the bill, it was held that, while the demurrer admitted all material facts, that these statements were not admitted because they were rather conclusions than averments of facts; and it was further held that any existing facts which would repel the presumption of payment must be averred in the bill. In *Cope v. Humphreys*, 14 Serg. & R. 15, it was held that, after the lapse of 20 years, a judgment is presumed to have been satisfied, unless there be circumstances to account for the delay. And, in the opinion of the court in that case, *Peake, Ev.* 481, is cited, where it is stated that 20 years is presumption of payment of a bond, and the same rule applies to a *scire facias* for execution on a judgment. And *Miller v. Smith's Ex'rs*, 16 Wend. 425, is to the same effect. It is not possible to cite all the cases bearing on this interesting subject, but the following may be added as additional illustrations of the principle involved: *State v. Virgin*, 36 Ga. 388; *Willingham v. Long*, 47 Ga. 540; *Whitney v. French*, 25 Vt. 663; *Anderson v. Settle*, 5 Sneed. 202; *Diamond v. Tobias*, 12 Pa. St. 312; *Reynolds v. Green*, 10 Mich. 355; *Howland v. Shurtleff*, 2 Metc. 26; *Anderson*

v. Smith, 3 Metc. (Ky.) 491; Cheever v. Perley, 11 Allen, 584; Inches v. Leonard, 12 Mass. 379; Summerville v. Holliday, 1 Watts, 507; Freem. Judgm. § 464; 1 Greenl. Ev. § 39.

2. The foregoing authorities hold with great uniformity that the lapse of 20 years creates a presumption of law that specialties, including judgments, have been paid; but this presumption is not, under all circumstances, absolutely conclusive. It may be disputed and overcome. In what manner this may be done, or what shall be sufficient to produce that result, the authorities are not agreed. Some of the authorities hold that any evidence tending to prove non-payment may be sufficient; that the fact must be found by the jury; and that any evidence ordinarily competent on the question of payment, if it satisfies the jury, is all that the law requires. Another class of cases, and which we think have the better reason to support them, hold with Lyon v. Adde, supra, that this presumption is one of law, and can be rebutted only by some positive act of unequivocal recognition, like part payment or a written admission, or, at least, a clear and well-identified verbal promise or admission, intelligently made, within the period of 20 years. So, in Cheever v. Perley, supra, it was held, if parol evidence was relied upon to control the presumption, it should clearly show some positive act of unequivocal recognition of the debt within that time; that is, within 20 years. And in Summerville v. Holliday, supra, it is said that it is not so much a presumption that the money has been paid, or a right of way granted, as it is the substitution of an artificial rule in the place of evidence or belief, after a delay which may have been destructive, of the evidence on which a belief might be justly founded. So, also, in Whitney v. French, supra, Chief Justice REDFIELD, in speaking of this presumption, said: "It is a presumption of law, and in itself conclusive, unless encountered by distinct proof. It is not to be submitted to the mere discretion of a jury, although adversely an inference of fact, where there is any conflicting evidence. And this presumption of payment of a mortgage or release of an estate is often made against what is believed to be the very fact, for the purpose of quieting a long adverse possession, and to prevent virtual fraud, by the setting up of dormant title long since supposed to have become extinct."

3. The pleadings in this case are so framed that it was hardly possible to properly try the real questions upon which the rights of the parties depend. The defendant, instead of directly pleading in his answer that he had paid the judgment mentioned in the plaintiff's pleading, alleged evidentiary facts, which, if proven, would have tended very strongly to establish the fact of payment. This was bad pleading on the part of the defendant; but the objection, I think, ought to have been taken by motion, and not by demurrer. It related more to the form of the pleading than it did to the substance, but there is neither demurrer nor motion in the record; and we cannot know just

what objections were urged against this pleading, nor in what form, further than is recited in the journal entry that it was by demurrer. The defendant seems to have acted at the trial on the assumption that the facts alleged in his answer remained a part of the record because he offered proof on the point originally alleged, but the same was objected to, and excluded. The facts which the defendant offered to prove at the trial were that, for several years after the rendition of the judgment attempted to be revived, the plaintiff and the defendant had large dealings together, and many settlements and business transactions together. This was evidence to go to the jury which they would have had the right to consider, if the pleadings were in such a condition to render it admissible; but of this there is considerable uncertainty. But I think the plaintiff's pleading is also insufficient, in that it fails to allege any facts or circumstances which would excuse the long delay, or which tended to continue the defendant's liability after 20 years. This was expressly held to be necessary in Olden v. Hubbard, supra. Several other questions were discussed by the appellant's counsel, but their consideration is deferred, for the reason the record is not in proper condition to present them. The judgment will be reversed, and the cause remanded; and if, in view of the opinion of this court, either party shall deem it necessary to amend his pleading, and retry the case in the court below, no doubt that court will afford either or both of the parties an opportunity to do so. We have purposely avoided saying anything in regard to the statute of limitations, for the reason that, if that objection were available to the defendant, it was apparent on the face of the plaintiff's pleading, and should have been taken by demurrer. Let the judgment be reversed.

#### SEALY v. CALIFORNIA LUMBER CO.

(Supreme Court of Oregon. April 21, 1890.)

#### OBJECTION TO SERVICE—ANSWERING OVER—GENERAL APPEARANCE.

A defendant cannot answer and make a full defense on the merits, without making a general appearance in spite of his special appearance; and when he does so he invokes the judgment of the court, and submits himself and his rights to its jurisdiction, and can no longer be heard to say that it had no jurisdiction.

(Syllabus by the Court.)

Appeal from circuit court, Coos county; R. S. BEAN, Judge.

J. W. Bennett and S. H. Hazard, for respondent. J. A. Gray and W. R. Willes, for appellant.

LORD, J. This is an action to recover money. The facts out of which the question arises to be determined are these: That on the return of the proof of service as indorsed on the summons, the defendant, by its attorneys, filed the following motion: "Now comes the defendant, by John A. Gray and Shedden F. Wilson, its attorneys, and, appearing specially and for the purposes of this motion only, moves the court to set aside the summons in the

above-entitled action, and also the service thereof; for the reason that the said summons and the service thereof are defective, and not in accordance with the laws of the state governing the same." The court overruled the motion, and the defendant then and there excepted. Thereupon the defendant, by its said attorneys, moved the court for leave to answer; which being granted, it filed its answer, to which the plaintiff filed his reply; and, after a trial, the verdict and judgment was for the plaintiff, and from which this appeal is taken. The error assigned is in overruling the motion of the defendant to vacate and set aside the summons served therein, and the service thereof. The contention of the defendant and appellant is that its subsequent appearance in the trial of the cause did not waive the error of the trial court in overruling its motion to set aside the service. The argument is that it is only when the defendant pleads to the merits in the first instance, without insisting upon the defects in the service, that such objection can be considered as waived; that when the defendant appears specially and for the purpose of calling the attention of the court to such defects, and the court overrules his objection, and he is thereby compelled to answer to avoid judgment being taken against him, he will not be deemed to have abandoned his objection to the jurisdiction because he does not submit to further proceedings without contestation. *Harkness v. Hyde*, 98 U. S. 476; *Lyman v. Milton*, 44 Cal. 635; and *Kent v. West*, 50 Cal. 185. It was held in the one case that a party was entitled to appear specially and move to set aside the service of an illegal summons, and in the other to set aside the service of the illegal service of a legal summons; and, further, that the wrongful refusal of such motion was an error that was not waived by the defendant's subsequent appearance, and trial of the case. On the other hand, the contention of the plaintiff is that the defendant, by its subsequent appearance and trial of the cause, waived the motion to set aside the summons and service thereof as defective, and submitted itself and its rights to the jurisdiction of the court. In *Kinkade v. Myers*, 17 Or. 471, 21 Pac. Rep. 557, the party appeared for the specific purpose, and no other, of setting aside the service, because it was alleged to be illegal; and it was held that he might make such special appearance, and that in so doing he did not waive such defects or submit himself to the jurisdiction of the court. See, also, *Lung Chung v. Railway Co.*, 10 Sawy. 19, 19 Fed. Rep. 254. But the question here presented is whether, when he appears specially for a specific purpose named, and the ruling is adverse to him, he can subsequently appear and contest the cause at every point, without submitting himself to the jurisdiction of the court. In a word, does not his subsequent appearance concede jurisdiction, and waive the defect in the service to which he limited his special appearance? A general appearance waives all questions as to the service of process, and is equivalent to personal service. A special appearance limits the appearance to the matter specified; it is

for that specific purpose, and no other, and contests the jurisdiction *in limine*. To preserve his *status* in the court, if he has appeared specially and questioned the jurisdiction, he must avoid any subsequent act which concedes jurisdiction, and invokes the judgment of the court. A defendant cannot answer the complaint, and make a full defense on the merits, without making a general appearance in spite of his special appearance; and when he does so he invokes the judgment of the court, and submits himself and his rights to its jurisdiction, and can no longer be heard to say that it had no jurisdiction. He cannot fight his side of the battle on the merits under a special appearance. The law will not allow him to occupy an ambiguous position to avail himself of its jurisdiction when the judgment is in his favor, and to repudiate it when the result is adverse to him. He ought to do one thing or the other,—either fight it out on the line of his special appearance, or, if he appear and go to trial, accept its incidents and consequences. According to this view, the subsequent appearance generally of the defendant to defend the action was equivalent to personal service; cured or waived the defect in the process or service to which the special appearance was limited; and cannot be availed to question the jurisdiction. It may not be amiss, however, to say that I am not entirely satisfied that an answer to the merits waives an objection duly made to an illegal service of a summons which is questioned by a special appearance; but it is thought by the court that the better reason is with those authorities which hold that a party waives his objections to a defective summons, or a defective service of a legal summons, whether overruled or not, when he subsequently appears generally, and defends the action. It results that the judgment must be affirmed.

#### DEERING *et al.* v. CREIGHTON *et al.*

(*Supreme Court of Oregon.* April 14, 1890.)

#### NEGOTIABLE PAPER—INDORSEMENT—JOINT MAKERS—PLEADING.

1. In this state, when a third person indorses a negotiable note before it is delivered to the payee, or indorsed by him, he is *prima facie* liable as a second indorser.

2. But while, in such case, when a third person so indorses a note the liability is presumptively that of an indorser, it may be shown by parol evidence to be the liability of a joint maker, according to the intention of the parties as disclosed by the facts.

3. The plaintiffs cannot recover, in such case, unless their complaint contain special averments showing the facts relative to the transaction which operate to charge the defendants as original promisors or joint makers. The defect cannot be obviated in the reply.

(*Syllabus by the Court.*)

Appeal from circuit court, Benton county; R. S. BEAN, Judge.

This was an action to recover on certain promissory notes made by divers persons, and payable to the order of the plaintiffs. The notes were made and executed in the usual form of negotiable paper. Taking one as an example of the others, it is

signed by Ruby E. A. Wood, Jesse Wood, I. N. Wood, as makers, and on the back of it an indorsement as follows: "For value received, we hereby waive protest, demand, and notice of non-payment. CRUGHTON & QUIVEY," etc. The answer admits the indorsement, but alleges that they were so indorsed after the making of the same by the said makers above named, and before the delivery to the plaintiffs as payees, etc. The reply admits this, and sets up that the indorsement was for the purpose of giving the makers credit with the plaintiffs, and in payment of machinery sold by the defendants upon commission, according to an agreement with them, etc. The cause was tried before the court, and, among other things, it found that the plaintiffs shipped goods as provided in the contract, and that the defendants took the notes mentioned for such goods when sold, and indorsed them as above, before delivery to the plaintiffs, who relied upon such indorsements of the plaintiffs, and not on the makers thereof, etc. The counsel for the defendants moved to strike out, and also demurred to, such matter set up in the reply, which was overruled by the court. The trial resulted in a judgment for the plaintiffs, from which this appeal comes.

W. S. McFadden, J. R. Bryson, and F. M. Johnson, for plaintiffs. L. F. Finn and J. W. Rayburn, for defendants.

LORD, J., (after stating the facts as above.) The principal question arises out of the decision on the demurrer to the matter set up in the reply as inconsistent with the facts alleged in the complaint; or, to raise the same question in another form, that the complaint does not state facts sufficient to show that the defendants are original promisors or joint makers. Taking the note as it stands, what is its legal effect? Are the defendants joint makers, guarantors, or indorsers? The liability created by such an indorsement presents an important, but perplexing, question, in which the conclusions of the courts are at variance. Such indorsements are regarded as irregular or anomalous, and the person so indorsing, a *quasi* indorser. There is but little doubt that the weight of authority is that a third person who indorses a note at the time of its execution, and before its delivery to the payee, will be presumed an original promisor or joint maker. Mr. Lawson says: "In a few of the states, as well as in England, he *prima facie* incurs the liability of an indorser; but parol evidence is admissible of the intention of the parties, which, when ascertained, determines his liability." "But," he adds, "by the weight of authority he is liable as a joint promisor or co-maker if he indorsed the note before it was issued, and it is so presumed; but, if shown to have indorsed it after its issue, he is liable as a guarantor; but in both cases evidence is admissible of the real intention of the parties, which, when ascertained, determines his liability." Lawson, Rights & Rem. § 1575, and note of authorities. See, also, 20 Amer. Law Reg. 331, note to Andrews v. Congar, where the authorities are carefully collected and distin-

guished by states; Tied. Com. Paper, §§ 270-272.

In this state, where a third person indorses a bill or note before it is delivered to the payee, or indorsed by him, he is *prima facie* liable as a second indorser. In Kamm v. Holland, 2 Or. 60, the question was presented as to the liability a third party assumes who indorses his name in blank on the back of a negotiable paper before it is delivered to the payee, and indorsed by him; and the court held that he became liable as an indorser, and, as such, was entitled to due demand, and notice of non-payment. So in Cogswell v. Hayden, 5 Or. 23, the court say: "The only presumption that can arise from Cogswell's indorsement is that he intended to become a second indorser." For its reason the court adopted the reasoning assigned in Bacon v. Burnham, 37 N. Y. 616, that "it must be supposed, in the absence of any proof to the contrary, that, perceiving the name of the payee in the note, he indorsed it on the presumption that the name of such payee, to whose order it was made payable, would also, at some time, appear upon the note; for only thus would it become negotiable." See, also, Barr v. Mitchell, 7 Or. 346. So that, whatever diversity of opinion may exist, or how, were the question *res integra*, we might be disposed to regard such liability in the absence of explanatory evidence, the rule of commercial law in this particular must be considered as settled. But while, in such case, when a third person indorses a note concurrently with its execution, and at or before its delivery to the payee, the liability assumed is presumptively that of an indorser, it may be shown by parol evidence to be the liability of a joint maker or guarantor, according to the intention of the parties as disclosed by the facts. Looking at the note, with its indorsement, upon the facts as alleged, the defendants were presumptively liable as indorsers, who waived demand, protest, and notice of non-payment. In the light of our adjudications, they cannot be regarded *prima facie* as joint makers, because, according to the reason assigned, in the absence of explanatory evidence, the presumption is that the defendants supposed that they would incur no liability until after the payee had first indorsed. According, then, to the facts as alleged in the complaint, they are liable as indorsers, while by virtue of the facts as alleged in their reply the defendants are liable as joint makers, and the plaintiffs have recovered against them as such for that reason. This is inconsistent. Upon the complaint as it stands, there could be no such recovery without amendment; but the reply cannot obviate this defect, or vary the liability. It is a part of the plaintiff's case, and the necessary facts must be alleged and proved to establish such liability. In a word, the plaintiffs cannot recover, in such case, unless their complaint contains special averments showing the facts relative to the transaction which operate to charge the defendants as original promisors or joint makers. Mr. Lawson cites numerous cases showing, in respect to these irregular indorsements, that parol

evidence is admissible of the intention of the parties, which, when ascertained, determines their liability; but the cases cited also show that the facts were alleged in order to sustain such a recovery. *Lawson, Rights & Rem.* § 1575, and note of authorities. The complaint in *Moore v. Cross*, 19 N. Y. 227, alleged the facts that the indorsement was made for the purpose of paying for coal sold and delivered by the plaintiff to the defendant on the credit of such indorsement, etc., and is referred to and adopted in 1 Abbott's Forms, 237, for the purpose of showing the facts necessary to be averred in such case.

As the plaintiffs claim that the defendants were joint makers of the note, and that such was their understanding and contract, these are facts necessary to be averred in their complaint, and the defect was not obviated by their statement in the reply. It made the reply inconsistent with the complaint, which, upon the facts as alleged, established a different liability. The demurrer to the new matter set up in the reply should have been sustained. It follows that the judgment must be reversed, and the case remanded for such further proceedings as may be proper in the premises.

**KING v. AMY & SILVERSMITH CON. MIN. CO.**  
(*Supreme Court of Montana. May 21, 1890.*)

**MINES AND MINING—EXTENT OF LOCATION.**

Rev. St. U. S. § 2322, provides that the locators of mining locations shall have the right to possess and enjoy any vein or lode whose apex lies within the lines of the location, though the lode may, in its downward course or dip, cross the side lines of the location; but that their right to such outside part shall be confined to the portion of it bounded by vertical planes, drawn downward through the end lines of the location, so continued as to intersect such outside part of the lode. Held that, where a vein crosses the side line of a location both in its strike and its dip, the right to follow the vein on its strike is bounded by a plane drawn vertically through such side line, and the right to follow it on its dip is bounded by a plane parallel to the end line of the location, drawn vertically through the vein at its point of intersection with said side line.

Appeal from district court, Silver Bow county; before Justice DE WOLFE.

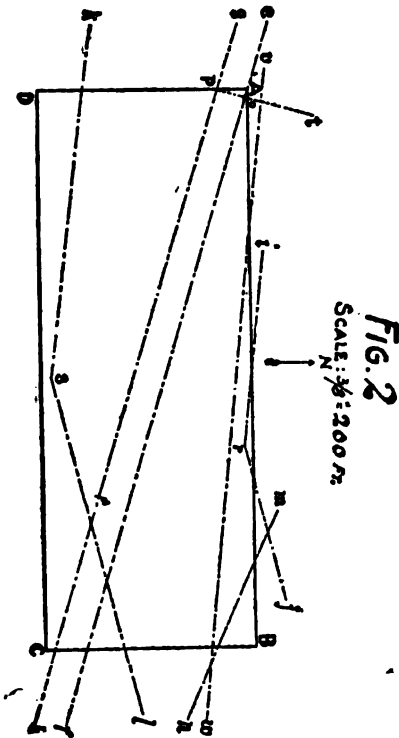
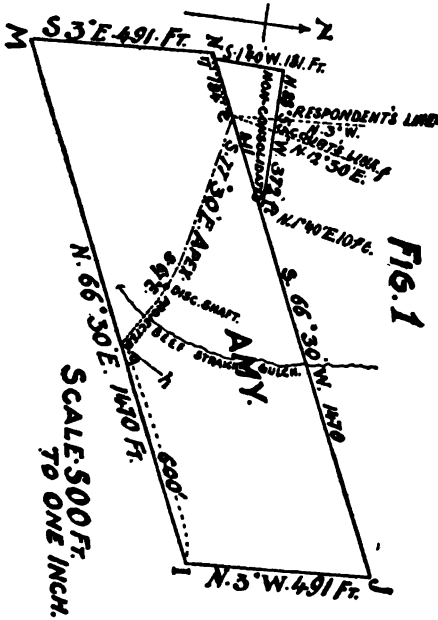
The plaintiff is the owner of the undivided three-fourths of the Non-Consolidated mining claim. The defendant is the owner of the other undivided fourth. The defendant is the owner of the Amy claim. The northerly side line of the Amy is the southerly side line of the Non-Consolidated. The west end line of the Amy is 491 feet long, and runs south, 30 deg. west. The east end line is the same length and course. The north side line is 1,470 feet in length, and runs south, 66 deg. 30 min. west. The south side line is the same length and course. The vein of the Amy claim, on its onward course or strike, passes through the north side line, and the apex thereof crosses said side line at a point 184 feet easterly from the west end line, and passes into the Non-Consolidated ground. Said vein runs on north-westerly, and does not again enter the Amy ground. The apex of the Amy vein passes out of the south side line of the location,

at a point between the south-east corner of the Amy and a point 600 feet westerly therefrom. The dip of the vein is to the north. Four hundred and eleven feet of the north line of the Amy, commencing at a point 17 feet east of the north-west corner, forms the south line of the Non-Consolidated. The west end line of the Non-Consolidated is 181 feet in length, and runs south, 1 deg. 40 min. west. The east end line is 10 feet long, and the same course. The north side line is 372 feet long, and runs north, 88 deg. 55 min. west. Each claim was located and patented subsequent to the passage of the United States mineral land act of May 10, 1872, and the amendments thereto, and is subject to the provisions of those laws.

The plat (Fig. 1) indicates the surface lines of the two claims, and the direction of the strike of the vein.

The plaintiff's action is for partition and accounting against the defendant, alleging that defendant has taken large quantities of ore from subterranean workings at a point north of the Amy north side line, which is the Non-Consolidated south side line. The only controversy is as to where the vertical end line bounding plane should be drawn downward as a limit of the mining operations of the defendant. Plaintiff contends that the Amy north side line should be considered the end line of that claim for all purposes, and that through that side line the vertical plane should be drawn downward perpendicularly, beyond which, to the north, the Amy company cannot follow the vein on its strike or dip. The defendant's position is that the vertical bounding plane, limiting its rights, must be drawn downward at the point where the Amy apex crosses the north side line of the claim; such plane to be parallel to the planes of the end lines as located by the Amy. On the trial the court took a view at variance with those of both plaintiff and defendant, and held that the bounding plane must be placed at the point where the apex crosses the north side line of the Amy; but that such plane must be drawn downward at a right angle to the strike of the vein at that point. The plat (Fig. 1) indicates the positions of the three planes described. They intersect at a common point, (e, on the plat,) viz., the point of departure of the apex from the Amy exterior boundaries. Judgment was entered in accordance with the views of the district court. The plaintiff appeals. The case comes before this court as a triangular contest. Since the decision below, the learned judge who tried the case appears as counsel for the respondent, and urges the theory for the respondent, which the court below adopted. Co-counsel for respondent presents the theory which he held below. Appellant's position is as it was in the district court. For convenience in terms we will designate these theories as follows: (1) The doctrine adopted by the court below will be called the court's theory and line and plane; (2) that contended for by the appellant, the plaintiff below, the appellant's; (3) that urged by the respondent, the defendant below, and presented by one of its counsel here, as the respondent's. The

point where the ore was taken out by defendant is north of the appellant's plane, and east of each of the two other planes. Whether the court's or respondent's view is adopted is practically immaterial to



the respondent, but the principles involved are vitally at variance. A decision as to which theory of the plane is the law in the case is the whole and only controversy. That decision will settle the title to the

portion of the vein from which the ore was taken.

William Scallon and E. W. Toole, for appellant. Stephen De Wolfe and John F. Forbels, for respondent.

DE WITT, J., (after stating the facts as above.) The case at bar involves the construction of section 2322, Rev. St. U. S., or, rather, the application of the facts of the case to that statute: "Sec. 2322. The locators of all mining locations \* \* \* shall have the exclusive right of possession and enjoyment of all \* \* \* veins, lodes, and ledges, throughout their entire depth, the top or apex of which lies inside of such surface lines, extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes, drawn downward, as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges." As said by Mr. Justice FIELD, (Iron Silver Min. Co. v. Elgin Min. Co., 118 U. S. 206, 6 Sup. Ct. Rep. 1183:) "This section appears sufficiently clear on its face. There is no patent or latent ambiguity in it. \* \* \* The difficulty arising from the section grows out of its application to claims where the course of the vein is so variant from a straight line that the end lines of the surface location are not parallel, or, if so, are not at a right angle to the course of the vein." We may add to these words that further difficulties arise when we are obliged to apply the statute to facts not wholly within its contemplation. If a mining location be made regularly,—made so that the strike of the vein crosses the location from end line to end line, and at right angles to said end lines,—there is nothing in the statute to construe or interpret. Mining Co. v. Tarbet, 98 U. S. 469; Iron Silver Min. Co. v. Elgin Min. Co., 118 U. S. 206, 6 Sup. Ct. Rep. 1177; Argentine Min. Co. v. Terrible Min. Co., 122 U. S. 485, 7 Sup. Ct. Rep. 1356. "There is no patent or latent ambiguity." But when veins on their strike cross the side lines, or a side line and end line, at all conceivable angles, difficulties confront the courts that can best be fully met by legislative aid. Until such aid is invoked, the courts must follow the statute and previous construction as closely as the varying facts permit. Iron Silver Min. Co. v. Elgin Min. Co., 118 U. S. 208, 6 Sup. Ct. Rep. 1177. The history of mining has proven that the law of May 10, 1872, and amendments thereto, do not afford clear, adequate, and simple solution for some of the practical conditions that arise in the development of the mining industry. The case at bar is a notable instance. It is a first impression in this court, and all other appellate courts.

Three solutions of this interesting problem are urged upon our consideration. Neither one is absolutely free from possible criticism, in view of prior construc-



tion of the statute, applied to cases where the facts departed from the regularity seeming to be contemplated by the law. The facts in this case we cannot ascertain have ever been before any court. We do not approach the consideration of the case with the assurance that we might possess were we able to follow a path that had heretofore been even partially opened. The situation is such that we do not feel prepared to pronounce an *ex cathedra* utterance. We are obliged to plow a furrow in virgin soil. It will be our endeavor to apply a view to the facts which shall seem to us most consonant with the true intent of the statute, and most in accord with the adjudicated cases in the United States supreme court, wherein the rights claimed under irregular locations have received the consideration of that court. Without attempting scientific discussion, we believe we can give a few practical definitions, to indicate the sense from the miner's point of view, in which we shall use certain terms in this opinion. Experience has shown that the precious mineral deposits, except what are commonly called "placers," as a rule lie in veins. Mr. Justice MILLER (*Mining Co. v. Cheesman*, 116 U. S. 531, 6 Sup. Ct. Rep. 483) says: "What constitutes a lode or vein of mineral matter has been no easy thing to define. In this court no clear definition has been given. On the circuit it has been often attempted." Mr. Justice FIELD, in the *Eureka Case*, 4 Sawy. 302, says: "A fissure in the earth's crust, an opening in its rocks and strata, made by some force of nature, in which the mineral is deposited, would seem to be essential to the definition of a lode in the judgment of geologists; but to the practical miner the fissure and its walls are only of importance as indicating the boundaries within which he may look for, and reasonably expect to find, the ore he seeks. A continuous body of mineralized rock, lying within any other well-defined boundaries on the earth's surface, and under it, would equally constitute, in his eyes, a lode. We are of opinion, therefore, that the term, as used in the acts of congress, is applicable to any zone or belt of mineralized rock, lying within boundaries clearly separating it from the neighboring rock;" the "neighboring rock" being called in the miner's language the "country," or the "country rock." A vein, to the miner, is a body of ore, quartz, or mineral-bearing substance, lying within the crust of the earth, bounded on each side by the country rock, greatly varying in width, and extending in length, across and through the country for greater and less distances. The direction of the vein so across and through the country is called the "strike." The direction of the vein, as it goes downward into the earth, is called the "dip." The dip, in different veins, and in the same vein sometimes, varies from a perpendicular to the earth's surface to an angle, perhaps, only a few degrees below the horizon. The dip is spoken of from three different points of view: (1) As to its inclination from a perpendicular to a horizontal, as so many degrees from the perpendicular or from the horizontal. A vein is thus described as

having a dip of 20 deg., 30 deg., etc. (2) As to the direction it takes from the strike or apex, by the points of the compass. If the strike were due east and west, and the vein in its course downward departed from the perpendicular at an angle, so that a perpendicular shaft sunk at the apex would leave the vein to the north of such shaft, the dip, in this point of view, would be said to be due north, or, the conditions reversed, due south. In this respect the dip—that is, the direction of the dip—is said to be, and is, at right angles to the strike. (3) The dip is again spoken of as the portions of the vein successively encountered in going down and away from the apex. The miner follows the dip when he works downward, leaving the apex further from and above him at each advance. He follows the strike when he works lengthways of the vein on a level; that is, when he is advancing along the vein, neither rising towards the surface of the ground nor descending, but going on a level with the plane of the earth's surface. A failure to distinguish these three views of the dip in using the word sometimes leads to confusion. As we shall use the term "dip" frequently hereinafter, for the sake of definition let us call the dip from the first point of view the inclination dip, the second the compass dip, and the third the practical dip; for this is the practical idea of the miner when he speaks of following his dip.

Under these definitions, a vein absolutely perpendicular to the plane of the earth's surface, an occurrence rarely if ever encountered, has no inclination dip or compass dip. It has only the practical dip. But in actual mining veins possess a dip from all three points of view. Keeping these definitions in view, we believe that some expressions of courts and arguments of counsel become more clear. This word "dip" is not used in the act of congress cited above. The expression there is "course downward." "Dip" is the miners' word, which has attained the significations above defined. The highest point of such vein or body as we have described is the apex. The apex may or may not reach the surface of the ground. The United States mineral law gives to the miner the whole of every vein the apex of which lies within his surface exterior boundaries, or which lies within perpendicular planes drawn downward indefinitely on the lines of those boundaries. The miner may follow the "dip," using the word in either of its significations, wherever it goes, provided he has the apex as a basis of operations, and that he does not cross the vertical planes of the end lines. The intent of the statute is to give the miner a section or block of the vein of a length on the strike which is equal to the length of the apex lying within the exterior vertical bounding planes of the location, and of a depth as far as he desires or is able to work downward, and that at the most remote depth attained he shall have the same number of feet on the strike as he had at the apex. *Iron Silver Min. Co. v. Elgin Min. Co.*, 118 U. S. 205, 6 Sup. Ct. Rep. 1177. It seems that such grant by

the statute to the miner, in view of the geological facts and history of veins, and particularly their almost universal tendency to depart from a perpendicular in their course downward, was deemed to secure to him a more satisfactory title than he would obtain if he were compelled to locate a parallelogram on the surface of the earth, as under the Spanish mining law, and take all, and only that portion of the solid contents of the earth included in a parallelepipedon formed by dropping vertical planes downward on the line of each side of such parallelogram; and the intent of the statutory grant of section 2322 is that the miner may follow his vein on the dip, but not on the strike, if it departs from the parallelepipedon indicated. Therefore, if the miner locates his claim regularly,—that is, as the statute contemplates that he will,—he has all that the statute intends to give him. See cases cited *supra*. If he "will not or cannot make the explorations necessary to ascertain the true course of the vein, and draws his end lines ignorantly, he must bear the consequences," (*Iron Silver Min. Co. v. Elgin Min. Co.*, 118 U. S. 207, 6 Sup. Ct. Rep. 1177;) that is, he takes less of the apex and strike than he would obtain by a regular location, and consequently less of the dip. But, in order for the miner to make his location in exact conformity with the intent of the law, he must know, when he fixes his exterior boundaries, what the true strike of the vein is. If he knows this, he will locate so that the strike shall pass through the middle of each end line, leaving 300 feet of surface ground on each side of the vein. But the true strike is often ascertainable only after immense sums of money are expended in development. He has 20 days, under our statute, to determine this important matter, which may take years to fully demonstrate. If in this helpless condition the prospector commits an error of geological judgment, and upon such error he expends the toll of years, and that toll has wrought its reward, we are of the opinion that the statute should be so construed as will come the nearest to giving to him that whole section or block of the vein which we have above indicated that it is the intent that he shall have, as is consistent with the amount of apex which he has happened to secure by his surface lines, and their planes extended downward.

In the light of these views, we will proceed to examine the three theories of the end line plane, presented for our consideration.

1. The court's theory. In this view the line that fixes the bounding plane is at right angles to the strike of the vein at the point where it leaves the Amy north side line. (On Fig. 1, the line is indicated by the letters *e, f*.) The plane drops perpendicular from that line. Counsel for appellant calls this a judicially established plane,—a plane created by the court, and not by one of the location lines. Respondent's counsel, who holds this theory, vigorously protests against this term, and asserts that the plane is not judicially established, but is that intended by the statute. This, however, is only a terminolog-

ical contention. Our own infirmity of language is such that we cannot better designate this line and plane than as does appellant. It is in no sense an original line or plane of the surface boundaries as located, nor a projection of, or parallel to, any of them. It is not a line fixed by location, nor ever fixed, except by the decree of the court below.

The United States supreme court cases cited by all the counsel are *Mining Co. v. Tarbet*, 98 U. S. 463, (*The Flagstaff Case*;) *Iron Silver Min. Co. v. Elgin Min. Co.*, 118 U. S. 196, 6 Sup. Ct. Rep. 1177, (*The Horseshoe Case*;) *Argentine Min. Co. v. Terrible Min. Co.*, 122 U. S. 478, 7 Sup. Ct. Rep. 1358. If there be one legal principle that is announced with more clearness and frequency than all others throughout all these cases, it is that "the boundary planes shall be definitely determined by the lines of the surface location, and that they shall not be subject to perpetual readjustment, according to subterranean developments made by mine workings." *The Elgin Case*, 118 U. S. 207, 6 Sup. Ct. Rep. 1183. See, also, 118 U. S. 205, 206, 6 Sup. Ct. Rep. 1181, 1182. The bounding planes must be drawn by reference to the original surface lines, and may not be established arbitrarily at the judgment of the parties, or the courts at a later day. The original location fixes the planes. We are forced to conclude that the court's theory is not in accord with this principle. The plane established is purely a judicial one. It has neither parallelism nor coincidence with, or projection from, or reference to, the planes of any of the original surface lines. It is not "determined by the lines of the surface location." It was never marked on the ground by the location, nor is it referable thereto. The whole theory of the advocate of this position is based upon the fact that he takes but one view of the dip,—that which we have called the "compass dip." The dip, in this respect, is, as counsel insists, at right angles to the strike. Then, from this single point of view, he argues that, when the miner follows the dip, he may go downward from the apex only at right angles to the strike, and limited further by the planes of the original location end lines. We take his own language from his brief, as follows: "The judge before whom the trial was had held that lines drawn at right angles through the vein or lode, where it crossed the side lines, and these lines extended in the direction of the dip of the vein until it intersects a vertical plane drawn downward through the end lines of the location, and continued in the same direction to the place of intersection, constituted the true dip of the vein, and the part which the locator was entitled to follow in its downward course." This is a fair and succinct statement of the position of the court below and counsel here. We cannot but remember that this case not only determines the rights of the parties hereto, but that the decision will form an important precedent for future adjudication in the courts of this state. If we adopt the court's theory, we must abide by its legitimate consequences. The planes in this case would be drawn on the lines *e, f*, and *g, h*, (Fig. 1.) We must then fol-

low the plane *g, h*, until it meets the plane of the east original end line, the line *I, J*, on the figure, extended in its own direction northerly, which latter plane, in its northward course, afterwards meets the plane *e, f*. Thus, three end-line planes operate as boundaries, and the portion of the vein that the miner takes runs to a point. This result cannot be the intent of the statute. This is not the section or block of the vein, in its entire depth, which the law intends to grant. Again, (in Fig. 2,) let a parallelogram, *A, B, C, D*, represent a location. The strike of the vein crosses the location, entering the east end line near the south-east corner, and passing out of the west end line near the north-west corner, as the *g, h*, on the figure. The inclination of the dip is northerly. Counsel's westerly boundary plane on his theory would run north-easterly, at right angles to the strike at the point of departure from the west end line, (the line *p, t*, on the figure.) The section of the vein taken again runs to the point of a wedge. The miner is deprived of the portion of the vein on the dip lying north of the north side line, and between the plane of his artificially established end line (the line *o, t*) and the plane of the original west end line, *D, A*, projected in its own direction. This portion of the vein it has never before been doubted, that we are aware, would belong to the owner of the apex of the vein *g, h*, lying between the protected planes of the located end lines. Again, the vein may enter an end line, and pass out of the side line, as the line *m, n*, in Fig. 2; or take a deflection, as the lines *i, r, j*, or *k, s, l*. These are possible, and quite probable, and we believe actual, occurrences in fact. The application of counsel's theory leads to results from which we must retreat. In fact, in innumerable practical examples, where a claim is not located with absolute statutory regularity, the miner is entirely cut off from following his dip, and cut off at a greater or less depth, depending upon the inclination of the dip, and the angle at which the strike passes out of a surface line. In the case before us the court drew the boundary plane at right angles to the strike, as it seemed to be demonstrated, at the point of departure from the north side line. The departure at the south side line is not definitely determined. If, in its course over the Amy location, the vein takes a deflection, as seems probable from the findings of the court, the court's bounding planes will not be parallel, and the portion of the vein secured will run to a point or into a fan-shaped section. If the court would draw the planes by reference to the general average strike of the vein throughout its whole extent, this could not be accomplished until extensive developments had been made on the vein over, perhaps, many locations thereon.

We are of the opinion that the view of the district court is not sustained by the statute or the adjudicated cases, and that its adoption threatens the security of mining titles. We are therefore obliged to disavow its doctrine. This conclusion, however, does not determine the case. We are compelled to announce a construction

of the law and the facts upon which judgment may be ordered entered below. This involves a discussion of the appellants' and respondents' theories. We will first examine the former.

2. The appellant's theory. The controlling principle of section 2322, and the decisions thereunder, is that the miner has title to all veins the apex of which lies within the vertical planes of his surface lines, although such veins, in their inclination on their course downward, cross the vertical plane of a side line, provided that such exterior parts lie within the projected planes of the end lines. We are unable to escape the conclusion that the application of the appellant's theory, in the case before us, violates this principle. Referring to the plat, (Fig. 1,) it will be seen that, if the Amy people go down upon their dip (using the word in any of its significations, and especially as to the compass dip) from any point on the apex, they will, at greater or less depth, depending upon the distance from the point where the apex crosses the north side line, encounter the vertical plane of that line; and if that plane is to cut them off upon the dip, and be the end line, the provisions of the statute and the universally accepted construction of the mining law are plainly subverted. Counsel holds that if the strike cross a side line, that such side line becomes an end line for all purposes. A better illustration of the revolutionary character of the theory could scarcely be presented than the one at bar. But, if it be correct, we must not shrink from its necessary results. Side lines are frequently not parallel. If the strike crosses two side lines not parallel, and these are made end lines, the section of vein taken constantly narrows if the inclination be towards the small end of the location, or widens if the inclination be in the other direction. In fact all the supposititious cases applied to the court's theory develop equal disasters under the one now considered. Referring again to Fig. 2, the vein indicated by the line *m, n*, or *v, w*, will have bounding planes not parallel, but at an angle to each other, and often a right angle. If the compass dip were north-easterly, the section acquired quickly runs to a point. If it was south-westerly, it would develop into a fan of infinite proportions, unless we applied the two other lines of the claim as end lines, and had four in operation. The vein *i, r, j*, would have end lines coincident; that is, there would be but one end line. The single plane of the north side line would cut off a northerly dip in a short distance downward; or, if the dip were southerly, would counsel call into requisition the original end lines, after the vein passed the south side line plane, and have three end lines taking effect? And here we stop to observe that, in the discussion of each of the theories, we are considering the effects of the doctrines upon the portions of the vein on the dip lying outside of the vertical planes of the side lines. Those portions inside the vertical planes of the surface lines of the location are controlled by the general provisions of section 2322. The appellant's view was urged in a learned

argument by counsel; but we feel that we must conclude that in the case at bar it seems to be contrary to the theory and intent of the mining law. We are constrained to disavow the doctrine.

3. The respondent's theory. We have arrived at our approval of this doctrine, partially upon what the logicians call the principle of exclusion. We believe, however, that the position is independently sustainable by its own reason, and upon previous construction. Its advocate also protests against calling his line or plane a judicially established one, and contends that it is established by the original surface lines; that is, by reference thereto, under the control thereof, and in accordance therewith. In the Elgin Case, 118 U. S. 206-208, 6 Sup. Ct. Rep. 1183, 1184, we find the following, in the opinion of Mr. Justice FIELD: "The surface side lines extended downward vertically determine the extent of the claim, except when in its descent the vein passes outside of them, and the outside portions are to lie between vertical planes drawn downward through the end lines. This means the end lines of the surface location, for all locations are measured on the surface. \* \* \* It is better that the boundary planes should be definitely determined by the lines of the surface location than that they should be subject to perpetual readjustment, according to subterranean developments made by mine workings. \* \* \* The provision of the statute that the locator is entitled throughout their entire depth to all the veins, lodes, or ledges, the top or apex of which lies inside the surface lines of his location, tends strongly to show that the end lines marked on the ground must control. \* \* \* This view of the controlling effect of the end lines of the surface location is also sustained by the decision of this court in the Flagstaff Case." From those utterances, and from the tenor of this case, as well as the Flagstaff and Argentine Cases, we believe that we may conclude that the bounding planes, sought to be applied in the respondent's theory to the facts of the case at bar, may properly be said to be "determined by the lines of the surface location." In the Flagstaff Case and the Argentine Case the strike of the vein was at right angles to the side line of the location, or, as the court in the former case says, practically so, and, for the purposes of the decision, treated as such. Therefore, in those cases, the vital matter before the court was not a question of the dip, but rather one of the strike, and the spirit of those cases seems to us to be that, when the strike passes out of the location through any surface line, that surface line, and its vertical plane, cut off the strike, and the miner may not follow the strike beyond such plane.

We are aware that there is language used in the Argentine Case that looks towards the adoption of the appellant's theory herein, in the sense that the side line, under the circumstances of the case at bar, must be an end line to limit, by its vertical plane, the dip, as well as to stop the pursuit of the strike. But there is a vital difference between the facts of the Argentine Case and those now before us, and the

language therein must be viewed in connection with the facts in the case before the learned justice. Chief Justice MARSHALL, in *Coburn v. Virginia*, 6 Wheat. 399, says: "It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated." Mr. Justice FIELD is the judicial father of the mining law of the United States. By his legal learning, and his practical knowledge of mining, he has illumined the path of the history of mining adjudications. His words in the Argentine Case, and those of Mr. Justice BRADLEY in the Flagstaff Case, were not spoken of a state of facts such as those now before this court; and we cannot consent that those distinguished jurists would admit that their language sanctions the doctrine that appellant applies to the Amy-Non-Consolidated situation. Turning to the Horseshoe Case, the other of the three leading cases cited, the facts were also entirely variant from those now before us. These three United States cases have compelled that court to endeavor to cast into the Procrustean bed of the statute individuals that strained the mould into which they were forced. But we believe that we may legitimately conclude from those cases that, in the facts now before us, the principle is that the north side line of the Amy terminates the strike of the vein, and that the dip must be controlled by the planes of the original end lines. The Amy people may follow their dip north of their north side line, but only as it lies between the planes of their end lines, as below considered. The object of parallelism in the end lines is that the locator may have his full section of the lode in its entire depth. But the determination of the strike of the Amy at a point on the side line deprives them of the dip north-west of that point, because the dip, in that portion, lies under the apex of the Non-Consolidated. The law intends that the plane of the end line shall operate as a boundary to the dip, and so operate at the point where the strike is ended. If the strike reached the original end line, as in a regular location, the bounding plane would there operate upon the dip. If the strike, by reason of its going out of a side line, falls short of reaching the original end-line plane, that plane must take effect where the strike in fact ends; that is, at a point on the side line, (point e, Fig. 1;) and, if it takes effect there, its parallelism must not be destroyed. We therefore have the bounding plane operating at the point where the apex leaves the north side line, and operating parallel to the east end line, and retaining its parallelism as originally marked on the ground. It is

not a new line or plane, or one judicially constructed. It is determined by the location lines on the surface. There is never any readjustment according to subsequent developments. The parallelism of the end line planes is fixed by location, and never varies. The point of departure of the strike from the surface lines fixes the point where the end line plane is to perform its functions, whether that departure be at an end line, as contemplated by the statute, or whether accident has fixed it at a point on a side line. Complications are soluble upon this theory. The intent of the statute seems to be secured.

We will notice some objections made to this doctrine, but which we believe are not sustainable. It is urged that the principle will not apply to a vein, the strike of which crosses the location at exact right angles to the side lines. But here there would be no dip in question. The side line would bound the strike, as in the Flagstaff Case. Again, it is suggested the Non-Consolidated surface location happens to be almost exactly parallel in its lines to the Amy. If the Non-Consolidated had been located with its end lines at right angles to the strike of the vein in the Non-Consolidated ground, that is, parallel to the court's line, (Fig. 1.) then it is objected that, if the Non-Consolidated go down on the dip, within the planes of such end lines, and the Amy go down within the planes as we define them, a collision would occur underground. If so, such conflict would be adjustable by priority of title. Again, it is urged that the Amy has an apex on the surface of a length, as it runs from south to north side line, but that under this theory, at a depth, the strike is shorter, and only of a length equal to the shortest distance between the bounding planes. This objection is based upon an error in the geometrical view, as may readily be shown by descriptive demonstration. A level run on the vein at 100, 500, 1,000, or any number of feet in depth, would be parallel to the strike at the highest point, and of equal length. Of the three theories which have been presented to us for application to this case, we approve and adopt the last considered. In accordance with this view, let the judgment in the district court be modified in this particular: that the plane bounding the portions of the dip of the Amy vein, lying north of and outside of the Amy north side line, shall be drawn from the point where the apex crosses that north side line, and in a direction north, 3 deg. west.

The case is remanded, with directions to the district court to enter judgment accordingly:

BLAKE, C. J., and HARWOOD, J., concur.

#### CITY OF BUTTE V. COHEN *et al.*

(Supreme Court of Montana. May 2, 1890.)

#### OFFICIAL BOND—JOINT AND SEVERAL LIABILITY—CONSTRUCTION.

1. The bond of the city treasurer specified the amounts for which each bondsman was bound, which were put opposite the signature of each

bondsman. In the body of the instrument, after the part specifying these amounts, was the phrase, "for the payment of which, well and truly to be made, we bind ourselves, our heirs, representatives, administrators, and assigns, jointly and severally, by these presents." Comp. St. Mont. § 631, (Code Civil Proc.) provides that in the construction of the instrument the intention of the parties is to be pursued, if possible, and when a general and particular provision are inconsistent the latter is paramount; and a particular intent will control a general one that is inconsistent with it. Section 346 provides, when an agreement has been intended in a different sense by the different parties to it, the sense is to prevail against either party in which he supposed the other understood it, and, when different constructions are equally proper, that is to be taken which is most favorable to the party in whose favor the provision was made. In an action on the bond the complaint alleged that "defendants have forfeited the bond, and become and are indebted to plaintiff in the respective sums set after their names in said bond." *Held*, that the instrument bound the sureties severally for the amount only expressly stated as respectively undertaken.

2. The complaint alleged that the treasurer failed to pay over according to law money which came into his hands as treasurer. Plaintiff offered books kept by the treasurer which showed parties indebted to the city who had in fact paid the treasurer; also City Ordinance No. 5, § 9, providing that the treasurer shall keep a true account of all moneys received by him. Defendants offered section 8, providing that the city treasurer shall receive one-sixth of all moneys collected by him. Defendants also offered the treasurer's books, which showed the amount collected and turned into the city, and that on this amount the treasurer had received only 10 per cent. *Held*, that the additional 6½ per cent. should have been considered in bar of recovery against the sureties.

3. Defendants were entitled to avail themselves of these facts under a general denial of the complaint.

Appeal from district court, Silver Bow county; STEPHEN DE WOLFE, Judge.

*McBride & Haldorn* and *Frank E. Corbett*, for appellants. *John F. Forbis*, for respondent.

HARWOOD, J. The appellants in this action were sureties, with others, on the official bond of one Edwin G. Leiter, treasurer of the city of Butte. The said bond is in words and figures as follows: "Know all men by these presents, that we, Edwin G. Leiter as principal, and D. H. Cohen, Paul Davis, Charles Schlessinger, Samuel Lewis, and James R. Boyce, Junior, as sureties, are held and firmly bound unto the city of Butte in the following penal sums, to-wit: The said principal in the penal sum of five thousand dollars, (\$5,000;) and the said sureties in the following penal sum five hundred dollars, (\$500;) the said Paul Davis in the penal sum of five hundred dollars, (\$500;) the said Charles Schlessinger in the penal sum of five hundred dollars, (\$500;) the said Samuel Lewis in the penal sum of five hundred dollars, (\$500;) and the said James R. Boyce, Jr., in the penal sum of three thousand dollars, (\$3,000.) For the payment of which, well and truly to be made, we bind ourselves, our heirs, representatives, administrators, and assigns, jointly and severally, by these presents. Sealed with our seals, and dated this 16th day of May, 1883. The condition of the foregoing obligation is such that whereas, the above-bounden principal, Edwin G. Leiter, was, at a general election

held in and for the city of Butte, Silver Bow county, Montana territory, on Monday, the 7th day of May, 1883, duly elected treasurer and assessor in and for said city: Now, therefore, the condition of this obligation is such that if the said Edwin G. Leiter shall well, truly, and faithfully perform all the official duties pertaining to said office, and required of him by the laws and ordinance of said city, and shall pay over, according to said laws and ordinances, all moneys which shall come into his hands as treasurer and assessor in and for said city of Butte, and will render a just and true account thereof whenever required by the city council of said city, and shall deliver over to his successor in office all moneys, books, papers, and other things appertaining thereto, or belonging to his office, then the above obligation to be null and void; otherwise to remain in full force and effect. EDWIN G. LEITER. [Seal.] \$500 dollars. D. H. COHEN. [Seal.] \$500 dollars. CHAS. SCHLESSINGER. [Seal.] \$3,000.00, J. R. BOYCE, Jr. [Seal.] \$500, S. LEWIS. [Seal.] \$500, PAUL DAVIS. [Seal.] This action was brought to recover from the defendant sureties the sum of \$814.95, alleged to have been collected by said principal, as treasurer of the city of Butte, as taxes and licenses belonging to said city, and embezzled and retained by said principal, Edwin G. Leiter, in breach of the covenants of said bond. The said Edwin G. Leiter, principal, was not made a party defendant in this action. As a result of the trial of the action, judgment for \$652.09, and costs amounting to \$109.50, was rendered against defendants D. H. Cohen, Paul Davis, Samuel Lewis, and James R. Boyce, Jr.

The first question presented for determination on this appeal is whether, under the terms and conditions of said bond, a judgment for the sums and costs aforesaid can be lawfully rendered against the defendant sureties jointly and severally, where, as the appellants contend, some of said sureties expressly undertook and bound themselves, by the terms of said bond, for a penal sum less than the amount of the judgment. In other words, the question to be determined is whether the sureties on said bond are only bound severally for the amounts set opposite their respective names in the body of said bond, and set before their respective names at the place of signing the same. Upon the subject of the construction of instruments the statute of this state (Comp. St. § 631; Code Civil Proc.) provides as follows: "In the construction of a statute the intention of the legislature, and in the construction of the instrument the intention of the parties, is to be pursued if possible; and, when a general and particular provision are inconsistent, the latter is paramount to the former. So a particular intent will control a general one that is inconsistent with it." Section 636. "When the terms of an agreement have been intended in a different sense by the different parties to it, that sense is to prevail against either party in which he supposed the other understood it; and, when different constructions of a provision are otherwise equally proper, that is to be

taken which is most favorable to the party in whose favor the provision was made." Applying these rules of construction to the instrument in question, we find no difficulty in construing it. The evident intent of the parties who executed this bond is plain. It recites in the body thereof "that we, Edwin G. Leiter as principal, and D. H. Cohen, Paul Davis, Charles Schlessinger, Samuel Lewis, and James R. Boyce, Jr., as sureties, are held and firmly bound unto the city of Butte in the following penal sums, to-wit: The said principal in the sum of five thousand dollars, (\$5,000;) and the said sureties in the following penal sum of five hundred dollars, (\$500;) the said Paul Davis in the sum of five hundred dollars, (\$500;) the said Charles Schlessinger in the penal sum of five hundred dollars, (\$500,)" etc. Now, if the said Paul Davis and other sureties who recited that they were bound in the sum of \$500 intended to be bound in the sum of \$5,000, why did they make these particular provisions that they are bound in the sum of \$500. Again, at the place where these sureties sign the bond is written before each of their names a sum like the one expressed after their names, respectively, in the body thereof. It is plain that each intended to be bound in the sum expressly stated for each of them, as distinguished from the amount that the principal was bound for. So far there appears to be no ambiguity or inconsistency in the language of the bond. There is a phrase, however, further along in the contents of the bond, which appears to be inconsistent with these particular limitations, and the several character of the penal sums for which each surety undertook to be bound. That phrase is as follows: "For the payment of which, well and truly to be made, we bind ourselves, our heirs, representatives, administrators, and assigns, jointly and severally, by these presents." It is contended by respondent that this provision binds the sureties jointly and severally for the whole penal sum of \$5,000. This is certainly a general provision in the bond, and is inconsistent with the particular provisions which go before it. Apply the statutory rule above quoted to this state of facts, the particular provisions must prevail over the general. It appears from the complaint that the plaintiff understood the liability of the sureties to extend to the amount stated in the bond as the penal obligation of each surety. The seventh paragraph of the complaint alleges that, "by reason of the breach aforesaid, the defendants have forfeited the said bond, and become and are indebted to plaintiff in the respective sums set after their names in said bond." We think this instrument should be construed as binding the sureties severally for that amount expressly stated in the bond as the obligation respectively undertaken. Hence the judgment against any surety should not exceed the amount for which he bound himself, in case of a breach of the condition, and may be enforced up to that amount, against each surety sued, until the judgment is satisfied. *People v. Edwards*, 9 Cal. 286; *People v. Love*, 25 Cal. 521; *People v. Rooney*, 29 Cal. 643; *City of*

Los Angeles v. Mellus, 59 Cal. 444; Moss v. Wilson, 40 Cal. 159; Bank v. Smith, 12 Allen, 243; Bank v. Willard, 10 N. H. 210; Murfree, Off. Bonds, §§ 236, 237.

If this was the only error complained of by appellant, the judgment in the court below should be modified to conform to the foregoing conclusions, but there are other assignments of error which demand consideration. The complaint in this action alleges that "while the said Leiter, was and acted as such treasurer and assessor, he committed a breach of the condition of said bond by misappropriating, embezzling, and failing to account for moneys collected by him for the use of the plaintiff, and by otherwise failing to well, truly, or faithfully perform his official duties to said office, and failing to pay over, according to the laws and ordinances, the money which came to his hands as treasurer and assessor as aforesaid, and by failing to render a just and true account thereof, and more particularly by embezzling and converting to his own use, and failing to account for, the sum of \$585 collected by him as such treasurer and assessor for licenses collected at various times from diverse and sundry persons, and the further sum of \$218.96 collected by him as such officer for taxes collected at various times from diverse persons." The defendants appeared, and by answer made specific denial of all the allegations of the complaint. To establish the allegations of the complaint the plaintiff offered, and the court admitted in evidence, certain books, provided by ordinance of said city, pertaining to the city treasurer's office, kept by said Leiter. According to the showing on the face of said books, a number of parties appeared to be indebted to the city for taxes or licenses, but upon investigation such parties produced a receipt from said Leiter, or other competent evidence, showing that such payments had been made. The books, on the other hand, did not show that said money had been paid over, or accounted for, to the city. The aggregate of the various amounts so proved is, we presume, the amount of the judgment, \$652.09. Having made such showing, the plaintiff's counsel offered, and the court received in evidence, section 9 of ordinance No. 5 of said city, which provides, among other things, that "it shall be the duty of the city assessor, as *ex officio* treasurer and collector, to keep a true account of all moneys received by him, stating from whom, and on what account, the same was received, in suitable books to be provided by the city council, and kept by him for that purpose;" and with this proof the plaintiff rested its case. The defendants then offered in evidence on their defense section 8 of said ordinance No. 5, which was admitted by the court without objection, and which provides, among other things, that the city treasurer "shall receive one-sixth of all moneys collected by him, and such other compensation as the city council may allow." The defendants further offered, and the court received in evidence, the books of account kept by said treasurer, which showed the amount of licenses collected and turned into the

city treasury by said Leiter during the time he acted as treasurer, and during the time the said defalcations are alleged to have occurred. In this respect the books showed that during said period the sum turned into the treasury was \$9,247.55. These books also showed that said treasurer had received only 10 per cent., or one-tenth, of said collections, as compensation, whereas the said ordinance allowed him one-sixth thereof, or 16 $\frac{2}{3}$  per cent. The appellants contend that this additional allowance which would be due to said treasurer on the showing of the books should be considered by the court, to the extent of the sum it amounted to, as a bar to recovery against the defendant sureties of the sum proved to have been collected and retained by said Leiter. We are of opinion that this ought to have been so considered. The defendants had denied, in effect, that the said Leiter, for whom they were sureties, had retained and converted to his own use moneys belonging to the city as alleged in the complaint. They were there making proof upon their side of the issue presented by such allegations and denials. The books required to be kept were properly introduced to prove facts which the ordinance required to be recorded in them, and these entries were made by the treasurer against his interest. *Coleman v. Com.*, 25 Grat. 865. No evidence was introduced in rebuttal of the showing made by the defendants.

It is urged by counsel for plaintiff that the defendants should have set up these facts in their answer in order to avail themselves thereof in defense on the trial, and it is suggested by counsel for plaintiff that, if that showing was allowed, it would more than counter-balance the whole deficit proved by plaintiff, and defendants would be entitled to a balance from the city; that the only way defendants can avail themselves of a counter-claim is to set it up by answer or cross-complaint. We do not agree with that proposition. This action is not against the principal, but is brought against certain sureties. The sureties in this action are not entitled to a counter-claim or set-off which exists in favor of the principal as between him and the city, but the sureties are entitled to defend against the main allegation, which involves them in a liability. These defendants are entitled to prove facts which would bar a recovery against them on an issue raised by the allegation of the complaint, and a specific denial of such allegations by answer. The principal, Leiter, if a party defendant to this action, could likewise make the same showing, on a simple denial of the allegations of the complaint, to bar a recovery. If he was shown to be entitled to a certain portion of the moneys collected, and this amount was proved, or the facts from which the mathematical deduction can be made with certainty, and this amount exceeded what he was charged with having retained, then this showing would be a bar to recovery from him or his sureties. Surely what would be allowed to the principal in an accounting with the city *a fortiori* should be considered when proved on behalf of the sureties in an action for a breach of



the covenants of the bond. The judgment is reversed, and the case remanded to the trial court to enter a judgment in conformity with the conclusions herein expressed.

BLAKE, C. J., and DE WITT, J., concur.

**MONTANA UNION RY. CO. v. LANGLOIS et al.**

(Supreme Court of Montana. May 1, 1890.)

**CARRIERS—USE OF PASSENGER PLATFORM—INJUNCTION.**

A railway company cannot grant to one hack-owner the exclusive right to use its platform for receiving and discharging passengers. Disapproving Railroad Co. v. Tripp, 17 N. E. Rep. 89.

Appeal from district court, Silver Bow county; STEPHEN DE WOLFE, Judge.

*J. S. Shropshire*, for appellants. *Charles O'Donnell*, for respondent.

HARWOOD, J. This is an action for an injunction. The complaint sets forth: That the appellant is a railway corporation, organized under the laws of the territory of Montana. That it is the owner of and operating, as a common carrier, a line of railroad running from Garrison, in Deer Lodge county, and divers other stations, to its station known as "South Butte," in Silver Bow county, Mont.; the latter station being about one and one-half miles from the United States post-office in the city of Butte, in said Silver Bow county. That at the said station of South Butte the appellant is the owner of and in possession of a large number of railway tracks, yard, station grounds, and buildings; that the appellant has at said depot or station building at South Butte a long platform for the accommodation of passengers, whom the appellant transfers to and from said station; and that said depot grounds are surrounded by a board fence, inside of which hacks and wagons are accustomed to drive for the purpose of conveying passengers to appellant's passenger trains, and receiving passengers from said trains. That at the time stated, and for a long time prior thereto, the appellant had a contract with the government of the United States whereby the appellant was obliged to carry upon its trains the United States mail matter to said station at South Butte, and thence to the post-office at the city of Butte. That appellants contracted with Geoffrey and Thomas Lovell, in the name of Lovell Bros., to carry said United States mail from said station at South Butte to the United States post-office at Butte City; and appellants further contracted with said Lovell Bros. to have an ample supply of hacks and omnibuses at said station of South Butte, at the arrival of all trains, for the safe and comfortable transportation of all passengers who desire such transportation from said station of South Butte to the city of Butte and points adjacent thereto. And in consideration thereof the appellant granted and agreed with said Lovell Bros. to give them the exclusive right to drive and stand their hacks, carriages, and omnibuses along the edge of the said platform. That

respondents are the owners or drivers of hacks and carriages, and at the times complained of, and against the will and protest of plaintiff, have forcibly driven their hacks and carriages into said depot yard of plaintiff, and driven and stood said hacks adjacent to and against the platform aforesaid, and have forcibly kept from such platform the hacks of Lovell Bros. That plaintiff, by its agents and servants, has often protested to defendants against their conduct in that respect, and repeatedly told defendants that they could not occupy said platform privileges; but that plaintiff did offer defendants the privileges of driving into plaintiff's said depot at said station, and standing their hacks in said yard, to deliver and receive passengers, provided the defendants would keep away from the said platform a distance of 50 feet, which place was clearly indicated to the defendants; and, further, that defendants might have the privilege of driving and standing their hacks and carriages at a point on said platform east of the passenger depot not occupied by the hacks of said Lovell Bros. That, notwithstanding these protests and concessions of plaintiff, the defendants continue to drive and stand their hacks next to said platform, and within said 50-foot limit; and defendants expressly decline to desist from driving and standing their hacks at said forbidden place, and expressly declare that they will persist in placing their hacks at the platform reserved, as aforesaid, to Lovell Bros. That if the defendants continue to do those acts complained of, or any of them, the plaintiff will be prevented from carrying out its part of the said contract with Lovell Bros., and the latter will decline to transport the said United States mail from the station aforesaid, and to the post-office at Butte City, and to care for plaintiff's railway passengers, as aforesaid. That plaintiff has not a plain, speedy, and adequate remedy at law. Upon the facts set forth, the plaintiff prays that the defendants be restrained by injunction from driving or standing hacks, cabs, carriages, or busses at the said platform of plaintiff at the west side of its depot buildings, or within 50 feet thereof.

The defendants answer, and admit that defendant Charles Langlois is the owner of a line of hacks, vehicles, and carriages, with which he is engaged in carrying passengers in and about the city of Butte, and to and from the station and trains of plaintiff, and that the other defendants named are in his employ as drivers of said hacks, carriages, etc.; but the defendants deny that they, or either of them, ever in any manner interfered with the said plaintiff in the conduct of its said railroad or passenger business at South Butte or elsewhere, or that they, or either of them, interfered with the comfort or convenience of passengers of plaintiff at said station. The defendants further allege that plaintiff never had any contract with any of its passengers to carry or transport them further than its said station at South Butte; and that plaintiff's contracts for transportation of its passengers to said station ends and is fully executed when such passengers are landed on said platform;

and that all such passengers are obliged to procure and pay for their transportation from said platform to the city of Butte or elsewhere. That the defendants, in their conduct in running their line of hacks and carriages for the transportation of passengers and baggage to and from the said station, have always conducted the same in a quiet and orderly manner, and have not gone upon the platform of plaintiff, nor solicited nor annoyed plaintiff's passengers, but have driven their hacks and carriages up to said platform on the west side of said station, and stood them there to receive and carry any and all such passengers as might wish to employ them so to do. That they never have at any time interfered, nor attempted to interfere, with the hacks of said Lovell Bros. at said station. That defendants have only driven their hacks up to said platform when there was a vacancy thereat, and had only refused to remove their hacks therefrom to make way for the hacks of said Lovell Bros. The defendants further allege that the portion of plaintiff's platform which is west of the said passenger station, as described in plaintiff's complaint, is the portion of the platform where passengers alight from plaintiff's trains at said station. That the portion of the said platform east of said station building which plaintiff alleges to have offered to allow defendants to drive their hacks to for the purpose of landing and receiving passengers is used almost entirely for handling freight and baggage, and the ground along-side thereof is always used by baggage and freight wagons. That if said Lovell Bros. are allowed the exclusive use of said platform west of said station-house, it will give the said Lovell Bros. the entire control of the business of carrying passengers from the said station, to the discomfort, inconvenience, and detriment of said passengers, and to the injury and destruction of defendants' passenger-carrying business from said station. That defendants have not in any manner interfered with or hindered the plaintiff or Lovell Bros. in the handling or transportation of the United States mails over said railroad, or from said station to the post-office in the city of Butte or elsewhere; but have always allowed and conceded to the said plaintiff and to the said Lovell Bros. sufficient ground and space at and against said platform for the use of said Lovell Bros.' baggage wagon, omnibus, two carriages or hacks, and their wagon used in carrying United States mails, without any interference or hindrance for defendants, or either of them. The defendants deny that, if said acts of defendants complained of be allowed to continue, the plaintiff will thereby suffer irreparable injury, or any injury whatever; or that, if defendants continue said acts complained of, it will hinder, prevent, or delay the plaintiff in its business. And the defendants allege that it is not for the convenience of plaintiff's business that they have entered into said contract with said Lovell Bros. as alleged in said complaint, but for the purpose of giving said Lovell Bros. an undue advantage over these defendants and other hackmen in

the said passenger carrying business from said station, and to exclude defendants and other hackmen from any competition in said business.

The foregoing facts are substantially the allegations of the complaint and answer, respectively. No other pleadings were filed. Final hearing of the cause was had upon the facts set forth in the complaint and answer, and determined in the court below by an order setting aside the temporary injunction, and denying the relief prayed for by plaintiff, from which order plaintiff appealed. The whole question involved in this controversy is compassed by the proposition, on the part of the plaintiff, "that it is the owner of said grounds, depot buildings, and platform, and that it may regulate the use of said platform as it desires, providing the traveling public is not inconvenienced; that it may, if it desires, engage in carrying passengers in hacks to and from its trains; that, if it was so engaged, it would have the right to its own property for such purpose; that, if it has such rights, it can as well employ Lovell Brothers with hacks to do such service as to own the hacks; that, if the plaintiff has the right to its platform, it has the right to sell that right to Lovells for a valuable consideration," and should be protected in the exercise and benefits of these rights. These propositions are controverted by defendants in so far as they affirm the right of the plaintiff to grant exclusive use of a portion of said platform to one party to approach and occupy the same, to convey passengers thereto, and receive passengers therefrom, and exclude all others from so doing. No complaint is made that any reasonable rule or regulation made by plaintiff for the government of its depot platform or grounds has been violated, or that defendants have committed any act which interferes with the transaction of plaintiff's business, except in so far as defendants interfere with the exclusive use of said portion of plaintiff's platform granted to Lovell Bros. In respect to the delivery of the United States mail matter at said platform, and transportation thereof to the United States post-office in the city of Butte, it is admitted that ample space for that purpose is left to the use of the company and its employees, according to its requirements. The question of handling the United States mail matter, it seems, is incidentally brought into this controversy; the transfer of this mail matter for the plaintiff being principally the consideration performed by Lovell Bros. for the grant of exclusive use of the designated portions of the railway platform to them, at which place Lovell Bros. may ply for passengers to patronize their hacks and carriages.

If the plaintiff has the right to grant the exclusive use of its platform in the respect mentioned, it may be granted for any other valid consideration as well. It is not denied that a railway company may make and enforce all reasonable rules and regulations necessary to govern persons coming to its station buildings, platform, and grounds. It is highly proper and beneficial to all concerned that this be done.

The law recognizes this right on the part of the common carrier, and the courts enforce it. Upon this point the learned counsel for appellant cites many authorities, with which this court agrees; but we conceive that the matter under consideration is a far different proposition. The grant of a special privilege to Lovell Bros. to use the specified portion of plaintiff's platform at said station, and the exclusion of all from approaching thereto, to land or receive passengers, is not a rule or regulation, in the common acceptation of these terms as used in the legal authorities, and applied to this subject. We therefore find in the numerous and valuable authorities cited on that theory only general aid in solving this controversy. A general rule or regulation, as applied to the government of the conduct of persons, or of a class of persons, contemplates uniformity, and not discrimination, in its requirements. This controversy must be solved by a consideration of the mutual rights of the appellant as a common carrier and its passengers. All passengers in common are entitled to equal opportunities and conveniences of place to approach and depart from plaintiff's trains. At the station mentioned the railway company either commences or terminates its engagement to transport its passengers to and from said station, as the case may be. The contract of the railway company does not require that it either furnish conveyance to bring the passenger to said platform, or transport him therefrom. The passenger may employ whom he desires to bring him there for the departure on plaintiff's trains, or to meet and receive him on his arrival at said station. But the plaintiff contends that it may grant the exclusive use of a large portion of its platform to one party, at which to land passengers for departure on said trains, or to receive passengers from said trains, and, if the passenger is willing to contract with this one party for transportation thereto or therefrom, such passenger may have the convenience of landing or departing from that portion of said platform; otherwise, he must land 50 feet away from said platform, or go to another portion of the platform, incumbered with express and baggage wagons and the handling of freight and baggage matter. Suppose a passenger travels every day from this station, and returns, he is entitled to the same convenience and facilities for approaching and leaving this depot as other passengers. If he contracts with another than Lovell Bros., or the party to whom the railway company has granted the exclusive use of said portion of the platform to bring him there, and be there to receive him on his return, he must alight from his carriage, or be received by it 50 feet away from said platform, or be landed where the express and baggage matter is handled; while the passenger who employs Lovell Bros. for the same purpose may land at and depart from this convenient portion of said platform. Or if a party desired to use his own carriage to bring him to said station, or receive him on his return, it seems the same conditions would prevail.

Certainly, if the plaintiff has the right to

grant the exclusive use of said platform to one, and exclude the public hackmen therefrom, it would apparently have the right to exclude the private hackmen therefrom. To the strong it would perhaps make no difference, as a matter of convenience, just where they were landed at or received from said station; but to the feeble and the helpless, and those incumbered with their care, it would be a matter of great discomfiture and inconvenience. Still other conditions which directly result from the position demanded by plaintiff, and which militate against the equal rights of passengers, may be suggested. Suppose all other hackmen who desire to compete with Lovell Bros. for the carrying passengers to and from this depot will perform the service for half the sum charged by Lovell Bros. are the passengers entitled to the benefit of this competition? Has not the passenger the right to call these other hackmen to his service, and, if he does call them, has he not a right to have such other hackmen approach the platform at the same place, or at least have an equal and common chance to approach at this same convenient place, as his co-passenger who employs Lovell Bros.? If any of the passengers do accept these better terms, they must suffer the discrimination of being denied a landing at that portion of the platform granted exclusively to Lovell Bros., or, when they alight from plaintiff's trains, they either go 50 feet away from that portion of said platform, or to the east side of the depot building, for transportation with a hackman at the less rate. It is a rule of universal application that the public is entitled to whatever competition may grow out of the public demands, on the one hand, and the contest of others to supply such demands, and receive the compensation therefor. Are not the conditions here sought to be so controlled by the plaintiff as to stifle the natural development of such competition? It is alleged by the plaintiff that by its arrangement with Lovell Bros. the latter engage to have a sufficient number of hacks and carriages, at the arrival of all passenger trains, to transport such passengers to the city of Butte from said station. But the plaintiff does not contract to carry its passengers destined to said station beyond that point, nor to see that such passengers are provided with transportation beyond that point. The plaintiff simply undertakes to reap a benefit from the necessity of its passengers, to procure on their own account, and from such party, and on such terms as they may, transportation to the city. This benefit is sought to be derived by the plaintiff from a grant of the most favorable portion of the platform, where plaintiff sees fit to land its passengers, exclusively to one party to solicit their patronage, and, for this grant, such party aids plaintiff in carrying out its contract to deliver the United States mails at the post-office in the city of Butte. On principle, we cannot reconcile these conditions which are demanded by appellant with the rule that all who come to take passage or who arrive at the station of a common carrier are entitled to equal convenience and op-

portunity to approach said station or depart therefrom. It seems to us that the direct effect of appellant's position is to say to its passengers, "You must employ Lovell Bros., or suffer certain inconveniences in taking passage with another."

These observations are not to be confounded with the question as to whether the railway company may not exclude all hackmen from its station buildings, or even from the platform, or set bounds on its grounds beyond which they should not come, as the exigencies of the situation and business might reasonably require, or to make and enforce any other reasonable rule as to the government of its depot buildings and grounds. It is not a general question of that character which here engages the consideration of the court. The constitution of this state (article 15, § 7) provides that "no discrimination in charges or facilities for transportation of freight or passengers of the same class shall be made by any railroad or transportation or express company between persons or places within the state."

The reported cases, involving like or similar facts as the one at bar, which have come to our attention, are few in number. The recent case of Railroad Co. v. Tripp, 147 Mass. 35, 17 N. E. Rep. 89, is the nearest in point. The facts involved in that case are quite similar to the case at bar, although it appears from the statement of facts and the opinion that while exclusive grant was made by the railroad company to Porter & Sons to come upon the depot premises to solicit passengers and baggage for transportation, and all other hackmen were forbidden to come there for that purpose, still all hackmen were allowed equal privileges to come to the station to deliver passengers and baggage, and to receive such as they had a previous order for. While we concur in the general principles of law applicable to common carriers announced by the majority of the nearly evenly divided court in that case, we cannot subscribe to the conclusions drawn by the majority. On the contrary, after a careful consideration of that case, we are inclined to adopt the reasoning and conclusion of the dissenting opinion delivered by the three minority judges. The majority opinion in that case very clearly and forcibly states the general principles of law governing common carriers applicable to the present consideration. The court says: "The plaintiff is obliged to be a common carrier of passengers. It is its duty to furnish reasonable facilities and accommodations for the use of all persons who seek for transportation over its road. It provides its depot for the use of persons who were transported on its cars, to or from the station, and holds it for that use; and it has no right to exclude from it persons seeking access to it for the use for which it was intended and is maintained. It can subject the use to rules and regulations; but by statute, if not by common law, the regulations must be such as secure reasonable and equal use of the premises to all having such right to use them." We do not find it consonant with reason, based upon those general propositions, to draw the

conclusion that the railroad company may bring its passengers to a common landing, where the necessity, comfort, or convenience of their situation compels them to obtain on their own account transportation to some place beyond, and there introduce them to one favored party, saying: "If you engage transportation from this party, you may do so here on the spot, without delay or inconvenience, and take passage from this platform without delay or inconvenience, provided you will engage this particular party, and pay his demands; otherwise, you must suffer the importunity of this party to take passage with him, and if you will not, you must suffer the inconvenience and delay of going to some other point to engage conveyance and take passage." All this the railroad does, not for a benefit to the passengers, but for a benefit to itself, over and above what the passenger has paid for transportation over the railroad. If the railroad company set bounds beyond which all hackmen were forbidden to come, and undertook to forbid all solicitation within the depot or on the platform on the part of hackmen or others for employment, this would be an entirely different proposition. The company does not undertake to protect the passenger from that annoyance in these cases, but invites it, and farms out the exclusive privilege and opportunity to do this. In the case cited supra, the majority of the court bases its conclusion on the ground that the hackman has no right or license to be in plaintiff's depot without the express or tacit permission of plaintiff; and this license, if granted, may be revoked at pleasure. We may grant this premise. The right which the railroad has to exclude all hackmen from its depot buildings and platform may rest upon the same principle. But has the railroad company, in dealing with its passengers, and exercising a control over their movements and the conditions which surround them for the time being, a right to place one hackman in their midst, with exclusive control over the common conveniences and facilities of the place at which the passenger may land, or from which he may depart, so that, if the passenger obtain the use of these conveniences and facilities, he must purchase the privilege from such hackmen or suffer discrimination? The use of these common conveniences and facilities belong to the passengers alike, in the order in which they may come to occupy them; whereas the railroad company has granted away what belonged to the passengers in common, and the one holding the grant may use it as an advantage over the passenger, to compel his employment. It is said in the opinion cited supra: "If a railroad company allows a person to sell refreshments or newspapers in its depots, or to cultivate flowers on its station grounds, the statute does not extend the same right to all persons." Upon this proposition it might be suggested that the passenger has no common interest or rights which meet and intermingle with the rights of the common carrier on this subject, or which are affected by such a grant. The same reply may be made, we think,

with good reason, to the proposition as to a place to serve refreshments on the premises of the plaintiff. The passenger has no common rights which are taken away or interfered with by the company in this respect. It is true, the passenger's necessities may require that he have food at proper times on his journey; but all passengers have an equal right to provide supplies, under regulations which apply to all alike as to the amount of baggage allowed to each. Moreover, this question has no relation to the mutual engagements existing between the common carrier and its passengers. The passenger has purchased, or proposes to purchase, from the common carrier, transportation, and he must come to the station to receive such transportation, and on arriving at his destination he must depart from the station. The right to come to the station, and depart therefrom, under reasonable regulations which apply alike to all passengers, without special conditions, is incidental to the main contract; while the supply of refreshments or newspapers, or the cultivation of flowers, at the station grounds, has, as we conceive, no appropriate connection with the engagements of the passenger and the common carrier.

The case cited *supra* is the only American case brought to our attention which passes upon points directly involved herein. The subject is apparently a new one in this country. The English cases involving the main subject of controversy are also few in number. In the case of *Marriott v. Railway Co.*, 1 C. B. (N. S.) 499, the complainant, Marriott, alleged that he brought passengers to defendant's railway station, and the latter refused him access to the station grounds to deliver his passengers there, while at the same time this privilege was granted to other omnibuses; and, upon this showing, an injunction was granted. Other English cases bearing upon the main subject here under consideration have been examined. *Beadell v. Railway Co.*, 2 C. B. (N. S.) 509; *Painter v. Railway Co.*, *Id.* 702; *Barker v. Railway Co.*, 18 C. B. 46. The demands in the case at bar on the part of plaintiff go beyond those urged in any of the cases so far examined by us.

Upon grounds of sound reason, public policy, and the general principles of law governing common carriers, as well as the provisions of the constitution, we believe the order of the court below ought to be affirmed; and it is so ordered.

BLAKE, C. J., concurs.

NOTE. Associate Justice DE WITT, having been counsel for plaintiff in this action in the court below, did not sit in the consideration thereof in this court.

#### STATE v. JACKSON.

(Supreme Court of Montana. May 21, 1890.)

MURDER—MISCONDUCT OF JURY—EVIDENCE—PROSECUTING ATTORNEY.

1. The word "papers" in *Crim. Prac. Act Mont.* § 354, providing that "a new trial shall be granted when the jury has received any evidence, papers, or documents not authorized by the court,"

does not refer to newspapers. The intent of the article is to prohibit documentary evidence going to the jury without the inspection and sanction of the court.

2. On the second or third day of a six-days murder trial, and before defendant had opened his case, a juror read newspaper comments adverse to defendant. The court, being informed of this, immediately gave instructions, in the presence of the jury, that newspaper comments should be kept from them. *Held*, that there was no absolute presumption of prejudice or injury from the receipt of the articles, and that the circumstances showed none.

3. The fact that three days after the trial a paper, issued during the trial, and containing comments thereon, was found in the jury-room, to which others had since had access, does not at all prove that a juror ever saw it.

4. Defendant introduced in evidence part of the testimony of a state's witness given by her at the preliminary examination, and which, after being reduced to writing, had been read to and signed by her. *Held*, that the state was thereafter properly allowed to introduce the whole of it, within *Comp. Laws Mont.* p. 224, § 326.

5. On the trial defendant's counsel, for the purpose of showing prejudice on the part of a state's witness, deceased's widow, against defendant, asked her if she had not said she would commit suicide if defendant was acquitted. *Held* properly excluded, as it was immaterial whether or not she made the statement, especially as she had just admitted that she had ill feeling towards defendant.

6. *Const. Mont.* art. 8, § 19, provides that the qualifications of one to be county attorney "shall be the same as are required by a judge of the district, except that he must be over 21 years of age, but need not be over 25 years of age." Section 35 provides that no district judge shall hold any other public office. *Held*, that section 35 does not apply to the office of county attorney.

7. *Const. Mont.* art. 4, § 1, providing that no person while charged with the exercise of powers belonging to either the legislative, executive, or judicial departments shall exercise any powers belonging to either of the others, does not inhibit one from being, at the same time, county attorney and notary public.

8. On the hearing of a motion for a new trial a motion, of which no notice had been given, to strike out an affidavit, on the ground that it was taken by a notary public, out of the county for which he was appointed, is properly denied where the party so moving insists on an immediate hearing.

Appeal from district court, Lewis and Clarke county; W. H. HUNT, Judge.

The defendant was indicted, tried, convicted, and sentenced for the crime of murder in the first degree. He appeals from the judgment and from the order of the court denying the motion for a new trial. The grounds relied upon on his argument in this court are as follows: (1) The verdict is not sustained by the evidence. The principal witness for the state, and the witness without whose testimony the case must utterly fail, was Mathilde Lavelle, widow of the deceased. In an exhaustive examination and cross-examination of many hours she testified minutely as to the facts of the homicide. She gave her evidence through the medium of an interpreter, she not speaking the English language well. The defense sought to impeach her, and break down her evidence, by endeavoring to prove contradictory statements and intrinsic inconsistencies. A portion of this effort was the introduction of her testimony given before the magistrate on the preliminary examination. (2) Defendant offered in evidence on the

trial a portion of the record of the testimony of the witness Mathilde Lavelle, given before the magistrate; this for the purpose of contradicting her statements made on the trial in the district court. This the court admitted, but with the ruling, made at the request of the state, that the state might read the whole of her evidence given on the examination. This was done. This admission of the whole record, which was a written one, after admitting the portion which the defense chose to produce, is assigned as error. (3) Certain affidavits were used by the state on the motion for a new trial. They were taken before C. B. Nolan, a notary public of Lewis and Clarke county. Said Nolan was also county attorney for that county. The defendant objected to the use of these affidavits, on the ground that Nolan, being county attorney, could not also hold the office of notary public, and that his acts as notary public were void, and the papers were therefore not affidavits. The objection was overruled, and the defendant assigns error. (4) Upon the hearing of the motion for new trial, defendant moved to strike out one of the affidavits being used by the state, on the ground that it had been taken in Cascade county by a notary of the county of Lewis and Clarke, and offered to prove the fact, asserting that an affidavit taken out of the county for which the notary was appointed was void. No notice of such motion was given, and defendant declined to give any, and insisted that the hearing should proceed forthwith on the motion for new trial, and the court should exclude the affidavit alleged to be irregularly taken. The objection was overruled, and error is assigned. (5) Upon the trial the defendant's counsel asked the witness Mathilde Lavelle whether she had not (giving time and place) said that she would commit suicide if Jackson were not convicted in this case. Counsel stated that he asked the question for the purpose of knowing whether the witness made such a statement, and was prepared to prove it if she denied it. This question was asked in connection and immediate context with other examination, by which counsel were endeavoring to show that the witness had a prejudice against the defendant. The question had just previously been put, "Is it not a fact that you are violently prejudiced against Jackson at the present time?" to which she had answered, "I do not like him now, because he put me in misery, but before that I had no ill feeling against him whatever." The court excluded the question as to suicide. This is another error assigned. (6) The case was on trial 10 days. The jury was impaneled March 12th. They retired for deliberation March 18th. The verdict was returned March 21st. It appears by the affidavit of Isaac Holbrook, bailiff of the jury, and by the affidavit of a newsboy, that on March 13th and 14th some of the jury obtained copies of daily newspapers, the Journal and the Independent. These papers contained accounts of the trial of the case, as it had proceeded, and also comments. The comments was interspersed in the account in the news columns. It is not nec-

essary to recite these comments, but it is sufficient to say that they were adverse to the defendant as to the offense for which he was being tried. Holbrook further states that he knows that some of the jurymen read these accounts and comments. These objectionable newspapers got to the jurymen, in their editions of the 13th and 14th. The attention of the jury and the bailiff was then called to the matter in open court, and thereupon the bailiffs, in charge of the jury, were ordered by the court that all newspapers thereafter coming into the possession of the jurymen should have cut from them all references to the trial. This order was carried out. (An alleged infraction of this order is noticed, paragraph 7, *infra*.) Ten of the jury make affidavit that they have no recollection of ever, at any stage of the trial, having read any newspaper accounts or comments upon the trial, and that their verdict rendered was upon the evidence introduced on the trial, and was not affected in any manner whatsoever by outside influences of any character, because no such influences had any existence in fact. One other juror swears that he did read the accounts and comments; and the twelfth says that he may have glanced cursorily at them, but is not positive even of this. The last two also swear very positively that what they read, or may have read, made no impression upon them, and had no influence upon their verdict. Counsel for appellant relies upon section 354, Crim. Prac. Act: "A new trial shall be granted \* \* \* when the jury has received any evidence, papers, or documents not authorized by the court." He contends: *First*. That, as it appears that the jury received these papers, it must be presumed that they read them; that they were influenced thereby, and injury to the defendant resulted; and that the jurymen cannot be heard to rebut these presumptions, and a new trial must therefore be granted. *Second*. That, even if this first position be not sustained, it does appear that these newspapers were read by at least one jurymen, and, being so read, prejudice must be presumed from the nature of the newspaper articles, and the jurymen cannot be heard to say whether the article had any effect or influence on his mind in forming his verdict; that is, that, even if it be held that the jurymen may testify as to facts, he cannot testify as to the effect of those facts on his mind. (7) On March 24th, three days after the jury had been discharged from the case, a newspaper of March 15th, a date subsequent to the admonition and order of the court as to excerpting all newspapers that might come into the possession of the jury, was found in the jury-room by the janitor and others. From the time of the discharge of the jury (the 21st) until the finding of this newspaper (the 24th) it does not appear that the room was locked, or that it was not open to whomsoever might come, including the defendant's friends. The newspaper thus found was uncut, and contained comments upon the trial. One of defendant's counsel was present when this paper was found, and called attention to it, and had it marked for identification. This is also assigned as mis-

conduct of the jury, on receiving papers not authorized by the court.

*Davies & Russell and T. E. Casey*, for appellant. *Henri J. Huskell*, Atty. Gen., and *C. B. Nolan*, for the State.

DE WITT, J., (after stating the facts as above.) The grounds set forth in the above statement are those presented on the argument on appeal, and we will consider them in their order.

1. It is true that the fate of the defendant depended, on the trial, upon the testimony of one witness, Mrs. Laveille. "The direct evidence of one witness, who is entitled to full credit, is sufficient for proof of any fact except perjury and treason." Section 616, p. 223, Comp. Laws. We have diligently, in view of the gravity of the offense and the character of the penalty, examined the 400 printed pages of evidence. Untiring efforts were made by defendant's counsel to impeach, discredit, and contradict the testimony of this one witness. Counsel cite numerous instances of what they claim to be inconsistencies and contradictions. Her testimony is given us in full, by question and answer, as is proper in a capital case where the verdict depends absolutely upon the truth or falsity of the testimony of one witness. In her testimony contradictions may be found by selecting isolated fragments and comparing them with like fragments in other portions of the record. Inconsistencies can be constructed by partially viewing segregated statements. Such can be done with the lengthy testimony of the most learned experts and scientific specialists. The witness here was an unlearned woman, speaking in a foreign language, through an interpreter, making her statements contemporaneous with the tragedy from the maze of overwhelming grief and under terrible excitement. It is impossible, in this opinion, to recite, or even epitomize, the mass of testimony, which occupied in the hearing six days. We can only say that a faithful and painstaking scrutiny of the record reveals the fact, beyond cavil or controversy, that Mrs. Laveille's testimony fully meets the rule of substantial truth with circumstantial variety. We are amply satisfied that her testimony, if true, sustains the verdict. The jury have said it was true. They not only heard her, but saw her, and the manner in which she testified. The court below, in hearing the motion for a new trial, found in the record no substantial attack upon the truth of her testimony. We find nothing upon which we can disturb the decision of that court that the verdict was supported by the evidence.

2. The defendant offered and read in evidence a portion of the testimony given by Mrs. Laveille at the preliminary examination, which had been reduced to writing, read to the witness, and by her subscribed. We are of opinion that it was not error in the court allowing the state to read to the jury the whole of that testimony. The rule is: "When part of an act, declaration, conversation, or writing is given in evidence by one party, the whole, on the same subject, may be inquired into by the other. When a letter is read, the answer may be given; and when a detached act,

declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence." Section 626, p. 224, Comp. Laws.

3. As to the point that Nolan, county attorney, could not be or act as notary public, counsel refer to article 8, § 19, Const., which provides that the qualifications of one to be county attorney "shall be the same as are required by a judge of the district court, except that he must be over twenty-one years of age, but need not be twenty-five years of age;" and section 35: "No district judge shall hold any other public office while he remains in the office to which he has been elected or appointed." It is perfectly clear that the first section cited simply prescribes the requirements for eligibility to election as county attorney as to age, residence, attainments, etc. The second section is a prohibition against a district judge holding another office,—a prohibition not including the county attorney. If among the qualifications of one to hold the office of county attorney had been one "that he shall not hold any other office," there might be some force in counsel's contention. Section 31, same article, provides: "No judge of any district court shall act or practice as an attorney or counselor at law in any court in this state during his continuance in office." This is another prohibition declared against the district judge. As well might counsel insist that this applies to the qualifications of the county attorney. A constitutional regulation as to the conduct of the district judge is not part of the description of the qualifications for office of county attorney. This view of counsel as to the constitution of the state is wholly without merit. Upon this point counsel also cite section 1, art. 4, Const.: "The powers of the government of this state are divided into three distinct departments,—the legislative, executive, and judicial; and no person, or collection of persons, charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others except as in this constitution expressly directed or permitted." Counsel's view of this section must be that Nolan, as county attorney, and Nolan as notary public, was acting in the exercise of the powers of two of the different departments of the government at once. It is not entirely clear how counsel classes the two positions of Nolan in two different departments. The county attorney is provided for in article 8, on judicial departments. If counsel takes the position that the county attorney is of the judicial department, then does he mean that as notary public he belongs to the executive or legislative department? The statement of the proposition answers itself.

4. The court properly denied the motion of the defendant to strike out the affidavit proposed to be used by the county attorney on the motion for a new trial. The state had no notice of such motion. Defendant declined to give any, and insisted that the hearing of the motion for new trial should proceed forthwith. The



state was entitled to some intimation that the defendant objected to the formalities in the taking of this affidavit prior to the moment of the hearing of the motion for the new trial. *Murray v. Larable*, 8 Mont. 218, 19 Pac. Rep. 574.

5. We are of opinion that the court properly excluded the interrogation to Mrs. Laveille whether she said that she would suicide if Jackson were not convicted. It is apparent from the context of the examination at that point, and it is now insisted by defendant's counsel, that the question was asked for the purpose of showing prejudice by the witness against the defendant. It is not at all apparent that such statement, if it were made, and such sentiment, if it existed, would indicate any prejudice. The witness had already just frankly admitted the existence of ill feeling towards defendant. We consider the matter offered wholly immaterial, and its exclusion no injury to defendant.

6. "A new trial shall be granted when the jury receive any evidence, papers, or documents not authorized by the court." Section 354, Crim. Prac. Act. Defendant's counsel construes the word "papers," above, to mean "newspapers;" and from that premise he argues that if a juror receives a newspaper, containing comments upon the trial, the verdict, *ipso facto*, must be set aside. If the word "papers" means "newspapers," counsel need not qualify the word by adding, "containing comments on the trial." If he reads the statute literally, or by supplying the word "newspaper" for "paper" therein, then the reception of a newspaper would, in itself, vitiate the verdict. We are of opinion that the word "papers" in the statute does not mean "newspapers," or, perhaps, even include them. The statute is not a prohibition against the jury receiving evidence, papers, or documents. Cases are tried upon evidence, papers, and documents, using the word "papers" in the sense of written instruments or documents. But the jury shall receive only such evidence, papers, and documents as are authorized by the court. Cases are not tried upon newspaper comments or arguments. Such cannot become evidence under any circumstances. It would be an idle thing for the statute to say that no newspaper argument shall be received by the jury except those authorized by the court. Such newspaper lucubrations could never be authorized by the court. Cases are presented to juries in another manner, by evidence and oral argument in open court. Counsel would construe the statute to make it prohibit the jury from hearing or reading, *ex parte*, private newspaper argument of a case. Of course, they shall not hear such, or determine cases in that manner. To do so is such an infraction of constitutional and established rights of jury trial that we cannot believe that the legislature went so far from the subject as to intend to prohibit, in this section, that which is otherwise so amply inhibited by the whole system of criminal procedure. The intent of this section is clear to us. The word "papers" occurs, in context, between the words "evidence" and "documents." It refers to something, as written instruments, for instance, which

might be competent testimony if scrutinized by the court, and found by the court to be competent, under the rules of evidence, and then authorized by the court to be introduced. If it gets to the jury without such authorization, it falls within the purview of the section being considered. Papers, documents, and written instruments are all, under some circumstances, evidence. Newspaper comments are never such. If the statute had used simply the word "evidence," it would have been sufficient. The addition of the words "papers" and "documents" simply makes it more explicit in the way of definition. The intent of the statute is simply to provide that evidence, whether oral, written, printed, or contained in papers or documents, shall not go to the jury without passing the scrutiny of the court as to its competency, etc., and undergoing the criticism of the argument of counsel. We do not justify the reception, by the jury, of newspaper comments. We only hold that this offense by a jury does not fall within the inhibitions of this section, (subdivision 1, § 354, Crim. Prac. Act.) but is governed by another division of the section, noticed *infra*. We have gone into this discussion in order to lay the foundation for our view, that the simple reception by a juror of a newspaper does not, *ipso facto*, vitiate the verdict, but that such reception must be considered as any other misconduct of a jury, and be treated by the rules governing cases of misconduct. The section of the law applicable is section 354, subd. 2, Crim. Prac. Act: "A new trial shall be granted when the jury has been separated without leave of the court, or have been guilty of any misconduct tending to prevent a fair and due consideration of the case." There is conflict in the decision of the courts as to the rules applicable to determining the question of setting aside a verdict for alleged misconduct of the jury in a criminal case. An extreme view is that, misconduct tending to injure defendant being shown, prejudice will be absolutely presumed, and a new trial granted, and the jurors will not be heard to deny the alleged facts of misconduct. This doctrine has not been adopted in this court. *Territory v. Hart*, 7 Mont. 489, 17 Pac. Rep. 718; *Territory v. Clayton*, 8 Mont. 1, 19 Pac. Rep. 293. The position towards which this court tends in those cases, and which we now approve, is that, if misconduct be shown tending to injure defendant, prejudice to the defendant is presumed, but not absolutely; the state may remove that presumption, and the burden is upon it to do so, and in so doing it may use the testimony of the jurors to show facts which prove that prejudice or injury did not or could not occur. For example, if a juror is temporarily separated from his fellows, by illness or the exigencies of nature, he may show that during such separation he saw or talked to no one, and that no influences were brought to bear upon him of any character. This court, however, has never held, and does not now hold, that, if the contact of the juror with outside, prejudicial influences be clearly demonstrated and uncontroverted, the juror may purge himself by testifying that such influences did not

affect his judgment in forming his verdict. This principle is well reviewed by Mr. Justice GRAY in *Woodward v. Leavitt*, 107 Mass. 453.

In the case before us it is clearly shown that only one juror read the objectionable newspapers. For the purposes of this decision we will not consider his affidavit that he was not influenced thereby. The difficulty is soluble on other grounds. The reason for holding that the reading by jurymen of newspaper accounts and comments adverse and prejudicial to defendant vitiates a verdict is that they are *ex parte* arguments and presentations of the case, made out of court, not under oath, made irresponsibly, not answerable by defendant by evidence or argument, and not subject to the rules of court as to admission of evidence and the proper argument of counsel. The efforts of learned and zealous counsel for the state, in open court, are far more dangerous to a defendant than the diatribe of any newspaper; but they are made under the eye of a vigilant court, under the established rules of procedure, and with the ever-present opportunity of the defendant to put a telling shot under the armor of the state wherever a joint is left loose.

In the case at bar the newspaper was read by the jurymen the second or third days of a six-day trial, before the state had closed its evidence, and before the defendant had opened his defense. The attention of the court was called to the matter, and the judge immediately admonished upon it in the presence of the jury. The jury had opportunity to be fully advised by the court, and to learn that the newspapers, and all their comments, should be excluded from their consideration. They were thereafter so excluded, and, indeed, at no time did the jurymen ever discuss them. After this admonition by the court they heard evidence for four days, including the whole of the defense, as well as the arguments of defendant's counsel, who had full opportunity to score the newspapers. A juror examined upon his *voir dire* may have read the most violent and prejudicial newspaper attacks upon the defendant, and have formed an opinion of the guilt of defendant, and still he is a competent juror if he "state on oath that he feels able, notwithstanding such opinion, to render an impartial verdict upon the law and the evidence, and the court is satisfied that he is impartial and will render such verdict." Section 287, Crim. Prac. Act. The day has passed when blank ignorance and stupidity in a jurymen were his best qualifications for service. There is more intelligence on the modern jury; and intelligent persons, the statute contemplates, are able to read contemporary history, and still preserve their mental balance. On the trial of a case, highly improper and incompetent testimony may accidentally fall from the lips of a sworn witness on the stand. This occurs in nearly every trial. Such evidence is stricken out by the court, and the jury instructed to disregard it. The court herein had equal opportunity to correct any possible evil influence of the newspapers. If these newspapers had gotten to the jury after they retired for deliberation; if the court

never had known of the fact, and never had opportunity to admonish the jury; if it had been too late for the jury to hear the defendant's evidence and the arguments of his counsel,—the possibility of injury and prejudice would be more apparent. The ultimate inquiry for the court is whether prejudice or injury has occurred; whether the same be by an absolute presumption, or by a view of facts presented by competent testimony. Cases must rest, to some extent, upon their own particular facts. Under all of the facts of the case at bar we cannot hold that prejudice or injury must be absolutely presumed, and we cannot hold that they in any manner appear.

7. The last point contended for by appellant scarcely calls for notice. Three days after the jury had been discharged, and had abandoned their room,—a room, for all that appears, open to every one, and, in any event, open to the janitor and one of defendant's counsel and another person,—a newspaper was found in that room, un mutilated, of date March 15th. This has not the slightest tendency to prove that a jurymen ever saw it. There has been a warm contention in this case over the conduct of newspapers in commenting upon the trial during its progress. The *Helena Journal*, published March 13th, has the following head-lines: "Evidence Given that is Likely to Hang Jackson. Mrs. Lavelle's Convincing Story. Looks Bad for Jackson." The article says, among other things: "Jackson sat through the process of weaving the rope that shall stretch his neck with apparent unconcern and smiling indifference;" "Cumulative evidence that Jackson should be hanged;" "The halter draws,"—etc. This paper also contains the following, in reference to one of defendant's counsel: "His chances for hanging have been materially augmented by the addition of a certain Casey to the lawyers for the defense. Casey has no seat at the table for counsel, but crowds himself up against their chairs, and confers with the amateur short-hand writers, occasionally interfering with the work of Messrs. Davies and Russell." We cannot leave this decision without a further word. Newspapers occupy a magnificent place in modern civilization. In England, the press has been called "the fourth estate of the realm." With all their faults, even with their occasional venality, and their vice of the adulteration of intelligence for ulterior purposes, newspapers are one of the bulwarks of liberty. The freedom accorded them in the discussion of all matters sends vice blushing into seclusion, makes the rogue in high places tremble for his security, and the public robber hesitate in his depredations. Journalism calls to its service the best intellectual effort of the earth. But let it remember that the citizen is innocent until a jury of his countrymen pronounce him guilty. However humble his station, and however crime-stained he appear, he is a citizen and an innocent man until he is found to be otherwise by the machinery of the law which the people have set up to determine the fact. He is not to be tried by hue and cry, or by newspaper harangue. The wisdom of centuries has

provided a method of trial which the people of this land have sanctioned by solemn constitution. Let that method prevail. The lapses of the newspapers in this case were doubtless through inadvertence. But they might have occurred at a time when they would have worked an injury to a fellow-citizen on trial for his life, and, in the eye of the law, as yet innocent as if he were in the highest of earth's stations. It is hoped that hereafter, when criminal cases are on trial, the machinery of the courts will be left undisturbed to work out the equal and exact justice which their creation and existence contemplate. The judgment of the district court, and the order denying a motion for a new trial, are affirmed; and it is directed that the judgment be carried into effect as entered in the court below.

BLAKE, C. J., and HARWOOD, J., concur.  
(9 Mont. 577)

LLOYD v. SULLIVAN.

(Supreme Court of Montana. May 21, 1890.)

ELECTION CONTESTS—APPEAL—PLEADING—EVIDENCE.

1. Const. Mont. art. 8, § 2, declares that "the appellate jurisdiction of the supreme court shall extend to all cases at law and in equity." Comp. St. Mont. div. 5, § 1044, provides that the decision of a district judge in election contests over a county office shall determine the right to hold such office "until such decision shall be reversed on appeal." Code Civil Proc. Mont. § 444, allows an appeal from the district to the supreme court "from a final judgment \* \* \* in an action or special proceeding," and from "an order granting or refusing a new trial." Held, that the supreme court had jurisdiction of an appeal from an order refusing a new trial in an election contest.

2. Where a statement of contest alleges that the county clerk illegally issued a certificate of election to the contestee on the ground that said contestee had received a large number of votes from a precinct, the return from which was not included in the abstract of votes, and that no legal return was made from said precinct, and the contestee, without demurring, answers the statement, and denies its allegations, the question of the legality of the return from such precinct is put in issue.

3. In an election contest, subpoenas for persons who appear to have voted at the election, with their returns, showing that such persons could not be found, are admissible in evidence to show diligence in endeavoring to procure their attendance. Following *Heyfron v. Mahony*, ante, 93.

4. An election was conducted in a certain precinct by three judges instead of five, as required by Comp. St. Mont. div. 5, § 1011. The clerks who signed the return did not act, the clerical work being done by the judges. The canvass of the votes was not made in public, as required by Id. § 1027, and the return was signed by the clerks two or three days after the election. The return was certified by the judges and attested by the clerks, instead of being certified by the clerks and attested by the judges, as required by Id. § 1030. The return showed that all the electors voted in alphabetical order, and that each elector voted for a candidate for every office, both of which statements were shown to be untrue as regarded some of the voters. Some of the votes were returned for different candidates than those for which they were cast. One elector who did not vote was returned as having voted, and the judges unlawfully placed the official stamp upon some of the ballots after they had been delivered to them to be put in the box. Held, that the entire return from such precinct should be rejected as evidence.

5. Where, in an election contest, the entire return from a precinct is rejected on account of fraud and irregularity, the burden of proving that any legal votes were cast in such precinct rests upon the party claiming them.

Appeal from district court, Silver Bow county; J. J. McHARTON, Judge.

Thompson Campbell, for appellant. M. Kirkpatrick and John W. Cotter, for respondent.

BLAKE, C. J. This is an election contest between Lloyd, the appellant, and Sullivan, the respondent, who were candidates for the office of sheriff of the county of Silver Bow at the election held in 1889. The certificates of the nomination of Lloyd by the Republican, and Sullivan by the Democratic, convention were properly filed. The official abstract of the vote cast at the election, according to the canvass which was made October 14, 1889, gave Lloyd 8,490, and Sullivan 8,363, votes. There was no other canvass of the vote for these parties, but the county clerk issued the certificate of election to Sullivan.

The statute which governs the procedure and trial of the issues arising in this proceeding provides as follows: "All contests of county \* \* \* officers shall be tried in the proper county; and, when an elector shall wish to contest such an election, he shall file with the clerk of the board of county commissioners, within ten days after such person shall have been declared elected, a statement in writing specifying the grounds of contest, verified by affidavit, and such clerk shall issue to the contestant a notice to appear, at time and place specified in the notice, before the district court." Comp. St. div. 5, § 1043. Then follows this section: "Sec. 1044. The district judge, at the time specified in the notice, (and it shall appear by the sheriff's returns that notice has been duly served on the contestor,) shall proceed to try such contest. Each party shall be entitled to subpoenas, and subpoenas *duces tecum*, as in ordinary cases in law; and the district court shall hear and determine in such manner as shall carry into effect the expressed will of a majority of the legal voters, as indicated by their votes for such office, not regarding technicalities, or error in spelling the name of any candidate for such office; and the clerk of said court shall issue a certificate to the person declared to be elected by said court, which shall be presumptive evidence of the right of said person to hold such office, and he shall be entitled to enter upon and hold said office until such decision shall be reversed on appeal." In pursuance of these statutory requirements, the proper notices were filed, issued, and served by Lloyd, an answer was made by Sullivan to the statement of contest, and a replication was filed by Lloyd.

It will be necessary to observe carefully some of the proceedings upon the trial; and, to prevent any misunderstanding thereon, they will be recited in the language of the court below. The following judgment was entered February 24, 1890: "This cause came on regularly for trial on the 11th day of February, 1890, before the court sitting without a jury; \* \* \* whereupon witnesses were examined, and other evidence introduced, on the part of the contestant and respondent respectively, and the evidence being closed, and the argument of counsel heard, the cause was submitted to the court for consideration

and decision; and, after due deliberation thereon, the court delivers its findings and decision in writing, which is filed, and orders that judgment be rendered in accordance therewith. Wherefore, by reason of the law and the findings aforesaid, it is by the court ordered, declared, and adjudged that at the general election held in the county of Silver Bow on the first Tuesday, being the first day, of October, 1889, the respondent, Eugene D. Sullivan, received a majority of all the legal votes cast in said county at said election for the office of sheriff of said county of Silver Bow, and was and is duly elected to said office.

\* \* \* The findings of fact, which are 15 in number, contain this statement: "The evidence in the above-entitled cause having been fully heard, together with the argument of counsel for the respective parties, and the same having been submitted to the court for decision, the court, in response to the written request of the parties, makes the following findings of fact from the evidence, and its conclusions of law thereon." Thereupon Lloyd filed a notice of his intention "to move the court to vacate and set aside the decision of the court rendered in the above cause, and to grant a new trial of said cause." The statement, which was "approved and allowed" March 31, 1890, by the judge of the court below, contains the testimony which was introduced upon the trial, the exceptions which were saved by the appellant, and the specification of the "particulars in which the evidence is insufficient to sustain the findings and decision of the court." Upon April 3, 1890, "the motion for new trial herein, heretofore taken under advisement, is by the court overruled, and to which ruling of the court plaintiff, by counsel, duly excepts." The notice of appeal states that "the contestant in the above-entitled action hereby appeals to the supreme court of the state of Montana from the order of the district court of the second judicial district of the state of Montana overruling contestant's motion for a new trial of said action, and refusing a new trial thereof, made and entered in said court on the 3d day of April, A. D. 1890."

At the threshold of this inquiry the respondent contends that the motion for a new trial does not lie, and that the court has no jurisdiction of the appeal. The statutes and constitutions of the states vary materially, and it must be admitted that the decisions are not harmonious, upon this question. The law of this state, which has been cited, evidently contemplates that the judgment of the district court shall not be final; for its terms expressly limit the right of "the person declared to be elected" to "enter upon and hold said office until such decision shall be reversed on appeal." The construction sought to be enforced by the respondent renders this provision nugatory, and deprives the aggrieved party of a substantial right. In *Payne v. Davis*, 2 Mont. 382, the value of the property involved in the controversy was \$50. The act of the legislative assembly declared that this court shall have jurisdiction in civil cases "where the amount in dispute exceeds one hundred dollars." Upon the motion of

the respondent to dismiss the appeal, we held that "statutes must be so construed as to maintain the right of appeal if the established rules of interpretation are not violated," and adjudged that the restriction was inconsistent with the organic act of the territory, which allowed appeals "in all cases from the final decisions" of the district court, and therefore void. The case was then heard and determined upon its merits. Subsequently the statute concerning this subject was amended, and now provides as follows: "The supreme court shall have appellate jurisdiction in all cases tried in the district courts." Code Civil Proc. § 697. Let us consider some sections of the Code of Civil Procedure: "A judgment or order in a civil action, except when expressly made final by this act, may be reviewed as prescribed by this act." Section 418. "An appeal may be taken to the supreme court from the district courts in the following cases: *First*, from a final judgment, or any part thereof, entered in an action or special proceeding commenced in those courts, or brought into those courts from other courts; *second*, from an order granting or refusing a new trial." Section 444. The constitution declares that "the appellate jurisdiction of the supreme court shall extend to all cases at law and in equity," (article 8, § 3;) and it is claimed by the respondent that an election contest is not included by the word "cases," which has a technical meaning. This construction would confine the jurisdiction of this court within narrow bounds. But it is obvious that full effect has not been given to every part of the instrument, which in this matter is its own interpreter. The eleventh section uses this language in defining the jurisdiction of the district court: "The district court shall have original jurisdiction in all cases at law and in equity." Then follows the phrase, "including all cases," which are enumerated, such as "proceedings in insolvency, \* \* \* actions to prevent or abate a nuisance, \* \* \* all matters of probate, \* \* \* actions for divorce and for annulment of marriage, and for all such special actions and proceedings as are not otherwise provided for." The framers of the constitution have plainly ignored the familiar signification which is attached in the Reports to "cases at law" and "cases in equity." This view is confirmed by this section: "There shall be but one form of civil action, and law and equity shall be administered in the same action." Article 8, § 28. The fifteenth section of the same article is of vital force in this discussion: "Writs of error and appeals shall be allowed from the decisions of the said district courts under such regulations as may be prescribed by law." Construing these provisions together, it is clear that the appellate jurisdiction of this court extends to all cases, actions, and proceedings which have been finally decided in the district courts. Our jurisdiction is, in substance, similar to that of the supreme court under the territorial government, and this objection could have been urged with equal power before the transition to statehood. The case of *Heyfron v. Mahony*, ante, 93, which was an election contest under the

statute *supra* for the same office, was filed July 8, 1889, in the supreme court of the territory, and was upon the docket during three terms. The able and learned counsel for the respondent never questioned the jurisdiction of the appellate court, and argued the case upon its merits. The cases of *Dorsey v. Barry*, 24 Cal. 449, and *Casgrave v. Howland*, Id. 457, support the position of the respondent that the power of the court which tries an election contest ceases upon the entry of the judgment, and that it cannot grant a new trial, or reopen the issues of law or fact. This conclusion is reached by the construction of this section of the Code of Civil Procedure of the state of California: "Either party aggrieved by the judgment of the court may appeal therefrom to the supreme court as in other cases of appeal thereto from the superior court." Section 1126. This is found in the title, which provides for "contesting certain elections." When we consult the chapter regulating "appeals from county courts," it will be seen that they are limited to "an order granting or refusing a new trial in the cases designated in this section." Code Civil Proc. § 946. Election contests are not specified in the cases which are enumerated. But in this state the district court possesses jurisdiction of the same matter, and the practice has been uniform that the appellate court will not consider the evidence in the record when there is no motion for a new trial. *Allport v. Kelley*, 2 Mont. 343; *Chumaseo v. Vial*, 3 Mont. 376; *Largey v. Sedman*, Id. 472; *Broadwater v. Richards*, 4 Mont. 78, 2 Pac. Rep. 544; *Twell v. Twell*, 6 Mont. 19, 9 Pac. Rep. 537; *Mining Co. v. Hayes*, 6 Mont. 31, 9 Pac. Rep. 581; *Blessing v. Sias*, 7 Mont. 103, 14 Pac. Rep. 663. On an appeal from a judgment, the judgment roll alone is brought before this court. *Chumaseo v. Vial*, *supra*; *Clark v. Baker*, 6 Mont. 153, 9 Pac. Rep. 911; *Princeton Min. Co. v. First Nat. Bank*, 7 Mont. 530, 19 Pac. Rep. 210. In *Chumaseo v. Vial*, *supra*, we said: "This appeal has been taken from the judgment alone, and the only questions before us relate to the conclusions of law, which must be drawn from the facts." The case of *Princeton Min. Co. v. First Nat. Bank*, *supra*, was tried by the court without a jury, and Mr. Justice BACH, in the opinion, says: "There was no motion for a new trial made. Therefore, we are to conclude that all of the findings are supported by the evidence; that there was no evidence to sustain the findings requested and refused; and that, where there is no finding on any issue, the court found in favor of the plaintiff upon that issue. Such is the rule laid down by the statutes and from the authorities." This procedure was followed in *Heyfron v. Mahony*, *supra*, and has been adopted in some states. *Govan v. Jackson*, 32 Ark. 553; *Dobyns v. Weadon*, 50 Ind. 298; *Hadley v. Guttridge*, 58 Ind. 307. We are therefore of the opinion that the appellant was compelled by the adjudications of this court to resort to the practice which is therein defined.

It now becomes necessary to refer to some of the findings of the facts by the court below which are properly before us for review: (5) "The returns of the elec-

tion at precinct 34 were delivered to the clerk of the board of county commissioners by the said W. A. Pennycook, one of the judges, in person, some time between the 1st and the 15th day of October, 1889. \* \* \* The said returns contained the proper tally sheets and extensions; the names of the candidates voted for; the number of votes received by each, written in full length, in words duly certified by the judges and clerks who held the said election at said precinct. \* \* \* The signatures to the said returns are in the true and genuine handwriting of the judges and clerks of election at said precinct, and, from an inspection of said returns, the number of votes cast, and for whom cast, can be easily ascertained." (7) "The said returns from said precinct 34 show upon their face, and the court finds the fact to be, that 174 votes were polled thereat at said election, and that the respondent, Eugene D. Sullivan, received at said precinct 165 votes, and the contestant, John E. Lloyd, 9 votes. At all the other precincts of said county, as shown by the returns thereof, respondent received at said election 3,363 votes, and the contestant, 3,490 votes. So that, counting the votes cast at precinct 34 together with the votes cast at all the other precincts of said county for the office of sheriff, the contestant, Lloyd, received 3,499 votes, and the respondent 3,528 votes,—a majority of 29 votes for said office in favor of said Sullivan; and the court so finds the fact to be." (11) "The polls were closed at six o'clock, as announced, and thereafter, during the evening and night of said day, the said judges proceeded to canvass and count, and make out the returns of the votes cast at said precinct." (12) "That A. N. Anderson and Thomas O'Keefe, who were sworn as clerks of election at said precinct 34, performed none of the clerical work thereat, but all the clerical work was performed by the judges, and principally by Pennycook." (15) "On the whole evidence the court finds that the said election held at precinct 34, in said county on the 1st day of October, 1889, was fairly and honestly conducted; that no fraud was committed or attempted at said precinct by the election officers or others; that such irregularities as occurred thereat were without fraudulent intent, and resulted in injury to no one, and did not affect the result or the fairness of the election; that all voters registered for said precinct who applied to vote were permitted to vote; that no intimidation or undue influence was exercised or attempted upon the voters by any one; that the said judges and clerks, nor either of them, did not mark any ballot after its delivery by the voters to the judge of election, nor were said ballots marked by the judges of election in any manner except by the official stamp placed thereon before they were delivered to the voters; and that the said returns from the said precinct 34 express and show the true and correct result of said election held thereat."

It is apparent from the findings of the facts that the election of the appellant or respondent to the office in controversy depends upon the vote of the precinct numbered 34 in the county of Silver Bow. The

court below decided that the returns which had been rejected by the board of canvassers were valid, and exhibited the true count of the ballots which had been cast by the legal voters. This is the battlefield of the judicial conflict. We are surprised that the counsel for the respondent maintains that "the question of fraud in the conduct of the election at precinct 34, which was thrust into this case by contestant against the objection of respondent, is an immaterial matter, and cannot be considered as an element in its determination." This was the main issue at the trial, upon which testimony was offered by both parties; and the objections of the respondent upon similar grounds were overruled, and the court found distinctly thereon, and rendered judgment accordingly. The record shows that Sullivan had commenced an action against Lloyd, and that, upon a question raised by counsel, the court said: "In these two cases there is only one point to decide, and that is as to who is entitled to this office. It seems to me that it is unnecessary to try both of the cases. The court is only desirous to determine the rights of these parties on the evidence that may be presented to it. I think that, from the pleadings presented in these two cases, the case of Lloyd v. Sullivan presents all the issues between these parties, and the issue of that will determine the whole matter." The statement of contest says that the county clerk, "disregarding his plain duty, \* \* \* issued a certificate of election to the said office to the said Sullivan; that the said clerk, in support of his said illegal action as hereinbefore set out, claims to have knowledge of the return of a large number of votes for the said Sullivan as returned from precinct 34, said county, and which said returns were not included in the said abstract of votes, and which said votes, if they had been so returned, would in fact give to the said Sullivan the highest number of votes for the said office; that in fact and in law there were no legal returns presented to said canvassers from the said precinct 34; \* \* \* that there were no legal returns, as by law in such cases provided, ever or at all received by said canvassers." The answer denies these allegations. The transcript shows that the appellant at all times assailed the returns of this precinct, and the conduct of the officers thereof, and pointed out specifically his objections. The respondent did not file a demurrer to the statement of contest, or move to make any part thereof specific and certain, or by any pleading attack the same. In *Heyron v. Mahony*, supra, we considered briefly the nature of this proceeding, and held that it was proper to allow the grounds to be amended to conform to the proof. If the court below had sustained this objection of the respondent, the appellant could propose amendments in compliance with the ruling, and the same issue would have been heard and determined. But we think that the trial was conducted upon the correct theory and interpretation of the pleadings. This view is entertained by distinguished lawyers, whose opinion upon the issue involved in the contest is entitled to great respect. Hon. George Gray, of Delaware, delivered a

speech in April, 1890, in the senate of the United States, regarding this matter, and said: "I had intended, but I will not detain the senate longer by doing so, to refer to the opinion of the court of the state of Montana, after the territory had become a state, in a cause that was properly before it concerning the election of the sheriff of Silver Bow county, in which the whole conduct of that election at precinct 34 was gone into judicially, and judicially found and determined. \* \* \* In the case to which I have just alluded, decided in February, the court makes certain findings. They are very interesting, of course not binding on the senate, but certainly persuasive as the judgment of a court upon the facts that were in contest before it, in a case pleaded to issue, and in which the issue involved the integrity of these polls." 21 Cong. Rec. 3104. The fifteenth finding of fact, supra, is then quoted by the honorable senator, who has a bias for the respondent. We have read carefully every speech and document relating to the admission of the senators from this state, and cannot find any expression of dissent from this remark regarding the issue to be investigated by the court below. When we reflect that every observation in that high body of legislators attracts searching and intelligent criticism, the unanimity upon this point is convincing.

The branches of this extensive examination may be treated in four divisions, and we will discuss in the first place the conduct of the officers of the election at precinct 34, and the statutes governing them. It appears that there were three persons who served as judges of election,—W. A. Pennycook, John Morrison, and William O'Reagan,—the first two named being appointed as Republicans, and the last as a Democrat. The statute requires the number to be five, and that vacancies shall be filled on the morning of the election by the voters. St. 16th Sess. p. 140, § 21; Comp. St. div. 5, § 1011. "The said judges shall choose two persons, having the same qualifications with themselves, to act as clerks of the election." Comp. St. div. 5, § 1012. A. M. Anderson and Thomas O'Keefe were evidently selected for this purpose. Anderson, the sole officer of the election who testified at the trial, was called by the respondent, and we quote from the record his answers to the questions: "Pennycook wanted me to act as clerk, and I refused, but he said to stay around, and he would do it for me. Who did the clerical work? Pennycook. Did Morrison do some? Yes, sir. So that the clerks did not do the work. That work was done by the judges? Yes, sir. There was another clerk appointed, too? Yes, sir; Tom O'Keefe. Did he act as clerk? I don't think he did. I went away about eight minutes to seven. The polls were closed then? Yes, sir; they closed the polls at six o'clock. Did Pennycook say anything about going away? No, sir. I asked him at six o'clock if I could go, and he said, 'Yes; you can go to work.'" The witness testified that he worked the night before and the night after the election, and upon cross-examination said: "You say that you came down, according to Mr. Pennycook's orders, to act as clerk of that

election? Yes, sir; he sent for me. As a matter of fact, did you ever write a line in that election? I never did. Who showed you the election returns after the close of the election? Pennycook. Where? He showed it to me when he came back from town. When he came back from Butte? The next time I saw him. Where did he have them? He had the papers in his hands. Did you certify that they [the returns] were correct? Yes, sir. How did you know that they were correct, if you did not keep them yourself? I don't say that I just know. Is it not a fact that you do not know whether they were correct or not? How could I know, when I did not keep them? Do you know when O'Keefe signed those returns? I suppose the same time as I did,—the same day. Was his name down when you signed? No, he signed after me, I think. When did you see Pennycook after that, [the closing of the polls, and going to work?] I don't know if it was a day or two days. You didn't see him the next morning? No, sir; I went right to bed when I came from my work. You didn't see him the second day after that? I think I saw him that night at twelve o'clock, when I was eating my supper. I saw him then. What night was that? The second or third night after election."

What are the duties which the law devolves upon the clerks of an election? "Previous to votes being taken, the \* \* \* clerks of election shall take and subscribe the following oath: 'I, A. B., do solemnly swear or affirm that I will perform the duties of clerk of the election according to law, and the best of my ability, and that I will studiously endeavor to prevent fraud, deceit, and abuse in conducting the same.'" Comp. St. div. 5, § 1015. At the opening and before the closing of the polls, "one of the clerks, under the direction of the judges, shall make proclamation of the same." Id. § 1017. "The clerk of the election shall enter the name of the elector and number in the poll-book." Id. § 1019. "Upon the adjournment of the polls the clerk shall, in the presence of the judges, compare their respective poll-lists, compute and set down the number of votes, and correct all mistakes that may be discovered, according to the decision of the board, until such poll-lists shall be made in all respects to correspond." Id. § 1024. "The ballots and the poll-lists agreeing, or being made to agree, the board shall then proceed to count and ascertain the number of votes cast; and the clerks shall set down in their poll-books the names of every person voted for, and, at full length, the office for which such person received such votes, and the number he did receive, the number being expressed at full length; such entry to be made, as near as circumstances will admit, in the following form: \* \* \*

Certified by us.		Attest:	
B. )		M. N. )	
and ) Clerks of Election.		O. P. ) Judges of Election."	
C. D. )		Q. R. )	

Id. § 1030. "The judges of election shall then inclose and seal one of the poll-books, under cover, directed to the clerk of the board of county commissioners of the county in which such election was held;

and the packet thus sealed shall, within three days from the closing of the polls, be conveyed by one of the judges or clerks of election, to be determined by lot, to the post-office nearest the house in which said election for such precinct was held, and register and mail the same to the clerk of the board of county commissioners." Id. § 1031.

All the statutory provisions requiring the services of the clerks of the election at precinct 34 were deliberately violated by the three judges. The clerks were selected with the understanding that they did not possess the necessary qualifications, and that they should not perform their lawful duties. The poll-book which is mentioned in the last section was delivered personally by Pennycook to the county clerk. There is no evidence to prove the time when the poll-books and returns were prepared, but Anderson did not affix his signature until the unusual hour of midnight, upon the second or third day after the election; and the name of his co-clerk, O'Keefe, was not visible. In the meantime, Pennycook had visited Butte, and returned; and it is needless to say that it was generally known then, from the news of the election which had been received, that the vote of precinct 34 might turn the scale in the county of Silver Bow and the state. He was compelled to make another trip to Butte, and carried the poll-book, which for some inexplicable reason had not been put in proper form as promptly as the law demands. "As soon as the polls of the election shall be finally closed, the judges shall immediately proceed to canvass the vote given at such election, and the canvass shall be public, and shall continue until completed." Id. § 1027.

John Wilson testified that he and Charles Omo were in this polling place at about 7½ o'clock P. M. "Did somebody put him [Omo] out? He was told to go out. By whom? By [Pennycook.] What else did he say to him? I don't know as I heard him say anything, except that he had no business there, he said. What did Omo say? He stepped out." Charles Omo testified: "What else did you see him [Pennycook] do while you were there? He stopped very shortly when I stepped in, and says, 'What can I do for you?' I said, 'Isn't there anything in here to drink or smoke?' 'No,' he says, 'there is nobody allowed in here, and the polls are closed. Please step out.' I said I supposed this was a public place. He said: 'Not at present. Please step out.' I did not move, and he jumped up, and came over to where I was, and said, 'Please step out.' What did you do when they told you to go out? Looked around, and then stepped over to the door, and Pennycook took me by the shoulder, and said, 'Please step out;' and I said, 'All right,' and walked out, and he shut the door behind us. Who told you that this was not a public place? Pennycook. Did these gentlemen say anything to you about it? Morrison said: 'The best thing you can do is to go out, and attend to your business.'" Thomas McCann testified that he voted "the straight Democratic ticket, except two men. Were you there after the polls closed? I was. Did you go into the polls



after they were closed? No, sir. Why did you not? I could not get in. Did you try to get in? Yes, sir. Why couldn't you get in? The judges wouldn't let me. Did you notice anything peculiar about this place? Nothing, only the door was locked. Did you try it? Yes, sir. Do you know who was inside? Pennycook and Morrison; that was all I saw. How did you see them? I saw Pennycook open the door once or twice. What did you say to the persons inside when you tried to get in, and found the door locked? I told them that I thought anybody could go in there that wanted to. What did they reply? That they could not. You were there until half past nine? Yes, sir; about that time. I went to bed between half past nine and ten. Were they [Pennycook and Morrison] in there all that time? Yes, sir." Dennis O'Neil testified that he was "electioneering" at this precinct, and "voted for the Democratic candidates. You say that you went up to the polling place after the polls were closed, and that the only reason that no person was allowed in there was what Pennycook told you,—that they were drunk? Yes, sir. Do you know that the other men who went there, and asked for drink, were drunk? No, sir. You don't? I know that they was not. You know that men went there, and asked for admission, who were not drunk? Yes, sir." From this and other evidence, which is contained in a voluminous record, and cannot be quoted at length, it is proved that O'Reagan, one of the judges of the election, did not discharge his grave public

task after the polls were closed. Pennycook and Morrison conducted privately the canvass, and excluded all persons from a privilege secured by the statute. The testimony does not prove that one citizen ever saw a ballot produced from the box of this precinct, or heard it read or tallied. There was no public canvass. The record does not disclose any reason for the assumption by Pennycook and Morrison of the labor and responsibility which should have been shared by five judges, and two clerks of the election.

The certificate of the returns is irregular:

Certified by us this 2d day of October, A. D. 1889.

Attest: W. A. PENNYCOOK, } Judges  
THOS. O'KEEFE, } Clerks of JOHN MORRISON, }  
A. N. ANDERSON, } Election. WM. O'REAGAN, } Election

The statute, supra, requires the clerks to certify, and the judges to attest, the number of votes received by each person.

2. We will now comment upon the anomalous features of the returns of precinct 34. The statute provides that the name of every elector shall be pronounced "with an audible voice," by the judges to whom his ticket may be delivered, before the same shall be put in the box, and the clerk of the election shall enter the name of the elector and number in the poll-book." The voters of the precinct were numbered consecutively from 1 to 174, and the poll-book shows that they cast their ballots in the following remarkable order: The three judges, the two clerks, and the remainder in alphabetical array, according to the capital letter, from John A. Anderson to Robt. Youngberg. This is the list:

No.	No.	No.	No.	No.
1. W. A. Pennycook.	36. J. Cosgrave.	71. T. Hendrickson.	106. Otto Leyer.	141. Chas. Pidgeon.
2. John Morrison.	37. C. Casady.	72. M. F. Hogan.	107. Wm. Maher.	142. John Pierson.
3. Wm. O'Reagan.	38. D. Doccio.	73. Wm. Huldberg.	108. Jas. Mulligan.	143. R. Pollock.
4. Thos. O'Keefe.	39. G. Doccio.	74. Ole Hanson.	109. John Moriarty.	144. A. Pederson.
5. A. M. Anderson.	40. M. Doherty.	75. Matt Isaacson.	110. J. Moran.	145. Jos. Preston.
6. John A. Anderson.	41. John Durkin.	76. C. Johnsson.	111. P. W. Murphy.	146. J. F. Pogson.
7. S. Aleworth.	42. C. A. Dahlgreen.	77. J. Jensen.	112. J. P. Murphy.	147. C. F. Peterson.
8. Hen. Anderson.	43. John Delavan.	78. J. T. Johnson.	113. N. Morfin.	148. John Peterson.
9. Axel Anderson.	44. Joe Davis.	79. A. Johnson.	114. R. Mooney.	149. A. Rod.
10. H. Abraham.	45. Jas. Douglas.	80. Ole Johnson.	115. J. Murey.	150. John Reynolds.
11. N. E. Albun.	46. Martin Decey.	81. Sam Johnson.	116. L. K. Moore.	151. A. Richter.
12. Swan Anderson.	47. Thos. Dunn.	82. Chas. Johnson.	117. J. P. McDonald.	152. Jas. Ryan.
13. James Bush.	48. M. Dougherty.	83. Frank Johnson.	118. John McLeod.	153. Geo. Remberg.
14. C. Baandet.	49. R. Egleston.	84. R. Keophile.	119. B. McHugh.	154. J. Ronke.
15. Wm. Beattie.	50. Jas. Engleish.	85. N. Knutson.	120. John McAvoy.	155. Ole Rosenson.
16. John Bergesen.	51. O. N. Erickson.	86. J. N. Kelly.	121. J. McPadden.	156. Owen Slavin.
17. Frank Brady.	52. L. N. Fish.	87. A. Kehrn.	122. Dan McCarthy.	157. H. Smith.
18. H. Broderick.	53. Mike Flaherty.	88. John Keskela.	123. J. W. McIlke.	158. J. Stanger.
19. Wm. Bros.	54. Chas. Fenton.	89. Nels Kurkkoia.	124. Thos. McCann.	159. Chas. Swanson.
20. John Boncher.	55. T. F. Gibbons.	90. M. Kearney.	125. Chris. Nelson.	160. Jas. Steele.
21. Noble Britton.	56. Jas. P. Gallagher.	91. M. F. Keefe.	126. Oscar Nolinie.	161. L. Subat.
22. A. Brooks.	57. Tom Gallagher.	92. Robt. Kelly.	127. M. Neylan.	162. John Smith.
23. J. J. Brandt.	58. Wm. Grant.	93. Ed Leary.	128. Ole Nelson.	163. L. Studdess.
24. Wm. Bruns.	59. A. Gillie.	94. Fred Levett.	129. C. Noegan.	164. C. Stream.
25. R. Brystrone.	60. E. Grenlund.	95. Ed Lang.	130. Thos. O'Reilly.	165. Wm. Sassa.
26. B. A. Borjesson.	61. Wm. Goodwin.	96. D. J. Lynch.	131. D. O'Leary.	166. R. Thompson.
27. Frank Curry.	62. John Gustafson.	97. A. Linden.	132. A. Olsen.	167. Ed. Wesner.
28. M. Cannavan.	63. O. Gilhooly.	98. N. Linden.	133. O. Olsen.	168. R. Williams.
29. F. H. Cirdland.	64. A. Green.	99. A. Locke.	134. D. O'Neil.	169. Jas. Whalen.
30. M. Cowley.	65. Thos. Herson.	100. Jere. Larkin.	135. E. M. Olander.	170. E. Williams.
31. C. Campbell.	66. Nat. Hoynes.	101. Jan Linfras.	136. G. Permell.	171. J. Waline.
32. J. Clark.	67. Pat Hannikan.	102. C. Lindgren.	137. Ed Pauley.	172. Pat White.
33. Tom Cavanagh.	68. A. Henderson.	103. E. Larson.	138. John Peterson.	173. John West.
34. Chris. Carolin.	69. D. Hogan.	104. C. Lindergreen.	139. John Presenya.	174. Robt. Youngberg.
35. P. Cuicere.	70. Chas. Holstrom.	105. C. Larson.	140. Frank E. Price.	

The official ballot at the precinct contained the names of 82 candidates for state, county, and township officers, to-wit: Member of congress, governor, lieutenant governor, secretary of state, attorney general, treasurer, auditor, superintendent of public instruction, clerk of supreme court, chief justice, two associate justices, district judge, county clerk, sheriff, senator, 10 representatives, 3 county commissioners, clerk of court, treasurer, county su-

perintendent of schools, surveyor, assessor, coroner, public administrator, attorney, two justices of the peace, and two constables. The Republican and Democratic parties had respectively made nominations for these positions, and the constitution was submitted for approval. Each of these alleged voters exercised fully his right of suffrage, according to the returns, which embody the figures:

21	Democrats had 171 votes, making.....	3,591 votes
3	" including constitution, 172	516 "
1	" votes, making.....	173 "
14	" including constitution, 170	2,380 "
1	" votes, making.....	169 "
1	" including constitution, 168	168 "
1	" votes, making.....	165 "
	Total .....	7,162 "
20	Republicans had 3 votes, making.....	60 "
5	" including constitution, 2	10 "
1	" votes, making.....	1 "
10	" including constitution, 4	40 "
4	" votes, making.....	20 "
1	" including constitution, 9	9 "
1	" votes, making.....	6 "
	Total .....	146 "
	Grand total .....	7,308 "

One hundred and seventy-four voters had 42 votes to cast,—7,308 votes. Such mathematical exactness upon the part of so many voters is unprecedented. When we remember that the Australian system prevailed, and that a mark was placed opposite the name of each candidate, and that a large number of these persons had recently obtained the right to vote through declarations of their intention to become citizens of the United States, the result seems to be wonderful. At the same time the proposition for the issuance of bonds in the sum of \$25,000 for school purposes excited a slight interest, and only 91 voters expressed their wishes thereon. We will illustrate these views by a reference to the vote of the other precincts of the county of Silver Bow and the state upon the adoption of the constitution, and the choice of a member of congress:

VOTE OF SILVER BOW COUNTY IN 1889 FOR CONGRESSMEN AND CONSTITUTION.

No.	Precinct.	Carter	Rep.	Maginnis	Dem.	Constitution	For. Ag.	Total
1.	Walkerville.....	239	208	253	85	286	447	
2.	" .....	107	108	126	21	147	215	
3.	Centerville.....	179	101	161	11	172	280	
4.	" .....	236	407	371	24	895	643	
5.	Butte.....	183	107	139	14	153	290	
6.	" .....	135	230	286	14	250	365	
7.	" .....	159	142	190	14	204	301	
8.	" .....	78	123	131	17	148	204	
9.	" .....	200	219	277	24	301	419	
10.	" .....	157	234	241	25	267	390	
11.	" .....	133	104	125	21	146	287	
12.	" .....	244	241	260	22	282	486	
13.	" .....	198	184	233	90	263	382	
14.	" .....	110	97	88	18	104	207	
15.	Parrott.....	158	170	199	65	284	373	
16.	Menderville.....	209	69	262	12	174	278	
17.	" .....	124	61	75	9	84	185	
18.	South Butte.....	160	167	203	25	228	327	
19.	Black Tail.....	35	28	18	2	15	63	
20.	Centennial Brewery.....	90	77	88	18	106	167	
21.	Rocker.....	91	39	53	4	57	121	
22.	Burlington.....	143	63	77	11	88	296	
23.	Silver Bow.....	10	18	13	8	21	31	
24.	" Junction.....	14	21	15	6	20	35	
25.	McCane's Wood Camp.....	25	161	142	7	149	196	
26.	German Gulch.....	2	12	8	2	8	14	
27.	Norton Gulch.....	18	19	3	1	11	27	
28.	Peeler.....	18	12	22	8	25	30	
29.	Divide.....	34	28	33	2	40	63	
30.	Medrose.....	8	2	6	1	7	10	
31.	Soap Gulch.....	6	5	7	7	7	11	
32.	Clipper Nine.....							
	Total.....	3,566	2,456	3,962	467	4,123	7,022	

No polls were opened at precinct No. 25.

The following was the result in the state: Carter, 19,922 votes; Maginnis, 18,264 votes; total for congressman, 38,186 votes; for the constitution, 24,676 votes; against the constitution, 2,274 votes; total upon the constitution, 26,950 votes; leaving a difference of 11,236 votes. Although the percentage of non-voters upon the submission of the constitution, when compared with the votes recorded for the congressional candidates, is high, and substantially the same, throughout Montana, in precinct 34 the rule does not operate, and every elector, according to the face of the returns, voted as to such submission. Even in precincts 32 and 33, where only 10 and 11 votes, respectively, were polled, this average is unchanged.

The number of voters in the county at this election is shown by another table to have been 7,329. When we consult the returns of these precincts for the candidates for the offices which have been mentioned, it will be seen that there is a great difference between the possible and the actual vote. The number of citizens who failed to signify their choice in some respects is so regular that the average can be applied generally.

VOTE OF SILVER BOW COUNTY IN 1889 FOR OFFICERS.

Precinct.	Voters.	Possible Vote.	Actual Vote.	Difference.
1	447	18,327	17,900	427
2	221	9,061	8,242	819
3	296	12,136	10,418	1,718
4	661	27,101	25,115	1,986
5	298	12,218	11,304	914
6	388	15,908	14,833	1,075
7	315	12,915	12,092	823
8	207	8,487	8,224	263
9	432	17,712	16,597	1,115
10	415	17,015	15,590	1,425
11	244	10,004	9,345	659
12	515	21,115	18,636	2,479
13	394	16,154	15,009	1,145
14	228	9,148	7,948	1,194
15	332	16,072	14,579	1,493
16	307	12,537	11,590	947
17	199	8,159	7,081	1,078
18	341	13,981	12,540	1,441
19	65	2,605	2,392	213
20	176	7,216	6,408	808
21	124	5,084	4,530	554
22	221	9,061	8,042	1,019
23	87	1,517	1,335	182
24	36	1,476	1,332	144
25		No polls opened.		
26	190	7,790	7,217	573
27	15	615	520	95
28	28	1,148	835	313
29	27	1,080	936	144
30	31	1,240	1,082	158
31	63	2,540	2,319	221
32	10	410	393	17
33	11	451	432	19
Total.....	7,329	300,368	276,896	23,472

Another peculiarity of this vote—which, however, commends it to our favor—is the triumph which the supporters of the constitution achieved. It is the greatest majority that has been reported in any precinct of similar numbers, being 172 votes for and 2 votes against it. While this question was not debated during the campaign from a partisan stand-point, the votes thereon were apportioned in the same manner as if they had been for the Democrats and against the Republicans. The county of Silver Bow, without precinct 34, was decidedly Republican; and the insignificant part of the ballots that were returned for its candidates, under

these conditions, must be noted as strange, and without an exemplar in Montana.

3. We will review the testimony proving that actual fraud was perpetrated at precinct 34: Before the record is examined, it should be observed that most of the persons whose names are registered upon the poll-book of the precinct were employed at the time of the election in building a railroad near that point, and vanished when the work was finished. It was therefore difficult to produce them upon the trial as witnesses, and the number who testified was 10 out of 174 voters. The appellant offered in evidence two subpoenas, with their returns duly verified, showing the names of the voters at precinct 34 who could not be found, to establish diligence upon his part to procure their attendance. The objection of the respondent to their introduction upon the grounds that they were irrelevant and immaterial was sustained by the court. The statute, *supra*, provides that "each party shall be entitled to subpoenas, and subpoenas *duces tecum*, as in ordinary cases in law." We affirmed the ruling of the court in *Heyfron v. Mahony*, *supra*, that these papers should be admitted for this purpose. In *Blue v. Peter*, 40 Kan. 717, 20 Pac. Rep. 442, the court said: "In addition there were subpoenas issued for about ninety of those claimed by Peter to be fictitious voters, and the return of the officer shows they were not found in Harper township. \* \* \* The failure to find the residence of so large a number of purported voters is more than suggestive, and to our minds a very strong proof of fraudulent voting." The effect of this error upon the rights of the parties will not be further considered, but the circumstances afford a satisfactory explanation of the failure of the contestant to bring into court all the voters of the precinct.

Charles Johnson testified that he was a registered voter of precinct 34, and that he did not vote at this election. His name is upon the poll-book as one who then and there voted, and is numbered 82. Five voters—Axel Anderson, Charles Lindgreen, John A. Anderson, A. Green, and John Petterson did not vote upon the constitution. Axel Anderson testified: "Did you vote for the constitution, or against it? I didn't vote at all for that." Charles Lindgreen, testifying through an interpreter, answered: "Did he vote for the constitution, or against it? He did not." John A. Anderson testified: "Did you vote for the constitution, or against it? No, sir; I left that blank." He also swore that he marked the ballots for A. Green and John Petterson. "Did you mark the constitution on either of them? No, sir." G. Pennell testified: "And you did not vote at all for Carter and Maginnis? For neither." C. Lindgreen testified: "Who did he vote for? Martin Maginnis and two Republicans. Did he vote for the balance of the Democrats besides the Republicans? No, sir. Did he only vote for three persons on the ticket? Only three." G. Pennell testified that he marked his ballot for "all of the Republican candidates except four," and three Democrats,—Toole, Bickford,

and Caplice. Axel Anderson testified that he voted "the Republican ticket," excepting a Democrat, who "was one of the last ones on the ticket." John A. Anderson, A. Green, and John Petterson voted "for the straight Republican ticket." The time when the witnesses deposited their ballots is generally given in their testimony, and can be stated as follows: Michael F. Hogan, 8 o'clock; John Morrison, quarter past 8 o'clock; G. Lindgreen, 10 o'clock; D. O'Neill, half past 10 o'clock; Axel Anderson, 1 or 2 o'clock; G. Pennell, 3 to 4 o'clock; and John A. Anderson, A. Green, and John Petterson voted together, but the hour is not revealed. Axel Anderson testified that he left his ticket with Pennycook, who held it in his hand as he went out, and also said: "Do you undertake to say that that ticket was marked or stamped by Pennycook after you handed it to him, or before? After. Are you sure of that? Yes, sir." C. Lindgreen testified: "After he had marked his ballot, what did he do with it? He gave it to Pennycook. What did Pennycook do with it? He put a mark on it, and put it in the ballot-box. What kind of a mark did he put on it? He had something like that, [the official stamp.]" Charles Omo, the witness above named, further testified that he and Charles Wilson went into the voting place after the polls were closed, and saw Pennycook and Morrison there. "What were they doing when you went in? This Pennycook was doing some kind of stamping work there. What with? With a stamp. Was it anything like that [the official stamp] on the table? Yes, sir; something similar. What was he stamping? Ballots. What kind of looking papers were they, for size and color, etc.? About six or eight inches in width, and twenty or twenty-four in length. What else did you see him do while you were there?" Then follows the answer. "When he jumped up, did you see anything else? The only thing that I noticed was a bunch of papers that he had been sitting on. What were the papers? I could not say. I took them to be ballots. They fell on the floor as he jumped up off the chair." On cross-examination this witness testified: "How many times did this gentleman stamp these papers? Once only. Positive? Yes, sir." John Wilson, the above-named witness, corroborated the testimony of Omo, and, in reply to questions by the court, said: "How many did he stamp? He must have stamped, probably, two. In how long a time? Just a short bit, probably a minute. Was that all he stamped while you were in there? That was all I noticed. Were you in there longer than the time he occupied in stamping two papers? I don't think I was. Did he have anything else there except papers? He might have had a pencil. Did you see any books or check-lists there? No, sir; I didn't take notice to it. Did you see what impress this stamp left on the paper? No, sir. Where was Omo at this time? He was in there." The foregoing testimony was not contradicted by any person, and no effort was made by the respondent to impeach one of the witnesses. Pennycook and Mor-

rison, who must possess the best evidence upon all the issues concerning the vote of precinct 34, were not put upon the stand. Through the remarks of counsel in the argument we learn that Pennycook, during the trial, was in Scotland, and Morrison was in Colorado. This case, in some of its phases, has invaded the senate chamber, and been expanded to national proportions; and the materiality of their testimony can be readily understood. But the subpoena of the appellant could not command Pennycook and Morrison to appear before the court and tell the truth.

When, therefore, the evidence which was produced is weighed, these facts are established: Some person voted in the name of Charles Johnson during his absence. All the electors of the precinct did not vote for or against the constitution. Pennell did not vote for either candidate for congress. Lindgreen marked only 3 out of 82 candidates upon the ballot. Three voters cast "the straight Republican ticket." Axel Anderson marked all the Republican candidates except one, probably a constable, and Pennell voted for 3 Democrats and 37 Republicans. Pennycook marked illegally some ballots after their delivery to him to be deposited in the box. The voters did not march to the polls in alphabetical array, and the poll-book does not disclose the number or order of those who voted. Pennycook and Morrison stamped ballots after the polls were closed, and Pennycook had a package under him when Wilson and Omo were present, and required to leave the polling place. The returns of precinct 34 are fraudulent, and do not state truly the vote which each candidate for office received at the last election; and voters who had a right to be present when the votes were counted were ejected from the polling place by the judges when they were stamping ballots after the closing of the polls.

4. We will apply to the facts the principles of the law which are laid down by the authorities. The extraordinary length of this opinion restrains us from collecting the cases which throw light upon this subject, and we shall rely upon the doctrines which are stated in the text-books. It is admitted by all that the statutes regulating elections are designed to protect the precious right of suffrage by securing an impartial count of the ballots, and the choice of the people for public trusts. The duties of the clerks of an election are as essential, and as distinctly defined, as those of the judges, so that they can be checks upon each other, and vindicate the purity of the ballot-box. While many of the statutory requirements are directory, and the form is always subordinate to the substance, they are nevertheless considered by the legislative department safeguards of the voter in the exercise of this privilege of citizenship. They have been violated with impunity by the officers of precinct 34, with the purpose of defeating the will of the people. Waiving the point that the returns are not properly certified, what legal weight attaches to them?

Mr. Paine says in his work on Elections: "Poll-books duly certified and returned

are *prima facie* evidence of the truth of their contents; but the presumption so raised may be rebutted by proof that they are fraudulent and fictitious to such an extent as to render them wholly unreliable." Section 592. Mr. Mechem writes in his treatise on Public Officers: "It is presumed that the officers of election have done their duty, and that the returns made by them are a full and fair statement of the true result, and this presumption is to be given effect until they are shown to be unreliable." Section 227. Mr. McCrary, in his treatise on Elections, says: "The returns must stand until such facts are proven as to clearly show that it is not true. When shown to be fraudulent or false, it must fall to the ground." Section 536. "If an officer of the election is detected in a willful and deliberate fraud upon the ballot-box, the better opinion is that this will destroy the integrity of his official acts, even though the fraud discovered is not of itself sufficient to affect the result. The reason of the rule is that an officer who betrays his trust in one instance is shown to be capable of the infamy of defrauding the electors, and his certificate is therefore good for nothing." \* \* \* We repeat, therefore, the opinion expressed in a former chapter, that a willful and deliberate fraud on the part of such an officer, being clearly proven, should destroy all confidence in his official acts, irrespective of the question whether the fraud discovered is of itself sufficient to change the result." Section 539.

The nature of the proof to establish fraud is accurately defined in *Wheat v. Ragsdale*, 27 Ind. 206, and Mr. Justice ELLIOTT, for the court, says: "Direct and positive proof of the alleged fraud would in such a case be more satisfactory to the court or jury trying the case. Such frauds, however, are seldom permitted in the presence of those who are not participants in them; and, if only direct and positive evidence were admissible, few, if any, of them would be brought to light. We are not aware of any reason why frauds upon the ballot-box, and thereby upon candidates for the offices to be filled, may not as well be established by circumstantial evidence as frauds of any other character." In the American and English Encyclopedia of Law the rule is stated as follows: "While fraud is not to be presumed, it is equally true in election as in other cases that it is usually proved by circumstantial evidence. It would be very difficult, and generally impossible, to prove an agreement between the parties who committed the fraud, and, if no circumstantial evidence was recognized as sufficient, the frauds would generally go unrebuked." Volume 6, p. 354. In *Littlefield v. Green*, Brightly, Elec. Cas. 494, the court observes: "The names of the first 668 voters, as appears from the poll-books, appear to have been registered and voted in alphabetical and numerical order. \* \* \* One of them [the officers who conducted the election] swears that he cannot account for the names appearing in alphabetical order on the poll-books from A to Z, and Z to A, but thinks that men voted

in that order,—a thing impossible and incredible." When, where, and by whom were the poll-books and returns of precinct 34 made? The transcript may be searched in vain for any answer to those important inquiries. No witness ever saw the name of one voter recorded in the poll-book.

In *Knox Co. v. Davis*, 63 Ill. 417, the court views as a circumstance tending to prove fraud on the part of the officers of an election their conduct, and says: "Again, the moderator of the election has absented himself, or absconded, since this proceeding was instituted, so that his evidence could not be had."

In *Russell v. McDowell*, 23 Pac. Rep. 183, which was an election contest affecting the office of sheriff, the supreme court of California referred to similar conduct, and Mr. Chief Justice BEATTY said: "Officers of election are, like all other persons, presumed to know the law; and their deliberate omission to follow directions designed to prevent fraudulent voting certainly calls for explanation. It casts suspicion upon their integrity, and is sufficient *prima facie* to make out a case of fraud. No doubt such omission is susceptible of explanation, and we are very willing to believe that the officers of these precincts erred through ignorance of the law, and were not actually guilty of fraudulent intent. But, as the case is presented, we cannot indulge that presumption. The officers were not called as witnesses, as they should have been, to prove that they acted as they did through ignorance, and not with fraudulent purpose; and, in the absence of any rebutting proof on this point, we feel constrained to hold that the contestant made out a case of malconduct on the part of the election boards. \* \* \* Here no proof in rebuttal was offered, and the evidence for contestant stands absolutely uncontradicted."

These authorities are directly in point, and we hold that the commission of fraud at the election in precinct 34 has been shown by both direct and circumstantial evidence. What is the remedy? If possible, the poll should be purged, and the legal vote should not be suppressed by reason of the malconduct of the officers of the election. The absence of the citizens of the precinct is an obstacle which cannot be overcome. How can the legitimate ballots be ascertained? If we reject the returns, we can reasonably presume that the vote of precinct 34 upon the constitution was in the same ratio as the remainder of the county of Silver Bow. A calculation upon this basis demonstrates that this vote should have been 112, and that Pennycook and Morrison may have tampered with 62 ballots. The constitution was not endangered, and there was no urgent demand for the counting of the whole vote of precinct 34 upon the question; but, in the preparation of the overwhelming majorities for certain candidates upon the ballots, from governor to constable, policy probably dictated that there should be no exception. There should also have been a difference between the possible and actual vote of this precinct of 584 votes, or there-

abouts, but, contrary to the rule which prevailed in every polling place of the county, none is returned. This conjecture is not the mode of settling the contest, and we must seek relief elsewhere. Upon whom rests the burden of proof under these circumstances? Paine writes in his work on Elections: "When a poll-book is so impeached, the burden of proving legal votes by other proof is thrown upon the party claiming them." Section 592. "When the proceedings are so tarnished by fraudulent, negligent, or improper conduct on the part of the officers that the result of the election is rendered unreliable, the entire returns will be rejected, and the parties left to make such proof as they may of the votes legally cast for them." Section 596. In *Phelps v. Schroder*, 26 Ohio St. 558, the court held: "Where a poll-book is impeached for fraud, and rejected as *prima facie* evidence, it does not follow that the legal voters who had voted at the election will be disfranchised, or that the candidates will be deprived of the legal votes they actually received at the election in the township. \* \* \* When the poll-book was rejected, the way was opened for either party, by testimony other than the poll-book, and in addition to it, to have proved the number of legal votes he received in the township. \* \* \* Of course, the burden of proof would have been on the party claiming the legal votes." The last sentence of section 539 *supra*, *McCrary, Elec.*, is the following: "The party taking anything by an election conducted by such an officer must prove his vote by evidence other than the return." In 6 *Amer. & Eng. Cyclop. Law*, 353, it is written: "Fraud destroys the value of returns as evidence. The fraud does not invalidate the legal votes cast, but, by destroying the presumption of the correctness of the returns, it makes it necessary that any person who claims any benefit from the votes shall prove them; and where no proof is offered, and the frauds are of such a character that the correct vote cannot be determined, the returns of the precinct will be rejected."

The findings of the court show that the majority for Lloyd in the remaining precincts of the county of Silver Bow was 127. Under the authorities, Sullivan would be compelled to prove that he received at least 150 of the 174 votes in precinct 34, (assuming that the last number represents the legal voters,) in order to obtain any majority. No evidence of this description was offered by the respondent. Some of the citations refer to the legal necessity for rejecting the vote of a precinct under the facts appearing in the record, and all the authorities lead to this conclusion. In 6 *Amer. & Eng. Cyclop. Law*, 334, we read: "But, if the irregularities are so great that the election is not conducted in accordance with law, either in form or substance, where they are matters of substance, and render the result uncertain, and where they are fraudulent, and the result is rendered uncertain thereby, the returns should be set aside, and the persons required to prove the legal votes cast for them. Where the incompetency, inefficiency, and reckless

disregard of the essential requirements of the law prevail to such an extent that the acts of the officers must be deemed unreliable, this will, of necessity, have the same effect as fraudulent action, and be ground for rejecting the returns." Says Mr. McCrary in his work on Elections: "While a mere irregularity which does not affect the result will not vitiate the return, yet where the provisions of the election law have been entirely disregarded by the officers, and their conduct has been such as to render their returns utterly unworthy of credit, the return must be rejected. In such a case the returns prove nothing." Section 476, (3d. Ed.)

We therefore conclude that the findings of the court below regarding the legal effect of the election held upon the 1st day of October, 1889, at precinct 34, are contrary to the evidence, and should be set aside. The returns thereof do not show the true result of the votes which were cast for the candidates, including the contestants for the office of sheriff. The officers did not canvass, count, and make said returns. The election was conducted in violation of the laws regulating the same, and the opportunity was afforded for the perpetration of crimes against the suffrages of the people. Ballots were illegally marked after they had been delivered to the judges to be put in the box. The official stamp was unlawfully placed upon ballots by one of the judges after the polls were closed. Fraud was committed by the officers of the election to such an extent that the actual vote of the precinct cannot be ascertained, and the returns are valueless as evidence, and must be rejected. When these findings are discarded, the official vote of the board of canvassers of the county remains unaltered, and Lloyd should have been declared the person who was duly elected to said office. It is therefore ordered and adjudged that the judgment be reversed, with costs, and that the case be remanded to the court below, with instructions to enter a judgment that John E. Lloyd was duly elected sheriff of the county of Silver Bow aforesaid for the term beginning with the date of the admission of the state of Montana into the Union, and ending on the first Monday in January, 1893, and make the necessary orders to carry into effect this judgment.

HARWOOD and DE WITT, JJ., concur.

#### ANDERSON V. HAMMON *et al.*

(Supreme Court of Oregon. July 1, 1890.)

#### LANDLORD AND TENANT—WASTE—CANCELLATION OF LEASE.

Where the neglect and omissions of the defendants to perform their obligations under a lease resulted in waste, which, if permitted to continue, must eventually result in the ruin and destruction of its subject-matter, to the irreparable damage of the plaintiff, held, that equity would interfere and cancel the lease to prevent such waste and destruction.

(*Syllabus by the Court.*)

Appeal from circuit court, Jackson county; L. R. WEBSTER, Judge.

This was a suit in equity, brought by the plaintiff and appellant, to have a lease canceled, and for damages, and for a temporary injunction pending the suit. A large amount of evidence was taken, and after a full hearing the court found that the evidence failed to sustain the complaint, and dismissed the suit. From the decree rendered herein, this appeal is taken.

H. K. Hanna and Francis Fitch, for appellant. C. W. Kahler, for respondents.

LORD, J. The plaintiff in his complaint alleges that, at the execution of the lease sought to be canceled, he was the owner of a valuable apple orchard, consisting of 30 acres, and also 20 acres or more set with peach, plum, and apricot trees; that each was in a good and healthy condition when taken possession of by the defendants; that, induced by the representations of the defendants that they would cultivate, prune, and care for said orchard if a lease could be obtained for the same, the plaintiff entered into a written lease with the defendants to have said orchards for the period of five years, in which they agreed to properly cultivate and prune the same according to the rules of good horticulture, plowing at least one way each year, etc., but that, by reason of the neglect and failure of the defendants to properly cultivate said orchards, they were overrun with suckers, water-sprouts, and orchard pests, so that the trees were and are going rapidly into decay and ruin, to the irreparable injury of the plaintiff. The answer admits the lease, etc., but denies specifically the neglect or failure to comply with the terms of the lease, and all else material. The contention of the defendants is that, under the lease, they were not required to do any particular amount of cultivation or pruning; that they only agreed to "prune and cultivate the orchards according to the rules of good horticulture," and that the only indication of the amount of cultivation is limited to "plowing at least one way each year," and consequently were not bound to grub out the trees, to cut out borers, to take proper measures to destroy the woolly *aphis*, or other insect life detrimental to the healthful condition of the trees. The evidence shows that the plaintiff and the defendant W. P. Hammon, previous to the execution of the lease, had several conversations in respect to the cultivation and preservation of fruit, and the production of fruit thereon, and that the defendant professed, and so represented himself, to be versed by study and experience in horticulture, and that the plaintiff, impressed with the value of such knowledge and experience in fruit-raising, and the ability of the plaintiff to handle and care for his orchards, so as to make them more profitable, and to improve and keep such orchards in good condition, and the trees in the best state of productiveness, was induced by the defendant to make the lease for the period named, which he represented to be necessary to effect such objects, keep the trees renovated, and in good, fruit-bearing condition, and reap the advantages suggested. It also shows that the

defendant took the plaintiff into his orchard, and explained to him wherein he failed, how the insect pests which often injured and destroyed the trees could be removed and exterminated, and how, according to good horticultural methods, the health of the trees could be maintained, and their fruit-bearing qualities preserved; that, after several conversations of this character, the defendant himself drew up the lease, and it was signed in view of these facts, and under such circumstances. The evidence shows that suckers growing around the roots of fruit-trees exhaust the nourishment that should go to the support of the trees; that water-sprouts growing after heavy pruning produce a similar effect; that the *aphis* infesting an orchard, when left to itself, eventually injures or kills the trees; and that the borer in a peach and apricot orchard, if not removed with a knife, produces a similar effect upon those trees.

It is clear, then, to properly care for and cultivate an orchard, it is necessary that one should look carefully after these matters, to prevent the decay or destruction of the trees, and to preserve them in a healthy, fruit-bearing condition; for it is conceded, unless suckers are removed, and these pests are checked or exterminated, the orchard will finally go into decay, and be irreparably injured. Whose duty, then, was it, under this lease, to attend to these matters? It would seem to me that the language of the lease necessarily included attention to these matters, without their express mention. To prune and cultivate an orchard according to the best horticultural methods would require the doing of all those things which are essential to keep the trees in a good condition, and preserve their fruit-bearing qualities, which would include the cutting off of suckers and water-sprouts when necessary to the health of the trees, as well as the taking of proper steps to remove insect pests which sapped their lives, when the trees are so infested. But, if there was any doubt as to the proper construction to be given to the lease, when what preceded and induced the making of the lease is considered, such doubt must be removed, and the duty of the defendant in the premises made plain. They must have understood their obligation to include the removal and destruction of all such insect pests as were detrimental to the health of the trees. The lease was obtained, and the possession of the orchard, upon the reliance placed on the representations of the defendant W. P. Hammon; and, under the circumstances, the defendants must have known how the plaintiff understood it, and also that the defendant W. P. Hammon would give his personal attention to the cultivation of the orchards according to the rules of good horticulture, as understood and explained by him. That he did not do so, but left the matter in other hands, and went to California, is not disputed. That, by reason of the neglect and failure of the defendants to comply with their agreement, and properly cultivate and care for the orchards, we think the evidence shows suckers and water-sprouts were allowed to grow and over-

run the apple orchard, and that both orchards were infested with insect pests which seriously injured the healthful condition of the trees, killing some, and causing others to go into decay, and which, if permitted to continue without any effort at abatement during the period of the lease, must result in the ruin and destruction of these orchards, and irreparable injury to the plaintiff. Under such circumstances, it seems to us, a court of equity ought to interfere, and prevent the decay and eventual ruin and destruction of these orchards, by canceling the lease, and arresting the progress of their waste from the failures and omissions of the defendants. We think, therefore, the court erred in dismissing the suit, and that the cause must be remanded to take the account prayed for, with directions to cancel the lease, and make the injunction perpetual; and it is so ordered.

#### STATE v. WRIGHT *et al.*

(*Supreme Court of Oregon. May 19, 1890.*)

BURGLARY—INDICTMENT—FORM—NAME OF OWNER.

1. Under Hill's Code Or. § 1270, when the forms of indictment given in the appendix to the Code are inapplicable, other forms, as nearly similar as the case will permit, may be used.

2. Form No. 13, given in the appendix to the Code, is for the crime of burglary defined by section 1758, and is sufficient, though it does not give the name of the owner of the building. An indictment for burglary, under section 1760, otherwise sufficient, which does not give the name of the owner of the building broken and entered, is sufficient, under section 1270 of the Code. Such an indictment is as nearly similar to the form given in the appendix to the Code as the nature of the case would permit.

(*Syllabus by the Court.*)

Appeal from circuit court, Union county; JAMES A. FEE, Judge.

The grand jury of Union county, Or., returned into court the following indictment, omitting the caption and introductory part: "Henry Wright and James Allen are accused by the grand jury of the county of Union and state of Oregon, by this indictment, of the crime of burglary, committed as follows: The said Henry Wright and James Allen then and there, acting together on the 28th day of November, A. D. 1888, in the county of Union and state of Oregon, unlawfully, feloniously, and burglariously broke and entered a granary, the same being then and there a building in which there was at the time property kept, to-wit, wheat, the same being then and there the personal property of one John N. Smith, with the intent then and there and thereby they, the said Henry Wright and James Allen, the said wheat, so kept in said granary as aforesaid, unlawfully and feloniously to take, steal, and carry away, contrary to the statutes in such cases made and provided, and against the peace and dignity of the state of Oregon. Dated at Union, in the county aforesaid, this 28th day of September, A. D. 1889. J. L. RAND, District Attorney." The defendants were duly tried thereon, and found guilty by a jury, and sentenced to the penitentiary for the term of three years



each. After their conviction, and before sentence, they moved in arrest of judgment, for the reason that the name of the owner of the building alleged to have been broken by them is not stated in the indictment. This motion was overruled by the court, to which an exception was taken, and that presents the sole question on this appeal.

*T. H. Crawford*, for appellants. *J. L. Rand*, Dist. Atty., and *J. J. Balleray*, for the State.

**STRAHAN, J.**, (after stating the facts as above.) The motion to arrest the judgment made by the appellants presents but one question, and that is the sufficiency of the indictment. The point of objection is that, in an indictment for the crime of burglary, the ownership of the building broken must be alleged. To support this contention, counsel for appellants cites these authorities: 2 Bish. Crim. Proc. § 137; 1 Bish. Crim. Proc. §§ 566, 573; *Com. v. Perris*, 108 Mass. 1, 3; *State v. Brant*, 14 Iowa, 180; *Pells v. State*, 20 Fla. 774; *Beall v. State*, 53 Ala. 460; *State v. Fockler*, 22 Kan. 542; *State v. Morrissey*, 22 Iowa, 158; *Wallace v. People*, 63 Ill. 451; and *Jackson v. State*, 55 Wis. 589, 13 N. W. Rep. 448. There is no doubt of the common-law rule, and that these authorities correctly declare it, and, if the principle is unaffected by our Code of Criminal Procedure, the judgment appealed from is erroneous, and must be reversed. Section 1269, Hill's Code, gives a general form of indictment, which may be readily varied by the prosecutor without changing its substance, so as to reach any crime defined and made punishable by the Code; and section 1270 is as follows: "The manner of stating the acts constituting the crime, as set forth in the appendix to this Code, is sufficient in all cases where the forms there given are applicable, and in other cases forms may be used as nearly similar as the nature of the case will permit." Turning to the appendix, we find but one form given for the crime of burglary, which is No. 13, and is as follows: "Break and enter in the night-time a dwelling-house in which there was at the time a human being, namely, one C. D., (or whose name is unknown to the grand jury, as the case may be,) with the intent to commit larceny (or other crime, describing it generally) therein, by forcibly bursting or breaking the wall (or an outer door or window or shutter of a window) of such house, (or as the case may be.)" This form is for the crime of burglary defined by section 1758, Id. which is for breaking and entering such dwelling in the night-time, with a particular felonious intent, or the commission of certain acts therein after entry. Section 1759 declares the same acts punishable when committed in the day-time, and the punishment is graded to about one-third less punishment than the preceding section. Section 1760 defines the crime for which the appellants were convicted. It provides: "If any person shall break and enter any building within the curtilage of any dwelling-house, but not forming a part thereof, \* \* \* booth, tent, railway car, vessel, boat, or other structure

or erection in which any property is kept, with intent to steal therein, or to commit any felony therein, such person shall be deemed guilty of burglary, and \* \* \* punished by imprisonment in the penitentiary not less than two, nor more than five, years." It will be observed that the form of indictment for burglary, under section 1758, does not give the name of the owner of the building charged to have been broken and entered. Under the language of the Code and the repeated decisions of this court, such an indictment would be held good in this state, and I think we are bound to give some effect to the latter part of section 1270, supra, and to hold an indictment good when no form is given in the appendix, but where the form actually used is as nearly similar to the forms given in the appendix as the nature of the case would permit. It was not claimed in this case that the form of this indictment was not as nearly similar to the form given in the appendix as the nature of the case would permit, or that its form was objectionable in any way except in the particular pointed out. Within the principle of the Code referred to, we think the indictment was sufficient, and that the court did not err in overruling appellants' motion in arrest of judgment. The judgment must therefore be affirmed.

#### STOUT V. WATSON et al.

(Supreme Court of Oregon. May 19, 1890.)

##### ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. A voluntary assignment for the benefit of creditors implies a trust, and contemplates the intervention of a trustee. When a creditor undertakes, under an agreement with the assignor, to sell the property, and to apply the proceeds to the payment of his own and other debts of his assignor, and refund the surplus, he becomes a trustee, and the transaction amounts to a voluntary assignment.

2. Sales are transfers in the ordinary course of business. Assignments commonly grow out of the embarrassment or suspension of business.

3. When H. & K. were about to be sued for a debt which they were unable to pay when it was due, made and delivered to the plaintiff a writing whereby they purported to transfer to him certain property, which was nearly all they possessed, and by the terms of the writing the plaintiff was to pay himself, and the men who had been working for H. & K. about the mill, and the residue to be applied on the debt of T. & B., held, that the same was an assignment for the benefit of creditors, and, not being for the benefit of all the creditors of H. & K., the same was avoided by section 3173, Hill's Code.

##### (Syllabus by the Court.)

Appeal from circuit court, Wasco county; *J. H. Bird*, Judge.

This is an action of replevin to recover certain specific personal property alleged to be of the aggregate value of \$1,334.96, and for \$466 damages for the wrongful taking and detention thereof. The plaintiff recovered a verdict for \$1,087.93 damages, upon which judgment was entered, from which the defendants have appealed. The answer alleges, in substance, that the property in controversy, at the time of said alleged taking, was the property of T. A. Hudson and C. L. Kelsey, doing business as partners under the firm name of

Hudson & Kelsey; that on the 21st day of October, 1887, Hudson & Kelsey were indebted to the defendants Watson & Luhrs in a large sum of money, and that they commenced an action in the circuit court of Wasco county against Hudson & Kelsey, to recover the same, in which action a judgment was duly rendered and given in their favor, and against said Hudson & Kelsey, about the 20th of December, 1887, for \$569.30 and costs and disbursements, taxed at \$36.20; that during the pendency of said action, and before judgment, the plaintiffs duly caused a writ of attachment to be issued therein, and placed the same in the hands of the defendant George Herbert, who was at said time the sheriff, for service; and that said sheriff, by virtue of said writ of attachment, on the 24th day of October, 1887, attached and seized all of the property in controversy, and, after the entry of judgment by virtue of an execution duly issued thereon, he duly sold all of said property, and applied the proceeds on said execution, and that the same were insufficient to satisfy said execution.

*J. J. Balleray*, for appellants. *F. P. Mays*, for respondent.

*STRAHAN, J., (after stating the facts as above.)* The only questions presented for review on this appeal, material to be noticed, are presented by the instructions which the defendant requested at the trial, and which were refused by the court. The plaintiff testified without objection, among other things, as follows: "I know all about the property described in the complaint. On October 22, 1887, it belonged to Hudson & Kelsey. It was sold to me October 22, 1887. I believe I owned it on October 24th. I came by it by bill of sale given by Hudson & Kelsey. The bill of sale is in writing. It was transferred to me on the 22d day of October, 1887. On the morning of the 22d, Mr. Hudson, in company with Mr. McAllister, came down to the mill. Hudson came into the engine-room, and called me out, and gave me the bill of sale. I took it and read it. I asked him how much the indebtedness to the men amounted to. He told me he did not know exactly, but he thought about \$650. He then said he wanted me to take the bill of sale, and the property, and pay myself and the men. I told him I would do it. He referred to the men in the mill. It is stated in the bill of sale. I did not know exactly who they were, or how much was owing." After describing the property, and giving other testimony, not necessary to be noticed, the witness further testified that he had no other agreement except what was contained in the bill of sale, and that was all the agreement he ever had with Hudson, and that there was no agreement outside of the bill of sale. The writing called a "bill of sale" was then offered in evidence, and is as follows: "Know all men by these presents, that, in consideration of a large sum of money due him from us for wages as engineer in the saw-mill operated by us near Wyeth Station, Wasco county, Oregon, and the further consideration of his assuming and agreeing to pay to the several workmen

in said mill the wages due them by us, and the further consideration of his assuming and agreeing to pay to Tatum & Bowen, of Portland, Oregon, such portion of the amount due to them by us for machinery and material purchased by us for use in connection with said mill as shall remain to him after paying the above-mentioned claims, we do hereby grant, sell, transfer, and deliver unto John Stout, his heirs, executors, administrators, and assigns, the following goods and chattels, viz., all the railroad cross-ties now at the said saw-mill, amounting to about 3,000, also all the lumber, amounting to about 30,000 feet, also all the slab-wood, amounting to about 200 cords, and also all the saw-logs, amounting to about 50,000 feet, and also all other material now at said mill; to have and to hold, all and singular, the said goods and chattels forever. And the said grantors hereby covenant with the said grantee that they are the lawful owners of said goods and chattels, that they are free from all incumbrances, that they have good right to sell the same as aforesaid, and that they will warrant and defend the same against the lawful claims and demands of all persons whatsoever. In witness whereof the said grantors have hereunto set their hands this October 21st, 1887. HUDSON & KEELSEY. Witness: FRANK CLOUTMAN." At the conclusion of the evidence the defendants' counsel asked the court to give these two instructions, which were refused, and exceptions duly taken: "(1) The written instrument introduced in evidence in this cause, purporting to be a bill of sale from Hudson & Kelsey to the plaintiff, is not, and did not make, an actual sale from Hudson & Kelsey to said plaintiff, but was an assignment to him for the benefit of creditors; (2) under the evidence in this case, the plaintiff has shown no title to the property sufficient to sustain a recovery in this cause, and you should therefore find for the defendants." These instructions present substantially the same question, and that is whether the writing offered in evidence is a bill of sale vesting title to the property in controversy in the plaintiff, or an assignment for the benefit of the creditors of Hudson & Kelsey.

1. The appellants' contention is that the writing referred to in the first instruction refused is a voluntary assignment made by Hudson & Kelsey for the benefit of a part only of their creditors, and that, not being for the benefit of all their creditors, it is void under the statute. Burrill, Assignment, § 3, says: "A voluntary assignment for the benefit of creditors implies a trust, and contemplates the intervention of a trustee. \* \* \* Assignments may be made either to the whole body of the creditors, or to particular creditors, or they may be of all or of a part of the debtor's property; but, unless a trust is thereby created by the assignor in favor of creditors, such conveyances are not within the class of instruments known as 'assignments for creditors.'" Further: "And when the creditor undertakes, under an agreement with the assignor, to sell the property, and apply the proceeds to the payment of his own and other debts of

the assignor, and refund the surplus, he becomes a trustee, and the transaction amounts to a voluntary assignment." *Truitt v. Caldwell*, 3 Minn. 364, (Gil. 257;) *Page v. Smith*, 24 Wis. 368. And it was held in *Murphy v. Caldwell*, 50 Ala. 461, that, when a debtor made an absolute conveyance of all his property to one of his creditors, in consideration of his grantee's paying certain other creditors, the same was a general assignment. The distinctions between an assignment and a sale are too marked to be misunderstood. Sales are transfers in the ordinary course of business. Assignments commonly grow out of the embarrassments or suspension of business. A sale is usually for a consideration actually paid, or agreed to be paid, and created or passing simultaneously. An assignment is, in most cases, for a consideration already executed, as for a precedent or subsisting debt. *Burrill, Assignm.* § 4. These citations sufficiently show the nature of an assignment, and the differences between an assignment and a sale; and, applying what is laid down as elementary law by this author to the instrument offered in evidence in this case, there is no mistaking its character. It was made to one creditor for his own benefit, and the other laborers in the mill, with a residuary clause in favor of *Tatum & Bowen*. The plaintiff was made trustee of the property conveyed, with power to convert it into money and pay his own debt, and the debts of the other creditors provided for in the assignment. In addition to this, there had been no negotiations whatever between the plaintiff and *Hudson & Kelsey* before the instrument was executed. In fact, the first notice the plaintiff had of this so-called "purchase," *Hudson* came down, and called him out of the engine-room, explained to him the nature of the instrument, and asked his consent thereto. The action which resulted in a judgment against *Hudson & Kelsey* was then impending, and they knew it. We therefore think the instrument under which the plaintiff claims title was an assignment, and not a bill of sale.

2. But a valid assignment passes the title to the assignee as effectually as a bill of sale, and such was the effect of the instrument referred to, unless the same is void under the statute. Section 3173, *Hill's Code*, provides: "No general assignment of property by an insolvent, or in contemplation of insolvency, for the benefit of creditors, shall be valid unless it be made for the benefit of all his creditors in proportion to the amount of their respective claims." The evidence shows conclusively that *Hudson & Kelsey* were insolvent at the time they made this assignment,—that is, they were not able to pay their liabilities as they matured in the ordinary course of business; and it tends very strongly to prove that the assignment was made in contemplation of insolvency. Mr. *Hudson* testifies that, at the time he made the instrument in question, he knew that the plaintiffs were going to sue his firm, but he did not know that they were going to attach. *Watson & Luhrs'* debt was due, and their debtors had no money wherewith to pay it. The obvious

import of the transaction is that *Hudson & Kelsey* had become involved beyond their ability to pay, and, knowing that *Watson & Luhrs* were about to endeavor to enforce the collection of their claim by law, *H. & K.* wished to give a preference to the laborers who had remained with them, and assisted them in their business, in the hope, and no doubt under the promise, that their claims should be met. This instrument was executed in furtherance of that purpose; and, independently of the statute, it was a worthy one. Its object was to give the day-laborer his wages; but, however honest the intent, or worthy the purpose, an instrument executed in violation of a statute, or contrary to its provisions, must fail. The court has no power or discretion in such case. The two instructions above set out were correct statements of the law as applied to the facts of this case, and should have been given. It is true they would have precluded recovery by the plaintiff, but that arose out of the inherent weakness of his case.

3. And this reminds us that at the close of the plaintiff's evidence the defendant moved for a nonsuit, which was refused, to which an exception was taken. This motion should have been allowed. The plaintiff had no other evidence whatever of his title to the property in controversy except this assignment, which, we have already indicated, was void under the statute. In this case it appears that the property in controversy was sold by *Herbert* as sheriff before the commencement of the action, and the proceeds applied on the execution. None of the defendants being actually in possession of the property when the action was commenced, would replevin lie in any event? The question is not made in the record, and we make no decision upon it. *Wells, Rep.* § 134. So *Watson & Luhrs* never had possession of the property. The sheriff took it under their attachment, and sold it for their benefit under a regular execution. Did that subject them to this action? *Id.* § 142. The judgment will be reversed, and the cause remanded to the court below with directions to sustain defendants' motion for a nonsuit.

#### BROWN v. JESSUP.

(*Supreme Court of Oregon*, May 19, 1890.)

JUSTICE OF THE PEACE—APPEAL—NOTICE—BOND—AFFIDAVIT.

1. The statute regulating appeals from justice's court (sections 2118-2121) does not in terms require that the notice of appeal must be first filed with the proof of service indorsed thereon. *Held*, therefore, that an appeal was sufficient when the undertaking was filed with the justice before the notice, but both were filed with the justice within 30 days after the entry of judgment.

2. An affidavit of the qualification of a surety on an undertaking for an appeal, which leaves the name of the surety blank at the beginning of the affidavit, thus, "—", being first duly sworn," etc., but contains no other defect, is sufficient.

(*Syllabus by the Court.*)

Appeal from circuit court, Gilliam county; J. H. BIRD, Judge.

This action was commenced in a justice's court in the city of Arlington before the

recorder of that city, who is *ex officio* a justice of the peace within said city, where the plaintiff recovered a judgment for \$17. The judgment was entered on Jan. 3, 1889. The justice's docket shows that a notice of appeal was filed on the 10th of January, 1889, and on the 11th of the same month a bond for appeal was filed with John Jordan as surety, which was approved by the justice. There is but one notice of appeal from the justice's court in the transcript, and the proof of service indorsed thereon is dated January 15, 1889, and it is marked filed the same day. There is no file-mark on the undertaking. At the term of the circuit court succeeding the appeal, the respondent filed a motion to dismiss the same, for the reason that there has been no undertaking filed in said cause as required by law, and that said appeal has not been perfected within the statutory time. This motion was allowed, and final judgment was entered against the defendant, from which this appeal is taken.

*F. P. Mays*, for the appellant. *A. S. Bennett*, for the respondent.

STRAHAN, J., (after stating the facts as above.) The only question presented on this appeal is the alleged insufficiency of the appeal from the justice. It was contended by the respondent that the notice of appeal was filed after the undertaking, and that there was therefore no undertaking given. The law regulating appeals from courts of record does prescribe the order in which the notice and undertaking shall be filed,—that is, the undertaking must be filed after the filing of the notice,—and it has been often held that a disregard of its provisions vitiated the appeal. Hill's Code, § 537. But the acts regulating justice's courts, and regulating appeals therefrom, do not contain those provisions. Section 2118 allows an appeal from a justice's judgment to the circuit court within 30 days from the date of the entry thereof; and 2119 is as follows: "An appeal is taken by serving a notice thereon on the adverse party, and filing the original, with the proof of service indorsed thereon, with the justice, and by giving the undertaking for the costs of the appeal as hereinafter provided." Although named in the section after the notice of appeal, it does not expressly direct that the undertaking must be filed after the notice of appeal. No doubt the better practice would be to first serve the notice of appeal, and indorse the proof of service thereon, and then file the same with the justice, together with the necessary undertaking. But the question which we must determine is, does a disregard of this order of procedure destroy the appeal or render it ineffectual; and we think it does not. Such a construction of the statute would introduce a degree of strictness and technicality into the practice in justices' courts very much beyond the requirements of the statute, and at variance with its spirit and purposes. Both the undertaking and the notice were filed within the 30 days after the entry of judgment, and the notice had indorsed thereon, at the time it was filed, proof of service, and this appears to be all that is requisite.

2. The name of the surety is not inserted in the body of the undertaking, and in the affidavit indorsed thereon his name is left blank at the beginning, thus: "—"; being duly sworn," etc.; but his name is signed both to the undertaking and the affidavit, and we think this is sufficient. *Dore v. Covey*, 13 Cal. 502, and *Ex parte Fulton*, 7 Cow. 484, hold that it is not necessary to insert the name of the surety in the body of the undertaking, and that his signature thereto sufficiently indicates his intent to be bound by the terms of the undertaking, which is all the law requires.

3. The objection to the affidavit does not fall within *Starks v. Stafford*, 14 Or. 317, 12 Pac. Rep. 670. In that case there were two blanks in the affidavit,—one at the beginning, as here, and, the other blank not being filled, the qualification of the surety did not appear. It read, "worth the sum of ——" The court held this to be not in compliance with law and insufficient, without pointing out the particulars. Section 2123 requires that sureties in an undertaking on appeal must have the qualifications of bail upon arrest. Section 118 prescribes what the qualifications of bail upon arrest shall be. In *Starks v. Stafford*, supra, no amount was specified, and it did not appear that the surety was worth the amount specified over and above all debts and liabilities, and exclusive of property exempt from execution. The cases are clearly distinguishable. The court below therefore erred in dismissing the appeal, and its judgment must be reversed, and the cause remanded for such further proceedings, as law and justice may require.

#### KEENEY v. OREGON RY. & NAV. CO.

(Supreme Court of Oregon. May 19, 1890.)

#### RAILROAD COMPANIES—KILLING STOCK—STOCK AT LARGE—HERDERS.

1. Stock running at large are animals that roam and feed at will, and are such as are not under the immediate direction and control of any one, and in such case, if they wander upon the track of a railroad, and are killed, the owner in allowing them to run at large is not guilty of contributory negligence, and precluded from a recovery.

2. Stock in charge of a herder, and subject to his control, is not stock running at large, as the places whither they wander and feed, or lie down to rest, are selected by him, and subject to his direction and control; and if he voluntarily drives and leaves them uncared for in a place of danger along a railroad track, where injury is likely to happen to them as a probable consequence, and they are killed, his act will be regarded as the proximate cause of the injury, and preclude the owner from recovery.

(Syllabus by the Court.)

Appeal from circuit court Gilliam county; *J. H. Bird*, Judge.

This is an action to recover damages for the killing of certain sheep by the defendant railroad, and is based on the statute. The answer, after denying the facts alleged, sets up a further and separate defense to the effect that the killing of said sheep was caused by the negligence of one George Taylor, and without any fault or negligence in the operation of the train, etc. Issue being joined a trial was had, and a verdict and judgment were rendered

for the plaintiff, from which this appeal is taken.

*W. W. Cotton*, for the appellant. *Bennett & Wilson*, for the respondent.

LORD, J., (*after stating the facts as above.*) There is but one question that we deem it necessary to consider upon this record, namely, whether the evidence was sufficient to sustain the verdict. It arises out of the defendant's motion for a nonsuit. The testimony of the plaintiff, as disclosed by the record, shows that one George Taylor was tending and in charge of the sheep when killed, that the night before the killing of them occurred, he drove them across the railroad track, and down to the river to water them; that he sometimes watered them there, but not often, and had brought them there that evening; that the railroad at that place, where the sheep were run over, is between four and five hundred yards from the river; that he left this band of sheep, composed of 2,600, on this space between the railroad and the river to rest that night, and repaired to his cabin for that purpose himself; that in the morning he drove the sheep to water, and then went back to his cabin and began cutting some wood, when he saw his sheep crossing the railroad track, and that about one half of them was across, but they were strung out on the track; that he could see down the track for two miles, and looked to see if there was a train, but saw none, and went to get his horse, and then heard the train coming, but that it was not very close, but he went to get the sheep off the track; that the train whistled when about 150 yards from the sheep, and kept whistling and rung the bell; and that the sheep, in their fright, bunched, when they were struck, etc.

Taking this evidence as true is it sufficient to sustain the verdict. Or did the court err in not granting the motion for nonsuit? The contention of counsel for the defendant is that from this evidence it clearly appears that it was the negligence of Taylor which occasioned the collision and caused the destruction of the sheep. It has been held in this state that the common-law rule, that every man is bound to keep his stock within his own inclosure, does not prevail, and that a party, in allowing his stock to run at large, which strays upon a railroad track and is killed, is not guilty of contributory negligence. *Moses v. Railroad Co.*, 18 Or. —, 23 Pac. Rep. 498. And it is also provided under the statute under which this action is brought that the allowing of stock to run at large upon common unfenced range, or upon inclosed land owned or in the possession of the owner of such stock, shall not be deemed or held to be contributory negligence. *Hill's Comp.* § 4048. Stock running at large are animals that roam and feed at will, and are not under the immediate direction and control of any one. They may be in an inclosure which may restrain the limits in which they shall wander and feed, or they may be on an unfenced range, relatively without limit, where they may roam and feed at will; but in either case they are not subject to

the direction and control of any one. So to speak, they are masters of their own movements, going whither they will, without personal direction or control. In such cases, if they wander upon the track of a railroad, and are killed, the owner, in allowing them to run at large, is not guilty of contributory negligence, and precluded from a recovery. But stock or sheep in charge of a herder, and subject to his control, whether in an inclosed field or upon a range are not stock running at large, as the places whither they wander and feed, or lie down to rest, are selected by him, and subject to his direction and control; so that, if he voluntarily drives or leaves them in a place of danger, and where injury is likely to happen to them, along a railroad track, and they are killed, his act will be regarded as the proximate cause of the injury, and preclude the owner from recovery. In such case the stock is not to be deemed running at large, within the meaning of the statute, so as to exclude the defense of contributory negligence. Now, it appears from the evidence that on the night previous to the killing of the sheep the herder had driven them down to water on the river, and left them all night on a narrow space or strip of land between the river and the line of the railroad; that it was only "sometimes" that he watered them at this place, but that he did it on this occasion, and when that was done he repaired to his cabin, some distance away, and remained for the night, leaving 2,600 sheep hemmed in this narrow space along the track of the railroad, liable to be used at all hours of the night and day, as the requirements of its business might demand, and with their feeding grounds on the other side of it. The sheep were thus voluntarily placed and left in a place of danger, and where, under the circumstances, injury to them would likely occur as a natural and probable consequence. As luck would have it, nothing occurred during the night to cause the sheep to leave the place in which they had been left, either arising from some external circumstances or from the promptings of animal instinct. In the morning, after watering them, he again left them in this space between the river and the track of the railroad, and went back to his cabin. The feeding grounds of the sheep were on the other side of the track, which they must cross to reach, and the direction their instinct would now lead them occurred, as was a plain consequence easily to be foreseen. When next he saw the sheep they were crossing the track, about one-half of them across it and the other half strung out along the track. As no train was in sight, and he could see two miles down the track, he went to get his horse, and then heard the train coming, and then went back to get the sheep off the track, and in the mean time the engineer began to sound the alarm whistle, and ring the bell of the locomotive, and the sheep, becoming frightened or panic stricken, bunched, and the collision occurred, which caused the loss or destruction of the sheep alleged. The place where the sheep were turned loose and left uncared for by the herder, under the circumstances,

was a place where danger is known to exist, and injury to them was a probable consequence. In *Moses v. Railroad Co.* supra, it was said: "An owner cannot turn loose his stock regardless of circumstances, or at a place where danger to them is constant and imminent, and when an injury occurs to them, as a consequence of his conduct, though the defendant may not have been free from fault, escape the charge of negligence or a want of ordinary care. \* \* \* In such case, the act itself is equivalent to deliberately putting the stock into a place of danger, and where injury to them is a probable consequence. The stock do not stray into a place of danger, but they are turned loose into a place where danger is known to exist, or may be foreseen by the exercise of ordinary care, and the party cannot and ought not to recover for injuries which are the direct result of his own negligence." The sheep did not stray from the range to the place where they were, but they were deliberately put where they were by the voluntary act of the herder, and there turned loose or left to roam at will at a place where danger is known to exist and injury likely to happen to them as a probable consequence of such an act. Nor is this all. The liability to loss of life and property, arising from such an act, to others, is incomparable to the damages to such animals, and is an important consideration not to be overlooked. The accident as it did actually occur illustrates the danger. It might have been a passenger train, and thrown its cars from the track, and endangered or destroyed the lives of its passengers. As the court said in *Smith v. Railroad Co.*, 34 Iowa, 508: "The owner of cattle may not turn them out and enable them to frequent a place of great peril on the depot grounds or track of a railroad company, and then demand that the railroad company shall stop its trains and drive off his cattle, or slacken the speed or change the time-table, in order to deliver his cattle from the peril into which he has voluntarily placed them." We think, therefore, the act of the herder in putting the sheep on the narrow strip where he left them, uncared for, and where injury was likely to happen to them under the circumstances, as a probable consequence, indicated such a want of ordinary care on his part as contributed to produce the injury of which the plaintiff complains and precludes his recovery. It follows that the judgment must be reversed, with the direction to the trial court to sustain the motion for nonsuit.

#### STATE v. COMBS.

(*Supreme Court of Oregon.* May 21, 1890.)

#### INTOXICANTS—ILLEGAL SALE—CRIMINAL PROSECUTION—SENTENCE.

On an indictment which charged an offense under section 1909, Hill's Code, a defendant cannot, on a plea of guilty, be sentenced under section 3, p. 9, Sess. Laws 1889.

(*Syllabus by the Court.*)

Appeal from circuit court, Grant county; M. D. CLIFFORD, Judge.

W. M. Ramsey, for appellant. J. L. Rand,

Dist. Atty., and J. J. Balleray, for respondent.

PER CURIAM. It is conceded that the indictment charges an offense under section 1909, Hill's Code, and the defendant, having pleaded guilty, is liable to punishment in any sum not exceeding \$25 and not less than \$10. The record, however, discloses that the court, by some inadvertence, sentenced the defendant to pay a fine of \$150, under section 3, p. 9, Sess. Laws 1889, and not under the section above cited. As this was error, the judgment must be reversed, and the cause remanded to the court below with directions to sentence the defendant under section 1909, supra.

#### ROE v. UNION COUNTY.

(*Supreme Court of Oregon.* May 23, 1890.)

#### HIGHWAYS—ESTABLISHMENT—PAYMENT OF DAMAGES BY COUNTY.

1. A county court has no jurisdiction to establish a county road unless satisfied that it will be of public utility, that the amount of damages assessed for opening it is just and equitable, and that it will be of sufficient importance to the public to cause the damages so assessed to be paid by the county; in which case it must order the same to be paid to the complainant out of the county treasury.

2. The court may, however, where it is of the opinion that the proposed road is not of sufficient importance to the public to cause the damages to be paid by the county, establish it as a public highway; but it can only do so in that case where the expenses or damages, or such part thereof as it may think proper, are paid by the petitioners. The court may in the latter case, by a supplemental order reciting the facts, establish the road; but this must be done at the term of court at which the preliminary determination is had.

(*Syllabus by the Court.*)

Appeal from circuit court, Union county, JAMES A. FEE, Judge.

The respondent sued out a writ of review from the said circuit court to the county court, to review certain proceedings had in the latter court for the laying out of a county road in said county, in compliance with the following petition, signed by O. H. Fay and more than 12 others: "To the Honorable the County Court of the State of Oregon for Union County: The petition of the undersigned householders of Union county, Oregon, residing in the vicinity of the road hereinafter described, hereby petition your honorable body to cause to be laid out and located and established a county road in said county of Union, on the following described line, to-wit: Commencing at the center corner of the north-east quarter of section 9, in township 2 south, of range 39 east of the Willamette meridian, thence running west one and one-half miles to the center corner of the north-west corner of section 8, in said township and range; thence running south one-fourth mile to the south-east corner of the south-west quarter of the north-west quarter of section 8, in said township and range; and your petitioners also pray that the following described portions of what is known as the 'Knapp Road' may be vacated and discontinued, to-wit: Commencing at the center corner of the south-east quarter of section 9, in township 2 south, of range 39

east of the Willamette meridian; thence running west one and one-half miles to the center corner of the south-west quarter of section 8, in said township and range." Viewers were duly appointed to locate the road, who, on the 7th day of October, 1885, filed their report, recommending its establishment. On October 12, October 26, November 4, 1885, respectively, G. W. Ruckman, J. W. Mitchell, and R. D. Ruckman, and on November 6, 1885, the respondent herein, J. L. Roe, each presented a claim for damages which they were liable to suffer in consequence of the said road crossing their respective premises. Subsequently, and on the 4th day of November, 1885, an order was made by the county court then in session, appointing viewers to appraise such damages; but they failed to make any report in the matter. On the 8th day of January, 1886, others were appointed for the same purpose, who, on the 10th day of the same month, submitted a report allowing G. W. Ruckman, J. W. Mitchell, and R. D. Ruckman each \$50. Upon the filing of this report the county court ordered that the viewers' and surveyors' report and the plat of the road be recorded, and the road be established as a public highway; provided, however, that the petitioners for said road pay the damages awarded. Thereafter, on March 7, 1888, G. W. Ruckman and J. W. Mitchell filed with the court the following relinquishment: "We, the undersigned, do relinquish all our right of damages on road petitioned for by O. H. Fay and others. [Signed] G. W. RUCKMAN. J. W. MITCHELL." Thereupon, and on the 6th day of April, 1888, the said court made the following order in the matter: "This matter coming on to be heard at this time, and it appearing to the court that the above-entitled road was regularly petitioned for, laid out, and established as a county road, but that there were certain claims for damages, all of which have been withdrawn except R. D. Ruckman's, which has been appraised at \$50, it is ordered by the court that a warrant be drawn on the treasurer in favor of said R. D. Ruckman for said sum of \$50, and that said road be ordered opened, and declared a public highway." On May 16, 1888, a motion by respondent and others was filed in said court, based on a remonstrance that the court reconsider the said order of April 6, 1888, but no action was taken in the matter. The respondent then sued out the writ of review from the said circuit court to the said county court, to review the said proceedings, and assigned, among other grounds of error, the following: "The court erred in making the order of April 6, 1888, as all the rights of the petitioners therein were lost by lapse of time, and there being no jurisdiction in the court to make the said order or to pay the said \$50 damages from the county funds, and said order being in violation of and in conflict with the said order of March 6, 1886, and the court having no jurisdiction of the parties in interest." Upon the hearing of the said writ of review the circuit court reversed the said order of the county court of April 6, 1888, which is the decision appealed from.

*J. W. Shelton*, for appellant. *R. Eakin and Cage Baker*, for respondent.

THAYER, C. J., (*after stating the facts as above.*) The order of the county court of April 6, 1888, was erroneous, and the circuit court properly annulled the same. Said county court, on March 6, 1886, had in effect determined that the proposed road would not be of sufficient importance to the public to cause the damages assessed and determined by the viewers to be paid by the county, although such was not its terms. A county court, in a proceeding to lay out a public road, before attempting to establish the same, must be satisfied that it will be of public utility. It must then be satisfied that the amount of damages assessed for the opening of the road is just and equitable, and that the proposed road will be of sufficient importance to the public to cause the damages so assessed to be paid by the county, in which case it will order the same to be paid to the complainant out of the county treasury. The court may, however, where it is of the opinion that the proposed road is not of sufficient importance to the public to cause the damages to be paid by the county, establish it as a public highway; but it cannot do so in the latter case unless the expense or damages, or such part thereof as it may think proper, be paid by the petitioners. The order of the county court of the 6th of March, 1886, instead of directing "that the viewers' and surveyors' report and the plat of the road be recorded and established as a public highway, provided the petitioners pay the damages awarded," should have concluded as follows: "But the court being of the opinion that the proposed road is not of sufficient importance to the public to cause the damages to be paid by the county, it refuses to establish the same as a public highway unless the damages be paid by the petitioners." In that case it would have been left with the petitioners whether or not the road should be established; and, if the petitioners then came forward and paid the damages, the court could, by a supplemental order rectifying the facts, have established the road. The matter, however, should have been consummated immediately, or at least during the term of court then in session. The said order last referred to was not in the form suggested, but it could not have any different legal effect, as the court could only do those things which the law authorizes it to do. It was therefore no more in fact than an intimation from the court that it would establish the said road upon compliance with the condition therein contained, and it had no authority to do so without such compliance being made during that term of the court. The order, therefore, of April 6, 1888, was a nullity. The decision appealed from will be affirmed.

#### BEEBE v. MCKENZIE.

(*Supreme Court of Oregon.* May 23, 1890.)

DEEDS—CONSTRUCTION—ESTATE IN FUTURO.

1. In construing an instrument to determine whether it is a will or deed, the intention is to control as collected from the whole instrument.



2. Where an instrument conveys a present title to the grantee, and the grantor reserves out of the estate conveyed the right to the use and possession during his life, the instrument is a deed, and not a will.

3. Such an instrument does not create an estate in freehold to commence *in futuro*, and is not within the technical rule of the common law applied in such cases.

(Syllabus by the Court.)

Appeal from circuit court, Union county; JAMES A. FEE, Judge.

This is an action of ejectment brought by the plaintiff against the defendant to recover the land described in the complaint. Both parties deraign title to the land from one Thomas McKenzie, deceased, —the plaintiff by deed, and the defendant as an heir at law. The cause was tried without the intervention of a jury, and judgment went for the plaintiff, from which this appeal is brought. At the trial the plaintiff, in support of her claim, offered in evidence the following instrument in writing: "This indenture witnesseth that Thomas McKenzie, for the consideration of the sum of one dollar to him paid, has bargained, sold, and quitclaimed, and by these presents does bargain, sell, and quitclaim, unto Fannie C. McKenzie, the undivided one-half of the following described property, to-wit:

\* \* \* The foregoing sale and conveyance is understood and agreed to be completed and done at the death of the said Thomas McKenzie, and that the possession and right of possession to and in the foregoing premises remains and rests, until his death, in the said Thomas McKenzie, in consideration of the marital will and assistance extended by the said Fannie C. McKenzie, retains to himself only the life proprietorship and ownership of the foregoing property, and conveys to her all other rights which the said Thomas McKenzie may have therein. Said Thomas McKenzie shall not sell nor attempt—the said premises, but shall occupy the same during his life-time. To have and to hold the said premises, with their appurtenances, unto the said Fannie C. McKenzie, heirs and assigns, forever. In witness whereof," etc. "THOMAS MCKENZIE. [Seal.] Done in the presence of JOHN McDONALD, A. MEACHAM." Then follows the acknowledgment, etc.; to the introduction of which the defendant objected, which the trial court overruling, the said instrument was admitted as evidence, and the ruling of the court in admitting the same is the error assigned on this appeal.

Shelton & Carroll, for appellant. T. H. Crawford, for respondent.

LORD, J., (after stating the facts as above.) The only question presented by this record is as to the validity of the above instrument as a deed, the defendant contending that, although in form a deed, it is a will, but, if not a will, that it is a deed that attempts to create an estate to commence *in futuro*, and is therefore void. To determine the nature of an instrument, the intention of the maker, to be collected from the whole instrument, subject to the rules of law, is the pole star by which to be guided. The fact that it is in form and

phraseology a deed signifies nothing. If it is plain from the language used, and what is appointed to be done after the maker's death, that it is testamentary in its nature, it is a will. But if it is plain that it was the intention of the grantor to convey a present estate, though the possession may be postponed until after his death, it is a deed, and not a will. The estate would stand created, but the possession or enjoyment of it postponed. The evidence of this intention, as afforded by the instrument, is that it is in the form of a deed of conveyance. It was made in consideration of "marital will and assistance extended," and was executed with the usual formalities prescribed by law. The grantor acknowledged before the proper officer that "he executed the same freely, for the uses and purposes therein named," and used words, namely, "has bargained, sold, and quitclaimed, and by these presents does bargain, sell, and quitclaim," that are specially appropriate in a deed, and not in a will. In the instrument itself it is referred to as a "conveyance," and the grantor delivers it as such to the grantee, who has it recorded as a deed. While this is not denied, it is urged, from other language used in the instrument, that the grantor never intended to convey to the grantee any present interest or estate in the land, but only an estate limited to take effect after his death, or to commence *in futuro*. The clause is not clear, and its language is much involved, but it seems to us the intention is to convey the fee *in present* to the grantee, the grantor reserving out of it the possession or enjoyment during his life. According to its terms, it is "the possession and right of possession" that "remains and rests" in the grantor, of which he "only retains to himself the life proprietorship" in consideration of "marital will and assistance extended" by his wife. The intention is to convey presently the freehold or fee to the grantee, subject to the grantor's possession and use during his life. It is to take effect, or took effect, in interest, upon the execution of the instrument, though the right of possession was postponed until after the death of the grantor. If this construction be correct, the intention of the grantor was to convey the land at the time the deed was executed and delivered, and to reserve to himself out of the estate conveyed the use and possession during his life. Looking at the whole instrument, it evinces a favorable intention to the grantee, nor does it contain any revocable words, or other language which indicates that it is testamentary in its nature. The language is, "does bargain, sell, and quitclaim," and the grantee is "to have and to hold the said premises," etc., "heirs and assigns, forever." From all this, it is clear that the instrument is not a will, but a deed, and conveyed a present title to the grantee, out of which the grantor reserved to himself the use and enjoyment of an interest during his life. As such, it was not a deed to commence *in futuro*, or to take effect at the death of the grantor; and therefore renders it unnecessary for us to consider whether, under our statutes and the policy of our laws, the technical rule

of the common law in respect to creating estates to commence *in futuro* prevails. There is no error, and the judgment must be affirmed.

HAASE v. OREGON RY. & NAV. CO.

(Supreme Court of Oregon. June 10, 1890.)

CARRIERS—PERSONAL INJURIES—PERSONS RIDING ON FREIGHT TRAIN.

1. In an action against a railroad company to recover damages for personal injuries, it is not competent for the plaintiff to give in evidence the statements and declarations of a stranger in relation to the departure or movements of the defendant's trains. Such evidence is hearsay.

2. A person, who has purchased no ticket and paid no fare, who goes to a caboose attached to a freight train, and, without the knowledge of those in charge of such train, attempts to get into said car at a place where the railroad company is not accustomed to receive passengers, is not a passenger; and, if he is injured in such attempt to board the train, and those in charge of it have no knowledge of his presence, the company is not liable for the injury.

3. A person who goes in the night-time, in the midst of a car-yard, and at a place where the railroad company is not accustomed to receive passengers, and, without the knowledge of those in charge of a freight train standing there, attempts to enter the caboose attached to such freight train, and is injured, is guilty of contributory negligence, and cannot recover for such injury.

(Syllabus by the Court.)

Appeal from circuit court, Wasco county; J. H. BIRD, Judge.

This is an action to recover damages for alleged negligence. It is charged in the complaint that the plaintiff, desiring to go to Hood River, on the line of the railroad owned and operated by the defendant between The Dalles and Portland, applied at the office of the company at The Dalles for the purpose of purchasing a ticket to Hood River, and to gain information as to when a train would leave for said station; that the office was closed, and that thereupon a man whose name the plaintiff does not know, but whom the plaintiff believes to be an agent of the defendant, directed the plaintiff to defendant's train at said Dalles city; that thereupon the plaintiff proceeded to a train which was standing still, and was in the act of stepping on one of the cars of the train while the same was standing still at the defendant's depot, a usual place of stopping, when, without warning to the plaintiff, or any signal, the train suddenly and rapidly backed up; that, by reason of said negligent and careless acts of the defendant, the plaintiff was thrown from the platform of said car to the ground with great force, and was thrown under the wheels of the car, which ran upon and over the plaintiff, crushing his left foot below the knee, necessitating the amputation thereof. The plaintiff lays his damages at \$50,000. The answer denies each material allegation of the complaint, and then alleges contributory negligence on the part of the plaintiff as the proximate cause of the injury, which was denied by the reply. The plaintiff had a verdict and judgment for \$3,500, from which this appeal is taken.

Zera Snow, for appellant. A. S. Bennett and J. L. Story, for respondent.

STRAHAN, J. During the trial, numerous exceptions were taken by the appellant, a few only of which it will be necessary to notice. At the conclusion of the evidence on the part of the plaintiff, the defendant moved for a nonsuit, which was overruled, and an exception taken.

Ernest Haase, the plaintiff, testified in his own behalf in substance. That he had been living at Trout Lake, in Washington Territory, for about five months. His occupation was that of a blacksmith and farmer. Had been employed by Bogurt & Sukesdorf, and just before the accident had been in the employ of Borthwick & Frame at a saw-mill in Washington Territory. Had worked there two or three days. He came over the river from Washington Territory on the day preceding the night of the injury, with a barge-load of ties, which being unloaded, in the course of which he had torn his clothes, he concluded to go to Hood River, to get some clothes which had been left there by him, having in the mean time bought a new suit. That he went to the Umatilla House at Dalles city to buy a ticket, but the office was closed. This was about half past 7 in the evening. He was told that no passenger train went out that night, nor before half past 8 the following morning, but that a freight train would be going out that evening about half past 10, and that it would start from the freight depot. It did not appear by whom this information was given to the plaintiff, and the same was objected to by the defendant, which objections were overruled, and an exception taken. This exception will be noticed in connection with some others presenting substantially the same principle. The plaintiff further testified that some man went with him from the Umatilla House towards Umatilla Junction, up the river, where there were several tracks, and some cars standing; but he could not tell what kind of buildings he saw. That he went a couple of hundred meters up the direction spoken of to where the cars were, and to the place where the man showed him. That part of this evidence which relates to the place pointed out to the plaintiff by this unknown man was admitted over the defendant's objection, and it was also excepted to.

The witness further testified: There was one car there, and a full train, to which was attached an engine. Smoke was coming out from the engine. That he undertook to get on the train. He stepped with his right foot on the steps, when the train gave a lurch, throwing him off under the cars. Immediately it went forward, and ran over his left foot, and over the heel of his right. That the train was not in motion when he first saw it; but, almost immediately upon putting his foot upon the steps to get onto the car, the train gave a sudden lurch backwards, and it went back about a car's length. Does not know whether he was holding onto the iron when trying to board the car or not. That the backward motion threw him off his balance. That the train, having backed about a car's length, started forward; and the forward motion threw him under the car, and his foot was

crushed. The train pulled out, leaving him lying on the ground; and three or four minutes after he fainted away, and has no recollection of when his foot was amputated. But he was conscious for three or four minutes after the amputation, and there were some people around him before he fainted, among them some one who spoke German; but he does not know who they were. That it was 10, or half past 10, when he undertook to get on this car. That he intended to get on the train to go to Hood River to get his clothes. That he intended to pay his fare. That the car he attempted to get on was a caboose-car. That he heard no bell rung or whistle blown before the train started. That after he was run over the train went on to Hood River. On his cross-examination the witness testified: That it was half past 7 or 8 when he went to the Umatilla House to get the ticket. That he was alone. That he stayed there about five minutes, and from there he went to take a walk through the town. He was alone. He went from the Umatilla House along the track, and turned to the right, where there was a butcher shop. Stayed there a quarter of an hour, or a little longer. He knew no one there. Went back down the railroad track, and down the street. He met somebody, and went back again with this person. Does not know the place to which he went, but had some port wine. The place was two or three streets from where the butcher shop stands, on the street leading to the brewery. The name of the man with whom he drank was Keller. He stayed in the saloon about 10 minutes. That no one was there but the bar-keeper. He went on back to the Umatilla House, parting with Keller on the street, and from there he went to the train, going up the street upon which the railroad is on. He did not stop on his way back to the Umatilla House, but came on down the railroad, walked over to the end of the Umatilla House, and then returned to take the train going up the street the railroad was on. That he first met Keller, before going to drink with him, on the street the railroad track is on. That he had never seen him before. That he was talking German with some one at the time, and he (the witness) took part in the conversation. That he had drank some beer in the early part of the evening at the Wolfgang saloon, just before going to the Umatilla House the first time, a short time before half past 7. He and three others drank a quart of beer, which was all the liquor he had drank. This was not at the same saloon at which he drank with Keller. From the time he left the Umatilla House to the time of his return after he had taken his walk, and had his wine with Keller, it was probably half an hour. That he went almost immediately back from the Umatilla House to the train, taking the sidewalk a part of the way, and the wagon road the other. Going up, he did not see any locomotive. That they first went upon the right-hand side of the track, crossed over some railroad tracks, and went the remainder of the distance on the river side of the track, from which point he undertook to get onto the caboose.

That there was an engine on one side of him, to his right hand. There was another car standing between him and the caboose which he attempted to get on, around which he had to go. The caboose which he attempted to get on was about 20 car-lengths from the engine. That he attempted to get on the front of the caboose. The caboose was at the rear end of the train, and was attached to the train when he attempted to board it. He does not recollect whether he had hold of anything with either hand when attempting to get on or not, the train went so quickly; but it moved back the first time from one-half to a car's length, and then moved forward, and the train left. The movement backwards was a quick jerk, and all at once it started ahead, and went on, and he saw no more of it. It moved forward, and he was thrown under the car. That, when the backward movement of the train threw him off his balance, he made an effort to catch hold of something, clutched at the bars, and slid off. The forward movement of the car, after it had backed some distance, was quick, and before he knew anything he was hurt. That the only time that he drank with Keller that evening was the wine he took. No one was present except the bar-keeper, Keller, and himself. He was quite sure he did not take beer. Does not know how long after he was hurt till he was picked up. He cried out, and somebody spoke German to him. That was before he fainted, and after he was hurt. The next thing he remembered is when the doctor tried to call him, after his leg had been taken off. It was the following morning. That the man who spoke German to him asked him what was the matter, and told him the doctor would be there pretty soon. When he undertook to get on the caboose, he did not see any other trains in the yard. Witness further testified: He has no recollection of the bar-keeper refusing to give him any more drink because he was drunk when at the bar with Keller, or any recollection of anything of the kind having occurred. That, the last time he left the Umatilla House to go to the train, he was in company with some other person,—he does not know whom,—and that they parted at the train, this person leaving while he (the witness) was performing a call of nature. That he did not stop on the way up from the Umatilla House, but walked leisurely on. He is sure the office was closed at half past 7, when he went to buy a ticket, and that, from that time to the time when he attempted to board the train, about three hours only had elapsed.

Other evidence tended to show that the defendant company had been in the habit of carrying passengers on freight trains, and charging fare therefor, and that they had been in the habit of taking such passengers aboard the train at the freight depot, which is four or five blocks east of the Umatilla House; that there was a building there, and more than one railroad track; that the distance from the Umatilla House is about 1,500 feet; only knows who was operating the road by information; that, if a person wanted to ride, he had to go to

the freight-house, and get onto the caboose. The plaintiff also introduced evidence tending to prove that, after the injury, he was found lying between two tracks in the freight-yard, which is alongside of the freight depot, from 20 to 30 feet from it, and to the north; that there were three side tracks between the freight-depot platform and where the plaintiff was lying. This is the substance of all the evidence on the part of the plaintiff.

1. The first question to which our attention will be directed is the appellant's exception to that part of the plaintiff's evidence in relation to what was told him at the Umatilla House, and what the unknown man said to him in relation to the movements of the defendant's trains, etc. The purpose of this evidence is not very apparent; but by it, I think, the plaintiff sought to place before the jury the information upon which he acted in relation to the defendant's trains, and to account for his going to the yard where he was hurt at the late hour of the night when the accident occurred. It is difficult to see how the unauthorized acts or words of a stranger, who is not shown to have any connection with the defendant company, could affect or bind it, and yet it is perfectly obvious from the whole tenor of this evidence that such was its purpose. What effect the jury permitted it to have upon their deliberations, we cannot know, but there can be no doubt it was prejudicial to the defendant. The plaintiff was charged with contributory negligence, and one effect of this evidence was, to some extent, to account for his presence in the defendant's car-yard at an unusual hour of the night, and under circumstances more or less dangerous, and, it may be, to relieve him from blame in being there under the circumstances detailed by the plaintiff; but in no view that has been presented to the court was the evidence competent.

2. But the defendant's motion for a nonsuit presents a still more serious question, and imposes the delicate duty upon the court of passing on the plaintiff's evidence, and determining whether or not it tended to prove a case sufficient to be submitted to the jury. The defendant, if liable at all, is liable on the ground of negligence; that is, it must have violated some duty which it owed to the plaintiff, and the plaintiff must have been free from any fault which contributed to the injury of which he complains. Looking at the plaintiff's complaint alone, it is difficult to say that it contains a charge of negligence. It is clear that it contains no direct charge of that kind. The fact the plaintiff proceeded to a train which was standing still, and was in the act of stepping on one of the cars of the train while the same was standing still at the defendant's depot,—a usual place of stopping,—when, without warning to the plaintiff, or any signal, the train suddenly and rapidly backed up, does not seem to me to be enough. It is true the plaintiff desired to go as a passenger to Hood River, and went to the car for that purpose, but it does not anywhere appear that the car was at the place where the evidence shows the defendant

was accustomed to receive passengers on the freight trains. But, waiving the question of pleading altogether, is the evidence sufficient? The defendant, being a common carrier, was bound to receive all persons as passengers who wished to travel on its trains, and who complied with its regulations in relation to fare; but it was not bound to receive passengers otherwise than at stations or places provided for that purpose. If it was in the habit of receiving passengers at its freight depot at The Dalles, then, whenever one of its trains which carried passengers was drawn up at that place, and ready to depart for any point on the road, it was bound to receive and transport to their destination all persons offering themselves as passengers who had tickets, or were ready to pay their fare, and in the performance of that duty the defendant company was bound to exercise the greatest degree of care; but it was not bound to receive passengers away from the usual place set apart for that purpose on that particular class of cars, or in the midst of its yard used for making up trains, nor is a person who goes and climbs upon a freight train in the midst of such yard, without notice to the company, at a place where the defendant company was not accustomed to receive passengers, in any sense a passenger. This train was not at the freight depot where the plaintiff proved the company received passengers. On the contrary the plaintiff's evidence shows that there were three side tracks between where the plaintiff was found lying after the injury and the freight depot. I do not think that, giving the fullest effect to all the evidence on the part of the plaintiff, and conceding every fact and inference that might or could properly be drawn from the evidence, it establishes, or tends to establish, that the relation of passenger and carrier was created between the plaintiff and the defendant. The plaintiff had not in any way made known to the defendant his wish to become a passenger on that or any train. He had paid no fare. He did not go to the place where the company was accustomed to receive passengers, but climbed upon one of the freight-cars in the midst of the yard. The company, having no knowledge of his presence, moved its train in such a way that he was injured; but how can it be said that it was guilty of negligence? Under these circumstances, I fail to see that it owed him any duty; and, being ignorant of his presence, it could not take the precautions to protect him from injury which it would otherwise have been its duty to do. But this is not all. The plaintiff did not use due care when he went into the defendant's car-yard at the hour of 10 o'clock at night or later, and, without the knowledge of any of the employes of the defendant, undertook to board one of its freight-cars for the purpose of going upon a journey; and it must not be overlooked that where the plaintiff undertook to board the train was not at the freight depot, where the defendant was accustomed to receive passengers in the caboose of the freight train, but in the midst of the yard, with three side

tracks between the depot and the place where the injury occurred. Such a course of conduct by the plaintiff was dangerous. The plaintiff thus put himself in a place of peril which it was his duty to avoid; and if, by reason of such conduct, he was injured, the law will preclude a recovery, on the ground of contributory negligence. The law will not permit an individual to voluntarily and knowingly place himself in a place of danger, or to be guilty of conduct which is dangerous in itself, and which causes an injury, and then permit such party to throw the responsibility for such injury upon another although such other may not have been without fault. These considerations necessarily lead to a reversal of the judgment, and render it necessary to remand the cause with directions to the court below to allow the defendant's motion for a nonsuit.

### MEACHAM v. STEWART.

(Supreme Court of Oregon. May 19, 1890.)

#### DEEDS—RECORDING—EFFECT—PATENTS.

1. Patents from the government or state do not come within the provisions of the recording laws of the state, where by the terms of the statute they are not expressly included.

2. Section 8038 (Hill's Comp.) applies in terms to state deeds or patents, and expressly provides that the effect of recording them shall be the same as other deeds.

3. To give them like effect as other deeds, priority of record confers superiority of title to a subsequent *bona fide* purchaser of the same lands from the state.

#### (Syllabus by the Court.)

Appeal from circuit court, Union county; JAMES A. FEE, Judge.

This was an action in ejectment to recover certain lands described herein. The verdict and judgment were for the defendant, from which this appeal has been brought. The plaintiff deraigns his title through a deed of conveyance made by the governor, the secretary of state, and the treasurer, as a board of school-land commissioners, for the land in dispute, to H. J. Meacham, dated on the 15th day of November, 1871, and recorded on the 6th day of June, 1883. The deed is in the form prescribed by the statute, and the grantee therein is the ancestor of the plaintiff. The defendant deraigns his title through a deed of conveyance made by the same public officials, as a board of school-land commissioners, for the same land, to one T. J. Hilts, dated on the 10th day of August, 1874, and recorded on the 17th day of September, 1878, etc.

Robert Eakin, for appellant. W. M. Ramsey, for respondent.

**LORD, J.,** (after stating the facts as above.) It will be noticed that, while the deed through which the plaintiff claims was executed prior to the deed through which the defendant claims, the deed of the latter was recorded prior to the former. Upon this state of facts, the trial court held that the defendant had the better title, and instructed the jury accordingly, with the result as stated. The question to be decided is whether the statutes for recording conveyances apply to

state deeds, such as were made to Meacham and Hilts. These deeds were executed under Deady's Compilation of 1874, § 10, pp. 631, 632, which among other things provides: "Which deed, without acknowledgment, shall be admitted to record, and shall convey to the grantee all the estate which the state had in the land at the date thereof; and the commissioners shall preserve, in a bound volume, duplicates of all such deeds, with an alphabetical index of names of the grantees, and such duplicate shall be primary evidence of such conveyance." Section 3038, Hill's Comp. 1887, is as follows: "Patents from the United States, or of this state, for lands within the state, \* \* \* and conveyances executed by any officer of this state by authority of law, \* \* \* shall be entitled to be recorded in the record of deeds of the county in which the lands lie, in like manner and with like effect as conveyances of land duly acknowledged, proved, or certified." Section 3027, *Id.*, provides: "Every conveyance of real property within this state hereafter made, which shall not be recorded as provided in this title within five days thereafter, shall be void against any subsequent purchaser in good faith and for a valuable consideration of the same real property, or any portion thereof, whose conveyance shall be first duly recorded." The contention of the counsel for the defendant is that, by force of the provisions cited, the failure of a purchaser of lands from the state to record his deed within the time prescribed, and before the subsequent purchaser in good faith and for a valuable consideration of the same lands from the state has recorded his deed, is visited with the same consequences as in other cases of private parties; in a word, that priority of record confers superiority of title. It is conceded that each party stands before the court as a *bona fide* purchaser for a valuable consideration, and that the record presents no issue of fact to be decided by a jury; the sole question being whether the recording acts apply to state deeds or patents. The counsel for the plaintiff insists that such laws do not apply, and that the doctrine of notice, which they are designed to impart, has no application in such cases. It is no doubt true that patents from the government or state do not come within the provisions of the recording laws of the state, where the terms of the statute do not specifically include them, (*Moran v. Palmer*, 13 Mich. 367; *Curtis v. Hunting*, 6 Iowa, 536,) though it is usual to record them in the county where the land is situated, and such registration, as a rule, is expressly permitted by statute. In *Moran v. Palmer*, *supra*, the act authorizing the record of such patents only authorized it to be used as evidence, and did not undertake to make patents not recorded void in favor of subsequent *bona fide* purchasers from the United States. But the provisions of our statute are different. The section already referred to, authorizing the making of state deeds and the form thereof, declares that such deeds, without acknowledgment, "shall be admitted to record;" and, further, that the duplicates of all

such deeds "shall be primary evidence of such conveyance;" and if the object of this is not to give notice, but only to make the record evidence as the deed itself, there still remains the further section, (3038,) declaring that such deeds "shall be entitled to be recorded in the record of deeds of the county in which the lands lie, in like manner and with like effect as conveyances of land duly acknowledged, proved, or certified." This section applies in terms to state deeds or patents, and expressly provides that the effect of recording them shall be the same as other deeds. If like effect is to be given to the recording or failure to record such deeds as in cases of other deeds, they are within the provision of section 3027, *supra*, declaring that a deed not recorded in five days from its execution is void as to subsequent purchasers in good faith, and for a valuable consideration, of the same real property whose conveyance shall be first recorded. Hence the deed to the plaintiff has become invalid, as against the defendant, by the operation of the recording acts. There was no error, and the judgment must be affirmed.

STRAHAN, J., expressed no opinion.

WEIDERT v. STATE INS. CO.

(Supreme Court of Oregon. May 19, 1890.)

INSURANCE—AGENTS—POLICY—CONDITIONS—WAIVER—ACTIONS—EVIDENCE.

1. Contracts of insurance must have effect like all other written contracts. The intention of the parties must govern and control, and when the language used is plain and unambiguous the intention of the parties to the contract must be gathered from the language used therein. In such case the office of the court is to ascertain the language used, and then enforce it according to its legal effect; and when an agent's authority is limited, and the party with whom he contracts has notice of such limitation or want of authority in the agent, under no circumstances can the principal be bound beyond the agent's authority.

2. When a policy contained an express limitation on the power of agents, an agent has no legal right to contract as against the company, with a party having actual knowledge of such want of authority, so as to change the terms of the contract, or to dispense with the performance of any part of the consideration, either by parol or in writing; and a party, by accepting a policy containing such limitations upon the powers of the agent, is estopped from setting up powers in the agent at the time in opposition to the conditions and limitations in the policy.

3. Agents of underwriters at a distance from their principals are either general or special agents, possessing plenary or limited powers, depending on the terms of the grant of power or powers exercised with the assent of the principals; and the extent of their power is to be determined by the same rules that control in respect to other agencies.

4. In case of a special agent, the assured must, at his peril, know whether the act relied on is within the scope of the agent's real or apparent authority.

5. When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms. All antecedent and contemporaneous oral agreements are merged in the writing. In such case the writing is the sole evidence of the agreement, unless a mistake or imperfection in the writing is put in issue by the pleadings, or when the validity of the agreement is the fact in dispute.

6. When it appeared that a party had two furnished houses in the same vicinity, and there was a question which was his residence, it was not error in the trial court to exclude evidence on his cross-examination tending to show at which place he had the most furniture. Such fact was too remote to give any aid in determining the question.

7. In an action on a policy of insurance, when the plaintiff alleges that he duly performed all the conditions of said contract on his part, and upon the trial seeks to prove that the defendant waived the performance of certain conditions of the policy, and relies solely upon such waiver, *quære* whether or not it is competent for the court to instruct the jury on a material issue outside of the pleadings. Suggested, but not decided, because the question was not made at the trial.

8. When a policy of insurance required the assured to make certain specific proofs in case of loss, such requirements are conditions to be complied with by the assured before he has any legal claim against the company for loss; and in such case all the conditions must be substantially, if not strictly, complied with, or no recovery can be had.

9. The facts examined, and held that the conditions of the policy as to proof of loss were not waived, and that there was not sufficient evidence to carry that question to the jury.

10. A waiver that would preclude the defendant from relying on the terms of the policy must be in the nature of an estoppel. The company must, by some act of an agent having real or apparent authority, have done or said something that induced the plaintiff to do, or forbear to do, something whereby he was prejudiced.

11. When a failure to comply with the conditions of a policy is due wholly to the fault of the insured, the general doctrine seems to be that the policy is dead, and cannot be revived by anything short of a new consideration, or an express waiver on the part of the insurer. If no proofs are served in time, and the insurer has done nothing to induce the omission, the insured has lost all rights under the policy, and the insurer is not bound to specify its defenses, nor does it waive those not specified.

12. Where a policy contained an enumeration of particulars that should not constitute a waiver of its terms or conditions in an action thereon, it may rely upon the terms of the policy unless precluded by fraud, or by such facts as would constitute an estoppel.

13. On motion for a nonsuit, the facts examined, and held that the dwelling-house insured was not occupied at the time of the loss, within the meaning of the policy.

14. The application for a policy of insurance provided that, "in case any of said property shall be or become vacant or unoccupied, the said policy shall remain suspended, and be of no effect in respect to any of these contingencies," and further provided that if any change shall take place in the occupancy of said premises " \* \* \* without being immediately notified, and its consent thereto obtained in writing, and indorsed hereon, and signed by the president or secretary of this company, this policy shall, in either event, immediately thereafter be null and void," and further, that "this company shall not be liable for any loss or damage while the above-mentioned premises shall be vacant or unoccupied." Held, that while the premises insured were not occupied the policy was suspended; and, if the loss occurred during said time, there was no liability on the policy. For a dwelling-house to be occupied, within the meaning of this policy, it must be used by human beings as their customary place of abode.

(Syllabus by the Court.)

Appeal from circuit court, Umatilla county; JAMES A. FEE, Judge.

On the 28th day of March, 1888, the defendant insured the plaintiff's house, and certain household goods therein, against loss or damage by fire. On the 9th of July of the same year, said house and goods were destroyed by fire; and this action is

brought to recover the amount of such policy, which is \$350. The plaintiff had judgment for the full amount claimed, from which this appeal is taken. The complaint is in the usual form in such cases. On the subject of the loss, and proof thereof, it has this averment: "That on the 9th day of July, A. D. 1888, said dwelling-house, with said beds, bedding, and household furniture therein, were totally destroyed by fire; \* \* \* that immediately thereafter plaintiff furnished the defendant with proof of his said loss and interest, and otherwise performed all the conditions of said policy on his part to be performed."

The answer denies each of the allegations of the complaint except the issuing of the policy and the loss. It also contains the following new matter: That the basis of said policy of insurance is the written application of the plaintiff therefor, and that said policy was so made and issued upon and undersaid application, and upon and under the statements, representations, agreements, and warranties therein contained. Among other things, said application contained the following provisions, to-wit: "Application is made by John Weidert, of Vansycle Cannon, county of Umatilla, state of Oregon, for insurance against loss or damage by fire, by the State Insurance Company, in the sum of three hundred and fifty dollars, for the term of one year from the 13th of March, 1888, by a policy, the usual conditions of the company, based upon the terms, agreements, and statements herein and hereon, on the property hereinafter described. The applicant agrees that all valuations are made by such applicant, and that the company is not to pay, in case of loss, to exceed three-fourths of the actual cash value of any building; that if this application does not truly answer the following interrogatories, and correctly describe, state, and make known the property, the value, the title, the location, the exposures, the occupancy, the liens and incumbrances thereon, and interest therein, or if any misrepresentations or omissions to make known any and all facts material to the risk are made herein or hereon, then the said policy shall in either event be null and void. The applicant further agrees that if the applicant, or any one else, shall have, or shall hereafter make, any other insurance on the property herein named, or any part thereof, or if there be any change or alteration either in the tenants, title, incumbrances, occupancy, stove-pipes passing through the roof or side of the building, or the erection of buildings or exposures, or if said property shall be conveyed or incumbered in whole or in part, whether by judgment, mechanic's lien, judicial decree, mortgage, voluntary transfer, or otherwise, or in case any of said property shall be or become vacant or unoccupied, that the said policy shall remain suspended, and be of no effect in respect to any of these contingencies, unless notice shall be given to this company, and its consent obtained in writing, and the same be indorsed upon the policy by the secretary before loss or damage shall occur. The applicant further agrees that the foregoing answers and statements are true,

and a warranty on the part of the assured; that any solicitor or agent of this company, in filling out or writing this application, in performing such act is the agent of, and acts for, such applicant, and not of or for or on behalf of this company, under any circumstances or in any manner whatever, and that the company shall in no respect be bound by any act done or statement made to, promise or knowledge of, any solicitor, agent, or other person which is not in such application, and that any notice given to, representation made, or knowledge of any solicitor, agent, or person representing this company, of any fact, change, act, or thing relating to the property, title, occupancy, incumbrance, or otherwise, insured under said policy, subsequent to the issuing of the same, shall not in any wise be binding on, or be regarded as notice to, or knowledge of, this company, but in order to be binding must be indorsed in writing on said policy by the company, as provided therefor. \* \* \* The policy, after declaring that the basis of said contract is the said application, which shall be deemed and taken as a part of the policy, and as a warranty on the part of the assured, and that any false or untrue answers, representations, or statements therein or thereon should render the said policy void, and that this contract of insurance was embraced wholly in said application and obligation of the assured; contains this further provision: "This company shall not be liable for any loss or damage while the above-mentioned premises shall be vacant or unoccupied, or resulting from the neglect of the assured to use all possible effort to keep the property safely protected against fires that may originate or start on the prairies," etc. And this: "In case said property, or any part thereof, shall be sold, conveyed, or incumbered, or if any change shall take place in the title, possession, or occupancy, \* \* \* without being immediately notified to this company, and its consent thereto obtained in writing, and indorsed hereon, and signed by the president or secretary of this company, this policy shall in either event, immediately thereafter, be null and void." The policy also contains a repetition of the statement contained in the application, to the effect that it is a part of this contract that any person other than the assured who may have procured this insurance to be taken by the company shall be deemed the agent of the assured, and not of this company, under any circumstances whatever, etc. It is then alleged that the plaintiff, in disregard and violation of the agreements, provisions, and conditions of said application and said policy, permitted and caused said dwelling-house to become and remain unoccupied prior to, and continuing up to, the time of said fire, without notifying the defendant thereof, and without in any way obtaining the consent of the defendant thereto or therefor. As a further and separate defense the defendant alleges the following facts: "That among other conditions on the back of said policy, and made a part thereof, by the terms of said policy, and by the terms of said application therefor,



It is provided: 'All persons having a claim under this policy for loss or damage shall proceed at once to put the property saved or damaged in the best order possible, separating the damaged from the undamaged, and shall give immediate notice, and shall render a particular account thereof in writing to the company, stating the time, origin, and circumstances of the fire, the occupancy of the building insured, or containing the property insured, at the time of the loss; the whole value and ownership of the property insured, and all incumbrances thereon; the amount of loss upon each article; other insurance, if any, giving a copy of all policies,—all of which shall be verified by the affidavit of the assured or claimant.' It is then alleged by special averment in the answer that the plaintiff never complied with either or any of these requirements and conditions.

The reply, among other things, contains these denials and allegations: "Plaintiff denies that, in disregard or violation of the agreements, provisions, or conditions of said or any application, or said or any policy, said plaintiff permitted or caused said dwelling-house to become or remain unoccupied for a long or any period prior to, or continuing up to, the time of said fire, without notifying the defendant thereof, or without in any way obtaining the consent of the defendant thereto or therefor; and the plaintiff alleges that, at the time he made the application to the defendant for said insurance policy, it was expressly understood and agreed by and between the plaintiff and the defendant that said plaintiff should and would be permitted at any and all times during the continuance of said policy to remove from said house, and remain from said house, to pursue certain farm labor in which plaintiff was engaged and had to do and perform, and for the further purpose of going to and returning from the mountains to haul wood for the use of the plaintiff and his family; and it was mutually understood and agreed, and defendant at the time of said application consented, that, while the plaintiff was absent as aforesaid, plaintiff's wife and family might remove to some place not so lonesome as the said house of the plaintiff." The reply further denies that, in disregard of the provisions of said or any condition, the plaintiff failed or refused to give notice to the defendant in writing, or proof of his said alleged loss in writing, or at all, or to render a particular or any account thereof in writing, or at all, or the origin or circumstances of the fire, or the whole value, or any value of ownership, of the property insured, or any part thereof, or all or any of the incumbrances thereon, or the amount of loss upon each article or articles, and denies that he failed or refused to verify by affidavit or otherwise, or at all, any proof of any loss or any account or notice thereof of any kind; and plaintiff alleges that, immediately after said fire, he made frequent applications to defendant and to its agent to adjust his loss caused by said fire, but said defendant at all times neglected and refused to entertain plaintiff's application, or to adjust his said loss.

W. H. Wilson, for appellant. W. E. Crews, for respondent.

STRAHAN, J., (after stating the facts as above.) The following are the assignments of error made by the appellant, and which have been argued in this court: "First. Error of the court in permitting the plaintiff to give evidence of an oral agreement between him and one Reeder, a solicitor of the defendant company, to the effect that the plaintiff might leave the insured premises unoccupied. Second. Error of the court in refusing to allow counsel for the defendant to ask the plaintiff, while a witness on his own behalf, how much more furniture the plaintiff had at what was known as his 'Middle Ranch' than at the place that was burned. Third. Error of the court in charging the jury as follows: 'The court charges you that, if you find from the evidence that the plaintiff made a statement in writing to the company, although such statement was not verified, if the company acted upon it, and sent an adjuster to settle or adjust the loss, then the company will be deemed to have waived that condition in the policy.' Fourth. Error of the court in overruling defendant's motion for a nonsuit." These assignments, so far as may be necessary to the proper disposition of the case, will be considered in their order.

1. The first assignment of error is based on what occurred at the trial in the examination of the plaintiff as a witness in his own behalf. He testified without objection that in March, 1888, one L. B. Reeder came to him, and asked him to have his property insured, and said that he had been there twice before to see him on the same business. Counsel for the defendant here asked and obtained leave of the court to inquire of said witness whether he had made a written application for insurance, and he answered that he had; and, said application being shown to the witness, he further testified that he had signed it at the time, but that he did not read it, or hear it read, except as Mr. Reeder read it to him; that he was a German, and did not speak, read, nor write the English language very well, but that he could read some, and there were always some difficult words that he did not know the meaning of. The application was then offered in evidence, and was received without objection; and the bill of exceptions recites that it contained the provisions set forth in the defendant's answer, in the same words as in said answer set forth. It also contained a particular description of the premises insured, and stated that the same was occupied by the insured as a private dwelling, and the following statements were indorsed thereon: "A part of Mr. Weidert's family lives in this house, and the other part lives in his other house,"—and on the back thereof was signed the name, "L. B. REEDER, Solicitor." The witness then testified, under an objection and exception by the defendant, that, at the time he made his application for insurance, he asked Reeder particular questions: "How is this," I said, "when I move away, and have part of my family here, and a part with me, as

I will have to do?" He said: "As long as your furniture remains here, and the house is occupied, all right." I said, "I will be away plowing before long now, and cannot stay on this place all the time;" and he said: "It does not make any difference. You can move." I then said: "If this is the case,—if I don't have to stay right steady,—I will get insured." Whether this evidence is competent is the question submitted for our determination.

One objection made to this character of evidence by the appellant is that Reeder had no authority to make any contract or agreement whatever with the assured, and that his want of authority to make agreements concerning the occupancy of the premises insured outside of, or different from, the terms of the application and policy, was plainly printed in the application which the plaintiff signed, and that he was bound to take notice of his want of authority. It must also be observed in this connection that the plaintiff says that Mr. Reeder read over the application to him at the time he signed it, and it is not pretended that he read it incorrectly; and, while the plaintiff testifies that he is a German, and does not understand English very well, he nowhere claims that he did not understand every word of that application. In the light of these facts, how can it be claimed that Reeder could make any other or different contract with the assured than to take his written application according to the rules of the company, and forward it to the home office, and, if it was there approved, a policy to be based on said application, and not on something the solicitor may have said to the assured, would be the issue? When it expressly appears that this solicitor's powers were so limited, and that the plaintiff knew it, how can it be claimed that the defendant was bound by his unauthorized act? Contracts of insurance must have effect like all other written contracts. The intention of the parties must govern and control; and, when the language is plain and unambiguous, such intention must be gathered from such language. In such case the court simply ascertains the language the parties themselves have agreed to and written down in their contract, and enforces it according to its legal effect. When an agent's authority is limited, and the party with whom he contracts has notice of such limitation or want of authority in the agent, under no circumstances can the principal be bound beyond the agent's authority. This principle has been applied to contracts of insurance. In *Catoir v. Trust Co.*, 33 N. J. Law, 487, it was held that, when a policy itself contained an express limitation upon the power of agents, an agent had no legal right to contract, as against the company, with the party to whom the policy had been issued, so as to change the terms of the policy, or to dispense with the performance of any part of the consideration, either by parol or in writing; and such party is estopped, by accepting the policy, from setting up powers in the agent at the time in opposition to the conditions and limitations in the policy. So in *Armstrong v. Insurance Co.*, 16 N. W. Rep. 94, it was held that an

agent of a fire insurance company who had authority to take applications for insurance, and receive and receipt for premiums, and forward applications and premiums, and receive from the company policies of insurance when issued, and deliver them to the assured, and who had no other or further powers, real or apparent, could not bind the company by a contract of insurance. So in *Critchett v. Insurance Co.*, 5 N. W. Rep. 548, where a note was given in payment of a premium upon an insurance policy which provided that, if default was made in the payment of any installment of premium upon a premium note for 30 days after due, the company should not be liable for any loss happening after that time, and before payment. It was claimed that an agent who had authority to receive applications for insurance, and collect and transmit premiums, had extended the time of payment; but it was held that such extension, even if shown, was not binding on the company, and they were not liable for loss occurring during the period of such pretended extension.

*Merserau v. Insurance Co.*, 66 N. Y. 274, is a very important case involving the principle under consideration. In that case the limitation of the agent's powers was indorsed on the policy, and he possessed powers similar to those conferred by the defendant company in this case. The agent called upon the assured, who was ready to pay the premium, but the requisite receipts had not been forwarded from the home office to enable the agent to receive the premium; and therefore the agent said to the assured: "Give yourself no trouble about it. I will see that you are kept all right with the company." A loss occurred, and the company set up the non-payment of the premium as a defense, and the plaintiff relied upon a waiver by the company through its agent; but the defense was sustained. ALLEN, J., delivering the opinion of the court, said: "Agents of underwriters, at a distance from their principals, are either general or special agents, possessing plenary or limited powers, depending upon the terms of the grant of power, or the powers exercised with the assent of the principals; and the extent of their authority is to be determined by the same rules that control in respect to other agencies." And it was further held that the assured had knowledge of the limited powers of such agent, and he was estopped from claiming that said limitation did not exist, or in hostility to it. And in *2 Wood, Ins.* § 411, the doctrine is stated as an elementary principle. It is said. "So, where direct notice or any notice which the assured as a prudent man is bound to regard, is brought home to the assured, limiting the powers of the agent, he relies upon any act in excess of such limited authority at his peril. That an insurance company has a right, in a fair way, to limit the powers of its agents, must be conceded; and when it does impose such limitations upon his authority, in a way that no prudent man ought to be mistaken in reference thereto, it is not bound by an act done by its agent in contravention of such notice." And Shuggart

v. Insurance Co., 55 Cal. 408; Insurance Co. v. Fromm, 100 Pa. St. 347; Insurance Co. v. Hannawald, 37 Mich. 103; Insurance Co. v. Holzgrafe, 53 Ill. 516; Dickinson Co. v. Insurance Co., 41 Iowa, 286; Insurance Co. v. Fay, 22 Mich. 467; Mitchell v. Insurance Co., 51 Pa. St. 402; Alexander v. Insurance Co., 66 N. Y. 464; Galbraith v. Insurance Co., 12 Bush. 29. The law of agency is to be applied here, and it is not different in its application to insurance from what it is in any other case to which it is applicable. 2 Wood, Ins. § 421, no doubt states the true rule. The author says: "But in all cases the distinction between the powers of special and general agents should be kept in view; and in the case of a special agent the assured must, at his peril, know whether the act relied on is within the scope of his real or of his apparent authority. He is bound to know when he has passed the precise limits of his power, and cannot rely upon the assumption of authority by the agent to do an act beyond the scope of his actual authority, real or apparent. The declarations of an agent are not evidence of his authority, but the scope and extent of his powers must be determined by his actual authority or by his acts, and the recognition thereof by his principal." Counsel for respondent cites Woodruff v. Insurance Co., 83 N. Y. 133; but in that case the agent did not assume to make a different contract from what was contained in the application and policy, nor does it appear what was the scope or extent of his authority, or apparent authority. He also cites Carroll v. Insurance Co., 13 Pac. Rep. 863; but that case relates to the question of waiver by the company, and does not touch the question under consideration. Menk v. Insurance Co., 14 Pac. Rep. 837, is also cited. In that case, under an issue of misrepresentation, it was held competent, in an action on a fire insurance policy, to give evidence that the application was made out by an agent of the insurance company with full knowledge of the condition of the premises, and that the plaintiff did not know what representation it contained. Whether the agent was general or special does not appear, and express averments were made as to the misrepresentation. Insurance Co. v. Pierce, 18 Pac. Rep. 291, is also cited by respondent; but that case does not hold that the acts of a special agent with limited powers, known to the assured, would bind the company. It holds that if, after hearing a full and truthful statement of the condition of the property insured from the owner, an agent of an insurance company fills the blanks in a printed form of application furnished him by the company with misrepresentations and false statements, and the insured signs the same without knowing its contents, and without other fault than that he relied upon the agent to write down his statements correctly, and pays the premium, obtains a policy, and sustains a loss, then the company was estopped from denying its liability under the policy. In this case the pleadings present no issue as to misrepresentations; nor, under the facts disclosed, would the questions involved be materially affected if they did. Kruger v.

Insurance Co., 13 Pac. Rep. 156, is also relied upon; but the court in that case found expressly that the agent was a general agent of the company, and that he had the power to waive the conditions of the policy. Insurance Co. v. Ruckman, 20 N. E. Rep. 77, is also cited by the respondent, but in that case the agency was general, and not special; and the learned editor has appended a note in which it is stated that an insurance company has power to restrict the powers and duties of its agents as it may choose, and, when their authority is expressly limited and restricted by the policy which the assured receives, such restrictions and limitations must be regarded as binding upon him; citing Cleaver v. Insurance Co., 65 Mich. 527, 32 N. W. Rep. 660; 8 Amer. St. Rep. 908, and note, 913. But in addition to what has been said, it is not perceived, when no fraud or mistake or other imperfection in the writing is not put in issue by the pleadings, on what ground this evidence could be admitted. The statements relied upon were contemporaneous with the writing. In such case they are merged in the writing, and cannot be proven unless under particular circumstances, which do not appear here. This is the common law, and was deemed so important by the legislature that it is enacted as a part of the statute law of this state. Hill's Code, § 692.

2. The next error complained of is the refusal of the court to allow plaintiff to testify on his cross-examination by defendant's counsel as to how much more furniture he had at what was known as his 'Middle Ranch' than at the place that was burned. This ruling was not error. The facts sought to be elicited are supposed to have some bearing upon the question of the occupancy of the building insured, but we think otherwise. They were too remote. We think the facts elicited show that the plaintiff had all the necessary furniture to answer his purposes at both places, and whether he had a little more or a little less at one place or the other had no bearing upon the question of occupancy.

3. The next error relied upon by the appellant is the giving of the following instruction to the jury by the court: "The court charges you that, if you find from the evidence that the plaintiff made a statement in writing to the company, although such statement was not verified, if the company acted upon it, and sent an adjuster to settle or adjust the loss, then the company will be deemed to have waived that condition in the policy." The pleadings present no issue whatever on the subject of waiver by the company of this or any condition in the policy. The plaintiff alleges that he duly performed all the conditions of said contract on his part to be performed. This he might do under section 87, Hill's Code, but the same section also provides that if such allegation be controverted the party pleading shall be bound to establish on the trial the facts showing such performance. On the trial in this case the plaintiff made no attempt to establish the facts showing performance, but what he undertook to prove was that the defendant had waived the per-

formance of a particular condition of the policy; and it was on that subject—an issue vital to the plaintiff's case, and not in the pleadings—that the court instructed the jury. On this branch of the plaintiff's case the court by this instruction made it possible for the plaintiff to recover on a question of fact nowhere alleged in the pleadings. But this question was not made in the argument, and we will not place our decision upon it. We only refer to it to indicate what we conceive to be the correct method of pleading in such cases, and to avoid misconception. There is no doubt that the policy declared on by the plaintiff makes certain proofs, to be furnished by the assured in case of loss, conditions to be complied with by him before he has any legal claim against the company for loss; and in such case all the conditions must be substantially, if not strictly, complied with, or no recovery can be had. 2 Wood, Ins. § 436, and authorities there cited. It is equally as well settled that the failure to make such proof may be waived by the company. Id. § 439, where the authorities are carefully collated.

One of the conditions of the plaintiff's policy, in case of loss or damage, was that he was to perform certain things in respect to the damaged property, and then give immediate notice, and render a particular account thereof, in writing, to the company, stating the time, origin, and circumstances of the fire, the occupancy of the building insured, or containing the property insured, at the time of the loss; the whole value of the ownership of the property insured, and all incumbrances thereon; the amount of the loss upon each article; other insurance, if any, giving a copy of all policies,—all of which shall be verified by the affidavit of the assured and claimant. And here is what the plaintiff says he did after the fire, as recited in the bill of exceptions: That at the time the fire occurred, which was the night between the 9th and 10th of July, he was at the mountains to get two loads of wood, to make his homethere; that, after the house was burned,—two or three days after,—he went to Mr. Reeder, to notify him. Mr. Reeder was not there, but his brother was. The second time he went to see Mr. Reeder, he was there; and he showed witness a letter he had received from the company, and he read it to him. When he went to Reeder, he said he would write a statement for witness. That witness wrote to the company himself, and received a letter from them. That after this Mr. Reeder came out to the place, and also Mr. Beeler, but that he was in Walla Walla at that time. That he offered to make a statement to Mr. Reeder in reference to this matter. On his cross-examination the witness said that he did not know whether he wrote the letter to the company right away after the fire or not; that he could not state the date; that he did not know whether he wrote once or twice; that he wrote as soon as Mr. Reeder told him to do so; that he told Mr. Reeder that he could not write very good, but Reeder told him to do as good as he could, and so he wrote. After being recalled the plaintiff

testified that he received a letter from the defendant, which he delivered to Mr. Tustin. Mr. Tustin was then called, and testified that the plaintiff delivered a letter to him with the policy; but, after making diligent search in his office, and at all places where he kept such papers, he was unable to find the same. The witness was then asked to state the contents of said letter; and, without giving date, he said that, as near as he could remember, it read: "Mr. John Weidert—Dear Sir: We have received your letter from Mr. Reeder as to your loss by fire, and we will send an agent as quickly as possible to value the damage." They said Mr. Reeder was agent. It does not appear that this paper was signed by any person. The witness further testified that Beeler was named in that letter; that he had gone to Mr. Reeder, and told him to write, and afterwards Reeder told him he had written. Mr. Paul testified that Mr. Beeler came to the place with Mr. Reeder, and that the plaintiff was away from home; that they stayed about half an hour, and said they wanted to see the plaintiff very bad. After dinner they went down towards the house that was burned. Beeler told the witness that he wanted to see Mr. Weidert; that he wanted to settle it up; that the plaintiff was expected home from Walla Walla that evening, and they said they wished they could stay, but they had to be in Portland that evening, and could not wait. He just said he wanted to settle up from that fire. This witness, on his cross-examination, said that Beeler told him that he wanted to see the plaintiff about the fire, and settle up; that he did not say anything about the money, but only said that he wanted to see about the fire, and how it was, and that he wanted to settle up; that he went down to the house that was burned, then he asked where the road was, and that was all he said. Mrs. Weidert testified substantially to the same facts as to Reeder's and Beeler's visit.

The defendant, having proven the plaintiff's signature to the following letter, offered the same in evidence: "Nov. 2, 1888. To the State Insurance Company—Dear Sirs: I just met with Mr. Reeder on the 29th of October. We have missed one another before. Even when Mr. Reeder was at my place, I was to Walla Walla. That is twenty-six miles from my place. I did not know that he was coming that day, or else I would have stayed at home. Mr. Reeder wanted me to state something to you about my business. About this place where this house has been burned: This house I bought for my special home, on account of there being a good house and good water on it. I could have insured it for \$300 more than I insured it for, but I did not want to. Where I lived before, I had to haul water. I could not move in that house when I bought it. It was rented till the 1st of March. This family moved out, and I moved in this house till I was done plowing. I have got ranches two and three miles apart. Then I moved onto the next place, and camped there, to plow there. This time the man who had the house before came to me, and said: 'Mr. Weidert, can I rent this house from

you till the 1st of July?' I said: 'No; I think I will get done here by the 1st of June, and then I want to move back again. But, if you don't disturb the furniture, you can move into it till the 1st of June, and then I want to move back.' Accordingly, he says: 'All right. It accommodates me very much.' I had another place, two miles further north, which I had hired to plow; but, the last week in May, this man sent me word that he could not plow the ground for me, so I had to finish this place, and go there and plow that myself. I had to camp on the bunch grass, and cook on a camp fire. The 1st of June came, and this man came to me, and said: 'Mr. Weldert, I cannot move by the 1st of June, and I would like to get ten or twelve days longer.' I says: 'All right, Mr. McNett. I don't think I can get back as soon as I calculated, on account of this plowing.' So he moved on the 12th of June. I did not get done plowing on that place till the 20th of June. Then we went to Walla Walla, and visited our friends, and picked berries, and canned them the same time, because they don't haul well that far. By that time the fourth of July came on, and we stayed over the fourth, and we came back the 7th of July, when we finished plowing. Then we went to the mountains to haul a couple of loads of wood back home. It got a little late when we came from the mountains, so we left our wagons standing where we stopped to take them home the next day; and that day our turn came to have our hay cut, and I had to go and show where to cut it. I told the hired man to fetch our dinner, and help cut some hay, when he came. He drove by there with a hack to bring something. When he came to us he said: 'We are moved now. The house is burned down,'—and I, and the man cutting hay for me, dropped everything and walked there; and we found it burned down. So we had to move down where we were cutting hay at that time, where there was an old shanty standing. I had to move my family in town this winter, to stay till next spring. This shanty is too cold. I was waiting on this new railroad to bring some dry lumber up here. They don't bring dry lumber this fall, and will not till next spring, so I can't build till next summer. We have got to haul the lumber with wagons too far here. The 8th of July (that was Sunday) we were in the house to straighten things up in the house, so that we would not be bothered when we came from the mountains. We were there pretty near every Sunday to look after our things, and make our home there. Gentlemen, that is as near as I can state it to you. I asked Mr. Roeder if it would make any difference if I was out to my other places at work, and he said, 'No, sir.' We have never left the house more than a week without going back, and taking care of things there. Please write me an answer on this statement as soon as possible. Yours, truly, JOHN WEIDERT, Vansycle, Umatilla county, Oregon."

On the question of waiver, the policy declared on contains this statement: "It is

expressly agreed that if any person or persons on behalf of the company shall aid, or attempt to aid, the claimant in making proofs of loss, so called, or examining the claimant, or otherwise investigating such claim, that, in either of such events, no conversation, promise, agreement, or understanding of such person with such claimant, or any one else on his or their behalf, or notice given to or knowledge obtained by such person or persons, shall be in any manner binding on the company, or regarded as a waiver or estoppel of any condition of this policy, or the law applicable thereto; and that no person has any authority or power to make any promise or agreement to pay any loss or claim under this policy, or to waive any conditions of this policy, or the law applicable thereto, except the president or secretary of this company, and then only when the same, and all the detailed terms and conditions thereof, are reduced to writing, and duly signed by said president or secretary." The instruction under consideration wholly ignores the element of time within which proof of loss should be made. By the terms of the policy, it was to be immediately after the loss, which, I have no doubt, required diligence on the part of the assured. But the time could doubtless be waived, as well as any other condition of the policy; and the question, therefore, is whether or not there was any evidence of waiver which authorized the court to submit that question to the jury. Just when the plaintiff wrote to the defendant does not appear, nor does the evidence anywhere disclose the nature or contents of the letter he says he wrote some time after the fire. It might be inferred from the contents of the letter which he says he received from the company that it said something about the plaintiff's loss; but that letter was not signed by any person, and it does not appear whether it really came from the company or not. More than that, the letter which the defendant received from the plaintiff of November 2d, and which it is conceded that he wrote, tends very strongly to show that the plaintiff did nothing after the fire, by way of submitting proof of loss, until he wrote this letter. The first paragraph of that letter admits of no other reasonable interpretation. But, taking all the oral evidence together with the letter, does it tend in any manner to prove a waiver? A waiver, in this sense, is in the nature of an estoppel. The company must, by some act of an agent having real or apparent authority, have done or said something that induced the plaintiff to do, or forbear to do, something whereby he was prejudiced. It does not appear from this evidence that the company did anything of that kind in this case; nor does it appear that it acted upon any statement in writing made by the plaintiff, or that it sent an adjuster to settle or adjust the loss. What relation Mr. Beeler sustained to the company does not appear. He may have been an authorized adjuster of the company; but, if he was, the fact does not appear from this record, and, until such fact be shown, it is not perceived on what ground the com-

pany could be bound by his acts. But, conceding that the record shows that he was such adjuster, the fact that he went to the place of the fire some time after it occurred, and inquired for the plaintiff, and said and did all the other things which the evidence tends to prove, there is not enough shown to constitute a waiver. 2 Wood, Ins. § 439, sums up the result of the cases by saying: "But generally it will be found that the delay has been induced by such acts and conduct on the part of the insurer or his agents as amounts to an estoppel, rather than a waiver; and the better doctrine seems to be—and that more consistent with principle—that, when the failure to comply with the condition is due wholly to the fault of the insured, the policy is dead, and cannot be revived by anything short of a new consideration, or an express waiver on the part of the insurer." And in the same section the learned author cites *Brink v. Insurance Co.*, 70 N. Y. 593, decided by the court of appeals of the state of New York, in which case the court said: "If no proofs are served in time, and the insurer has done nothing to induce the omission, the insured has lost all rights under the policy; and the insurer is not bound to specify its defenses, nor does it waive those not specified."

4. But, however this may be, there is another view of this subject that is decisive against the plaintiff on this question. An insurance contract, like every other contract, in the absence of fraud, illegality, or mistake, must be so construed that every part of it shall have effect according to its terms. The intention of the parties must be gathered from the contract. If that be uncertain, the circumstances, surroundings, situation of the subject-matter, and other rules of construction may be resorted to for the purpose of aiding the court in determining the meaning of the contract, and the intention of the parties in making it. But, when the import of the language of the contract is so plain as to leave no doubt whatever as to what the parties intended, the court has no discretion but to enforce it. Section 694, Hill's Code, states the rule, which is only declaratory of one of the first principles in the laws applicable to the construction of contracts: "In the construction of a statute or instrument, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted; and, where there are several provisions or particulars, such construction is, if possible, to be adopted as will give effect to all." A party cannot protect himself from the consequences of his own fraud by contract; but, in the absence of something of that kind, I fail to see any reason why the terms of the policy as to waiver should not be given full effect. This the trial court did not give or allow by the instruction under consideration, and the same was therefore erroneous.

5. At the conclusion of the plaintiff's evidence the defendant moved for a nonsuit because the plaintiff had failed to prove a case sufficient to be submitted to

a jury, which was overruled; and this is assigned for error. All the evidence is in the transcript, but the great length of this opinion will only allow a very brief examination of this question. The plaintiff encountered the same difficulty here that he did in another part of his case. He alleged due performance of the agreement on his part, and then sought to prove a contemporaneous parol agreement as to the occupancy of the premises, which, we have already indicated, was objectionable; but on the argument here the plaintiff's counsel insists that his evidence tended to prove an occupancy of said premises from the date of the policy to the fire. To test the correctness of this claim, I have carefully read all the evidence, and think it fails to show such occupancy. The plaintiff testifies that he moved away from the place on about the 20th of March or the 1st of April, (he did not remember which,) and that McNett moved in the next day, or day after that, (he did not remember which;) that McNett lived there until the 15th or 20th of June, and that, after McNett moved away from the house, he or his hired man, or some member of the family, was there at the house every day to see if things were all right. He further says he was at the house after the 20th of June frequently until the house burned; that the big members of his family were there often; that he was not there when it burned, and did not know how the fire occurred. On recross-examination the witness said he did not know whether Mr. McNett was at the house after the 12th of June or not. He further said that some of the family were at the house every day; that they just went down there to see that nothing was destroyed. The fire occurred on the night after the 9th of July. Paul was also a witness, but his evidence adds nothing to what the plaintiff said. Conceding to the fullest extent all the facts that this evidence tends to prove, is any occupancy of said premises shown after McNett moved out? The appellant did not make the question as to whether McNett's moving into the house was a change in the tenancy, within the meaning of the policy, or not; and so we confine our inquiry simply to the question of occupancy after McNett moved out. In *Keith v. Insurance Co.*, 10 Allen, 228, an instruction to the effect that it is not sufficient to constitute occupancy that the tools remained in the shop, and that the plaintiff's son went through the shop almost every day to look around to see if things were right, but some practical use must have been made of the building, and that, if it thus remained without any practical use for the space of 30 days, it was, within the meaning of the policy, an unoccupied building for that time, and the policy became void, was approved by the supreme court of that state. So in *Ashworth v. Insurance Co.*, 112 Mass. 422, it was held that a dwelling-house and barn are unoccupied, within the meaning of an insurance policy, which provides that buildings unoccupied shall not be covered by the policy when the house is only used by the insured and his servants for the purpose of taking their meals there when engaged in carry-

ing on a contiguous farm, and the barn is only used for the purpose of storing hay and farming tools. So, also, in *Corrigan v. Insurance Co.*, 122 Mass. 298, it was held, in an action on a policy which provided that, if the house should "remain vacant or unoccupied for the space of ten days without written notice to and consent of the company," it was not erroneous to instruct the jury that, if the house had not been used as a dwelling-place by some one within 10 days of the loss, the policy would be void, and that, if the former occupant had moved with his family into another house, where they slept and took their meals, the fact that some of the furniture remained in the house, and the key had not been surrendered to the landlord until within the 10 days, does not constitute an occupancy of the premises. And in *Herrman v. Insurance Co.*, 81 N. Y. 184, it was held that a dwelling-house was unoccupied when no one lives therein, but that it was not necessarily vacant. And in *Herrman v. Insurance Co.*, 85 N. Y. 163, it was held that for a dwelling-house to be occupied, within the meaning of a policy which contained a condition declaring it void in case the premises "become vacant or unoccupied, and so remained for more than thirty days without notice to and consent of this company in writing," it must be used by human beings as their customary place of abode. *Cook v. Insurance Co.*, 70 Mo. 610, was also an action on a policy which was to become void if the premises should be unoccupied. The insured left the house, and went elsewhere to reside, taking only part of her furniture. She left a man in possession, with instructions to sleep in the house at night. This man quit the premises, and several days afterwards a fire occurred; no one being in the house at the time. Held, that the house was unoccupied, and that the policy was void. Other authorities hold the same doctrine. *Insurance Co. v. Meyers*, 63 Ind. 238; *Dennison v. Insurance Co.*, 52 Iowa, 457, 3 N. W. Rep. 500; *Fitzgerald v. Insurance Co.*, 64 Wis. 463, 25 N. W. Rep. 785.

Under the facts disclosed at the trial, and in the light of the authorities cited, I think the conclusion irresistible that the building in question was not occupied at the time of the fire. In such case the policy, by its terms, stood suspended. For the reason that proof of loss was not made as required by the policy, and because the facts show that the building was not occupied at the time of the fire, the circuit court erred in refusing the defendant's motion for a nonsuit. The judgment will therefore be reversed, and the cause remanded with directions to allow the defendant's motion for a nonsuit.

THAYER, C. J., being directly interested in the result, did not sit, and took no part in the decision of this case.

LORD, J. I concur in the result only.

NUTTER V. GALLAGHER.

(Supreme Court of Oregon. June 18, 1890.)

WATER-COURSES—NAVIGABLE STREAMS.

1. A stream or water-course, in order to be navigable, must be of sufficient extent and capaci-

ty to enable the community at large to utilize it in the navigation of boats and other water-craft thereon, for the transportation of products and merchandise, or for the purpose of floating logs and timber from forests to market.

2. Where N., desiring to open a way of navigation to a certain point on a navigable tide slough, situated upon the land of G., which adjoined his premises, cleared away logs and brush from a gulch through which flowed a small mountain stream, deepened the same, and cut a channel therefrom through the intervening land of G. to such point of navigation, thereby opening a water-course between his premises and said point, by means of which he was enabled to float logs and small boats thereon at extreme high tides, which occur but a few days during the year; and it appearing that the communication so established was merely for the use and benefit of N., and those who might succeed him in the ownership of his premises,—held, that such water-course did not constitute a navigable stream in the sense and meaning of the term as legally understood.

3. The decision of this court in *Haines v. Hall*, 17 Or. 165, 20 Pac. Rep. 831, approved.

(Syllabus by the Court.)

Appeal from circuit court, Clatsop county; F. J. TAYLOR, Judge.

The appellant brought suit against the respondent, in said court, to enjoin him from erecting an alleged obstruction to the navigation of a certain slough, in said county, termed by him "Vincent's Slough." He alleged ownership in fee and possession of the W.  $\frac{1}{2}$  of the N. W.  $\frac{1}{4}$  of section 15, township 7 N., of range 9 W., in said county; that for the last five years he had occupied said premises as a home; that they are situated about three-quarters of a mile from Young's river, a navigable stream, wherein the tide ebbs and flows, and the only way the appellant can get to and from them, or can carry or transport the products of the said land to market, is upon a body of water extending from said Young's river to the said premises, called and known as "Vincent's Slough," which is a natural water-way, navigable for boats, saw-logs, scows, and other water-craft, and that, without the use thereof for such purposes, it will be impossible for him to have ingress and egress to and from the premises; that said slough has been from time immemorial navigated by the public generally, in the manner aforesaid. The appellant also alleged that he was, and had been for six years past, the owner of a largescow and other boats, and during all that time had navigated said slough, and transported thereon the products of his land, and wares and merchandise, to and from market; that since the commencement of the suit a county road had been laid out and established, leading from his land down the south bank of said slough to a point on respondent's land where a bridge on another county road crossed the slough; that the road leading from respondent's land connected with the bridge, and he could transport his supplies and products to and from the land over such road to the bridge, and from the bridge upon the slough to and from market; that the water in the slough at the bridge was deeper, and navigable for larger craft, than on his land; that respondent was threatening to entirely close the entrance to the slough by driving in the bed thereof large piling, and filling be-



tween with brush and other material, causing thereby great and irreparable injury and damage. The respondent denied the material allegations contained in the complaint, and, for a further answer, alleged that he was owner and in possession of lots No. 5 and 6, in section 10, township 7 N., range 9 W., in Clatsop county, Or., which premises lie north of and adjoin said land of appellant; and that said slough was wholly within respondent's premises, and was not subject to public navigation, but was necessary for the free use and enjoyment of his land; that said land is known as "tide land," and is only productive and useful by being diked and reclaimed; that to reclaim it he will be compelled to dike a portion of it; which diking is the obstruction complained of by appellant. A reply was filed on the part of the appellant, denying the new matter set forth in the answer. The case was thereupon referred to J. A. Bowlby, Esq., to take testimony, and report the facts and conclusions of law.

The said referee thereafter made his report, in which he found: That the said parties were owners, respectively, of the said parcels of land hereinbefore referred to, and were in possession of the same as alleged; that said Young's river was a navigable stream, in which the tide ebbs and flows, and that it runs a northerly course, near the said lands, and east thereof; that a small stream coming from the hills flows across appellant's land, and down through sloughs, across the land of respondent, to Young's river near by; that the tides rise in Young's river, and back the water in these sloughs and this stream onto the parties' said lands, but only high tides and winter freshets increase the depth of the water on the stream on the appellant's land; that the highest tides of summer only raise the water on the land of the latter a few inches, but the highest winter tides and freshets raise it two or three feet; such freshets only occur two or three times during a winter; that on said stream, and on the respondent's land, about 12 miles below the south line of appellant's land, is a landing known as "Vincent's Landing," to which boats and scows run from Young's river, and bring and carry away freight; that in the years 1861 and 1869 persons ascended with boats from Young's river the said slough and stream to a point on respondent's land four or five rods above Vincent's landing, to where lay a large log across the slough, now known as the "foot log." The water there at that time was three feet deep at neap tide, and six feet deep at new-moon tide. That above the foot log, on the respondent's land, the channel was obstructed with logs and overhanging bushes; that, prior to 1878, the channel from Vincent's landing to a short distance below was from four to six feet wide, and about the same number of feet in depth, and high tides would fill and overflow the channel to a depth of some two feet; that in the year 1878 the then occupant of appellant's land, with the consent of R. Vincent, then occupant of respondent's land, cut out the foot log, and cleared the logs and bushes out of the stream and slough,

and cut away the points at crooked places thereof, so that small boats could pass from appellant's land to Young's river, and return at high tide; and about the same time the channel below Vincent's landing was so improved that large boats, wood-scows, steamers, and vessels ran to that point; that subsequent to 1882 appellant, with the consent of the then owners of respondent's said land, further improved the channel between his land and Vincent's landing, so that saw-logs were run down during winter freshets. He also, on high tides, boated wood, hay, and supplies on scows, 7 by 20 feet, from his place to said landing; that the appellant, prior to bringing the suit, had no public way of getting to market other than through this water-course, but that, since the commencement of the suit, a county road had been laid out from his land to a point on respondent's land at or near the end of a bridge, which within the (then) past year, had been built across said slough about two rods above Vincent's landing; that another county road across said bridge connected with the road above referred to, and ran across the respondent's land down to a navigable point on the slough below where respondent desired to dam the water-course in controversy, which was somewhere below Vincent's landing; that said county road from the bridge to said navigable point ran part of the way on a dike, and was not yet open to convenient travel; it cannot be traveled with a wagon; that the distance from the bridge to the navigable point was about three-quarters of a mile; that the land of respondent through which the said water-course ran was low, and subject to overflow by high tides, and the appellant desired to dike and dam the slough in order to reclaim it, and thereby greatly enhance its value; that to dike it so as not to cross the water-course would be more expensive than the manner proposed by respondent, and the latter would lose 8 or 10 acres thereof; that there was about 400,000 feet of timber which could be taken from appellant's land down the stream and water-course, besides wood and farm products, if they were kept open. Upon which said facts the said referee found, as conclusions of law, that the water-course in controversy was navigable from the bridge to Young's river, and subject to public use; that between the bridge and appellant's land the same was not subject to public use, but was the private property of respondent; that respondent had no right to obstruct said water-course below said bridge. The said report of the referee having been duly filed, the appellant's counsel moved the court to confirm it, and the respondent's counsel moved to set it aside; whereupon the said court found as facts that the respondent, at the time of the bringing of the suit, was the owner and in possession of lots 5 and 6 of section 10, township 7 N., range 9 W., in Clatsop county, Or., and that said lots were adjacent to the north boundary line of appellant's said claim; also that, since the commencement of the suit, a county road had been laid out from the land belonging to appellant to a point on respondent's land, at or near the

end of a bridge that crosses the said slough some two rods above a point thereon known as "Vincent's Landing," where it connected with another county road which ran across the land of respondent to a point on said slough, where the same was navigable, and which said point was below where respondent proposed to dike said slough; that during and since the year 1878 the occupants of appellant's land had, with the consent of occupants of respondent's land, cleared out, dug out, and straightened the said slough, from below or south of said Vincent's landing on respondent's land, up south on to appellant's land, so that small flat-bottomed boats could be navigated thereon at high stages of water, and logs could be floated out thereon at new and full-moon tides; but that, prior to such digging, clearing, and straightening, when the said slough was in its natural state, it could not be navigated with boats and logs, except at extreme high winter tides, above the point known as "Vincent's Landing," which point was entirely and wholly upon respondent's land, and could not be reached from appellant's land by any public highway, nor otherwise than by crossing the land of the former. And the said court thereupon set aside all the findings of fact of the said referee inconsistent with its findings of fact as above set out. Said court also set aside the conclusions of law as found by the referee, and instead thereof found the following: "That Vincent's slough is not a navigable slough above the point known as 'Vincent's Landing,' and that, therefore, plaintiff is not entitled to the relief prayed for in his complaint; but that this suit should be dismissed." Upon this finding of facts and law by the court a decree was rendered, dismissing the suit, at the cost of the appellant; which is the decree appealed from.

*George C. Fulton*, for appellant. *F. D. Winton*, for respondent.

THAYER, C. J., (*after stating the facts as above.*) The main question in this case is whether the respondent, at the time of the commencement of the suit, was obstructing and threatening to obstruct a navigable water-way leading from appellant's land across the land of respondent into what is known as "Young's River." The testimony bearing upon the question is rather voluminous, but extremely vague upon some of the material points in the case. The appellant contends that a certain slough, known as "Vincent's Slough," extends from his land, either directly to Young's river or into other sloughs connecting with it, constituting an uninterrupted course of navigable water from his premises to said river, which is admitted to be a navigable stream. It appears that said Vincent's slough extends across a part of respondent's land, south towards the land of appellant, and that a slough or gulch, in which flows a small stream of water, runs from the appellant's land into it; but that ordinary flood-tides reach the appellant's land through said slough or its branches is strongly controverted by the testimony of the respondent. It does appear, however, that the appellant,

his grantors and predecessors, opened a channel from said slough or gulch upon his land into said Vincent's slough at a point known as "Vincent's Landing," by clearing the logs and brush from the gulch, deepening the channel thereof, and cutting a channel or ditch through solid ground, and that he used the same at extreme high tides to float saw-logs from his premises to said slough at said point, and for other purposes, as found by the circuit court in its findings of fact. Whether this improvement of the channel renders Vincent's slough navigable from appellant's land to Young's river is, as I understand, the real point in issue between the parties.

The circuit court decided that Vincent's slough was not a navigable slough above Vincent's landing, and I think its conclusion upon that point was clearly correct. This court, in *Haines v. Hall*, 17 Or. 165, 20 Pac. Rep. 831, held that "the doctrine that a stream of water is navigable if of sufficient extent and capacity to float logs and timber from mountainous regions to market, and may thereby be utilized for the benefit and advantage of the community at large, cannot be extended so as to include small streams of only a few miles in length, although they rise during a few weeks in the year sufficiently high to be used to a limited extent, by the application of artificial means, to float logs and timber a short distance." In the present case the stream or water-course from appellant's premises to Vincent's landing was only a few rods in distance, and between those two points it had no capacity for general purposes of navigation. No one but the appellant can utilize it, and he can only for a few days during the year. There is no pretense that it can be of the slightest service to the public generally, or that it was intended to be so. Those who made the improvement did so for the sole benefit of the owners and occupants of the land now belonging to appellant, and if it were done with the consent of the owners of the land now belonging to respondent it would only amount to a temporary license, as a permanent right in favor of the appellant to maintain such a channel across the land of respondent could only be created by grant, or by prescription which presumes a grant. If the question, therefore, whether the appellant's right to have the respondent enjoined on account of the matters alleged in the complaint depends upon the navigability of the slough from Vincent's landing to appellant's premises, he must necessarily fail. But whether or not that is a vital point in the case, I have been unable to learn from the pleadings, proofs, and findings referred to in the foregoing statement. They vaguely hint that the respondent is diking his land somewhere below said landing. In what manner, however, he is doing it, or at what particular locality it is being done, does not appear. If he is doing the diking in such a manner that it will obstruct the navigation of the slough to said landing, from points below there, he is doubtless doing a wrong; but that fact, so far as I can discover from the transcript, is in the dark. The circuit court, it appears, dismissed the appellant's com-

plaint, upon the ground that the slough was not navigable above Vincent's landing, and, in the absence of any showing that the diking would interfere with its navigability, or with the rights of the appellant, we must conclude that it would not affect either. Hence the decree appealed from must be affirmed.

### KEEL v. LEVY.

(Supreme Court of Oregon. July 1, 1890.)

#### FRAUDULENT CONVEYANCES—PRINCIPAL AND SURETY—CHATTEL MORTGAGES.

1. Unless fraud or illegality be pleaded and proven by a preponderance of the evidence, the writings executed by the parties must be enforced according to their legal import.

2. Fraud is a matter of fact, which must be proven. It is never presumed. It may be established by circumstances; but the circumstances relied upon must be of such a satisfactory character as to convince the mind of the trier of the fact that the transaction was a sham, and not what it purports to be.

3. Whether when the holder of a note secured by a chattel mortgage causes the mortgaged property to be attached on another debt due to him by the mortgagor, and sold, and such mortgages purchases the same at the sale, and there is nothing to show that he intended to keep the mortgage alive as a lien, the mortgage is merged, *quære*.

4. When the principal and surety each mortgages his own property as security for the debt of the principal, and the surety pays the debt, the principal's mortgage given to secure such debt passes to the surety by operation of law, and he is subrogated to all of the rights of such creditor.

5. Where the principal and surety have both mortgaged property to secure the debt of the principal, the surety is entitled to have the property of the principal sold first, and applied in satisfaction of the debt.

6. The lien of a chattel mortgage on a growing crop follows the grain after severance and removal, and the money after sale.

(Syllabus by the Court.)

Appeal from circuit court, Marion county; R. P. Boise, Judge.

This suit is prosecuted by the respondent to secure a partition of certain personal property, consisting mainly of grain grown upon the defendant's farm, and some land leased of other parties. The grain was raised by the plaintiff and one Rickey as partners. During all of the times mentioned in the pleadings, Rickey was indebted to the defendant in a large amount of money. After the grain had been sown, Rickey executed a mortgage to one A. Grant on his interest in the grain, to secure the payment of \$700 which he had theretofore borrowed of Grant under a contract that said mortgage should be executed after the grain had been sown. Afterwards, for the sole purpose of additional security for the \$700 borrowed of Grant by Rickey, the plaintiff executed a mortgage on his interest, being one equal undivided third of the same crops. Plaintiff's note was for \$708.50. Keel's mortgage contains the following recital: "The above note, together with the mortgage to secure the same, is given by me to said A. Grant in consideration of \$708.50 loaned this day by said A. Grant to James M. Rickey at my special instance and request; and this note and mortgage is given by me to said A. Grant to secure said A.

Grant the payment of the note and mortgage given this day by said James M. Rickey for said sum of \$708.50, in case said James M. Rickey failed to pay on demand his said note; said note so given being dated April 2d, 1888, due one day after date, principal \$708.50, with interest at ten per cent. per annum from date until paid, and for reasonable attorney's fees; and that it is further agreed that, when said Grant's claim is fully satisfied, my responsibility is to cease." After the maturity of these notes, and when they were overdue, the plaintiff purchased them, as well as the mortgages, for the consideration of \$710. He then caused an action to be commenced in his name against Rickey to recover a large amount which Rickey then owed him, and caused Rickey's interest in said grain to be attached, harvested by the sheriff, and then sold, at which sale the plaintiff became the purchaser. The amount of plaintiff's judgment in said action was \$2,928.34 and costs, and the amount of plaintiff's bid for Rickey's interest was \$1,115.50. The sheriff, after his levy under the attachment, harvested all of said crops; and his expenses and charges amounted to \$1,058.79, which were paid by the defendant Levy.

Tilmon Ford, for appellant. J. J. Murphy, for respondent.

STRAHAN, J., (after stating the facts as above.) The fact that Keel executed his note and mortgage on his one-third interest in the crops as surety for the \$700 borrowed by Rickey of Grant must be taken as established by a clear preponderance of the evidence. Such is the plain import of the mortgage made by Keel to Grant, and it is not attacked for fraud either by the pleadings or directly by the evidence. *Misner v. Knapp*, 13 Or. 135, 9 Pac. Rep. 65. It is true the appellant refers to some of Keel's evidence on his cross-examination in relation to borrowing money, from which, it is suggested, an inference of fraud might be drawn; but I do not think this is enough. Nor is this evidence alone sufficient upon which to predicate any such conclusion. Fraud is a matter of fact, which must be proven. It is never presumed. It is true that direct evidence on the subject is rarely attainable. It may, therefore, be established by circumstances; but the circumstances relied upon must be of such a satisfactory character as to convince the mind of the trier of the fact that the transaction drawn in question was a sham, and not what it purported to be. The evidence relied upon by the appellant on this point falls short of that. Briefly, it is that Keel had in his possession about that time the sum of \$600; and, when questioned where he obtained it, the account he gave was unreasonable and improbable. Hence it is insisted that the loan from Grant was really for Keel's use, and that, therefore, he is the principal debtor, and Rickey the surety. There is a possibility that this assumption may be true, but in questions of this nature the court cannot act on possibilities. Proof that is satisfactory, that which is strong enough to overthrow the solemn writings executed by the parties

at the time, is requisite; and that I am unable to find in this record.

2. Treating these writings, then, for just what they purport to be, the question, what are the rights and liabilities thereby created? is presented for consideration. Whatever rights Grant had under the mortgages were transferred to Levy by the assignment, and he acquired no other thereunder. The facts, then, briefly recapitulated, are these: Rickey borrowed \$700 of Grant, and gave his promissory note therefor, secured by a chattel mortgage on an undivided one-third of certain growing crops. Afterwards Keel, as additional security for the same debt, made his promissory note, secured by a chattel mortgage on his undivided one-third of the same crops. After said notes fell due, Levy, for the consideration of \$710 paid to Grant, purchased said notes and mortgages, and they were assigned to him. He then caused Rickey's interest in the crop to be attached and sold on a debt due from Rickey to himself, and purchased the same at such sale. He now claims that the Rickey note remains unsatisfied, and that he may resort to the Keel mortgage for payment. To this there appear several objections. When Levy purchased Rickey's interest in that grain, being also the holder of the mortgage thereon, it is difficult to see why the mortgage interest was not merged. By that purchase the entire interest becomes vested in him, and there is nothing to show that he intended to keep the mortgage in force as a lien. 1 Jones, Mortg. § 871; Colton v. Colton, 3 Phila. 24; Klock v. Cronkhite, 1 Hill, 107; Shaver v. Williams, 87 Ill. 469; Lynch v. Pfeiffer, 17 N. E. Rep. 402. If a merger did take place, which we do not now deem it necessary to decide, for other reasons presently to be stated, then the mortgage ceased to exist,—it was drowned in the greater estate,—and Keel would be exonerated.

3. But there is another objection to the defense relied upon. If Keel's property should be applied to pay off Rickey's note and mortgage, he would at once be subrogated to Levy's rights under Rickey's mortgage, and would be entitled to have the property which Rickey mortgaged applied in payment of the debt. In other words, by operation of law, Rickey's note and mortgage would be assigned to him. 3 Pom. Eq. Jur. § 1419, and authorities there cited; Fields v. Sherrill, 18 Kan. 365; Low v. Smart, 5 N. H. 353; Muir v. Berkshire, 52 Ind. 149. But, by the sale of this mortgaged property, Levy has destroyed the fund to which Keel was entitled to resort to reimburse himself had he paid Rickey's debt; and, for that reason alone, I think Levy has precluded himself from resorting to Keel's property for payment.

4. One other objection: Where the principal and surety have both mortgaged property for the debt of the principal, the surety is entitled to have the property of the principal sold first, and applied in satisfaction of the debt. Nelmewicz v. Gahn, 3 Paige, 614; James v. Jacques, 26 Tex. 320. In this case the defendant, Levy, having caused this mortgaged property to be sold on another process for his own bene-

fit, has received the proceeds of the sale, and has the same now in his possession. Under the particular facts disclosed by this record, I think the law would apply such proceeds in exoneration of the plaintiff's property, and that Levy could not be permitted to apply the same on his individual debt to the injury of the plaintiff. That grain was mortgaged to secure Rickey's debt as well as the grain of the plaintiff, and that fact gave the plaintiff the right to insist that Rickey's grain should be first applied in payment of Rickey's debt. The defendant, Levy, stands in no position to contest or deny this right. Rickey's grain brought \$1,115.50. The sheriff's bill for harvesting the entire crop was \$1,058.79. Assuming, without deciding, that Rickey was properly chargeable with one-third of this expense, because he owned one-third of the grain harvested, his portion of the expense would be \$352.93. Deducting this amount from the proceeds of the sale, \$1,115.50, and there remained \$762.67 to be applied in discharge of Rickey's mortgage, or so much thereof as was necessary. It seems to me this view of the subject alone is enough to entirely dispose of the contention of the defendant. The propriety of this application of the money cannot be questioned, for the reason that the lien of a chattel mortgage on a growing crop follows the grain after severance and removal, and the money after sale. *Muse v. Lehman*, 30 Kan. 514, 1 Pac. Rep. 804; *Rider v. Edgar*, 54 Cal. 127.

5. But it was substantially conceded upon the argument that the fact is established by the evidence that the defendant paid for harvesting the grain \$866. The plaintiff gets the benefit of one-half of this sum, namely, \$433, which we have concluded to deduct from the decree appealed from. The decree appealed from will therefore be modified to this extent, and in all other respects affirmed. The appellant recovers costs in this court.

#### YEARANCE v. SALT LAKE CITY.

(Supreme Court of Utah. June 3, 1890.)

#### MUNICIPAL CORPORATIONS—OBSTRUCTION OF SIDEWALK.

In an action for damages alleged to have been caused by a pile of bricks which was placed by a city on and near a sidewalk, and continued to the time of the injury in the same condition in which it was left, it is not error to instruct that it was the duty of the city to keep its sidewalk reasonably safe, and to refuse to charge that the city is bound only to use reasonable care and diligence in keeping its walks in safe condition.

Appeal from district court, third district; T. J. ANDERSON, Justice.

S. A. Merritt and J. L. Rawlins, for appellant. John M. Zane and O. W. Powers, for respondent.

HENDERSON, J. This action was brought in the third district court to recover damages claimed to have been occasioned by obstructions placed upon the streets by the defendant. The complaint, after alleging the corporate character and duty of defendant relative to streets, states the cause of action as follows: "And the plaintiff further alleges that the defend-

ant, on or about the 21st day of November, A. D. 1888, placed, or caused to be placed, a pile of bricks on the sidewalk, and on the north side of Third South street, at or near where the west line of Third West street intersects the same in said city,—said pile of bricks extended across a portion of the sidewalk where footmen were accustomed to walk,—and negligently left the same there.” It further avers the injury, the exercise of due care by the plaintiff, and the damages. The defendant’s answer to that part of the complaint above quoted is as follows. “And for further answer to plaintiff’s complaint the defendant alleges that, in the operation and maintenance of its system of water-works for supplying the inhabitants of said city with water for culinary and other purposes, it becomes necessary from time to time to repair the water-pipes, gates, and valves pertaining to said water-works, and to repair and replace the curbing surrounding the same; that, in making necessary repairs, and renewing the curbing of a water-gate or valve situated on Third South street, near the intersection of Third West street, in said city, about the 21st day of February, 1889, about seven hundred or eight hundred bricks were taken to said water-gate or valve, by order of the superintendent of water-works for Salt Lake City, for the purpose of repairing and renewing the curbing thereof; and said bricks were carefully piled behind a tree opposite said valve, on the outer edge of the sidewalk, and in such a manner and position as to be the least possible obstruction thereto; that immediately thereafter the workmen commenced to lay said bricks, and construct with them the necessary curbing for said water-gate or valve; that the said repairs or construction of said curbing were prosecuted with due diligence, and as rapidly as possible, until their completion, about the 23d of said month; that, at all times while said bricks remained on said sidewalk and street, they were in such a position as to cause no obstruction or danger to persons passing along said street or sidewalk, \* \* \* that said bricks were not permitted to remain on said sidewalk any longer than was absolutely necessary for the completion of the aforesaid public work and repairs; that, at all times while they did remain, they were so placed as to leave the sidewalk free and unobstructed.”

The case was brought to trial before a jury, and the court, after stating the plaintiff’s complaint, among other things charged the jury as follows: “The defendant, by its answer, admits the placing of about seven or eight hundred brick upon said sidewalk about the time stated in the complaint, and avers that the same were placed on the outer edge of the sidewalk, so as not to constitute an obstruction to travel thereon; that the placing of said brick at such a place was necessary in order to make certain repairs to the water-works of said city; and that they were not permitted to remain there longer than was reasonably necessary in order to make said repairs. \* \* \* It is the duty of the defendant to keep its sidewalks in a

reasonably safe condition, so that persons can pass along and through the same safely, by the exercise of ordinary care and prudence, by day or by night; and the failure to do so renders it liable to any one injured by reason of such failure, unless he is himself guilty of negligence contributing directly to the injury. Negligence is the absence or want of that degree of care usually observed by an ordinarily careful and prudent person; and, before the plaintiff can recover in this action, he must have satisfied you, by a clear preponderance of the testimony, that the injuries for which he sues in this action were caused by the fault and negligence of the defendant, without any fault or negligence on his part contributing thereto. If you find from the evidence, by a clear preponderance thereof, that the defendant, by its agents or employes, placed, or caused to be placed, on the sidewalk in question, a pile of bricks, and suffered the same to remain there on the night of the 21st of November, 1888, without placing any guards around, or lights upon or near the same, to protect travelers thereon by warning persons of danger, and that by reason thereof travel on the sidewalk was rendered dangerous, it is for you to say whether or not it was negligence of the defendant to leave said sidewalk in said condition.” The defendant requested the court to give several instructions to the effect that it was only the duty of the city to use reasonable care and diligence in keeping its streets and sidewalk in safe condition, and that it must be shown that the city had notice of the defect, or that it had existed such a length of time as to imply notice, all of which were refused. The jury found a verdict for the plaintiff, upon which judgment was entered. Motion for a new trial was denied, and the defendant appeals from the judgment and order denying the motion for a new trial.

The appellant contends in this court that the judgment and order should be reversed for the following reasons: *First*, that the court erred in instructing the jury that “defendant, by its answer, admits the placing of about seven or eight hundred brick upon said sidewalk about the time stated in the complaint;” *second*, that the court erred in instructing the jury that “it is the duty of the defendant to keep its sidewalks in a reasonably safe condition,” etc.; *third*, that the court erred in refusing to give the instructions asked by defendant.

As to the first claim of error, we think the court correctly stated the substance of the answer. It is expressly stated therein that the bricks were taken to and piled in the street by the agent of the defendant, in the discharge of his duties as such.

As to the second and third points made by appellant, they can be discussed together, for they relate to the same subject. The appellant’s contention is that, according to the instruction given, the duty of the city to keep its streets and sidewalks in safe condition is absolute and unconditional; that according to it the city would be liable for a defect happening

by a sudden emergency of which it had no notice; that, therefore, the instruction given was erroneous, and instead thereof the jury should have been instructed, as requested, that it was only chargeable with reasonable diligence and care to ascertain the condition of its streets and sidewalks, and that it would only be liable for injuries caused by defects of which it had notice, or which had existed so long as to charge it with notice. It will be seen from the complaint above quoted that this action was not brought for the neglect of the corporation to put the streets in repair, or to remove obstructions therefrom, or remedy causes of danger occasioned by the wrongful acts of others, but the ground of the action is the positive misfeasance of the corporation. The charge is that the defendant itself put the obstruction in the street which caused the injury, and therefore no notice was required as a condition of recovery. 2 Dill. Mun. Corp. § 1020; 2 Thomp. Neg. 762. Instructions to juries should always be given and construed with reference to the issue on trial. Here the charge was that the defendant had itself, by its positive and affirmative act, placed a dangerous obstruction in the street; and as to that charge, and such acts of the defendant, it was its absolute and unconditional duty to keep its streets and sidewalks in a reasonably safe condition. To have instructed the jury relative to the conditions upon which the city would be liable for damages caused by defects in its streets other than those which it had itself put there would have been instructing them about a case not on trial, and would have been misleading. There is not error in the record, and the judgment and order appealed from should be affirmed.

BLACKBURN, J., concurs. ZANE, C. J., did not sit in this case, having been of counsel.

#### JOHNSON V. UNITED STATES.

(Supreme Court of Utah. June 9, 1890.)

#### CLAIMS AGAINST UNITED STATES—APPEAL—FEDERAL AND TERRITORIAL COURTS.

While, in an action under the act of March 3, 1837, "to provide for the bringing of suits against the United States," (24 U. S. St. p. 505, c. 359,) an appeal lies to the supreme court of the United States by virtue of section 9 of that act and Rev. St. U. S. § 707, yet, if no such appeal be taken by either party, one may be had to the supreme court of the territory, under Rev. St. U. S. § 1910, giving to the district courts of the territories the same jurisdiction as is vested in the circuit and district courts of the United States, and providing that appeals in all such cases may be had to the supreme courts of the territory.

Appeal from district court, first district; J. W. BLACKBURN, Justice.

George Sutherland and S. R. Thurman, for appellant. L. S. Varian, for respondent.

ZANE, C. J. This action was instituted by the plaintiff, in the district court of the first judicial district, to recover fees

for services as commissioner in United States cases. Upon a hearing of the case, the court rendered judgment against the plaintiff, from which he appealed to this court. It was brought under "An act to provide for the bringing of suits against the United States," in force March 3, 1837, (24 U. S. St. p. 505, c. 359.) Its provisions, so far as necessary to refer to them for the purposes of this case, are as follows: Section 1. "The court of claims shall have jurisdiction to hear and determine \* \* \* all claims founded upon the constitution of the United States, or any laws of congress, except for pensions, or upon any regulation of any executive department, or upon any contract, express or implied, with the government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty, if the United States were suable." This section gives the court of claims jurisdiction of the causes of action described in it; and section 2 provides that the district courts of the United States shall have concurrent jurisdiction with the court of claims, as to all of such causes, where the amount of the claim does not exceed \$1,000; and the circuit courts of the United States shall have such concurrent jurisdiction in all of such cases when the amount claimed exceeds \$1,000, and does not exceed \$10,000. And section 9 reads as follows: "The plaintiff or the United States, in any suit brought under the provisions of the act, shall have the same rights of appeal or writ of error as are now reserved in the statutes of the United States in that behalf made, and upon the conditions and limitations therein contained." Section 707 of the Revised Statutes of the United States reads: "An appeal to the supreme court shall be allowed on behalf of the United States from all judgments of the court of claims adverse to the United States, and on behalf of the plaintiff in any case where the amount in controversy exceeds three thousand dollars."

In *U. S. v. Davis*, 131 U. S. 36, 9 Sup. Ct. Rep. 657, the court, after referring to the above provisions of law, said: "Inasmuch as the object of the latter act was to enable the district and circuit courts to exercise concurrent jurisdiction with the court of claims in respect to suits against the United States as therein provided, in our judgment the right of appeal reserved to the government 'in the statutes of the United States in that behalf made,' before the enactment of this act, was the right of appeal reserved in the statutes relating to the court of claims; and, as that right could be exercised by the United States in the instance of any judgment of the court of claims adverse to the United States, it follows that the same right can be exercised by the United States in any case of the prosecution of a claim in the district or circuit courts of the United States under said act." Section 1910, Rev. St. U. S., reads: "Each of the district courts in the territories \* \* \* shall have and exercise the same jurisdiction in all cases arising under the constitution and laws of the

United States as is vested in the circuit and district courts of the United States; \* \* \* but writs of error and appeals in all such cases may be had to the supreme court of each territory, as in other cases." By section 9, above mentioned, as construed in *U. S. v. Davis*, supra, the same right of appeal secured in the law relating to the court of claims is reserved, whether the action is brought in that court, or in the district or circuit courts of the United States; and, as the district courts of the territories, within their respective limits, have the same jurisdiction in all cases arising under the constitution and laws of the United States as is vested in the circuit and district courts of the United States, it follows that the right of appeal to the supreme court of the United States exists in behalf of the United States in all such cases so instituted in the district courts of the territories, and on behalf of the opposite party when the amount in controversy exceeds \$3,000.

The act of March 3d first made claims against the United States like the one in controversy actionable. Judgments in the district courts of the territories in such causes would be appealable to the territorial supreme courts under section 1910, referred to, unless forbidden by section 9, quoted. If such appeal does not lie, then the judgments of the district courts of the territories are final in all such cases when the claim in controversy does not exceed \$3,000. That section does not, in express terms, deny the right of such appeal. Therefore, if such appeal is denied, it must be by implication. The law does not favor repeals by implication, and the same rule applies where the implication, if allowed, would so limit and narrow an existing law as to deny to parties important rights which they otherwise would enjoy. The actions authorized by the law under which this suit was brought are only for claims against the United States. An appeal from the district to the supreme court of the territory cannot deprive either party of any right of appeal to the supreme court of the United States under the act by virtue of which this suit is prosecuted; for the section in which such right is reserved declares "that the plaintiff or the United States, in any suit brought under the provisions of this act, shall have the same rights of appeal or writ of error as are now reserved in the statutes of the United States in that behalf made," and that means, as seen, the right of appeal to the supreme court of the United States given in section 707. Such right of appeal to the supreme court of the United States exists as to all suits for claims against the United States under the act. The right of appeal to the supreme court of the territory cannot deprive either party of this right of appeal to the supreme court of the United States. If no appeal is taken to the latter, one may be had to the former, and in that way both rights may stand together. It follows that the motion to dismiss for want of jurisdiction of the appeal by this court must be denied. The motion is overruled.

HENDERSON, and ANDERSON, JJ., concur.  
v.24p.no.4—17

## GILA R. I. CO. v. WOLFLEY.

(Supreme Court of Arizona. April 18, 1890.)

## APPEAL—RECORD—WAIVER OF ERRORS.

1. A failure to file an assignment of errors will be deemed a waiver of all errors not apparent upon the record, and which do not go to the foundation of the action.

2. Motion for new trial, and ruling thereon, will not be considered by this court unless embodied in a bill of exceptions.

3. Time of presentation and filing of a bill of exceptions must appear of record.

(Syllabus by the Court.)

Appeal from district court, Maricopa county; W. W. PORTER, Judge.

H. N. Alexander and Frank Cox, for appellant. Baker & Campbell, for appellee.

SLOAN, J. An inspection of the record in this case shows that no assignment of errors has been filed. The case should be dismissed for the failure to comply with the plain provision of paragraph 940, Rev. St. 1887, which requires appellant to file with the clerk of the court below his assignment of errors. The effect of a failure to file any assignment of errors is to waive all errors not apparent upon the record, and which do not go to the foundation of the action. *Roy v. Bremond*, 22 Tex. 626; *Burns v. Wiley*, 35 Tex. 20; *Railroad Co. v. Scanlan*, 44 Tex. 649. In the absence of an assignment, the court may either affirm the judgment of the court below, or dismiss the appeal. *Dyer v. Dement*, 37 Tex. 431. The objection having been made by appellees at the hearing of the case, this may be taken as a motion to dismiss the appeal. *Chevallier v. Whitaker*, 8 Tex. 204.

Numerous other omissions to comply with the statutory provision regulating appeals are disclosed by the record. There is no statement of facts, nor anything purporting to be in the nature of a statement of facts. There is nothing but a minute entry of the clerk showing that the motion for a new trial was overruled, and no bill of exceptions was preserved to the ruling, if any there was. A bill of exceptions was prepared to a ruling of the court made during the trial, but was not settled until 90 days after the conclusion of the trial; but whether it was presented within 10 days after the trial, or filed during the term, is not disclosed by the record. The appeal is dismissed.

WRIGHT, C. J., and KIBBEY, J., concurring.

## RUFF v. HAND.

(Supreme Court of Arizona. April 18, 1890.)

## MOTION FOR NEW TRIAL—APPEAL—NOTICE—BOND.

1. Paragraph 887, Rev. St. 1887, requires that a motion for a new trial shall be determined at the term in which made. Held to be mandatory.

2. Notice of appeal must be made during the term, and the appeal-bond must be filed within 20 days after the term at which judgment was rendered; otherwise this court has no jurisdiction.

(Syllabus by the Court.)

Appeal from district court, Maricopa county; W. W. PORTER, Judge.



*Goodrich & Street*, for appellant. *Baker & Campbell*, for appellee.

SLOAN, J. This cause was tried at the May, 1888, term of the district court of Maricopa county. The judgment was entered on the 14th day of June, 1888. The first Monday in November following was the day fixed by law for the beginning of the succeeding term of said court. There is a minute entry of the clerk in the transcript showing that a motion for a new trial in this case, submitted at the May term, was overruled by the court on the 3d day of December, 1888, and notice of appeal given on that day. The bond on appeal was filed on the 12th day of December, 1888.

Paragraph 887, Rev. St. 1887, requires that a motion for a new trial shall be determined at the term when the motion is made. This requirement of the statute is mandatory. If a motion for a new trial be not acted upon during the term, it is discharged at the end of the term by operation of law. *McKean v. Ziller*, 9 Tex. 58. The remedy, in such a case, is to apply to the court for action upon the motion before the end of the term. *Laird v. State*, 15 Tex. 317.

The notice of appeal must be made during the term, and the bond on appeal must be filed within 20 days after the term, at which final judgment is entered. These requirements must be strictly complied with to give this court jurisdiction. In this case no notice of appeal was made during the term at which the judgment was entered, and no bond given until more than 20 days after the end of the term. These facts appearing upon the record, the appeal must be dismissed for want of jurisdiction. It is so ordered.

WRIGHT, C. J., and KIMBBY, J., concurring.

#### CLANTON V. RYAN.

(Supreme Court of Colorado. June 13, 1890.)

#### ELECTIONS—CONTEST—TRIAL—RECOUNT—EVIDENCE.

1. A county election contest may be tried notwithstanding a change of county judges after the commencement of the trial; but in such case the trial must be *de novo*.

2. Where the cause of contest alleged is error, mistake, fraud, malconduct, or corruption in the counting or declaring the result of an election, a recount of the ballots should be ordered as a matter of course upon request of the complaining party.

3. Upon the production of evidence tending to show error, mistake, fraud, malconduct, or corruption on the part of the election board, or any of its members, in the matter of receiving, numbering, depositing, or canvassing the ballots, or other illegal or irregular conduct in respect thereto, an inspection and comparison of the ballots with the poll-lists should be allowed, in connection with the oral evidence in reference thereto.

4. In a county election contest, the statement of contestor that he is "an elector of the county" is a material averment, and, if denied by the answer, must be proved, or the contest as such must fail; nor is the contestor excused from producing evidence in support of such averment on the ground that other competent evidence is refused.

(Syllabus by the Court.)

Appeal from Lake county court.

The facts necessary to an understanding

of the opinion, as disclosed by the record, are as follows: At the general election in 1889, there were three candidates for the office of sheriff of Lake county—Timothy B. Ryan, appellee; Harmon R. Clanton, appellant; and Willis A. Loomis. The result, as certified by the county board of commissioners, showed that Ryan had a plurality of 193 votes over Clanton, the next highest competitor. Thereupon Clanton instituted proceedings against Ryan pursuant to the act of April 10, 1885. Sess. Laws, 193. The statement of contest, filed pursuant to section 14 of said act, contains, among other things, allegations to the effect that contestor was at the date of the election, and still is, an elector of said Lake county; that there were errors, mistakes, fraud, and corruption in the count and return of the votes from certain precincts of the county, and that such errors and mistakes thus fraudulently made were sufficient to change the result of the election, whereby the will of the electors was annulled and defeated, and the contestor deprived of the office to which, but for the errors, mistakes, and fraud aforesaid, he would have been declared lawfully elected. The answer denies the alleged errors, mistakes, fraud, and corruption in the count and return of the votes, and also denies that contestor was at the date of the election, or at any time since said date, an elector of said county. The issues being settled, the contest came on to be tried before Hon. GEORGE S. PHELPS, county judge; the trial commencing on December 26, 1889. A large amount of testimony was introduced in behalf of the contestor, including the testimony of nearly 100 witnesses, and the examination of a large number of ballots which were alleged to have been fraudulently counted and returned. This evidence tended to show many gross errors, mistakes, and frauds in the count and return of the votes, and other misconduct of some of the election officers, as alleged in said statement. Pending the trial, January 13, 1890, the term of office of the presiding judge expired; and thereafter, the case being called for trial before Hon. WILLIAM R. HALL, the new county judge, it was objected by counsel for contestee that the trial, having been commenced before one judge, could not be proceeded with before another. The court, however, ruled that the contest might still be tried, but that the trial must be *de novo*. Counsel for contestor objected and excepted to this ruling, and also to the refusal of the court to consider the testimony taken before the former judge; such testimony having been "taken in full, and filed in said cause," as required by the statute. Counsel for contestor then offered the ballots which had been cast in certain precincts as primary evidence to contradict and dispute the return and certificate of the judges of such precincts, and to support the particular and specific allegations of the statement that the election judges, by malconduct, fraud, and corruption, had erroneously counted votes in favor of contestee which had really been cast for contestor. Objection to this offer was sustained on the ground that there had been no proof that would warrant the court in

opening the ballot-boxes; the court holding, however, that contestant would be permitted to offer any legitimate proof of the fraud and corruption as charged. Counsel for contestant reserved exceptions; and, the case being decided in favor of contestee, this appeal is brought. The section of the act of 1885, (Sess. Laws, 198,) specially considered in the opinion, reads as follows: "Sec. 17. Immediately after the joining of issue as aforesaid, the county judge shall fix a day for the trial to commence, not more than twenty, nor less than ten, days after the joining of issue, as aforesaid, and such trial shall take precedence of all other business in said court. The testimony may be oral, or by depositions taken before any officer authorized to take depositions. Any depositions taken to be used upon the trial of such contest may be taken upon four days' notice thereof. The county judge trying such cause shall cause the testimony to be taken in full, and filed in said cause. The trial of such causes shall be conducted according to the rules and practice of the county court in other cases. An appeal from the judgment and final determination in any cause may be taken to the supreme court, the same as in other causes tried in said court: provided, that such appeal be prayed for, bill of exceptions settled, bond for costs executed and filed, and the record transmitted to the clerk of the supreme court, within twenty days from the date of entering such judgment. The supreme court shall advance such cause to the head of the calendar, and hear and determine the same with all reasonable dispatch."

A. S. Weston, S. J. Hanna, Geo. Goldthwaite, and Geo. R. Elder, for appellant.  
A. T. Gunnell, for appellee.

ELLIOTT, J., (after stating the facts as above.) No extended argument is necessary to demonstrate that it was the design of the framers of our constitution that laws should be enacted whereby contested election cases might be thoroughly tried, and impartially and speedily determined. In a republic the people are sovereign, and their sovereignty is primarily expressed in the choice of those who are to exercise governmental powers. In monarchical governments, it is regarded as one of the highest crimes to attempt to overthrow the authority of the reigning prince. As citizens of a free republic, we should at least be as loyal to our country and its institutions as the subjects of a monarchy are to theirs, and should regard any attempt to defeat the will of the sovereign people in the lawful exercise of the elective franchise as the highest crime against the state or nation. In the light of these fundamental truths, the obligation of every department of the government, and the duty of all good citizens, become clearly apparent. Stringent laws should be carefully enacted to secure fairness and prevent fraud in the conduct of elections; and such legislation should be liberally construed, and rigidly enforced. Upon the faithful discharge of these duties and obligations depends the stability and perpetuity of our free institutions.

By the act of 1885 (Sess. Laws, 193) it

is provided that contested election cases of county officers, except county judges, shall be tried by the county judge or county court of the proper county. The issues are required to be speedily made up, and the trial to be fixed for an early day; and in case of appeal the cause is to be taken direct to the supreme court, where it has precedence over ordinary cases. Though we shall not undertake to notice all the assignments of error presented, yet, as certain questions of paramount public concern, and of great practical importance in the trial of election contests, are involved in the record, and have been fully argued by counsel, we shall endeavor to give them due consideration.

In our opinion, Judge HALL was right in ruling that a trial of the contest might be had upon his accession to the bench, notwithstanding the term of Judge PHELPS had expired after the trial had commenced. Elections for county judges take place once in three years, but it is only once in six years that such elections occur simultaneously with the general election of county officers. While county election contests, if promptly proceeded with, may be concluded before the date when newly-elected county officers are required to qualify, yet we see no reason to suppose that the law relating to the trial of such contests was framed specially with reference to that event; and, if such trials are not then concluded, there seems to be no reason why they should not be finished or retried afterwards. Public policy undoubtedly requires that election contests shall be tried as speedily as the rights of the parties, and the orderly administration of justice, will permit. Every citizen is, or should be, interested in having such contests determined according to the real choice of the lawful electors, as expressed at the polls, without regard to his individual preference. Section 17 of the act of 1885, supra, provides that "the county judge trying such cause shall cause the testimony to be taken in full, and filed in said cause." From this language, it is argued with much force that the new judge should have taken up the trial where the retiring judge left it, and should have considered the evidence taken by his predecessor as substantive evidence in the cause. In view of the hardships resulting from mistrials which are liable to occur in cases of this kind, especially where a change of county judges follows a general election of county officers, we might be inclined to hold that such was the purpose and intent of requiring the testimony to be thus preserved, were it not that the very next sentence of the act requires that "the trial of such causes shall be conducted according to the rules and practice of the county court in other cases." By the words "other cases" must be understood ordinary civil actions. It certainly is not "according to the rules and practice" in the trial of ordinary civil actions before a court of record for one judge to hear the evidence, or a part thereof, orally, and then for another judge to render a finding and judgment upon such evidence, however perfectly the same may have been preserved. It is more probable that the object of requiring the testimony

to be preserved was for convenient reference afterwards, or for use on appeal, or as a deposition in case a second trial should be had when witnesses should have died or removed from the county.

From the allegations of the statement in this case, it appears that the contestant undertook to show that certain ballots cast by legal voters were either falsely counted, and so made the basis of a false return, or that they were surreptitiously changed or destroyed by some of the election officers, and other and different ballots substituted in their stead. To sustain these allegations, oral testimony, in connection with the ballots and the poll-lists, was competent evidence to be introduced at the trial. When the ballots and poll-lists are produced from the possession of the proper custodian, it is presumed, *prima facie*, that a ballot bearing the number opposite the name of an elector on the poll-list shows how such elector voted. When it is attempted to overthrow this *prima facie* presumption by oral evidence, it is important that the trial judge should have an opportunity to hear and see the living witnesses, if they can be produced, in order that he may the better pass upon their credibility and the weight of their evidence.

Under the causes of contest set forth in the sworn statement of the contestor, a recount of the ballots in the precinct where error, mistake, fraud, malconduct, or corruption was charged should have been ordered as a matter of course upon request of the complaining party. A mere recount does not involve any exposure of the secrecy of the ballot. Upon the production of evidence tending to show error, mistake, fraud, malconduct, or corruption on the part of the election board, or any of its members, as charged, in the matter of receiving, numbering, depositing, or canvassing the ballots, or other illegal or irregular conduct in respect thereto, an inspection and comparison of the ballots with the poll-lists should also have been allowed, in connection with the oral evidence in reference thereto. The secrecy of the ballot is not so important as its purity; and when, in a proper proceeding, there is evidence tending to show that the ballots of electors have been changed, tampered with, or destroyed, either by mistake or by the fraudulent conduct of any member or members of the election board of any precinct, or any other person or persons, it is the right of the public, and of the electors themselves, as well as the candidates, to have such matters thoroughly investigated; and courts of justice, under such circumstances, should be swift and fearless to assist in all lawful and proper ways to ascertain the truth in respect to such charges, and to rectify as far as possible any and all wrongs, whether of mistake, negligence, or crime, which may be proved to have been committed against the elective franchise.

In an election contest proceeding such as this, the averment in the statement of contestor that he is "an elector of the county" is a material averment. (Act 1885, p. 197, § 14;) and if denied by the answer, as in this case, it must be proved, or the con-

test as such must fail. Nor can the contestor, on appeal to this court, excuse the non-production of evidence in support of such averment, on the ground that competent evidence in support of other averments was offered and refused on the trial. The contestor having rested his cause in the court below without offering any evidence that he was an elector of the county, the contest was rightly dismissed, and the judgment is accordingly affirmed.

PEOPLE ex rel. RUCKER v. DISTRICT COURT OF ARAPAHOE COUNTY.

(Supreme Court of Colorado. June 13, 1890.)

MANDAMUS TO DISTRICT COURT—JUDGES.

1. The writ of *mandamus* may be used to command a subordinate court to proceed to judgment; but when the act to be done is of a judicial or discretionary character, the kind of order or judgment to be rendered cannot be thus controlled or directed. The writ cannot properly usurp the functions of a writ of error, or take the place of an appeal; nor will it lie against a subordinate court unless it be clearly shown that such court has refused to perform some manifest duty.

2. In Colorado two or more district judges cannot lawfully sit and act together as a district court except as they sit in bank for the purposes specified in the act of April 2, 1887.

(Syllabus by the Court.)

C. I. Thomson, H. B. Johnson, S. D. Walling, and A. W. Rucker, for petitioner. L. S. Dixon, C. J. Hughes, Jr., and Geo. J. Boal, for respondent.

ELLIOTT, J. This is an original application to this court upon petition and notice for a writ of *mandamus* against the district court of Arapahoe county. The cause is submitted upon the petition and answer. There is but little conflict between the allegations of the two pleadings; but to the extent they differ the averments of the answer, not being controverted, must, for the purposes of this hearing, be taken as true. The facts necessary to an understanding and determination of this application, as disclosed by the petition and answer, are substantially as follows: The district court of Arapahoe county has four judges, and holds three terms of court a year, commencing in January, April, and September, respectively. The relator, Rucker, as plaintiff, commenced an action in said court against Young and others, as defendants, to enforce the specific performance of an alleged contract in reference to an interest in a certain mining claim in Pitkin county, Colo., and for other relief. Said cause came on for hearing at the September term, 1889, before Hon. THOMAS B. STUART, one of the judges thereof; and at the same term the court made certain findings of fact, and rendered a certain decree in favor of the plaintiff in said cause, by which it was ordered and adjudged, *inter alia*, that an accounting be had between the parties in said cause; that one A. B. Seaman, Esq., be appointed referee to take the accounting, and also to take testimony, and ascertain a proper description by metes and bounds of that portion of the mine in litigation, and to make report to the court concerning his actings and doings in the premises within 90 days from the date of

said decree. The cause was thereupon continued for further proceedings. Shortly after rendering said decree, and at the same term of the court, the defendants Young et al. filed their motion for a new trial. The motion was continued till the succeeding January term of the court, when, the term of office of Judge STUART having expired, the motion was, by consent of parties, heard before Hon. W. S. DECKER and Hon. GEORGE W. ALLEN, two of the judges of said district court. The motion having been submitted, it was afterwards, and at the April term of said court, 1890, ordered by the said judges DECKER and ALLEN that said decree be set aside and for naught held, and that the cause stand for further proceedings before the court. Shortly thereafter, at the same term of the court, and before taking any other step in the litigation, plaintiff, Rucker, filed his motion in said cause, asking the court to fix the time when the testimony to be taken before said referee should be closed and the report made, and to direct the referee to proceed with all due dispatch. This motion was filed upon the theory that the hearing and order for a new trial was a nullity, inasmuch as the statute requires the judges to "sit separately for the trial of causes and the transaction of business." The motion to expedite the proceedings before the referee, having been heard in said district court before Hon. DAVID B. GRAHAM, one of the judges thereof, was denied. By the petition herein we are now asked to grant a writ of *mandamus* against said district court, commanding it to vacate, set aside, and expunge from its records the aforesaid order made by Judges DECKER and ALLEN, granting a new trial in said cause, and commanding said court to fix a time when the testimony shall be closed and report made by the referee as aforesaid.

The grounds upon which a superior court exercises jurisdiction by *mandamus* to control or direct the proceedings of subordinate courts have been so thoroughly elucidated by judicial authority, and are so well understood, as to require no extended discussion. The writ of *mandamus*, in modern practice, takes the place of the ancient writ of *procedendo ad iudicium*, by which a subordinate court was commanded to proceed to judgment, that is, to hear and determine a cause or matter properly brought before it for adjudication; but when the act to be done was of a judicial or discretionary character, the writ was not used to control or direct the kind of order or judgment to be rendered. The writ of *mandamus* cannot properly usurp the functions of a writ of error, or take the place of an appeal; nor will it lie against a subordinate court unless it be clearly shown that such court has refused to perform some manifest duty. *Union Colony v. Elliott*, 5 Colo. 371; *High. Extr. Rem.* §§ 147-149, 188; *Mos. Mand.* 19 et seq. Applying the foregoing principles to the circumstances of the present case, it is unnecessary to determine the character of the motion for a new trial filed by the defendants Young et al.; for, whether it be the statutory motion, which may be interposed as a matter of right "after trial

and decision" in every civil action, as provided by chapter 17 of the Code, or whether it be regarded as a petition for rehearing in an equitable action, sometimes allowable in the sound discretion of the court, at an interlocutory stage of the controversy before the final decision thereof, the motion having been interposed in good faith, either party was entitled to have it disposed of, and until disposed of the court is not bound, as a matter of right, to proceed with the litigation by making any order to expedite the consideration of the case by the referee. It follows, therefore, that if the order made by Judges DECKER and ALLEN, granting a new trial in the case of Rucker v. Young et al., is, as contended by counsel for relator, an absolute nullity, then the motion for a new trial, or petition for a rehearing, remains undisposed of, and plaintiff is not entitled, as we have seen, to proceed with the litigation before the referee. If the order made by the two judges was valid, then the interlocutory decree by which the referee was appointed has been vacated, a rehearing has been granted, and the trial cannot proceed before the referee, but must be recommenced *de novo*. If the order made by the two judges be merely erroneous or irregular, then the remedy must be by some other proceeding than *mandamus*, so that upon whatever theory the application for a writ of *mandamus* in this case is based it cannot be sustained.

Though we might do so, it would hardly be excusable to conclude this opinion without determining which of the foregoing theories is the true one. To leave conclusions thus hypothetically expressed, would be to embarrass, rather than aid, the district court by the decision. The question, moreover, is fairly involved in the record, has been ably argued by counsel, and is of much practical importance. Upon due consideration, we feel constrained to say that two or more district judges cannot lawfully sit and act together as a district court except as they sit in bank for the purposes specified in the act of April 2, 1887. The first section of that act reads as follows: "In any district court composed of more than one judge, each of said judges shall sit separately for the trial of causes and the transaction of business, and shall have and exercise all the powers and functions, as well in vacation of court as in term-time, which he might have and exercise if he were the sole judge of said court." *Sess. Laws* 1887, p. 260. Section 3 of said act provides that the judges may sit in bank for certain specified purposes, and "for no other purpose whatever." The language of the act, as well as the manifest object of providing additional judges of the same court, leave no room for construction as to the mode in which the judges are required to sit and transact business. In the trial of causes, and in the hearing and determination of any matter of purely judicial cognizance pending in the district court, each judge must sit and act alone. He must exercise all the powers and functions of the court, and assume the full responsibility in the decision of each and every cause, demurrer, motion, and the like, coming before him for adjudication,

as if he were the sole judge of said court. Two or more judges, by sitting together, cannot share or divide such responsibility. They cannot thus jointly hear and determine, and render a valid and binding judgment or order in any cause. It is not to be inferred from this that every order in a civil action thus made by consent of the parties, and afterwards accepted and acted upon by them without objection, can be repudiated at any subsequent stage of the litigation. Such question is not before us. In this case it appears that, though the parties consented to the hearing of the motion before the two judges, they did not acquiesce in the decision thereof, but promptly repudiated it; and, inasmuch as the record affirmatively shows that the hearing was had and the decision rendered by the two judges, the order in such form cannot be sustained. It is *coram non jure* upon its face. *State v. Tolle*, 71 Mo. 645; *Duryea v. Traphagen*, 84 N. Y. 652; *Courson v. Browning*, 78 Ill. 209; *Mining Co. v. Howcutt*, 6 Colo. 574. It follows from the foregoing views that the motion for a new trial in *Rucker v. Young et al.* remains pending and undisposed of, to be hereafter heard and determined by the court in the regular exercise of its jurisdiction, and that the application for a *mandamus* must accordingly be denied.

#### WIER V. JOHNS.

(Supreme Court of Colorado. June 20, 1890.)

EQUITY—REFORMATION OF DEEDS—FRAUD AND MISTAKE—EVIDENCE.

On a bill to set aside a conveyance, it appeared that plaintiff had agreed to donate to defendant land, in consideration of his erecting a factory upon it. There was a dispute as to whether the tract to be donated was to contain 10 or 12 acres; and in order to settle the matter the land was surveyed and platted, and the parties agreed on a conveyance of certain tracts by metes and bounds. Plaintiff assisted in the survey, and could easily have ascertained exactly how many acres the tracts contained. Before executing the conveyance, and after the tracts had been platted, he was informed that they contained considerably more than 10 acres. Held, that the conveyance was not obtained by fraud, nor made under misapprehension or mistake, and that plaintiff was not entitled to relief.

Commissioners' decision. Appeal from district court, Arapahoe county.

*J. P. Heisler and Benedict & Phelps*, for appellant. *Dand & Fowler*, for appellee.

REED, C. Appellant, plaintiff below, on the 1st of May, 1889, was, and for a long time previous had been, the owner of a tract of land near the city of Denver, and, being desirous of encouraging manufacturers, and enhancing the value of his land, entered into a contract with appellee whereby appellant was to donate and deed a tract of land to appellee in consideration of his building and maintaining on some part of the land quite an extensive factory for the manufactory of carriages. The contract in the first instance was for the donation of a tract 10 acres in extent. Afterwards it was increased, and was to be 12 acres. After that, and before a conveyance was made, a question arose between the parties in regard to the extent of the tract; appellant insisting it

should not exceed 10 acres. In order to arrive at the proper conclusion a surveyor was employed by the appellee; and, with the assistance of appellant, a survey was made of four different parcels, conforming to the Platte river, and to streets to be laid out for the subdivision of the property. After some negotiation, appellee expressed a willingness to take the four tracts in full satisfaction, which seems at the time to have been acquiesced in by appellant, but, as alleged, under a mistake as to the aggregate quantity embraced in the four parcels; he supposing it did not much, if any, exceed 10 acres in extent. A plat was made of the surveyed area, showing streets, size of blocks, courses, distances, etc. According to the evidence the four tracts aggregated about 13.15 acres, exclusive of streets and the river, for which appellee requested a deed, which was made and executed, describing the tracts by courses, distances, metes, and bounds, but not designating the number of acres. The deed was delivered to appellee, who executed and delivered a contract to erect a factory. On the 29th of May, 1889, appellant commenced this suit by filing a complaint alleging his contract to convey 10 acres and no more, the making and delivery of the deed by which, as alleged, he conveyed a fraction over 14 acres; averring that the deed was by him executed under a misapprehension of the amount of land, and by mistake, and obtained by appellee through fraud and concealment of the facts; that the land donated and conveyed was worth \$2,000 an acre, for which he received no consideration except the proposed erection of the factory; and asking that the deed be canceled and held void, that the description in the deed be corrected so as to embrace the proper amount of land, that the defendant be required to reconvey to plaintiff all land conveyed in excess of the 10 acres, and for an injunction restraining the defendant from selling or encumbering the land. A trial was had to the court, resulting in a judgment for the defendant.

Several errors are assigned, but those relied upon are, in substance, that the finding was against the evidence and the law. Much testimony was taken in regard to the original and subsequent contracts of the parties as to the amount of land to be conveyed, which need not be considered by this court, as it appears that such contracts had expired by limitation, or had been superseded, and that, at the time of the survey and attempted designation and final adjustment of the matter, there was no definite understanding between the parties either as to quantity—whether 10 or 12 acres—or location; and, as all former negotiations must be regarded as leading up to, and having been merged, in final adjustment, much of the testimony may be disregarded except in so far as it explains the intention of appellant as to the amount of land he was to convey.

The only question necessary to be determined is whether appellant was overreached by fraud and concealment on the part of appellee, and, through misapprehension of the facts or by mistake, conveyed more land than he intended, and

the other had a right to require. It is apparent from the evidence that appellant was, in the transaction, generous in the extreme, conveying a very large and valuable property for apparently a very inadequate consideration, and conscientiously carrying out an oral agreement when it could not have been enforced, perhaps, at law. It is equally apparent that appellee was selfish and exacting. But these are matters outside of the limit of proper examination in this court. A court of equity cannot relieve a party from the effects of generous, hasty, or inconsiderate acts entered upon understandingly, however ill advised and injurious they may be. It appears from all the testimony, including that of appellant, that he assisted in the survey, designated different points and courses, and had the survey made with a view to having it coincide with the intended platting of the remainder of the tract, and that this was all done as preliminary to determine what parcels, and how much, appellee should have. It also appears that, after these preliminary facts were ascertained, it was agreed between the parties that the four parcels should be conveyed and accepted, concluding the transaction. It does not conclusively appear that appellant was definitely informed of the contents of each parcel. The contents of the two westerly blocks, and the triangular piece on the east side of the river, seem to have been properly ascertained and duly stated to the appellant; but it does not conclusively appear that he was properly or definitely informed of the amount of land contained in the other tract adjoining the river on the westerly side. But there is no evidence of concealment of the fact by appellee or the surveyor, while it is conclusively shown that appellant had, or could have had, all necessary information and data to arrive at exact knowledge of the quantities, had he deemed it necessary. These facts, of themselves, might be deemed sufficient to warrant a court of equity in refusing to interfere, but there are still stronger reasons for refusing the relief asked.

After the survey was completed, a plat was made, showing boundaries, courses, and distances, from which the contents of each tract, and consequently the aggregate of all, could have readily been computed. Appellant had access to the plat, had it in his own possession, submitted it to his lawyer before the conveyance was made, and a rough or partial computation was made; and he was informed, as he testified, that it was greatly in excess of 10 acres,—near 15 acres in all. Mr. Heiler, counsel for appellant, testified that he informed appellant that the aggregate of the four tracts considerably exceeded 10 acres in extent. Appellant went back, and informed appellee of the fact. A general discussion followed, and explanations. Then, with full knowledge, or means of full and accurate knowledge, he concluded to deed, deliberately executed, and delivered the conveyance of, the four parcels. It is hardly necessary to say, on these undisputed facts, that a court of equity cannot relieve him.

In *Kerr, Fraud & M.* 236, 237, the law is

said to be that "whatever is notice enough to excite the attention of a man of ordinary prudence, and call for further inquiry, is, in equity, notice of all facts to the knowledge of which an inquiry suggested by such notice, and prosecuted with due and reasonable diligence, would have led." \* \* \* If a man had actual notice of circumstances sufficient to put a man of ordinary prudence on inquiry as to a particular point, the knowledge which he might, by the exercise of reasonable diligence, have obtained, will be imputed to him by a court of equity. The presumption of the existence of knowledge is so strong that it cannot be allayed to be rebutted." And the text is sustained by numerous authorities cited, both English and American. In *Kennedy v. Green*, 3 Mylne & K. 722, it is said: "Whatever is notice enough to excite attention, and put the party upon his guard, and call for inquiry, is notice of everything to which such inquiry might have led. When a person has sufficient information to lead him to a fact, he shall be deemed conversant of it." In *Ang. Lim.* § 187, and notes: "The presumption is that, if the party affected by any fraudulent transaction or management might, with ordinary care and attention, have seasonably detected it, he seasonably had actual knowledge of it." In *Wood v. Carpenter*, 101 U. S. 143, after a careful examination of the authorities, it is said: "Concealment by mere silence is not enough. There must be some trick or contrivance intended to exclude suspicion, and prevent inquiry. There must be reasonable diligence; and the means of knowledge are the same thing, in effect, as knowledge itself." See 2 *Pom. Eq. Jur.* § 803; 1 *Story, Eq. Jur.* § 200a; *Tuck v. Downing*, 76 Ill. 79; *Nudd v. Hamblin*, 8 Allen, 130; *Cole v. McGlathry*, 9 Me. 131; *McKown v. Whitmore*, 31 Me. 448; *Enfield v. Colburn*, 63 N. H. 218; *Dickinson v. Lee*, 106 Mass. 557. Having in view these well-settled principles, the court was warranted in finding that the deed was not obtained by fraud and concealment on the part of appellee, nor executed under misapprehension or through mistake of appellant, and that no case was made authorizing a court of equity to decree a cancellation of the deed, and a reconveyance of a portion of the land. We think the judgment of the district court should be affirmed.

PATTISON and RICHMOND, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is affirmed.

BEARDT *et al.* v. McALLISTER.

(*Supreme Court of Montana.* May 5, 1890.)

DEFAULT JUDGMENT—EXCUSABLE NEGLIGENCE.

On a motion to set aside a default judgment, defendant showed that, when served with summons, he was living with his family in a tent 50 miles from the county-seat, and, being unwilling to leave them, engaged a business friend to attend to the matter; that the latter employed an attorney to prepare an answer, but, owing to business troubles, forgot to call at the attorney's office to verify it until the last day allowed for fil-

ing; that the answer was immediately mailed, but did not reach the clerk of the court until two days later. The allegations of this answer constituted a complete defense to the action. Held, the delay was excusable, and plaintiff is entitled to have the judgment set aside.

Appeal from district court, Jefferson county; T. J. GALBRAITH, Judge.

On August 29, 1889, the complaint was filed. The summons issued thereon was served on defendant, in the county where the action was commenced, August 31st. His time to answer expired September 10th. No appearance was made by defendant on that day; and on September 12th, at the opening of court in the morning, his default was duly entered for want of an appearance. On the evening of that day, after the default was entered, the clerk of the court received by mail a duly-verified answer of the defendant, which he retained, and marked "Filed" in the case. On January 13, 1890, on motion of plaintiffs, the court struck this answer from the files of the court. On January 14th the plaintiffs made some formal proofs to the court, and entered judgment against the defendant. January 27th the defendant moved the court to set aside the judgment, open the default, and allow him to answer on the merits. The motion was supported by the presentation of the answer which he had formerly sent to the clerk, and by his affidavit. The answer thus presented is a complete and specific denial of the material allegations of the complaint, and sets forth a defense on the merits to the cause of action set up in the complaint. It is verified, and meets all the requirements of an affidavit of merits. In other words, if the matters set up in the answer are true, they are an absolute defense on the merits. A portion of the matter in the answer is confirmed by an affidavit of three persons purporting to be familiar with the facts. The affidavit of defendant personally reiterates some of the matters of defense set forth in the answer, and refers to said answer. The affidavit then sets forth the following facts, which the defendant urges as showing his diligence in endeavoring to get his appearance into court: At the time when summons was served on him he was living at Home Stake Gulch, 50 miles from the town of Boulder, the county-seat of Jefferson county, in which the action was commenced, and 16 miles from the city of Butte; that he was preparing to engage in cutting cord-wood, and had his family temporarily lodged in a tent; that, with due regard to the safety and health of his family, he could not make the overland trip to Boulder; that one James Brown, of the city of Butte, was interested in the cord-wood business with defendant, and was a man of personal integrity and prompt business habits; that defendant went to Butte, and delivered to Brown copies of the papers served on him the 2d day of September, and arranged with Brown to procure counsel, and attend to the defense of the action; that Brown engaged the services of counsel in Butte, who prepared an answer in ample time for the same to be forwarded to Boulder for filing; that at this time Brown was laboring under great

financial and business troubles of his own, and, owing to his disturbed state of mind thereby, he did not go to the office of counsel to verify the answer until September 10th, the last day for appearing; that the answer, as appears by the verification itself, was sworn to on that day; that counsel then, on said day, mailed the same to the clerk of the court at Boulder, inclosing the clerk's fees due him for filing the answer; that the answer so mailed did not reach its destination until the 12th; that defendant did not know that he was in default until after judgment was rendered against him. The plaintiffs filed nothing in reply to this showing, and on the same the court denied the motion to open the default on the 27th day of February. From this order the defendant appeals.

*McBride & Haldorn*, for appellant. *Cowan & Parker*, for respondents.

DE WITT, J., (after stating the facts as above.) The filing of the answer September 12th was after the defendant's default had been duly taken in open court. Such filing was a nullity. The answer is before us, however, for another purpose; that is, as an exhibition of defendant's alleged meritorious defense. As such it meets every requirement. An answer could not well have been framed, the matter in which, if true, would be a more thorough defense on the merits. The motion to set aside the judgment was made in time. Section 116, Code Civil Proc.

The only other consideration is whether defendant is entitled to relief from the judgment by reason of his mistake, inadvertence, surprise, or excusable neglect. *Id.* The matters set up in defendant's motion are undenied, and are taken by this court as true. The defendant was living at a remote place, 50 miles from the county-seat. His family were temporarily sheltered in a tent at the approach of winter. He made a journey of 32 miles to Butte, and placed the matter of his defense in the hands of a business associate and responsible person, one James Brown. This was eight days before his answering time expired. Brown employed able counsel, who prepared an answer at once. Personal disasters of a serious nature caused Brown to forget the business of defendant until the last day, September 10th. He then verified the answer, which was promptly mailed to the clerk of the court. If a defendant situated as this one was, and displaying the diligence that he did, cannot be relieved from a judgment by default, against which judgment he has a perfect defense, it is difficult to conceive of a case in which a court would grant the relief. We cite the following cases in this court upon the subject generally: *Lowell v. Ames*, 6 Mont. 189, 9 Pac. Rep. 826; *Whiteside v. Logan*, 7 Mont. 373, 17 Pac. Rep. 34; *Donnelly v. Clark*, 6 Mont. 136, 9 Pac. Rep. 887; *Briscoe v. McCaffrey*, 8 Mont. 336, 20 Pac. Rep. 691; *Benedict v. Spenddill*, 22 Pac. Rep. 500. The order is reversed, with costs, with the direction to the district court to set aside the judgment, and allow defendant to answer.

BLAKE, C. J., and HARWOOD, J., concur.



## STATE v. KING.

(Supreme Court of Montana. May 2, 1890.)

GRAND JURY—MURDER—"AIDING AND ABETTING"  
—RES GESTÆ.

1. The judge ordered the sheriff to summon grand jurors for the term commencing on the first Monday of January, 1890; and afterwards notified the sheriff to inform the persons summoned that their services would not be wanted. On January 7th the court ordered that, "it appearing that no grand jurors have been summoned, and that a grand jury is wanted," persons be drawn and summoned to serve. Act March 14, 1889, (Laws Mont. 16th Sess. p. 166,) § 14, provides that when from any cause, on the meeting of or during the term of a court, a grand jury is wanted, or there is not a sufficient number of grand jurors present, or those summoned have been excused or discharged, it shall be lawful for the judge to have persons drawn and summoned to serve as grand jurors. Const. Mont. art. 3, § 3, provides that a grand jury shall only be drawn and summoned when the district judge shall in his discretion consider it necessary, and shall so order. *Held* that, the order having recited that "it appears that a grand jury is wanted," it will be presumed that the judge considered his action necessary; and that a challenge to the panel, "for the reason that the same was not drawn in accordance with the essential provisions of the law," as permitted by Crim. Prac. Act (Comp. St. div. 3, § 119,) was properly overruled.

2. Under Comp. St. Mont. div. 3, § 176, providing that "any person who counsels, aids, or abets in the commission of any offense may be charged, tried, and convicted in the same manner as if he were a principal," one person may be charged with murder, and another with being an aider and abettor, in the same indictment.

3. State's witness testified that he was standing at the head of the hall stairs, and heard defendant say, when going out of the door, that he would kill the son of —; that "K. [defendant] was talking to P.; he did not say whom he would kill." It was contradicted that the accused parties had had a difficulty in said hall with deceased, and that they passed down stairs a few minutes before defendant shot deceased. Another witness testified that he saw K. and P. at the foot of the stairs, and heard K. say to P., "Smash the son of — when he comes down the stairs." *Held*, that the evidence was admissible as part of the *res gestæ*.

Appeal from district court, Jefferson county; THOMAS J. GALBRAITH, Judge.

George D. Greene and W. L. Hay, for appellant. M. H. Parker, Co. Atty., and Henri J. Haskell, Atty. Gen., for the State.

BLAKE, C. J. The defendant was found guilty of the crime of murder in the first degree, and this appeal has been taken from the order of the court below in overruling the motion for a new trial. The appellant and George Peters were indicted January 14, 1890, by a grand jury consisting of seven persons, and separate trials were demanded and allowed. The alleged offense was committed November 29, 1889, in the county of Jefferson. The first error that is assigned appears in different motions, and relates to the organization of the grand jury that returned the indictment. The following order was made at chambers, November 25, 1889, by the judge of the judicial district: "Ordered that out of the twenty persons whose names are contained in the proper envelope, labeled as follows, to-wit, 'Grand jurors for the next regular term of the district court of Jefferson county,' the names of nine of said persons be drawn by the clerk of said

court, or his proper deputy, and of the judge of said court, if he be there present, in the presence of the sheriff, or his proper deputy, to be summoned as grand jurors, to serve at the next regular term of said court, which commences on the first Monday in January, A. D. 1890, and that a proper *venire* do issue for said persons returnable on the first day of said term, at ten o'clock A. M. See Laws Mont. 16th Sess. pp. 166, 167, and especially sections 4 and 7; and in so far as possible conform with the provisions thereof *in re*." This order was complied with, and the *venire*, containing the names of the above-described nine persons, was issued to the sheriff, November 30, 1889. The judge of the district court instructed the clerk by a letter which was received December 15, 1889, to "advise" the officer that he had "concluded to dispense with the use of a grand jury at the January prox. term," and to return this *venire*; and also to notify the persons who had been summoned that their services would not be wanted. The clerk acted accordingly. The sheriff made his return on the *venire*, January 1, 1890, showing that all of these persons had been personally served to appear, and act as grand jurors. The following order was made by the court, January 7, 1890: "It appearing that no grand jurors have been summoned, and that a grand jury is wanted, ordered that the judge and clerk of this court do forthwith prepare a list of twenty persons, competent to serve as grand jurors, who shall be summoned by the sheriff to be and appear before said court on the 9th day of January, 1890, at ten o'clock A. M." In conformity therewith, these persons were selected to serve as grand jurors, and, in open court, the defendant was notified of his rights of challenge before they were sworn. A challenge was then interposed to the panel, "for the reason that the same was not drawn in accordance with the essential provisions of the Laws of Montana." The particulars will be commented on hereafter. This challenge was overruled, and thereupon the clerk, by order of the court, selected by lot, from this list of twenty, a grand jury composed of seven persons, who were duly sworn and charged. The foregoing indictment was presented January 14, 1890.

The challenge to the panel is based upon the provisions of Crim. Prac. Act, (Comp. St. div. 3, § 119.) The appellant contends that the persons who were summoned to serve as grand jurors under the order made November 25, 1889, were discharged without lawful authority, and that the proceedings by virtue of the order made January 7, 1890, were void. The act relating to juries, approved March 14, 1889, should be faithfully executed, so that the names of the persons who may become grand or trial jurors shall be always selected by the commissioners who are designated. But circumstances may arise which will render its requirements nugatory, and the transcript shows that this event occurred. The statute, however, provides directly for the contingency in these terms: "When, from any cause, on the meeting of, or during the term of, a court, a grand jury is wanted, or there is

not a sufficient number of grand jurors present, or those summoned have been excused or discharged, it shall be lawful for the judge of the district court, and for the clerk of the court, or his deputy under the direction of the judge, to prepare a list of the names of a sufficient number of persons competent to serve as grand jurors, who shall be summoned by the sheriff to attend at such time as the court may direct." Section 14. The constitution declares that "a grand jury shall only be drawn and summoned when the district judge shall, in his discretion, consider it necessary, and shall so order." Article 3, § 8. It is claimed that the order complained of should show the necessity therefor. While the clause is self-executing, and the language of the statute has been followed, in stating that it appears that a grand jury is wanted, it is evident, and will be presumed, that the judge considered his action necessary.

It is maintained by the appellant that the grand jury should have consisted of 16 persons; that the statute requiring the foreman to indorse indictments does not contemplate a body of any other number; and that the prosecution should have been by information. We have placed these matters together, because they have received due consideration in the case of *Territory v. Ah Jim*, 23 Pac. Rep. 76. These constitutional questions were therein examined and determined adversely to the position of the appellant, and we affirm its conclusions. The indictment was found by a legal grand jury, and the challenge to the panel, and the motion to quash the indictment, were properly overruled.

A demurrer to the indictment was submitted upon the ground that two offenses are charged,—one against the appellant for murder in the first degree, and the other against Peters for being an aider and abettor. The statute has abolished the refined distinctions, which formerly prevailed in this regard, and provides as follows: "Any person who counsels, aids, or abets in the commission of any offense, may be charged, tried, and convicted in the same manner as if he were a principal." Comp. St. div. 3, § 176. In *People v. Davidson*, 5 Cal. 134, the supreme court interpreted a similar law, and said: "The indictment in charging Davidson and Kennedy with an assault with an intent to commit murder, and afterwards Kennedy with being an accessory, charges but one offense. \* \* \* It is not error to charge the defendant as principal and accessory in the same indictment."

It is argued that the testimony of John Harrington "was incompetent and immaterial, and tended to prejudice the minds of the jury." This was, in substance, that he was standing by the door at the head of the hall stairs, and heard the defendant say, when going out of the door, that he would kill the son of ——. "King \* \* \* was talking to Peters; he did not say who he would kill." It is uncontradicted that there was a difficulty between the accused parties and the deceased in the hall spoken of by the witness, where there was a dance, and that they passed down the stairs a few moments before the fatal shot was

fired by the appellant. James Higgins testified that he "saw King and Peters there at the foot of the stairs, \* \* \* and I heard Thomas King say: 'Smash the son of — when he comes down the stairs.' He made this remark to George Peters, and he did not say the name of any party or person." We are satisfied, after the reading of the evidence, that the testimony of the witness Harrington was a part of the *res gestæ*, and should therefore be considered by the jury in its relations to the entire transaction. The bare fact that the threats thus uttered did not disclose the name of any party did not make them immaterial or irrelevant. The evidence in the transcript establishes beyond a reasonable doubt that the person so threatened was the deceased.

An examination of the record shows that every issue in the case was thoughtfully covered by the court in 29 instructions. They follow the sections of the statute, which, with some modifications and explanations that should be adjusted to the exceptional facts of each controversy, embody the law which is applicable. No requests were made by the appellant for further instructions, and he now attacks with authorities that which defines a "reasonable doubt," and the sole criticism is that it embraces conflicting phrases. It is claimed that the expression, "in their own most important concerns or affairs of life," contradicts the words, "in the graver and more important affairs of life." Viewing the whole paragraph, there is no difference in the meaning of both clauses, and the rule that conflicting instructions are erroneous has no bearing upon the proposition. We conclude that the appellant has had a legal trial, and that the verdict is founded upon the law and evidence. It is therefore ordered that the judgment be affirmed, and that the same be carried into effect as entered in the court below.

HARWOOD and DE WITT, JJ., concur.

KLEINSCHMIDT *et al.* v. KLEINSCHMIDT *et al.*  
(Supreme Court of Montana. April 24, 1890.)

DEED ABSOLUTE IN FORM—BOND TO RECONVEY—  
SPECIFIC PERFORMANCE.

1. Where a deed absolute in form was given in consideration of the grantees' note for \$5,500, and the grantees at the same time executed a bond providing that, if they did not reconvey upon the payment to them of \$5,500, with interest at 10 per cent., before a given date, "then this obligation to be void, otherwise to remain in full force," a suit for specific performance cannot be maintained, since the obligation is not to reconvey, but to forfeit \$5,500 on failure to reconvey.

2. It appearing that the note was paid by the grantees, and that no tender of the amount, with interest, was made to them by plaintiffs, the transaction, on its face, bore no proof that the deed was intended by the parties to be a mortgage.

Appeal from district court, Lewis and Clarke county; WILLIAM H. HUNT, Judge.

The complaint in this case was filed September 7, 1888. It alleges that the plaintiffs were the owners, and seised in fee, of the premises in controversy, describing them by metes and bounds; that, being

so seised, on the 14th day of May, 1884, plaintiffs executed and delivered to defendants a warranty deed of the premises; that said conveyance, although in form a warranty deed, was in fact a mortgage, and was made and intended by all the parties to secure the repayment to the defendants of the sum of \$5,500, which sum the defendants on said day loaned to the plaintiff Carl Kleinschmidt; that on the same day, and as part of the transaction, the defendants executed and delivered to the plaintiffs a writing obligatory, in the penal sum of \$5,500, conditioned that they would, on or before the 1st day of August, 1886, reconvey to the plaintiffs said premises, on payment by the plaintiffs to defendants of said sum of \$5,500, with interest from May 14, 1884, at the rate of 10 per cent. per annum. The complaint further alleges a tender of said sum on August 1, 1886, to the defendants, and refusal of said tender by defendants. The prayer of the complaint is: *First*, that the plaintiffs be allowed to redem said lands from said mortgage, upon paying to the defendants the amount due thereon; *second*, that upon such payment the defendants reconvey to the plaintiffs, by good and sufficient warranty deed, all and singular the aforesaid lands; *third*, that the plaintiffs recover their costs herein, and that they have such other and further relief in the premises as to this court may seem meet and equitable. The answer is, first, a specific denial of all the material allegations of the complaint, admitting, however, the making of the deed named in the complaint, but denying that it was intended as a mortgage. The answer further alleges that the defendants paid plaintiffs for said premises with their promissory note for \$5,500, payable on or before August 1, 1886, with interest at 10 per cent.; that, in addition to the provisions of the bond named in the complaint, it was further agreed that the plaintiff Carl Kleinschmidt might return said promissory note to the defendants on or before August 1, 1886, and, if so returned, defendant would redeem said premises. In case of the failure of the plaintiff to return said note, or pay said amount, on or before August 1, 1886, plaintiffs should lose all right and claim upon said premises. The answer further alleges that the plaintiff failed to comply with the terms of their agreement on August 1, 1886; that the plaintiff Carl Kleinschmidt negotiated said note shortly after obtaining possession of it; that he has never returned said note, or tendered said money; that the defendants have been in possession of the premises ever since May 14, 1884; that the plaintiff Carl Kleinschmidt and the Blackfoot Horse & Cattle Company were also indebted to the defendants at the time of this transfer, and it was agreed that this indebtedness, and other indebtedness to be contracted by said Carl Kleinschmidt and said cattle company, should become an additional claim against any interest of the plaintiffs in the premises, but that, unless plaintiffs complied with the terms and conditions of the bond, and delivered up the note as above set forth, then plaintiffs ceased to have any interest in or to said premises, or any part

thereof. There is a replication denying the material allegations of the answer.

The case was tried to the court without a jury. A motion was made by the plaintiffs for judgment on the pleadings, upon the ground that the answer substantially sets forth that, at the time of the execution of the conveyance, the further indebtedness of Carl Kleinschmidt and the cattle company should become an additional claim against the interest of the plaintiffs in the premises mentioned in the deed, and that such matter in the answer was a confession that the transaction constituted a mortgage, as contended for by the plaintiffs, and not an absolute sale. This motion was denied. The court found the facts, which may be abbreviated as follows: (1) On May 14, 1884, the plaintiffs, being then the owners of the premises in controversy, made, executed, and delivered their warranty deed to the same to the defendants. (2) The agreed purchase price was \$5,500. (3) In payment of said land, defendants delivered to plaintiff Carl Kleinschmidt their promissory note for \$5,500, negotiable in form, and which was subsequently negotiated by plaintiffs for full value. (4) That on May 16, 1884, defendants made, executed, and delivered to plaintiffs their bond for a deed of said property in the penal sum of \$5,500; that said bond sets forth that the obligors, the defendants, are bound to the obligees, the plaintiffs, in the penal sum of \$5,500; that the condition of the obligation is such that if the obligors shall, on or before the 1st day of August, 1886, make, execute, and deliver unto the said Carl Kleinschmidt and Marie Kleinschmidt (provided the said Carl Kleinschmidt and Marie Kleinschmidt shall, on or before that day, have paid to the said obligors the sum of \$5,500, with interest at the rate of 10 per cent. per annum, the price by the said Carl Kleinschmidt and Marie Kleinschmidt agreed to be paid therefor,) a good and sufficient conveyance, a guaranty deed, free from all incumbrances, all that certain lot (describing the premises,) then this obligation to be void; otherwise to remain in full force and virtue, etc. (5) Said deed and bond were duly filed for record. (6) The note given by defendants to plaintiffs was given and received in full payment of the agreed purchase price of the plaintiffs' interest in said land; that the transaction was intended as an absolute sale of the premises, and an agreement to reconvey the same upon the plaintiffs' compliance with the terms and conditions of the bond. The agreement to reconvey contained no reference to the deed, nor were there any words or provisions showing that the bond was intended as a defeasance to said deed, and the bond was not so intended. (7) At the time of the transaction, it was further agreed between the parties that plaintiffs might take up said bond by returning said note, instead of paying the amount set forth in the bond; but this was a privilege given by defendants to plaintiffs, and there was no obligation on the part of the plaintiffs to return the note, unless they desired. (8) The delivery of the note by defendants to plaintiffs was not a loan, and did not create an

indebtedness from plaintiffs to defendants. (9) There was no act to be done by plaintiffs for which the deed was intended to be a security. (10) The intention of the plaintiffs was to make an absolute sale, and the intention of the defendants was to make an absolute purchase, with the right of the plaintiffs to repurchase, upon a compliance with the terms of the bond. (11) That the deed was not intended by any of the parties to be a security for the payment of any money, or the performance of any act. (12) The consideration of \$5,500 was full value for the land. (13) That, upon the execution and delivery of the deed, plaintiffs gave defendants possession of the premises, which they have ever since held. (14) That, at the time of these transactions, Carl Kleinschmidt was considerably in debt, and, with the exception of his interest in this land, had little or no property subject to execution, and that the plaintiffs made this sale with intent to hinder and delay the creditors of Carl Kleinschmidt. (15) On August 1, 1886, Albert Kleinschmidt, on behalf of the plaintiffs, tendered to Louis Hillebrecht, defendant, \$5,500, and no more, and demanded a deed under said bond. (16) That said Hillebrecht did not waive a tender of the full amount, which amount was \$5,500, with interest at 10 per cent. per annum from May 16, 1884. (17) That at no other time have plaintiffs made any other tender of money, nor have they offered to return said note. (18) The note has been paid by defendants; that said payment was by them resisted in an action at law. Upon the facts above the court found the following conclusions of law: (1) The defendants are the owners in fee-simple, and entitled to the possession, of the premises, as against plaintiffs, and all persons claiming under them. (2) The transactions evidenced by the deed of May 14, 1884, and the bond of May 16th, constituted an absolute sale, and not a mortgage; nor was said bond intended as a defeasance of the deed. (3) No debt or other obligation was created by these transactions for which the deed could constitute a security. (4) When plaintiffs sold the land, they were endeavoring to get said land out of their hands, in order to delay certain creditors of the plaintiff Carl Kleinschmidt, and, by reason of their attempt to hinder and delay the creditors of Carl Kleinschmidt, are not entitled to the relief of a court of equity. (5) That at no time have the plaintiffs made any legal tender of the amount due under the bond, and have therefore lost all their right to enforce from the defendants a conveyance of the land in controversy.

Upon these findings of fact and conclusions of law, judgment was entered in favor of the defendants, confirming their title to the premises. Plaintiffs moved for a new trial on the grounds: *First*. Of the insufficiency of the evidence to justify the findings and decision. The insufficiency is specified as to almost all the findings of fact, and in each instance it is to the effect, simply, that the finding is unsustained by the evidence, setting forth the reasons why plaintiffs consider that such evidence is insufficient. They further specify that the

finding of the court that the conveyance was made with the intent to hinder and delay the creditors of Carl Kleinschmidt is not supported by the allegations of the answer. *Second*. Plaintiffs except to the conclusions of law by the court for the reason that said conclusions are contrary to the evidence. *Third*. Plaintiffs assign errors of law as follows: (a) Error in admitting testimony tending to show that Carl Kleinschmidt was endeavoring to hinder and delay his creditors, there being no allegation to that effect in the answer; (b) error in overruling plaintiffs' motion for judgment on the pleadings. The motion for a new trial was by the district court denied. The plaintiffs appealed both from the judgment and from the order denying a new trial.

*McCutcheon & McIntire*, for appellants.  
*Botkins & Shelton*, for respondents.

**DE WITT, J.,** (after stating the facts as above.) We are of opinion that the plaintiffs' motion for a judgment on the pleadings was properly denied. The allegations of the complaint, material to the plaintiffs' theory of the case, are all specifically denied in the answer. The further matter set up in the answer, as to the indebtedness of Carl Kleinschmidt and the Blackfoot Horse & Cattle Company, existing and to be incurred, to defendants, being a lien on plaintiffs' interest in the land, was conditioned upon plaintiffs' complying with the terms of the bond. It left the inquiry to be decided by the evidence, whether the intent of the parties was that the transaction should be a mortgage or a sale, and the court properly heard evidence upon that issue. The prayer of the complaint seems to be for specific performance on the bond. Plaintiffs pray that the defendants reconvey the premises. Such relief could not be granted on the bond. An inspection of that instrument reveals the fact that the obligors make no covenant to reconvey. They simply agree that, if the obligees pay them \$5,500 and interest, and if they (the obligors) do not make, execute, and deliver a deed, then the bond of \$5,500 shall be in full force; otherwise to be null. The obligors could discharge the bond by accepting the tender of \$5,500 and interest, and then paying the penal sum of \$5,500 to the obligees. No conveyance could be compelled under the bond if a valid tender had been made. But appellants, in their brief before us, demand "other and further relief" as prayed in the third division of the prayer of the complaint; that is, that the deed in evidence be declared to be a mortgage, and that they have leave to redeem such mortgage. We have carefully examined the voluminous evidence in the record. It demonstrates beyond question that, although there was a conflict and contradiction, the findings of the court are sustained by the evidence, and a preponderance thereof. Such was the view of the lower court on the trial, and on the motion for a new trial. This court will not now disturb those findings. We will say, in passing, that the view we take of the other points of the case makes it unnecessary to decide whether the fourteenth find-

ing is supported by the pleadings. That finding is not necessary to the determination of the case.

The only other question before us is the conclusion of the court, from the facts, that the transactions were a sale, and not a mortgage. This whole proposition has recently been so ably discussed, and the law so clearly defined, by the late territorial supreme court, through Mr. Justice BACH, (*Gassert v. Bogk*, 7 Mont. 585, 19 Pac. Rep. 281,) that the law is no longer, with us, an open question. The court in that case says: "The cases cited \* \* \* may be divided into three classes. \* \* \* The first class includes those cases in which the papers, (deed and bond,) upon their face, recite that the transaction is one for the security of a loan. \* \* \* The second class includes those cases where evidence *allunde* shows that a mortgage, and not a sale, was intended, including cases where the evidence shows such facts as a previous loan, an application for a loan, great difference in value, application on the part of grantee to have the debt or portion thereof repaid. \* \* \* The third class of cases is that in which the courts hold that a deed with contract to reconvey are *per se* mortgages." The case at bar is not included within the first class. The court, in *Gassert v. Bogk*, disavow the doctrine in the third class. The only standing for appellants is to bring themselves within the second class. Changing the names of parties to those in this case, we may read again from *Gassert v. Bogk*, page 599, 7 Mont., and page 284, 19 Pac. Rep.: "In the case under consideration, the deeds and contract, upon their face, show an absolute conveyance. No obligation appears therefrom binding [Carl Kleinschmidt] to pay anything. No words appear from which the characteristic of security, so essential to a mortgage, can be deduced. *Prima facie*, the transaction is one of sale. It is incumbent upon the [plaintiffs] to produce some evidence tending to show that a mortgage in fact was intended." And at page 600, 7 Mont., and page 285, 19 Pac. Rep., same case, as follows: "Where the papers do not show that a security was meant, it is incumbent upon the party seeking to establish a mortgage to show that a mortgage was intended." The court, in the case before us, has found from the evidence that a mortgage was not intended, but that the papers were intended as an absolute sale, and an independent privilege to repurchase. The reason and the authority of *Gassert v. Bogk* are sufficient in this case. We are of opinion that the judgment and order denying the motion for a new trial should be affirmed, and it is so ordered.

BLAKE, C. J., and HARWOOD, J., concur.

O'CALLAGHAN *et al.* v. BODE *et al.*

(Supreme Court of California. June 12, 1890.)

DEATH BY WRONGFUL ACT — CONTRIBUTORY NEGLIGENCE — PARTIES — MEASURE OF DAMAGES — PRACTICE.

1. In an action to recover damages for the death of plaintiffs' intestate, it appeared that deceased was killed by a bale of goods which was rolled down on him as he was passing through defend-

ant's warehouse from the office, where he went every day to deliver a paper. There were two entrances to the passage-way leading through the house, both of which were used, though one was larger and more used than the other. Deceased had entered by the smaller, where there was no one to warn him that goods were being thrown down in the passage-way, though such warning was given at the other entrance. *Held*, that defendants were negligent in not giving such warning.

2. It was not contributory negligence on the part of deceased to enter by the smaller way, where there was no warning of any danger, though he was ordinarily in the habit of entering by the main door, at the other end of the house.

3. Nor was his failure to get out of the way when the men shouted, after having started the bale down from the pile, contributory negligence.

4. A demurrer on the ground that plaintiffs have not legal capacity to sue must be overruled if any one of the plaintiffs has capacity to sue.

5. A demurrer on the ground of misjoinder of parties must specify wherein the misjoinder exists.

6. Where the petition shows that the mother of deceased is his sole heir, and that deceased was killed through the negligence of defendants, whereby she was damaged, it states facts sufficient to constitute a cause of action.

7. When the evidence shows that deceased was 23 years old, of good habits, and the sole support of his mother and her children, to whom he gave from \$40 to \$50 per month, a verdict for \$8,000 is not excessive.

8. Where, on appeal, it appears that during the trial plaintiffs' counsel handed the clerk a paper stating that it was in reference to the guardian *ad litem*, it will be presumed in favor of the judgment that the guardian was properly appointed, though the contents of the paper do not appear.

9. A variance between the allegations of the petition and the proof as to the sex of the minor children, brothers and sisters of deceased, is not material.

Commissioners' decision. Department

1. Appeal from superior court, city and county of San Francisco; T. H. REARDON, Judge.

W. W. Davidson, for appellants. J. D. Sullivan and Henry McCrea, for respondents.

GIBSON, C. This was an action against the owners of a warehouse to recover damages for the death of one Francis J. O'Callaghan, which is alleged to have been caused by the negligence of the defendants. The plaintiff had a verdict and judgment, and the defendants appeal.

The general features of the case are as follows: The warehouse was oblong in form, and had a wide door and passage at one end, and a small door and passage at the other. These two passages were parallel with each other, and at right angles to the length of the building. Between them was a large room or space in which bales of merchandise, etc., were so piled as to leave a passage or gangway connecting the two passages above mentioned. The office was on the passage-way leading from the small door. On the morning of the accident the employes were engaged in throwing bales of bags from the top of the pile into the gangway. The deceased was in the habit of coming to the building to deliver a publication called the "Guide." He usually entered by the main entrance, (the large door,) came down the gangway to the passage leading to the small door, and put up the Guide in a room adjoining the office. On the day of the accident, however, he entered by the small

door, put up his paper in the usual place, and started to go out through the gangway to the main entrance. The men engaged in throwing down bales into the gangway did not see him until it was too late. He was struck by a bale weighing between six and seven hundred pounds, and almost instantly killed.

The main position of the appellants, on the merits, is that there was no negligence on the part of the defendants, or, if there was, that there was contributory negligence on the part of the deceased. We think that the evidence shows that the defendants were guilty of negligence. The gangway was a place through which persons having business at the warehouse were accustomed to pass. It was the mode of reaching the office from the passage-way at the main entrance. It was the way "that everybody, strangers as well as others in the employ of Bode & Haslett, used in going to the office." And it was the usual route of the deceased in his regular visits to the place where he was in the habit of putting up the Guide. The throwing of heavy bales into such a gangway made it a place of danger. It was a case in which precautions were necessary. Especially is this true under the circumstances of the case. According to the foreman, who was in the employ of the defendants at the time of the trial: "It was not possible for the man standing up there on the top of the bales to see, from his position, where the bales would land when they came down. He knew they would land in the passage-way. That was the only place for them to land down below there. He could not see where they were going to hit." The employes of the defendants seemed to have felt that some precautions were necessary, for a lookout was stationed at the main entrance. This was well enough for that entrance. But some precaution should have been taken for the other entrance. The only thing done to the latter entrance, however, was to throw down a couple of bales near that end of the passage. These, however, did not block the whole of the passage, but left room for a man to pass by them, and we think that such a partial obstruction of such a place would not be a sufficient warning to persons who were in the habit of using the passage. It would have been a very simple matter to have drawn a rope across that end of the gangway, or to have posted a notice of danger there, or even to have stationed a lookout there, as was done at the other entrance. The want of such a precaution, under the circumstances, seems to us to have been negligence; and the fact that other warehousemen were in the habit of acting similarly does not excuse the defendants.

The deceased was not guilty of contributory negligence. He came to the warehouse upon a matter of business. It is true that he was in the habit of entering by the main entrance. But the other, though furnished with a lock, was kept unlocked; and, though it was not much resorted to, it was sometimes used by the employes, and occasionally by teamsters. The fact that the deceased used it on the

day of the accident admits of the inference that he knew about it; and there is no pretense that either he or any one else was forbidden to use it, or notified that it was dangerous to do so. We see nothing in the evidence to show that the entrance by the small door constituted negligence on his part. Being in the building, and having put up the Guide as usual, it was perfectly natural and proper for him to attempt to go out through the gangway. That was the passage which he and others ordinarily used; and, as above stated, its partial obstruction by a couple of bales was not a sufficient indication that it was dangerous.

Nor was he guilty of negligence in failing to appreciate the situation when the employes shouted to him. These shouts were just as the bale was toppling over, and after the man on the top of the pile had lost control of it. The deceased evidently heard the shouts, but did not know just what to make of them. "He made a kind of look. He still walked just as fast as he could. He came right under the bale, making a kind of look up, so fast as he could run." The interval between the shouts and the time the huge mass came bounding down the passage could not have been great; and we do not think that, under the circumstances, an ordinarily prudent and self-possessed man could be expected to do any better.

Quite a number of other points are made, which will be briefly noticed:

It is contended that the demurrer to the complaint should have been sustained. The action was brought by the mother of the deceased, and his brother and sisters. The counsel for the appellants says that "the complaint discloses that the plaintiff, Catherine O'Callaghan, mother of the decedent, is his sole heir," and argues that the other plaintiffs did not have legal capacity to sue. But the demurrer is not drawn so as to present that question. It says that "the plaintiffs" have not legal capacity to sue, and, as it is admitted that one of them had capacity to sue, this ground of demurrer was too broad, and was properly overruled.

It is also said that there was a misjoinder of parties plaintiff, and a misjoinder of causes of action. These points, like the foregoing, are based upon the alleged want of right in the plaintiffs other than the mother of the deceased, but the demurrer does not specify wherein the alleged misjoinders existed. It is not sufficient for a demurrer on either of these grounds to simply follow the language of the statute.

As the deceased left neither wife, issue, nor father surviving him, his mother is his sole heir, under section 1386, subd. 2, of the Civil Code. The complaint shows these facts, and also that the deceased was killed through the negligence of defendants, by which his mother was damaged. This being so, the demurrer upon the general ground that the complaint does not state facts sufficient to constitute a cause of action was properly overruled, because a general demurrer is not sustainable if the complaint states a cause of action in favor of any one of several plaintiffs.

It is contended that there were errors in

rulings upon evidence. It is objected that the judge was absent from the court-room during a portion of the trial. This, however, was not an error. It may have been an irregularity, but the motion for new trial was not on that ground. In the next place, the counsel for the appellants made no objection to the temporary absence of the judge. See Hayne, New Trial & Appeal, § 27.

After the sister of the deceased had given several answers, part of one of which was not responsive to the question, the counsel for the defendant said: "I object to the questions on the ground that they are irrelevant," etc. The court stated that it should have to allow them, and the examination drifted to something else. If the counsel had desired the non-responsive part of the answer stricken out, he should have made a motion to that effect. The question was proper, and called for relevant and competent testimony.

The fact that the deceased once owned a route on the Examiner, and sold it for \$1,000, was probably irrelevant; but we do not see how it could have injured the defendants.

The question objected to at folio 121 was substantially answered by the response to the next question. Therefore, if there was any error in sustaining the objection it was cured.

A further contention is that there was error in the instructions to the jury. The first point under this head seems to be based upon the ground that there was a misjoinder of parties plaintiff. But there was no issue as to this. The facts appeared in the complaint, and hence the objection was one that should have been taken by demurrer. This was not done, as already shown in passing upon the points in the demurrer, and in consequence was waived. The warehouse was a bonded warehouse, and there was the usual government agent on the premises to look after the duties. The evidence showed conclusively that the defendants were the persons liable for any negligence in relation to the occurrence in question. The court might properly have given a direct instruction to that effect. It did not give such instruction, but told the jury that the defendants, and not the government agent, were liable under certain conditions. It is claimed that in stating the conditions the court omitted an important one. But, inasmuch as the court might have instructed the jury that the defendants were liable for any negligence that occurred, the error, if such it be, was clearly immaterial. The next point is based upon the use of the word "plaintiff" instead of "decendent" in the instruction marked "XX." It is apparent, however, that this was a mere inadvertence, and that it could not have misled the jury. It is further claimed that the court erred in refusing to give certain instructions to the jury requested by defendants. These instructions number 38 in all; and the only argument in relation to them is based upon the idea of the misjoinder of the parties plaintiff, which has already been disposed of. Hence we do not feel called upon to examine the instructions any further.

It is suggested that the damages given are excessive. The deceased was a young man of 23, of good habits, and was the sole support of his widowed mother and her minor children, to whom he gave out of his earnings \$40 or \$50 a month. The verdict was for \$3,000. We do not think that this amount was excessive.

It is urged that there was no evidence in support of the allegation that a guardian *ad litem* for the infant plaintiffs was appointed. We are by no means sure that the court which appoints a guardian *ad litem* to conduct a particular suit will not take judicial notice of his appointment, so far as the purposes of that suit are concerned. But it is not necessary to express an opinion upon this point. It appears in this case that during the trial the plaintiff's counsel handed a paper to the clerk, saying: "This is the paper in reference to the guardian *ad litem*." Nothing else was said by either party, and presumably the clerk took charge of the paper, as he would in the case of any exhibit in the case. This is not a very formal way of putting a paper in evidence. But we think that all the parties must have understood that the paper was in evidence, and consequently that it must be held to be so. *Wright v. Roseberry*, 81 Cal. 87, 22 Pac. Rep. 336. It therefore appears that a paper in relation to the guardian *ad litem* was in evidence. What were its contents? It certainly was incumbent upon the appellants to show what the contents were. Notwithstanding that it was not a most complete and perfect appointment, the presumption is in favor of the judgment, and the party alleging error must make it affirmatively appear. For analogous applications of this rule, see *Clark v. Sawyer*, 48 Cal. 141, 142; *People v. Grundell*, 75 Cal. 304, 17 Pac. Rep. 211.

It was argued that the evidence is insufficient to show that the plaintiffs were the only heirs at law of the deceased. But we think that these facts sufficiently appear. The witness Mary Kepple testified as follows: "Question. You are the sister of Frank O'Callaghan, who was killed? Answer. Yes, sir; I am. Q. Is your father living or dead? A. My father died the 23d of March; six weeks before Frank was killed. Q. Is your mother living now? A. Yes, sir; she is sick in bed. \* \* \* Q. Who was your support up to the time of the death of Frank O'Callaghan? A. Frank was the sole support. \* \* \* He brought in \$14 a week from the Examiner, and would turn all of that money in to his mother, for her and the four little children,—a brother thirteen years old, a little girl going on twelve; the other baby is going on six; this little boy is two and half years old. He supported all of them. My mother is living. She is in bed, sick. \* \* \* Q. Frank was unmarried,—had no wife? A. No; single. \* \* \* He was twenty-three years and ten months old at the time he died. He worked for the last thirteen or fourteen years for the family." It is true there was a slight variance between the testimony of this witness and the allegations of the complaint respecting the minor children. She says there were two boys, one girl, and another, whose



sex she failed to state, while it is alleged that such children consisted of one boy and three girls, but we do not deem this of sufficient importance to warrant a reversal. This same witness did not say whether her mother and the minor children were the same persons who were named as plaintiffs in the complaint, nor that her deceased brother never had been married, but we think the jury properly inferred these facts from what she did say. We are unable to perceive any prejudicial error in the record, and therefore advise that the judgment and order appealed from be affirmed.

We concur: FOOTE, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

3 Cal. Unrep. 265

MURDOCK v. CLARKE et al. (No. 13,475.)

(Supreme Court of California. June 7, 1890.)

MORTGAGES—ACCOUNTING.

1. A conveyance of land to secure the payment of money, though the grantee is put in possession under an agreement for an accounting for the rents and profits, is only a mortgage, and does not pass the legal title.

2. By an agreement between a mortgagor and mortgagees, the latter were to have the sole right to the possession of the land mortgaged, accounting for the rents and profits, and were to select a person to manage the property. At an accounting against the mortgagees, the latter testified that they were to send a man to take possession, in order to take care of the personal property security, and that everything was to be run in their name. They also spoke of the man selected, both in their testimony and in the pleadings, as their agent. Held that, for the purposes of possession and accounting, such person must be considered as the agent of the mortgagees only, although his selection was approved by the mortgagor, and his salary was paid as a part of the running expenses.

3. In such case the mortgagees are held to the exercise of reasonable diligence in the management of the property mortgaged.

4. Where both the agent and the defendants kept their own cattle on the mortgaged land, along with the cattle of the mortgagor, the wrong done was satisfied by charging defendants with a proportion of the running expenses, and with the value of the use of the land.

5. Nothing was chargeable to defendants on account of horses which they sent to the land, and which were needed and used for farm work.

6. One of the notes given by the mortgagor providing for compound interest if not paid when due, the net receipts were properly applied first to the payment of the interest on such note.

7. Sums advanced to the wife of the mortgagor without any order from him were not chargeable against his estate.

8. It not being necessary, under Code Civil Proc. Cal. § 454, to give an itemized account in pleading, the findings need not give the items of the account.

9. One who accepts a bill of sale purporting to transfer a certain number of cattle is not estopped thereby from denying that he actually received that number.

10. As against respondents on appeal, the findings of the lower court must be presumed to be true. It will not be presumed that an error was the result of inadvertence.

Commissioners' decision. Department 1. Appeal from superior court, Lassen county: PHIL. W. KEYSER, Judge.

J. D. Goodwin, D. W. Jenks, and W. N.

Goodwin, for appellant. A. L. Hart and S. Solon Hall, for respondents.

HAYNE, C. This is the second time that this case has been before the court on its merits. The action was by the administratrix of a mortgagor against the mortgagees in possession under an agreement for an accounting of the rents and profits, and to redeem the property. The trial court adjudged that there was due to the defendants the sum of \$31,926.37; that upon payment thereof the defendants should reconvey the real property and redeliver the personal property; and that, if the plaintiff should fail to make such payment within 30 days, the property should "vest absolutely in the defendants." The plaintiff appeals from the judgment, and from an order denying a new trial.

The following facts are undisputed: On February 4, 1875, Adam Murdock, the plaintiff's intestate, borrowed from the defendant Clarke the sum of \$8,500, and gave his note therefor, to become due one year after date, with interest at the rate of 1½ per cent. per month, payable semi-annually, and, if not so paid, to be compounded. To secure the payment of this note, Murdock made a deed to Clarke of a tract of 330 acres known as the "Beaver Creek Ranch," and assigned to him a certificate of purchase of a tract of 4,366 acres situated about 20 miles from the first, and known as the "Big Valley Ranch." Soon after this, Clarke assigned to the defendant Cox a half interest in this note and security. Shortly afterwards, viz., on March 22d of the same year, Murdock borrowed from Clarke and Cox a further sum of \$5,000, and gave his note therefor, bearing interest at 1½ per cent. per month. In order to secure the payment of this latter note, and to further secure the payment of the first note, and of such additional sums as should be advanced, it was agreed that Clarke and Cox should take possession of the two ranches, and of the cattle and other personal property thereon, and out of the rents and profits should pay the running expenses, and apply the balance to the liquidation of the amount due to themselves. The property was to be managed by a person to be selected by the defendants, but whose salary was to be paid as part of the running expenses. Murdock had permission to reside upon the property, and assist in the work, but was not to exercise any control. It was also agreed that, as further security, Murdock should assign to Clarke and Cox a half interest in a portable saw-mill, then on public land, together with the machinery, etc., then owned by him in partnership with one Quinn, who was the manager thereof. In pursuance of this agreement, the defendants, with the approval of Murdock, selected one Stanton to manage the property, and he went there on March 22d; but the formal bill of sale was not made out until April 10th. On the next day after the execution of this bill of sale, the defendants advanced, at the request of Murdock, the sum of \$3,176.45, for which he gave his note bearing interest at 1½ per cent. per month; and subsequently further advances were made. Murdock remained

upon the property until the following December, at which time he died. About eight months thereafter the plaintiff was appointed administratrix of his estate. The property continued to be managed by Stanton until May, 1886, at which time he died, and one Snell was appointed by the defendants as his successor. During the period of Stanton's management, he received various sums of money from sales of cattle, etc., out of which sums he paid the running expenses, and gave the remainder to the defendants. During a considerable portion of the time the defendants had cattle of their own upon the ranches, and Stanton kept his own cattle there also. They were not kept separate from the Murdock cattle, but all were taken care of together. The accounting sought embraces the whole period, and various charges of neglect and misfeasance are made.

A fundamental question in the case is as to the capacity in which Stanton acted. The defendants contend that he was the agent of both sides, and consequently that neither is responsible to the other for his acts, while the appellant contends that he was the agent of the defendants only. We think that the latter position is correct. Until recently the defendants seem to have understood that Stanton was their agent. At the first trial of the case Clarke testified as follows: "We were to send a man to take possession of the property, take a bill of sale of the stock, and everything was to be run in our name." And at the last trial the same defendant testified as follows: "I told Adam Murdock we would have to have a man go there and take possession, or the personal property security would be no good." The other defendant testified at the first trial as follows: "I had the real-estate possession of everything. I was put in possession of everything. Question. Everything he had; for what purpose? Answer. For the purpose that he told me,—that during the year he would pay off the debt, and if not we were to hold the property, and manage it until we got our money." This testimony accords with the circumstances of the case. It is admitted that the agreement gave to the defendants the sole right of possession of the ranches, and we do not understand them to maintain that they did not exercise all their rights under the agreement, so far as the ranches are concerned. But it is not pretended that they had possession in any other way than through Stanton; and we think it follows that, for the purposes of possession, and all its consequent responsibility, Stanton must be held to have been their agent; and at the first trial the defendant Clarke testified distinctly that such was the case. He was asked this question: "This man Stanton was the agent of you and Murdock in taking charge of the property?" And he answered: "No, sir; he was my agent." Furthermore, Stanton seems to have always taken his orders from the defendants; and we do not think that all this is outweighed by the fact that his wages were to be paid as part of the running expenses, or by the fact that his selection was approved by Murdock, or by both cir-

cumstances together. But the matter is put beyond doubt by the defendants' answer, which avers "that according to such agreement the defendants, on or about the 1st day of April, 1875, through their agent, Stanton, took possession of the said two ranches, and have ever since run and operated the same, and are now in possession thereof." Even without this averment, we think that, upon the evidence, Stanton must be held to have been the agent of the defendants only. As we construe the findings, however, the court below did not take this view of Stanton's capacity, but held that he was the agent of both sides; and this is the construction of the counsel for the respondents, for they say: "There is nothing in the record, either in the evidence or in the findings, which would justify the inference that, by their contract, Clarke and Cox assumed to become responsible for the management of the Murdock estate." And they devote several pages to an argument to show that Stanton was the agent of both sides, and consequently that neither was responsible to the other for his acts. It thus appears that the court took the account upon a fundamentally wrong principle. This must have had an important influence upon the result, and there are several injurious consequences which we can see that it did have. In the first place, the court charged the defendants with the value of the use of the property "for their own stock" only, whereas, if Stanton was their agent, they were responsible for his acts, and should have been charged with the value of the use of the ranches for the stock that he kept there. In the next place, they should have been charged with a proportion of the expense of the care, etc., of Stanton's cattle. Upon the former appeal, it was held that they must be charged with a proportion of the expense of the care, etc., of their own cattle, (59 Cal. 695, 696;) and they were so charged by the court below. But for this purpose their agent's cattle must be considered as theirs. Except in the single item of hay, however, they were charged only with a proportion of the expense of their own cattle, and not for those of Stanton. This is apparent from the transcript, where the defendants' cattle are identified as having been bought from one Ames, and they are charged with one-third of the expenses, because such was the proportion of the Ames cattle to the Murdock cattle; and it is expressly stated that it was "upon the principle of this finding" that the proportion of the expenses was determined. These are consequences which can be seen to have resulted from the erroneous principle upon which the court proceeded. But the principle is so fundamental in the accounting that, even if no injurious consequence affirmatively appeared, we think the case would be within the rule that, where error is clearly shown, injury is presumed, unless the contrary appears. See cases collected in Hayne, *New Trials & App.* § 287.

There is another error in the findings, not flowing entirely from the erroneous principle upon which the court proceeded, but somewhat broader. It is perfectly

plain that the defendants should have been charged with a proportion of the taxes upon the cattle, as well as of the other expenses. But the court expressly excludes the taxes from the amount to be deducted from the running expenses. The respondents' counsel say in reference to this that "the words 'and taxes' were evidently inadvertently put into said finding." But, although the error is plain, we do not see upon what basis it could be set down to inadvertence. As against the respondents, the findings must be presumed to be true; and that an error is the result of inadvertence will not be presumed, but must be made to appear. *Carpenter v. Superior Court*, 75 Cal. 508, 19 Pac. Rep. 174; *Wunderlin v. Cadogan*, 75 Cal. 619, 17 Pac. Rep. 713.

We have considered whether the judgment could not be modified so as to avoid the consequences of the errors above referred to. But the findings afford no basis for such a modification, even as to the injurious results which affirmatively appear. For example, it is not found what was the number of Stanton's cattle, nor how long he kept them on the property. In the judgment of the writer of this opinion, it would conduce to the better administration of justice if the appellate court could look into the evidence for the purpose of modifying a judgment to avoid the consequences of any error that may have crept into the proceedings. But, while it may look into the evidence to see if it sustains the findings, or to ascertain and declare the principles of law which apply to the case, it is settled that it cannot resort thereto for the purpose of making findings to serve as a basis for a modification of the judgment. *Ellis v. Jeans*, 26 Cal. 278; *Carpentier v. Gardiner*, 29 Cal. 164; *Hayes v. Martin*, 45 Cal. 563. And in addition to this, as above remarked, we cannot see that the erroneous principle upon which the court proceeded did not have injurious consequences which do not appear.

There is also a radical error in the decree. The court adjudged, in effect, that the legal title passed to the defendants, and it gave to the plaintiff a certain time in which to redeem, failing which the property was to vest absolutely in the defendants. But, as it is admitted that the conveyances were intended only to secure the payment of money, they were mere mortgages, and did not pass the legal title. "It is the settled rule in this state that, if a deed absolute in form was made merely to secure an indebtedness [to the grantee,] it is a mere mortgage, and does not pass the title." *Smith v. Smith*, 80 Cal. 325, 21 Pac. Rep. 4, and 22 Pac. Rep. 186, 549. See, also, *Hall v. Arnott*, 80 Cal. 352, 22 Pac. Rep. 200; *Booth v. Hoskins*, 75 Cal. 275, 17 Pac. Rep. 225; *Raynor v. Drew*, 72 Cal. 309, 13 Pac. Rep. 866; *Healy v. O'Brien*, 66 Cal. 519, 6 Pac. Rep. 386; *Taylor v. McLain*, 64 Cal. 514, 2 Pac. Rep. 399. And the fact that the mortgagees were put in possession does not change the rule. As was said in *Smith v. Smith*, above cited, "such a deed gives a mere lien upon the property, just as if the parties had put their agreement in the form of a mortgage;" and it has been decided that, in

this state, the interest of the mortgagee is not enlarged or affected by the fact that he is in possession under the mortgage. *Dutton v. Warschauer*, 21 Cal. 609. The legal title, therefore, remained in Murdock, and vested in his heirs, and is not in the defendants; and the court below was not authorized to decree that it should vest absolutely in the defendants upon the failure of the plaintiff to pay what was due within a certain time. The defendants, however, have a right to retain possession until the sums due to them have been paid; and, even if they have not, the court has power to impose proper conditions upon the plaintiff. *Raynor v. Drew*, 72 Cal. 311, 13 Pac. Rep. 866; *Booth v. Hoskins*, 75 Cal. 271, 17 Pac. Rep. 225; *De Cazara v. Orena*, 80 Cal. 134, 22 Pac. Rep. 74. And the answer prays that the property be sold, and the proceeds applied to the payment of the debt. The decree, therefore, ought to have provided that, in case of the failure of the plaintiff to pay what was due within a specified time, the property should be sold, and the proceeds applied to the payment of whatever is due to the defendants.

As the case must go back to the court below, it is proper to dispose of certain other questions which will arise upon a retrial, and which have been argued.

1. It is contended for the appellant that the defendants were trustees, and were therefore bound to account as such, and are held to the same strict responsibility in the management of the property committed to their care. It is true that mortgagees in possession are often spoken of as "trustees." But they are so only in a limited sense. *Ten Eyck v. Craig*, 62 N. Y. 422; *Clark v. Sibley*, 13 Metc. 213; *Cholmondeley v. Clinton*, 2 Jac. & W. 184; 1 Hill. Mortg. 391. As remarked by SHAW, C. J., in reasoning to a somewhat different point: "In some very limited respects, a mortgagee is a trustee; as when he has entered, and is in the receipt of the rents and profits, he is liable to account therefor, and in that respect may be denominated a 'trustee.'" *King v. Insurance Co.*, 7 Cush. 7. That they are bound to account for the rents and profits is a matter of course. 2 Story, Eq. Jur. (13th Ed.) § 1016a; *Raun v. Reynolds*, 15 Cal. 471. And we think that the rule as to trustees in general, viz., that their accounts should be clear, distinct, and accurate, and that all obscurities and doubts should be resolved against them, (2 Perry, Trusts, 4th Ed., § 821,) applies here. But the accounting is not to be extended to imaginary profits. Where no negligence or improper conduct is alleged, a mortgagee in possession is chargeable with what he has actually received, and no more. *Benham v. Rowe*, 2 Cal. 407. In this case, negligence and improper conduct are charged, and various claims are based thereon. It is therefore necessary to consider what was the degree of care required of the defendants. Chancellor Kent, in his Commentaries, stated the rule as follows: "If the mortgagee obtains possession of the mortgaged premises before foreclosure, he will be accountable for the actual receipts of the net rents and profits, and nothing more, unless they

were reduced or lost by his willful default or gross negligence. By taking possession, he imposes upon himself the duty of a provident owner; and he is bound to recover what such an owner would, with reasonable diligence, have received." 4 Kent, Comm. 166. This statement of the rule has found its way into the decisions of the courts, and the treatises of text-writers, (see *Hidden v. Jordan*, 28 Cal. 309; *Moshier v. Norton*, 100 Ill. 68;) and a similar passage was quoted from a modern text-writer on the former appeal of this case, (59 Cal. 694;) but it cannot be determined from the opinion whether the court meant to establish a rule or not. But, if the term "gross negligence" is to be taken in its ordinary sense, viz., as denoting the absence of slight care, (see *Shear. & R. Neg. 4th Ed.*, § 49,) it is manifest that the passage quoted is somewhat inconsistent; for, if the mortgagee, by taking possession, "imposes upon himself the duty of a provident owner, and is bound to recover what such an owner would with reasonable diligence have received," it is evident that he is bound to something more than slight care, and is responsible for something less than gross negligence. What we think the passage means, when taken as a whole, is that the mortgagee in possession is bound to exercise reasonable care, and is responsible for the want thereof. This was the construction given to similar language by a comparatively recent case in Alabama. The court said: "On a bill to redeem, a mortgagee in possession will not be held accountable for anything more than the rents actually received, unless there has been willful default or gross negligence, which in such case is the measure of reasonable diligence." *Gresham v. Ware*, 79 Ala. 199. That reasonable diligence is required, is laid down in several cases. *Shaeffer v. Chambers*, 6 N. J. Eq. 548; *Strong v. Blanchard*, 4 Allen, 543, 544; *Scruggs v. Railroad Co.*, 108 U. S. 375, 2 Sup. Ct. Rep. 780. It seems plain, upon principle, that the mortgagee in possession is bound to something more than slight care. And we think that Chancellor Kent, and the courts and writers who adopted his language, meant to say that reasonable care was required. Applying this rule to the case before us, we think that the evidence shows, without material contradiction, that, while there were some errors of judgment, the general management of the property was what was required. Especially does this appear when it is considered that it was agreed that the ranches were to be run as they had been by the mortgagor. This does not mean that, if the mortgagor was negligent as to any matter, the mortgagees should be so too, but that the management of the mortgagees should be on the same general lines as that of the mortgagor; and, as above stated, we think it was.

2. Much argument is based upon the undoubted fact that both Stanton and the defendants kept their own cattle upon the ranches, not separate from the Murdock cattle, but together with them. This was certainly wrong. But it was settled on the former appeal that it made them liable for a proportion of the running ex-

penses, (59 Cal. 695, 696;) and, in addition to this, the court below allowed the value of the use of the land. This, we think, was all that could properly be charged against the defendants on this account. In addition to the cattle, the defendants sent some horses to the property. This was because the horses were needed for ranch work, and they were used for that purpose. This was for the benefit of the property, and nothing can be charged against the defendants by reason thereof. Similar remarks apply to the stallion. He was useful as a work-horse, and for breeding the ranch mares. The money made from outside parties during the breeding season belonged to the defendants.

3. Part of the property mentioned in the bill of sale was a half interest in a portable saw-mill located upon public land, and owned by Murdock in partnership with one Quinn. No profits were ever made from this mill, and it does not clearly appear what finally became of it. It was moved once while Quinn was in control. Afterwards, it was moved again, and it seems that one Harris "took it." The court below found that the defendants never had possession, and the evidence leads us to the same conclusion. The defendants incurred no liability to Murdock or his estate by not taking possession; for it was as much his duty to deliver it to them, as theirs to receive it, and there is nothing to show that he tendered it. Even if the defendants be considered as having been in possession, we cannot say that there was a want of reasonable care on their part. Quinn was allowed, with the acquiescence of Murdock, to run it as he had been doing previous to the bill of sale. After Murdock's death, Quinn was the surviving partner, with authority to settle up the affairs and dispose of the property. He is the person who is accountable to the plaintiff in relation to the matter. The defendants are not bound to litigate with him for the benefit of the estate.

4. A point is made in relation to the number of cattle received by the defendants with the ranches. The bill of sale purports to transfer 1,322 head, and it is argued that its acceptance estopped the defendants from denying that they received that number. There is no force in this suggestion. After the bill of sale was signed, it was Murdock's duty to deliver the cattle in accordance therewith. If he did not perform this duty to its full extent, the defendants are certainly at liberty to prove the fact.

5. As above stated, one of the notes provided for compounding the interest if not paid when due. The court below refused to allow compound interest, and the respondents contend that this was error. The theory upon which the court acted was, probably, that the receipts should have been applied first to keeping down the interest upon the note which provided for compound interest; and this, we think, was the right view. The net receipts should be applied first to the payment of the interest upon the note which provided for compound interest, and afterwards to the payment of the interest upon the other

sums due; and, if anything remained, it should be applied to the payment of the principal. There can be no doubt that the note bore interest from its date.

6. Some objection is made to the findings; and, for the guidance of the court below, it may be stated that it is not necessary for the findings to give the items of the account. It is not necessary to give an itemized account in pleadings, (Code Civil Proc. § 454,) and a finding which follows the pleading is sufficient. In this, as in other cases, it is sufficient to find the ultimate facts, or secondary facts from which the ultimate fact necessarily follows.

7. Whatever sums were advanced to Mrs. Anna Murdock upon the order of the mortgagor are chargeable against the estate, but sums advanced to her without any such order are not so chargeable. Sums advanced to the widow personally cannot be charged against the estate. We therefore advise that the judgment and order appealed from be reversed, and the cause remanded for a new trial.

We concur: VANCLIEF, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are reversed, and the cause remanded for a new trial.

83 Cal. 620

*Ex parte* AH SAM. (No. 20,689.)

(Supreme Court of California. April 30, 1890.)

HABEAS CORPUS—WHEN WRIT GRANTED.

That petitioner was convicted without being informed of all his rights, or that he was sentenced too soon after conviction, are mere irregularities reviewable on appeal, and cannot be inquired into on *habeas corpus*.

In bank. Petition for writ of *habeas corpus*.

L. L. Chamberlain, for petitioner. Geo. A. Johnson, Atty. Gen., for respondent.

PER CURIAM. The alleged illegality of the imprisonment in this case is that the petitioner is held under a commitment issued upon a conviction of the crime of battery, and that the commitment is void because it does not appear therefrom that the petitioner was informed of all his rights, or that six hours elapsed after conviction and before sentence, or that time was waived. There is no law that makes it necessary that these facts should be recited in the judgment, or copied into the commitment. Besides, if it is true that the defendant was not duly informed of his rights, or was sentenced too soon after conviction, these were mere errors, not excesses of jurisdiction, and were reviewable on appeal. They cannot be inquired into on *habeas corpus*. Writ denied.

3 Cal. Unrep. 259

CURRAN V. KENNEDY *et al.* (No. 13,703.)  
(Supreme Court of California. May 3, 1890.)

BILL OF EXCEPTIONS—SETTLEMENT.

Under Code Civil Proc. Cal. § 652, providing that, if a judge refuses to allow an exception in accordance with the facts, the party desiring the bill settled may apply by petition to the supreme court to prove the same, such an application will be granted where the petitioner alleges that a

bill settled by the judge is not in accordance with the facts, pointing out the particulars in which it is incorrect, and the judge alleges that the bill is true.

In bank. Petition to prove bill of exceptions.

Code Civil Proc. Cal. § 652, provides that, if a judge refuses to allow an exception in accordance with the facts, the party desiring the bill settled may apply by petition to the supreme court to prove the same.

Charles F. Hanlon, for petitioner. Gartlan & Curran, for respondents.

PER CURIAM. This is an application under section 652, Code Civil Proc., for leave to prove and to settle bill of exceptions to be used on appeal. The petition concedes that the judge has settled and certified a bill of exceptions, but alleges that the same is not a true bill, in accordance with the facts, and annexes to his petition a copy of the bill as settled, and also a copy of the proposed bill. The respondent alleges that the bill as settled and allowed by him is true and correct. The case presents a direct issue between the petitioner and respondents as to the accuracy of the bill as settled; the petitioner pointing out the particulars in which he claims that it is incorrect. It seems to be a case in which the petitioner should be allowed to prove the truth of the issue thus presented. It is therefore ordered that this cause be, and the same is hereby, referred to Hon. R. Y. HAYNE, a commissioner of this court, to take the proofs, and report the same, with his findings thereon, to this court.

3 Cal. Unrep. 265

WHITE V. WHITE. (No. 13,331.)

(Supreme Court of California. May 9, 1890.)

APPEAL—DISMISSAL.

1. An appeal will not be dismissed because of interlineations in the transcript of the record.
2. An order allowing alimony is appealable.

In bank. Appeal from superior court, city and county of San Francisco, T. K. WILSON, Judge.

E. D. Wheeler and Barclay Henley, for appellant. Henry E. Highton, H. C. McPike, and J. A. Cooper, for respondent.

PER CURIAM. Respondent moves to dismiss the appeal from the judgment in this case on the ground of written interlineations in the transcript of the record. This is not ground for dismissing the appeal, nor was it so held in *Green v. McMann*, 79 Cal. 561, 21 Pac. Rep. 964.

There is also a motion to dismiss the appeal from an order allowing alimony. The order in this case is within the decision in *Sharon v. Sharon*, 67 Cal. 185, 7 Pac. Rep. 456, 635, 8 Pac. Rep. 709. We adhere to the ruling in that case. The certificate of the clerk of the superior court to the transcript is in all respects sufficient. Both motions are denied.

83 Cal. 649

RUMFELT V. TRINITY RIVER CANAL & HYDRAULIC MIN. CO. (No. 13,585.)

(Supreme Court of California. May 3, 1890.)

APPEAL—PRACTICE.

Appellant, not having filed its transcript on appeal within the time required by the rules of

court, made affidavit, for the purpose of obtaining an extension of time, that the transcript had "not yet been printed," for certain reasons; that the manuscript of the record was "ready for printing;" and that it would be necessary for appellant to have further time in which "to prepare and serve" the transcript. An order was made granting appellant further time "to serve and file" its transcript. Held, that the order clearly contemplated a printed transcript, and that, appellant having merely delivered a manuscript copy of the record to the clerk of court within the time limited by the order, without any service upon respondent, the appeal should be dismissed.

In bank. Appeal from superior court, Trinity county; T. E. JONES, Judge.

John A. Wright, (W. H. H. Hart, of counsel,) for appellant. J. W. Turner, for respondent.

McFARLAND, J. This cause is before us upon a motion of respondent to dismiss the appeal because no transcript on appeal was filed and served within the proper time. There seems to have been great delay from the start in perfecting the appeal, and taking steps to prepare and print the transcript. Judgment was entered September 29, 1888; the bill of exceptions was settled and certified July 20, 1888; and the notice of appeal was not filed until September 25, 1889. On November 4, 1889, for the purpose of getting an order of this court extending the time for filing and serving the transcript, the attorney of appellant made an affidavit in which he stated that "the transcript on appeal in said cause has not yet been printed owing to unavoidable delay in getting a capable person to prepare the manuscript of the record of said cause; that said manuscript of the record of said cause is now prepared, and ready for printing; that it will be necessary for appellant to have further time in which to prepare and serve its transcript on appeal." Upon the presentation of said affidavit, four justices of the court, on said November 4th, made the following order: "Upon application of counsel for appellant in the above-entitled action, and good cause appearing, it is hereby ordered that said appellant may have twenty days further time from this date within which to serve and file its transcript on appeal in said action." On November 23, 1889, appellant, instead of filing a printed transcript, and serving it on respondent, as was clearly contemplated by the order, merely delivered to the clerk of this court one manuscript copy of the transcript, and on November 25th paid to the clerk the amount of money necessary to pay for printing it. The 24th of November, the last of the 20 days, fell on Sunday; and appellant now contends that, because it had the manuscript transcript on file when the motion to dismiss was made, it is protected against the motion by rules 10 and 3 of this court. Rule 10 is, no doubt, somewhat incomplete; but we think that the general understanding has been that, read in connection with other rules on the subject, the proper construction is that, when an appellant chooses to have his transcript printed by the clerk, he must furnish it to the clerk soon enough for the latter to have it printed and served within the 40 days. But, however that may be, (and we

do not decide the point here,) the appellant in the case at bar did not bring himself within rule 10 or any other rule. It did not file or serve either a printed or a manuscript transcript within 40 days. It depends entirely upon the grace given it in the order extending the time. But there was no compliance with that order. It gave 20 days in which "to serve and file" the transcript, which was not done. Moreover, it was made upon an application and affidavit which showed that the manuscript was ready, but that additional time was necessary in order to have it printed; and it was as much an order giving additional time to serve and file a printed transcript as if the word "printed" had been written in the order itself. The transcript was not "on file," within the meaning of rule 3. The appeal is dismissed, and the written transcript stricken from the files of the court.

We concur: BEATTY, C. J.; PATERSON, J.; FOX, J.; SHARPSTEIN, J.; THORNTON, J.

84 Cal. 114

PEOPLE *ex rel.* ATTORNEY GENERAL V.  
DASHAWAY ASS'N. (No. 11,089.)

(*Supreme Court of California.* May 10, 1890.)

CORPORATIONS—QUO WARRANTO—ESCHEAT.

1. An information in the nature of *quo warranto* to forfeit the charter of a corporation for perversion of its franchise may be brought by the people, under Const. Cal. art. 6, § 5.

2. The forfeiture of the charter of a corporation cannot be maintained on an averment in the information in the nature of a *quo warranto* that the corporation was formed to "promote the cause of temperance," and that it has abused its trust and misappropriated its funds, as it cannot be said that the perversion of the fund from so vague an object as "temperance" is a public injury.

In bank. Appeal from superior court, city and county of San Francisco; F. W. LAWLER, Judge.

Atty. Gen. George A. Johnson, S. Heydensfeldt, and Jos. P. Kelly, for appellant. Tilden & Tilden, for respondent.

PER CURIAM. This is an information in the nature of a *quo warranto* to forfeit the charter of the Dashaway Association, a corporation organized and existing under the laws of the state of California, and for a judgment declaring that its property escheat to the state; that a receiver be appointed to take possession of all the property; that an injunction issue, etc. The complaint avers that the object and purpose for which the said corporation was formed was to promote the cause of temperance; that it has no capital stock; that it has members who are elected under the provisions of its by-laws; that it has since its incorporation received at various times from its members and others contributions and donations of money for the purpose for which it was incorporated, to-wit, the promotion of the cause of temperance, with which moneys it acquired by purchase real estate in the city and county of San Francisco; that in 1883, by leave of the court, it sold certain real estate in said city and county for \$156,000; that it paid off a mortgage of \$45,000, leaving a balance in cash on hand of \$111,000, realized from property purchased with

donations as aforesaid, and for the purposes aforesaid; that the corporation has abused and misused its powers, disregarded its corporate trust, and violated its charter, and has fraudulently and unlawfully perverted its funds and misapplied \$72,000 from the object for which the corporation was formed, and from the use for which it was given and received, by dividing, distributing, and paying out the same among its members; that the officers and members have conspired and colluded with defendant to fraudulently and unlawfully accomplish this result, and that the corporation has still the sum of \$39,000 on hand, received in like manner and for like purpose, which, as relator is informed, it will dispose of in like unlawful manner, unless restrained. Defendant demurred to the information upon the grounds: "(1) That the said complaint does not state facts sufficient to constitute a cause of action; (2) that the said court has no jurisdiction of the person of the defendant or the subject of the action." The demurrer was sustained by the court below "on the grounds that the court has no jurisdiction." Judgment was entered in favor of defendant, from which judgment relator appeals to this court.

Corporations are creatures of the law, and when they fail to perform duties which they were incorporated to perform, and in which the public have an interest, or do acts which are not authorized, or are forbidden them to do, the state may forfeit their franchises and dissolve them by an information in the nature of a *quo warranto*. *People v. Insurance Co.*, 15 Johns. 358; *People v. Railroad Co.*, 53 Cal. 694; *Golden Rule v. People*, 118 Ill. 492, 9 N. E. Rep. 342. The grant of corporate franchises is always subject to the implied condition that they will not be abused. *Insurance Co. v. Needles*, 113 U. S. 574, 5 Sup. Ct. Rep. 681. "In its relations to the government, and when the acts or neglects of a corporation, in violation of its charter or of the general law, become the subject of public inquiry, with a view to the forfeiture of its charter, the willful acts and neglects of its officers are regarded as the acts and neglects of the corporation, and render the corporation liable to a judgment or decree of dissolution." *Ang. & A. Corp. § 310*; *Life Ins. Co. v. Mechanics' Ins. Co.*, 7 Wend. 35; *Bank Com'rs v. Bank of Buffalo*, 6 Paige, 497; *Ward v. Insurance Co.*, 7 Paige, 294. This reasoning proceeds upon the theory that the corporation is cognizant of, and approves of, the acts of its agents; and where it is made to appear that the agent has departed from his duties, as prescribed by the corporation, or violated his instructions in the performance of the acts complained of and relied upon as a basis for forfeiture, no such forfeiture will be declared. *State v. Commercial Bank*, 6 Smedes & M. 237. In *People v. Insurance Co.*, 15 Johns. 358, an application had been previously made by the attorney general to a court of chancery for an injunction to restrain the company from usurping the franchise of banking, which application was refused because there was a complete and adequate remedy at law by an information in

the nature of a *quo warranto*. *People v. Bank*, 6 Cow. 196; *People v. Bank*, Id. 211; and *People v. Bank*, Id. 217, are authority to the point that the action is properly brought in the name of the people, and against the corporations in their corporate names, in cases where they had, as corporations, usurped franchises not granted by their charters. See, also, *People v. Trustees*, 5 Wend. 211. The writ of *scire facias* was formerly used by the government as a mode to ascertain and enforce the forfeiture of a corporate charter, in cases where there was a legal existing body, capable of acting, but who had abused their power. It would not lie in cases of mere *de facto* corporations. It was necessary that the government be a party to the suit, for the judgment was that the parties be ousted and the franchises seized into the hands of the government. 2 Kent, Comm. 313. The writ of *quo warranto* was a writ which issued to bring the defendant before the court to show by what authority he claimed an office or franchise, and was applicable alike to cases where the defendant never had a right, or where, having a right or franchise, he had forfeited it by neglect or abuse. 3 Bl. Comm. 262, 263. An information in the nature of *quo warranto*, which has succeeded the writ of that name, was originally in form a criminal proceeding, to punish the usurpation of the franchise by a fine, as well as to seize the franchise. This information has in process of time become, in substance, a civil proceeding to try the mere right to the franchise or office. It was a peculiarity of both the *quo warranto* and information in the nature of *quo warranto* that the ordinary rule of pleading was reversed, and the state was bound to show nothing, and the defendant was required to show his right to the franchise or office in question; and, if he failed to show authority, judgment went against him. *Ang. & A. Corp. § 756*. The practice has, however, become quite general in this country for the information to set forth the facts relied upon to show the intrusion, misuser, or non-user complained of. In information of *quo warranto* there were two forms of judgment. When against an officer or individual, the judgment was ouster; when against a corporation by its corporate name, the judgment was ouster and seizure. In the first case, there being no franchise forfeited, there is none to seize; in the second case there is, consequently the franchise is seized. 2 Kent, Comm. 312, and note. But there may be a judgment of ouster of a particular franchise, and not of the whole charter. *People v. Railroad Co.*, 15 Wend. 113. By such ouster and seizure the franchises are not destroyed, but pass to and exist in the state. The corporation was destroyed, and ceased to be the owner or possessor of lands or goods, or of rights or credits. The lands reverted to the grantor and his heirs, and the goods escheated to the state.

The principle of forfeiture is that the franchise is a trust, and the terms of the charter are conditions of the trust; and, if any one of the conditions of the trust be violated, it will work a forfeiture of the charter. Cases of forfeiture are said to be divided into two great classes: (1) Cases



of perversion, as where a corporation does an act inconsistent with the nature, and destructive of the ends and purposes, of the grant. In such cases, unless the perversion is such as to amount to an injury to the public who are interested in the franchise, it will not work a forfeiture. (2) Cases of usurpation, as where a corporation exercises a power which it has no right to exercise. In this last case the question of forfeiture is not dependent, as in the former, upon any interest or injury to the public.

We have referred, in a general way, to the modes of procedure under these several writs, and the nature of the relief granted under them, for a purpose which will become apparent when we look into the following provisions of our Code: Section 802 of the Code of Civil Procedure of 1872 provides as follows: "The writ of *scire facias*, the writ of *quo warranto*, and proceedings by information in the nature of *quo warranto* are abolished. The remedies obtainable in these forms may hereafter be obtained by civil actions, under the provisions of this chapter." Then follow the provisions of the chapter from sections 803 to 809, both inclusive, providing for an action by the attorney general, in the name of the people of the state, against any person who usurps, intrudes into, or unlawfully holds or exercises, any public office, civil or military, or any franchise within this state. This was the condition of our law until 1879, when the present constitution of the state went into effect, the fifth section of article 6 of which authorizes the superior courts and their judges to issue writs of *quo warranto*; and in 1880 the Code of Civil Procedure was amended to conform in this respect to the constitution. Code Civil Proc. § 76. If, then, it be contended that the effect of the constitution and amendment to section 76 of the Code of Civil Procedure, reviving the writ of *quo warranto*, is to repeal by implication the chapter providing for an action against persons who usurp offices or franchises, the answer must be that it makes little difference, as the power under a writ of *quo warranto* is quite as broad as under the statute.

The mode of proceeding under the several writs we have mentioned has not in modern times been very uniform, and we regard the information or complaint in this case sufficient in its general scope to uphold a proceeding like the present, whether brought under the statute, or in support of a writ of *quo warranto*. We say sufficient in its general scope, in the view that it will uphold the one equally with the other. We are clearly of opinion that the proper parties are before the court, the nature of the relief sought considered. The vital question, however, remaining in either case is this: Has there been a perversion by the defendant of its funds under such circumstances as to amount to an injury to the public? We have already said that in cases of perversion the acts must result in injury to the public who are interested in the franchise, or no forfeiture will be declared. Has the public such an interest here, and has it been injured? The information avers "that

the object and purpose for which the said corporation was formed was to promote the cause of temperance;" that it has received moneys contributed and donated by its members and other persons for "the promotion of the cause of temperance." These are the only allegations touching the objects of the association, the scope of its action, and the manner of its achievement. Whether temperance in eating, in drinking, or temperance generally and in all things, is meant, is not stated, and must be left to conjecture. Whether its operations and efforts are confined to members of the association, or extended to those outside of the pale of the society, does not appear. In *Saltonstall v. Sanders*, 11 Allen, 448, the supreme court of Massachusetts upheld as a public charity a residuary bequest for the following purposes: "First, 'to the furtherance and promotion of the cause of piety and good morals;' or, second, 'in aid of objects and purposes of benevolence or charity, public or private;' or, third, 'temperance;' or, fourth, 'for the education of deserving youths.'" In reference to the third clause, relating to the bequest, viz., that for the furtherance and promotion of temperance, another portion of the will indicated so unmistakably the meaning of the testator, that the court says that the term, "temperance," which is shown by the previous clause above quoted to have been used by the testator in its modern and limited sense of restraining the abuse of intoxicating liquors." That a bequest for the purpose of being used by a trustee for the cause of temperance, in restraining the abuse of intoxicating liquors, is a public charity, and may be upheld as such, we do not doubt. So, too, we are fully alive to the fact that upon the construction of general charitable bequests, "if there are two meanings of a word, one of which will effectuate and the other will defeat the testator's object, the court is bound to select that meaning of the word which will carry out the intention and objects of the testator." The enforcement of charitable uses cannot be limited to any narrow and stated formula. As has been well said, it must expand with the advancement of civilization and the daily increasing needs of men. New discoveries in science, new fields and opportunities for human action, the differing condition, character, and wants of communities and nations, change and enlarge the scope of charity; and, where new necessities are created, new charitable uses must be established. The underlying principle is the same. Its application is as varying as the wants of humanity. Public charities have often been enforced in cases lacking in that definiteness essential to uphold a bequest to individuals. It does not follow, however, that we can by adjudication give a definite meaning to language which, standing by itself, or in connection with its context, has only a general signification, incapable of limitation. The word "temperance" has no fixed legal meaning, as contradistinguished from its usual import. Webster defines it as "habitual moderation in regard to the indulgence of the natural appetites and passions; restrained or

moderate indulgence; moderation, as temperance in eating and drinking; temperance in the indulgence of joy or mirth." Where a testator bequeathed the residue of his estate to the bishop of D., to dispose of the same "to such objects of benevolence and liberality as the bishop in his own discretion shall most approve of," the bequest was held void upon the ground that objects of benevolence and liberality were not necessarily charitable, within the statute of Elizabeth, and were therefore too indefinite to be executed. *Morice v. Bishop*, 9 Ves. 399. Upon the like ground, a bequest "for the relief of domestic distress, assisting indigent but deserving individuals, or encouraging undertakings of general utility," has been held void for vagueness and uncertainty, and as not being within the scope of the statute of Elizabeth. *Kendall v. Granger*, 5 Beav. 300.

We are of opinion that the term used in the information here is too vague and uncertain to enable us to say therefrom that the fund in question is a public charity which can be administered by a court of equity. It follows that the perversion of the fund is not an injury to the public, and hence that the forfeiture cannot be maintained. The judgment is affirmed.

FOX, J., deeming himself disqualified, did not participate in this decision.

84 Cal. 318

CLEARY V. FOLGER. (No. 12,843.)

(Supreme Court of California. June 9, 1890.)

VENDOR AND VENDEE—FORFEIT—MUTUAL DEFAULT.

In a contract for the sale of real estate, \$900 was paid as forfeit, \$4,100 to be paid on or before a certain date, the balance secured by mortgage. Time was stipulated to be of the essence of the contract. The installment of purchase money was not tendered within the specified time, nor was a deed tendered, or demand of payment made. *Held*, that the forfeit remains in the hands of vendor as money had and received for vendee, and subject to be recovered by him less the damages vendor may have suffered by the failure to complete the sale.

Commissioners' decision. Department 1. Appeal from superior court, Alameda county; W. E. GREENE, Judge.

*B. McFadden*, for appellant. *R. M. Fitzgerald*, for respondent.

FOOTE, C. This was an action to recover the sum of \$900 alleged to have been received by the defendant for the plaintiff's use. The court below, upon the evidence offered by the plaintiff, granted the motion of nonsuit made by the defendant. From the judgment thereupon rendered, and an order denying a new trial, this appeal is taken.

The facts of the case are that the two parties to the action entered into a contract which is as follows: "This agreement made and entered into this 22d day of August, in the year of our Lord one thousand eight hundred and eighty-seven, between J. A. Folger, the party of the first part, and Michael Cleary, the party of the second part, witnesseth that the said party of the first part, in consideration of the

covenants and agreements on the part of the said party of the second part hereinafter contained, agrees to sell and convey unto the said party of the second part, and said second party agrees to buy, all the certain lot or parcel of land situate in Brooklyn township, county of Alameda, and state of California, and bounded and particularly described as follows, to-wit, a tract of land containing seven and one-quarter (7¼) acres, more or less, on the south-easterly side of the county road, the said road being the first road running north from Hopkins street, after leaving Fruitvale avenue, going towards the east, now known as the 'Thorne property,' adjoining the lands of Mr. Welsh and Mr. Rhoda, for the sum of \$9,425, gold coin of the United States; and the said party of the second part, in consideration of the premises, agrees to pay, at the times and in the manner hereinafter mentioned, to the said party of the first part, the sum of \$9,425, gold coin, as follows, to-wit: \$900 in gold coin as forfeit; \$4,100 in gold coin on or before September 6, 1887; the balance due of purchase, namely, \$4,425, on mortgage at 8 per cent. per annum. And the said party of the second part agrees to pay all state and county taxes or assessments, of whatsoever nature, which may become due on the premises above described. In the event of a failure to comply with the terms hereof by the said party of the second part, the said party of the first part shall be released from all obligations, in law or equity, to convey said property, and said party of the second part shall forfeit all right thereto; and the said party of the first part, on receiving such payment, at the time and in the manner above mentioned, agrees to execute and deliver to the said party of the second part, or to his assigns, a good and sufficient deed conveying said land free and clear of all incumbrances made, done, or suffered by the said party of the first part. And it is understood that the stipulations aforesaid are to apply to and bind the heirs, executors, administrators, and assigns of the respective parties, and that time is of the essence of this contract. In witness whereof the said parties to these presents have hereunto set their hands and seals the day and year first above written. [Seal.] J. A. FOLGER, Jr. [Seal.] MICHAEL CLEARY. Signed, sealed and delivered in the presence of W. K. MOCKBEE. [Indorsed] Filed, December 8, 1887. CHAS. T. BOARDMAN, County Clerk. By ROBERT EDGAR, Deputy-Clerk." On the 12th of September, 1887, the plaintiff notified the defendant in writing that he rescinded the contract; and he demanded back the \$900 which, under the terms of the contract, had been paid over, and designated as a "forfeit." Up to that time, neither the plaintiff had tendered the payment of the balance of the purchase money, nor the defendant a deed, etc., to the premises. Upon this, the defendant failing to pay back the deposit, the plaintiff institutes this action. The defendant answered, and filed a cross-complaint, the object of which last was to force the plaintiff to comply specifically with the contract, and pay the balance of the purchase money, upon the

defendant's making a good and sufficient conveyance of title, etc., to the premises.

The court below seems to have decided against the defendant on his cross-complaint, evidently, upon the theory that he could not enforce a mutual and dependent covenant of the plaintiff without having on his (the defendant's) part tendered a deed at the date fixed in the contract, and demanded payment of the installment due, but does not seem to have determined anything with reference to the right of the plaintiff to recover back the \$900 sued for. Neither the balance of the purchase money was tendered on the 6th day of September, 1887, by the plaintiff, or a deed by the defendant, or demand made of payment of the installment due. So far, then, as the further carrying out of the agreement was concerned, time being of the essence of the contract, each side had neglected to perform its part of the agreement necessary to consummate the contract, and it was at an end. The plaintiff could not be forced to pay the balance of the purchase money, as no deed had been tendered him, or installment due demanded. *Bohall v. Diller*, 41 Cal. 535. The defendant was no longer obliged to make a deed to the premises conveying a good and sufficient title, as the balance of the purchase money was not tendered. *Englander v. Rogers*, Id. 421. So that the material question is left to be determined, whether or not the plaintiff, upon this state of facts, is entitled to recover from the defendant, as money in his hands held for plaintiff's use, the \$900 which he deposited with the defendant, on the inception of the contract, as a forfeit. Time was undoubtedly of the essence of the contract, under the rule laid down in *Grey v. Tubbs*, 43 Cal. 364, in construing such a contract as the one in hand. In that case this covenant was contained in the contract: "In the event of failure to comply with the terms hereof by the party of the second part, [the purchaser,] the party of the first part shall be released from all obligations, in law or equity, to convey said property, and said party of the second part shall forfeit all right thereto." In the present case the language is: "In the event of a failure to comply with the terms hereof by the said party of the second part, [the purchaser,] the said party of the first part shall be released from all obligations, in law or equity, to convey said property, and said party of the second part shall forfeit all right thereto." In *Grey v. Tubbs*, supra, it was said of the language above quoted from the contract construed in that case: "It would be difficult to express with greater clearness and certainty than the parties did in this contract that time is of the essence of the contract, except it were done by the insertion of those very words in the instrument. Courts of equity have not the power to make contracts for parties, nor to alter those which the parties have deliberately made; and whenever it appears that the parties have in fact contracted that, if the purchaser make default in the payments as agreed upon, he shall not be entitled to a conveyance, and shall lose the benefit of his purchase, and when it also appears that the

purchaser is without excuse for his delay, the courts will not relieve him from the consequences of his default."

Forfeitures, as such, are not favored by the courts, and are never enforced if they are couched in ambiguous terms. It is not perfectly certain what the intentions of the parties to this contract were with reference to the \$900 paid as a forfeit; but, construing it with reference to the second clause of the agreement, which we have quoted, and compared with that contained in *Grey v. Tubbs*, it appears as if it was intended to be in the nature of liquidated damages, if the purchaser should fail, after the contemporaneous tender of a deed to him of the land, and demand of payment of the installment due, etc., to comply with his part of the agreement. Now, as both parties have failed to comply with their part of the agreement, and, as we have seen, time being of the essence of the contract, the contract is at an end, the \$900 remain in the hands of the defendant as money had and received from the plaintiff, subject to be recovered by the plaintiff, less the amount of damages which the defendant may show for the failure of the plaintiff to complete the purchase. The agreements of the parties were reciprocal, and to be performed, or offered to be performed, contemporaneously at a certain stated time. Both have failed to offer to perform; and, if any damage has been done by the plaintiff, the defendant may recoup for it in an action brought to recover the \$900, which reverts to the plaintiff as money held by the defendant for his use. The pleadings, as they now stand, do not admit of this determination, but the defendant on a retrial may reform his pleading so as to raise that issue.

We perceive no error in the ruling of the court upon the introduction of the judgment-roll in the matter of the cross-complaint. It did not tend to show any determination of the question as to what was to become of the \$900 designated as a "forfeit."

The other points raised it is unnecessary to notice; but, for the reasons above given, we advise that the judgment and order be reversed, with leave to the defendant, within a reasonable time, to frame his pleading as heretofore indicated.

We concur GIBSON, C.; VANCE, J.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed, with leave to the defendant, within a reasonable time, to frame his pleading as indicated therein.

34 Cal. 444

IN RE O'SULLIVAN'S ESTATE. No. 11,952.)  
(*Supreme Court of California*. June 10, 1890.)  
ADMINISTRATION—SALE OF REAL ESTATE—PUBLICATION OF NOTICE.

1. Code Civil Proc. Cal. §§ 1539, 1547, providing that in proceedings by an administrator to sell real estate the order to show cause, and the notice of sale, shall be published in such "newspaper" as the court may direct, does not limit the publication to daily newspapers alone, and a publication in a weekly newspaper of general circulation is a sufficient compliance with the statute.

2. Where an administrator's private sale of real estate was set for February 15th, the publication of notice thereof in a weekly newspaper on January 27th, February 3d, and February 10th, was a sufficient compliance with the provisions of Code Civil Proc. Cal. §§ 1549, 1705, requiring that such notices shall be published "for two weeks successively next before the day on or after which the sale is to be made," and as often during the prescribed period as the paper is regularly issued.

Commissioners' decision. In bank. Appeal from superior court, city and county of San Francisco; J. V. COFFEY, Judge.

*Edward P. Cole*, for appellant. *Frank J. Sullivan*, for respondent.

BELCHER, C. C. This is an appeal from an order for the sale of real property, and an order confirming the sale, and directing conveyances to be made. The facts set out in the record are as follows: On November 1, 1885, the administrator of the estate of James C. O'Sullivan, deceased, filed in the superior court of the city and county of San Francisco a petition, verified and in all respects sufficient, for the sale of certain real property belonging to the estate. Thereupon an order to show cause why the prayer of the petition should not be granted was duly made and filed. The order directed that a copy thereof should be published once a week for four successive weeks in the *Weekly Star*, a weekly newspaper printed and published in the said city and county. At the time named in the order, and after proof of its publication for the time specified, and that proper notice had been given, and after taking testimony, the judge of the court made an order for the sale of the property at private sale. Thereafter the administrator caused notice of the sale to be posted up in three of the most public places of the said city and county, and to be published in the *Monitor*, a weekly newspaper printed and published therein, for two weeks successively next before the day on or after which the sale was to be made. The notice was published on January 27, February 3, and February 10, 1886, and the day named for the sale was February 15, 1886. A. P. Sullivan became the purchaser of the property for the sum of \$500, and the administrator then made a return of his proceedings to the court. On the day fixed for a hearing upon the return, Sullivan, the purchaser, appeared, and objected to a confirmation of the sale. The court overruled the objections, and entered an order confirming the sale, and directing conveyances to be executed; hence this appeal. The objections to a confirmation of the sale were: (1) That the order to show cause was published in a weekly, and not a daily, newspaper; (2) that the notice of the sale was published in a weekly, and not a daily, newspaper; (3) that the notice of sale was not published up to and including the day on which the sale was to take place. And the same objections are urged here as grounds for a reversal of the orders appealed from.

The provisions of the Code bearing upon the questions presented are as follows: A copy of the order to show cause must be personally served on all persons interested in the estate, "or be published four

successive weeks in such newspaper in the county as the court or judge shall direct." Section 1539, Code Civil Proc. The court, at the time and place appointed in the order, upon satisfactory proof of personal service or publication of a copy of the order, must proceed to hear the proofs of the petitioners, and of all persons interested in the estate who may oppose the application. Section 1540, Id. If the court is satisfied, after a full hearing, that a sale is necessary, an order of sale must be made. Section 1543, Id. When a sale is ordered, and is to be made at public auction, notice of the time and place of sale must be posted and published in a newspaper for three weeks successively next before the sale. Section 1547, Id. When a sale of real estate is ordered to be made at private sale, notice of the same must be posted and published in a newspaper for two weeks successively next before the day on or after which the sale is to be made. The notice must state a day on or after which the sale will be made, and a place where offers or bids will be received. The day last referred to must be at least fifteen days from the first publication of notice, and the sale must not be made before that day, but must be made within six months thereafter. Section 1549, Id. When any publication is ordered, such publication must be made daily, or otherwise as often during the prescribed period as the paper is regularly issued, unless otherwise provided in this title. The court, or a judge thereof, may, however, order a less number of publications during the period. Section 1705, Id.

It is argued that proceedings for the sale of property belonging to an estate are statutory, and that every requirement of the statute must be strictly observed and complied with, or the sale, if made, will be void; that the object of the publication provided for in the sections of the Code above referred to is to give notice to all parties interested in the estate, so that they may appear and avail themselves of any rights they may have; that the publication most likely to give such notice in a large city, like San Francisco, is one in a daily newspaper; and that publication in a weekly newspaper in such a city is, therefore, not authorized by the statute, and is insufficient to give the court jurisdiction. It is true that proceedings like those involved here are statutory, and that their validity depends upon a substantial compliance with the law. But the statute provides only that the order to show cause shall be published in "such newspaper in the county as the court or judge shall direct," and that the notice of sale shall be published in "a newspaper, if there be one printed in the same county; if none, then in such paper as the court, or a judge thereof, may direct." In this there is nothing to indicate a legislative intent that the publication should be in a daily, rather than a weekly, paper; and in the absence of anything appearing to the contrary it must be assumed that no such intent existed. The court found that the *Weekly Star* and *Monitor* were "newspapers of general circulation published in the city and county of San Francisco dur-

ing the time referred to in the sworn return of sale on file herein, and that the said notices appeared once a week during the prescribed period, as regularly as the newspapers were issued, in accordance with section 1705 of the Code of Civil Procedure." The publications in the papers named were therefore, in our opinion, sufficient to meet all the requirements of the law. To hold otherwise would require the court to ingraft upon the statute a new provision; and this it has no power to do. *Richardson v. Tobin*, 45 Cal. 33.

It is also urged that it is a matter of absolute necessity that the notice of sale be published up to and including the day when the sale is to take place; and this, it is said, can only be accomplished by having the publication in a daily paper; and in support of this position counsel cite *McCurdy v. Baker*, 11 Kan. 111; *Witaker v. Beach*, 12 Kan. 492; and *Early v. Doe*, 16 How. 610. The last case cited has nothing to do with the question. The other two relate to sales of real property under execution, and the sufficiency of notices thereof. It was held that under the statutes of that state such notices must be published in a newspaper for a certain number of days, "and continued in each successive issue of the paper up to the day of sale;" and in another case in the same state (*Treptow v. Buse*, 10 Kan. 170) it was held that publication in a weekly paper was sufficient. Under our statute, notice of a sale like that involved here must be published "for two weeks successively next before the day on or after which the sale is to be made," and the publication must be "as often during the prescribed period as the paper is regularly issued." This means that the publication must be for two successive weeks, (*Estate of Cunningham*, 73 Cal. 558, 15 Pac. Rep. 136,) and in each successive issue of the paper up to the day on or after which the sale is to take place. The notice, as we have seen, was so published, and was therefore sufficient. We find no error in the orders complained of, and advise that they be affirmed.

We concur: FOOTE, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the orders appealed from are affirmed.

84 Cal. 484

PEOPLE V. SAMARIO. (No. 20,570.)

(Supreme Court of California. June 12, 1890.)

HOMICIDE—DYING DECLARATIONS—ARRAIGNMENT.

1. On a trial for homicide, where it appears that deceased was stabbed, and that he died two days thereafter, testimony that he said, after discovering that he had been spitting blood for some time: "I am dead;" "I am going to die, but you can say that I die innocent,"—is sufficient to show that he was under a sense of impending death; and his declarations, thereafter made, as to the circumstances of the stabbing, are admissible.

2. The court's denial of defendant's motion to strike out part of the dying declarations relating to occurrences taking place before the killing will not be disturbed where defendant failed to object to the admission of such evidence.

3. Though defendant is unable to understand

English, his arraignment is not insufficient because the record fails to state that an interpreter was appointed, where it does state that the information was read to defendant, that a copy was given him, and that he pleaded not guilty.

4. The court's denial of defendant's motion to amend the record so as to show that defendant never pleaded personally to the information will not be disturbed, as it is a decision of a matter of fact within the knowledge of the court.

Commissioners' decision. Department 1. Appeal from superior court, Contra Costa county; Jos. P. Jones, Judge.

E. R. Chase and A. D. Splivalo, for appellant. Geo. A. Johnson, Atty. Gen., for the People.

HAYNE, C. The appellant was convicted of manslaughter for the killing of one Antonio Ninuccio. Several points are made upon the appeal.

1. It is contended that the evidence is insufficient to sustain the verdict. It is not disputed that the defendant stabbed the deceased, and the uncontradicted evidence is that the latter died from the effects of the wound within two days after receiving it. It is argued, however, that the defendant acted in self-defense. But, if the evidence of Donati and Coppola is to be believed, he did not act in self-defense; and whether they were to be believed or not was a question for the jury.

2. It is urged that it was error to admit the dying declarations of the deceased, because, as is said, it was not shown that he was under a sense of impending death. One of the witnesses to whom the declaration was made testified as follows: "At about 11 o'clock at night, or a little after, as this man, all the time spitting blood—At one time he had a mouthful of blood, and couldn't throw the blood away from him, and it went all over his face and chin, and then on his breast. I, of course, took a towel to clean the blood from him, and the blood was going all over his face, and I cleaned it the best I could. Finally, there was a little blood left on his eye, and he said: 'Clean there by my eye.' While I was cleaning that, he grabbed the towel that was in my hand, and looked at it, and he said: 'Oh, my countryman, I am dead. That ain't spit I am spitting; that is blood I am spitting. Oh, I am going to die.' \* \* \* When he said that, I said: 'Keep up your courage; you are not going to die. To-morrow, perhaps, you will get up.' His answer to me was: 'O no! I am going to die, but you can say I die an innocent man.'" There was nothing to indicate a revival of hope, and we think that the declaration was properly admitted.

It is argued, however, that part of what the deceased said did not relate to the circumstances of the killing, but to prior occurrences. But there was no objection to the admission of the evidence. The defendant waited until the evidence was in, and then moved to strike it out. In such case, if the court denies the motion, its action will not be disturbed. *People v. Long*, 43 Cal. 446.

3. It is contended that the arraignment was not sufficient because the record does not show that an interpreter was appointed. The record states that the information was read to the defendant, and a copy

thereof given to him, and that he pleaded that he was not guilty of the offense charged. This was sufficient. It was not necessary that it should be stated that an interpreter was appointed.

It is further contended that the court should have granted the defendant's motion to amend the record so as to show that he never personally pleaded to the information. But in the first place that was a matter which took place in the presence of the court, and presumably it recollected the circumstances, and its decision as to the fact will not ordinarily be disturbed. In the second place, if the proposed amendment had been allowed, it would have made no difference. *People v. McCoy*, 71 Cal. 396, 12 Pac. Rep. 272; *People v. Bowman*, 81 Cal. 568, 569, 22 Pac. Rep. 917. The other matters do not require special notice. We therefore advise that the judgment and order appealed from be affirmed.

We concur: BELCHER, C. C.; GIBSON, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

(84 Cal. 535)

**DUTERTRE v. SUPERIOR COURT. (No. 13,696.)**

(*Supreme Court of California. June 12, 1890.*)

**NOTICE OF APPEAL—UNDERTAKING—PROHIBITION.**

Where, on appeal from a justice court to the superior court of San Francisco, the undertaking on appeal was filed more than 5 days before notice of appeal was served, the notice of appeal was notice that an undertaking had been or would be filed within the statutory time of 30 days, and a writ of prohibition will not be granted because the applicant complains that he did not have an opportunity to except to the sureties upon the undertaking.

*Mr. O'Brien and Morrison & Daingerfield*, for petitioner. *Manuel Eyre*, for respondent.

PATERSON, J. This is an application for a writ of prohibition directed to the Honorable F. W. Lawler, judge of the superior court, prohibiting him from hearing the action of Dutertre v. Calvert, on appeal to the superior court from the justice's court. The grounds upon which it is claimed that the superior court has no jurisdiction to hear the appeal in that case are that judgment was entered in favor of the plaintiff therein in the justice's court on August 12, 1889; that an undertaking on appeal was filed in the office of the clerk of said justice's court on said August 12, but the notice of appeal was not filed until August 19, 1889, and was not served on the plaintiff therein until August 23, 1889; and that no notice of the filing of the undertaking was given plaintiff. It is claimed that because the undertaking was filed more than five days before service of a notice of appeal, and no notice of the filing of the undertaking given, the plaintiff lost the benefit of the statutory time to except to the sureties, and that the appeal was ineffectual for any purpose; that to render the appeal effectual an undertaking must be filed after service of the notice, or at least that notice of the filing of the undertaking must be given in some form.

In *Coker v. Superior Court*, 58 Cal. 177, it was held that the notice of appeal must be filed and served, and an undertaking given, within 30 days after the rendition of the judgment, to render the appeal effectual, but that the order in which they were done is not material. In that case the judgment was rendered June 12th, notice of appeal served June 16th, and filed June 17th, but the undertaking on appeal was not filed until July 7th; and yet it was held that jurisdictional prerequisites had been complied with. In the case before us the plaintiff had no notice that the defendant in the action (in the justice's court) would appeal to the superior court until 11 days after the defendant therein had filed an undertaking. The petitioner herein claims that he was entitled to the benefit of the statutory time of 5 days after notice of the filing of the undertaking to except to the sufficiency of the sureties therein. In this we think he is right. As this court said in *Columbet v. Pacheco*, 46 Cal. 651, referring to provisions of a similar nature, "it would be unreasonable to hold that this period of time may run against the respondent without his having had notice in some mode that the undertaking had been actually filed in the clerk's office, and, the Code having failed to provide for a special notice of that fact, we think it was intended that the service of the notice of appeal should itself operate such notice." But the petitioner did have an opportunity to except to the sufficiency of the sureties. The notice of appeal was notice to him that an undertaking had been or would be filed within the 30 days after the rendition of the judgment. It was not necessary for the appellant to give a new undertaking. The statute gives the appellant the right to file and serve his notice of appeal and his undertaking at any time within the 30 days; and, as we have seen, the order in which these jurisdictional steps are taken is immaterial. Application denied.

We concur: BEATTY, C. J.; FOX, J.; WORKS, J.; SHARPSTEIN, J.; MCFARLAND, J.

(84 Cal. 311)

**SCAMMON v. WELLS, FARGO & Co. (No. 12,690.)**

(*Supreme Court of California. June 9, 1890.*)

**CARRIERS OF GOODS—STIPULATED VALUE—SETTLEMENT WITH CONSIGNEE.**

1. Civil Code Cal. § 2200, provides that "a common carrier of gold, \* \* \* upon loss or injury of such articles, \* \* \* is not liable for more than the value of the articles named in the receipt or bill of lading," and plaintiff having received that amount, by his agent, cannot maintain an action for damages for the wrongful conversion of property, there being no charge of fraud, malice, or oppression on the part of the defendant.

2. In case of unqualified consignment of property, the carrier has the right to assume that the consignee is the owner, and to settle a claim, for damages for the non-delivery of property, with him.

3. Where an agent was authorized to receive money in payment of damages, he was authorized to receipt therefor, and the principal was charged with notice of the agent's acts.

Department 1. Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

*J. F. Cowdery, for appellant. Pillsbury & Blanding, for appellee.*

PATERSON, J. On April 12, 1875, plaintiff delivered to defendant at Downieville two sealed packages of gold-dust of the value of \$3,758.93, but which he represented to be of the value of \$3,260, to be transported by defendant's express to plaintiff's agent, the London & San Francisco Bank, Limited, at San Francisco. The packages were placed by defendant with other packages of gold-dust, valued at about \$2,000, in the express box. On April 13, 1875, the stage-coach in which the gold was being transported from Downieville was stopped by a highwayman, and robbed of all its treasure. On April 21st the bank (plaintiff's agent) demanded the packages or their value. Defendant thereupon, and without knowing that the bank was not the owner of the property, paid to it the sum of \$3,260, and took a receipt from it, in which the two packages were specified as being a sealed bag, valued at \$160, and a sealed package, valued at \$3,100, "taken by robbers at Oregon Hill, April 14, 1875." At the time this payment was made the defendant had no knowledge that the bank was not the owner of the packages, and did not know by whom the robbery was committed, or where the property was concealed. Through the efforts of the company's chief detective, J. B. Hume, the robber was arrested, and the gold-dust recovered on May 4, 1875. When recovered, plaintiff's gold-dust was mingled with other gold-dust, the property of other persons, taken by the robber, and could not be identified. On May 4th, plaintiff, having learned of the recovery of the gold, called upon defendant, and offered to return the \$3,260 received from it, and demanded the packages shipped by him, stating that the dust was worth more than the value placed upon it when shipped. The agent of defendant stated to plaintiff that the defendant had expended a large amount of money in recovering the property, and asked him if he was willing to stand any part of the expense. Defendant declined to do so, and has never paid or offered to pay any part of the expense incurred in the recovery of the gold-dust. The regular rate of the defendant for carrying gold-dust was \$5 for each \$1,000 worth, but, in consideration of plaintiff's agreement to ship all his gold-dust by defendant's express, defendant was charging plaintiff only \$4 per thousand. The packages were sealed, and, of course, defendant knew nothing of the true value thereof, except from what the plaintiff told it. The court found that, if defendant had known at the time it received the shipments that the property was of greater value than \$3,260, it would have charged and collected \$4 for each \$1,000 worth of dust. Nothing has ever been paid or offered to defendant for transporting the excess of gold-dust above the value of \$3,260. Plaintiff brought this action to recover from defendant the sum of \$498.93. The court gave judgment for the defendant, and from said judgment, and from an order denying his motion for a new trial, plaintiff has appealed.

We think the judgment is right, and should be affirmed. The Civil Code provides that "a common carrier of gold, silver, platina, or precious stones, or imitations thereof, in a manufactured or unmanufactured state, \* \* \* is not liable for more than \$50 upon the loss or injury of any one package of such articles, unless he has notice, upon his receipt thereof, by mark upon the package or otherwise, of the nature of the freight; nor is such carrier liable upon any package carried for more than the value of the articles named in the receipt of the bill of lading." Section 2200. This measure of damages was adopted for the protection of the carrier, and does no injustice to the owner. The carrier is an insurer of the property intrusted to him, and is legally responsible for acts against which he cannot provide, from whatever cause they may arise, only the acts of God and of the public enemy, and those which arise out of the fault of the owner, being excepted. He therefore has a right in all cases to be truly informed as to the value of the property in order to estimate the risk and determine the care which should be exercised in the protection of the property, and to save himself from loss. Lawson, Cont. § 20; 3 Suth. Dam. 243.

This action being for damages for the wrongful conversion of the property, the rule given in section 2200, supra, cuts off the right of the plaintiff to recover, there being no charge of fraud, malice, or oppression on the part of the defendant. If the carrier should collude with the robber, or, after rescuing the property, should willfully mingle it with other property of the same kind, so that it could not be identified and segregated, the measure of damages might be different; but nothing of that kind is claimed here. There are other reasons why the plaintiff is not entitled to recover. The defendant did not know that plaintiff was the owner of the property, and, the consignment being an unqualified one, it had the right to assume that the consignee was the owner, and to settle the matter with the bank. *Boston & M. R. Co. v. Warrior Mower Co.*, 76 Me. 260; 2 Ror. R. R. 1380, 1381; *Hutch. Carr.* § 720. If the bank be treated as the agent of plaintiff,—and it is alleged in the complaint that it was,—the same conclusion is reached. If the bank was authorized as agent of plaintiff to receive money in payment of the damages, it was authorized to receipt therefor, and the plaintiff was charged with notice of what its agent had done. Section 2322, Civil Code. The \$3,260 was paid to the bank on April 21st. Not until after plaintiff learned that the gold-dust had been recovered, viz., on May 4th, was any objection made to the settlement made by the agent. That it was a settlement and abandonment, so far as the agent had authority to make it, there can be no doubt. The agreed statement states that the bank "demanded of defendant the said packages or their value, and defendant then and there upon such demand paid," etc. Plaintiff had the right to demand the value of the property which was lost, or to wait until the property was recovered, and then demand the possession



of the property itself. He chose through his agent to accept \$3,260, the value which had been placed upon the property by plaintiff. Thereafter defendant, proceeding upon the assumption that by the payment of the loss it had become the owner of the property, expended the sum of \$1,635 in recovering the property which had been stolen, and of which plaintiff's gold-dust was the greater part. It would be manifestly unfair to allow the owner to abandon the property under such circumstances, accept a certain sum in payment of the loss, lie by until a large sum of money had been expended in recovering the property, (larger than the amount of loss sustained by the owner in the settlement,) and then to set aside the settlement, and require the carrier to pay the full value of the property. If plaintiff had sued defendant, and recovered judgment before the property was restored to defendant, and defendant had paid the judgment, the title to the property would have vested in defendant, regardless of its actual value. *Smith v. Smith*, 51 N. H. 571; *Cooley, Torts*, 458. The acceptance without suit of the amount offered in payment of damages had precisely the same effect, and passed the title to defendant. Judgment and order affirmed.

We concur: BEATTY, C. J. FOX, J.

84 Cal. 537

SMITH *et al.* v. SOLOMON. (No. 3,670.)  
(Supreme Court of California. June 13, 1890.)  
APPEAL—DISMISSAL—FAILURE TO FILE TRANSCRIPT.

Rule 3 of the supreme court requires the transcript on appeal to be filed within 40 days after the appeal is perfected, and the bill of exceptions settled. *Held*, that an appellant cannot excuse his failure to file the transcript within 40 days after the appeal is perfected by the fact that the bill of exceptions had not yet been settled, where more than 40 days have expired since the entry of judgment without his taking any steps to settle such bill; Code Civil Proc. Cal. § 650, requiring an appellant to draft his proposed bill of exceptions and serve the same on the adverse party within 10 days after the entry of judgment, or within such further time as the judge may allow, which additional time is limited to 30 days by section 1054.

Department 1. Appeal from superior court, city and county of San Francisco; T. H. REARDEN, Judge.

Code Civil Proc. Cal. § 650, provides: "When a party desires to have exceptions taken at a trial settled in a bill of exceptions, he may within 10 days after the entry of judgment, \* \* \* or such further time as the court in which the action is pending, or a judge thereof, may allow, prepare the draft of a bill, and serve the same, or a copy thereof, upon the adverse party." Section 1054 provides: "When an act to be done, as provided in this Code, relates to the \* \* \* preparation of statements or of bills of exceptions, \* \* \* the time allowed by this Code may be extended, upon good cause shown, by the court in which the action is pending, or a judge thereof; but such extension shall not exceed 30 days without the consent of the adverse party."

*Beatty & Fowler*, for appellant. *Geo. D. Collins*, for respondents.

Fox, J. Appeal from judgment foreclosing mechanic's lien. Motion to dismiss appeal, for failure to file transcript in time. Judgment was rendered and entered November 25, 1889. Appeal perfected December 7, 1889. The transcript was due in this court January 16, 1890; there being no bill of exceptions or statement settled or filed. Notice of this motion given January 20, 1890, showing that the same would be made on certificate of the clerk of the court below, which was also filed, dated January 17th, showing that no bill of exceptions or statement had been settled or filed in the cause, and that he had not been requested to certify any transcript in the cause. Appellant, by affidavit, attempts to excuse the delay in filing transcript by showing that the bill of exceptions had not been settled, relying upon rule 3 of this court, which requires that the transcript shall be filed within 40 days after the appeal is perfected, and the bill of exceptions and statement, if there be any, are settled. But that does not help out the case; for the same affidavits show that no attempt was made to settle bill of exceptions until January 10, 1890, more than 40 days after the entry of judgment, and then the only attempt was to speak to the counsel of respondent about it. No proposed bill of exceptions has ever been served or offered to the judge for settlement. No extension of the time in which to settle the same had ever been given by counsel; and the time allowed by law, and all the time which the court had power to give in which to prepare and serve upon opposite counsel a proposed bill of exceptions had expired before said opposite counsel had been even spoken to upon the subject. See Code Civil Proc. §§ 650, 1054. It was therefore too late to settle any bill of exceptions in the case, and no satisfactory excuse is given for failure to file the transcript in time. It is therefore ordered that the appeal be dismissed, and the court below is directed, under section 1195, *Id.*, to allow as additional costs in the case a reasonable attorney's fee for the services of the attorney of respondent in this court.

We concur: BEATTY, C. J.; PATERSON, J.

84 Cal. 505  
JUDSON v. LYFORD *et al.* (No. 12,032.)  
(Supreme Court of California. June 12, 1890.)  
FRAUDULENT CONVEYANCE—INTENT—QUIETING TITLE.

1. Civil Code Cal. § 3442, provides that the question of fraudulent intent is one of fact, and not of law, and that no transfer can be adjudged fraudulent, solely on the ground that it was not made for a valuable consideration. One largely indebted attempted to make a voluntary settlement of the only property he had on his children and himself. The trustee testified that this was done to "protect" the children. There was no other evidence to overcome the inference of fraud. *Held*, that a finding that there was no fraudulent intent must be set aside, as against the evidence.

2. A debtor, with intent to defraud a creditor, conveyed land to a trustee, who was directed to divide the income between the debtor and his chil-

dren, and, at his death, to hold in trust for them. The land was sold under execution in favor of the creditor, and bid in by him. *Held*, under Civil Code Cal. § 3489, providing that every transfer of property made with intent to defraud any creditor is void, that the sheriff's deed made on such sale passed the legal title in fee.

8. A purchaser at an execution sale of land, conveyed by the debtor to defraud creditors, may sue a vendee, with knowledge of the fraudulent intent, to quiet title, under Code Civil Proc. Cal. § 788, providing that an action may be brought by any person against another, who claims an estate or interest in land adverse to him, for the purpose of determining such claim.

McFARLAND, J., dissenting.

In bank. Commissioners' decision. Appeal from superior court, Marin county; E. B. MAHON, Judge.

*E. F. Swortfiguer*, (Walter Van Dyke, of counsel,) for appellant. *E. D. Sawyer* and *Sawyer & Burnett*, for respondents.

HAYNE, C. This was an action by a judgment creditor to set aside a deed made by his debtor to the defendant Lyford, in trust for certain purposes. The court below gave judgment for the defendants, and the plaintiff appeals. The general features of the case are as follows: On and prior to September 15, 1883, the plaintiff was the owner of a judgment against one Deffebach upon which was due the sum of \$9,446.74. On that day the latter inherited from his wife an undivided one-third interest in a tract of 646.51 acres of land in Marin county. Within a month thereafter, and while the judgment against him was in force, he made a deed to the defendant, Lyford, in trust to sell sufficient of the property to pay off certain mortgages upon the property, and to collect the income of the remainder, and, after paying the taxes, etc., to pay one-half of such income to the grantor during his life, and to use the balance for the support of his minor children, and, upon the arrival of the youngest child of age, to convey the property to such children in equal shares. (The mortgages referred to were omitted from the litigation by stipulation.) This deed was entirely without consideration. It was therefore a gift for the benefit of the children, with the reservation for himself of a life provision out of the income. A little more than a month after the execution of the deed a writ was issued upon plaintiff's judgment, and levied upon the property, and all the right, title, and interest which Deffebach then had therein was sold to plaintiff for something less than the amount of the judgment. In due course the plaintiff received a sheriff's deed, and within four days thereafter Deffebach died. This action was commenced soon afterwards. Before the trial Deffebach's administrator paid to plaintiff the balance due upon the judgment, which was thereupon satisfied of record. The foregoing facts appear without contradiction.

The main position of the respondents is that the deed to Lyford conveyed to him the legal title to whatever share Deffebach had in the property, leaving in the latter only an equitable life-interest in half the income; that this equitable interest was all that the plaintiff got by his

sheriff's deed; and, being only for Deffebach's life, ceased at his death; and that, as the judgment was paid and satisfied, plaintiff has no foundation for his action. But this argument overlooks the charge that the deed was made to hinder and delay the plaintiff's rights as a creditor, which is the basis of the plaintiff's case. If it were not for this feature, the case would be like *Kennedy v. Nunan*, 52 Cal. 326, cited for the respondents, and we are not prepared to say the position would not be sound. But the charge of fraud introduces an altogether different element. If the charge be true,—that is to say, if the deed was in fact made to hinder and delay plaintiff's rights as a creditor,—then the deed was void as against him, and his sheriff's deed vested in him, not merely an equitable life-interest in the income, but all the interest which Deffebach had in the property before he made the deed, and entitled the plaintiff to have the deed canceled as a cloud upon his interest, as was fully explained in *Hager v. Shindler*, 29 Cal. 48.

The proposition that a deed in fraud of the rights of creditors is absolutely void, as against them, is well settled. It was so under the statute of Elizabeth. "A fraudulent conveyance, made with the view of defeating the claims of creditors, is altogether void by the statute 13 Eliz. Such a deed, therefore, can confer no legal interest on which a trust can be fastened by a court of equity." *Hill, Trustees*, 163. The same rule prevails in the majority of American courts. In this regard Mr. Freeman says: "In many instances the aid of equity is invoked. But generally this is unnecessary, for a transfer made to hinder, delay, or defraud creditors, while as between the parties it conveys the title, has, as against a creditor proceeding under execution, no such effect. As against the fraudulent transferee, the creditor may seize the property, whether real or personal, as that of the fraudulent vendor, and may proceed to sell it under execution. The title transferred by such sale is not a mere equity,—not the right to control the legal title, and to have the fraudulent transfer vacated by some appropriate proceeding; it is the legal title itself, against which the fraudulent transfer is no transfer at all." *Freem. Ex'ns*, § 136. The statute of California embodies this rule. It says that "every transfer of property or charge thereon made, every obligation incurred, and every judicial proceeding taken with intent to delay or defraud any creditor or other person of his demands, is void," etc. Civil Code, § 3489. And in case of *Bull v. Ford*, 66 Cal. 177, 4 Pac. Rep. 1175, the precise point was decided. There, after showing that the conveyance was in fraud of creditors, the court, per Ross, J., said: "The conveyance to defendant being void, as against Alvarado's creditors, the creditors were authorized to levy upon and sell the property, as if no conveyance had ever been made by their debtor. *Freem. Ex'ns*, § 136, and the authorities there cited."

It is obvious, therefore, that the question upon which the case must turn is whether the conveyance was in fraud of

the rights of the plaintiff as a creditor. This, under our statute, is a question of fact, (Civil Code, § 3442;) that is to say, a question of intent. And the intent which is material is that of the grantor. It is immaterial how innocent the grantee was. *Lee v. Figg*, 37 Cal. 336; *Peek v. Peek*, 77 Cal. 111, 19 Pac. Rep. 227; *Swartz v. Hazlett*, 8 Cal. 128. And where, as here, the grantee paid no value for the deed, it is immaterial that he had no notice of the fraud. Nor is it necessary that the grantor should have had any malice against the creditor, or any evil intent to injure him, or any actual intent to do a wrong. It is immaterial whether, as a matter of fact, he supposed that he had a perfect right to conceal his property from his creditor. Concealment of property from one's creditor is what the law forbids, and the intent so to conceal it is considered fraud, and it is sufficient so to plead it. *Hager v. Shindler*, 29 Cal. 59; *Bull v. Ford*, 66 Cal. 176, 4 Pac. Rep. 1175. The question, then, is reduced to this, viz.: Had the grantor, as a matter of fact, an intent to hinder or delay his creditor? The court below found that he had not. But we think that the findings are entirely unsupported by the evidence.

At the time of the execution of the deed, the grantor had no other property than the land he attempted to convey. This is distinctly testified to by the witness Valentine, and by the defendant Lyford himself. And there is no evidence to the contrary. The argument which the counsel for the respondents make against this is that the record does not state that it contains all the evidence, and that the presumption is in favor of the findings. But the point is properly specified. And it has long ago been settled that the presumption is that the record contains all the evidence which is material to the point specified. *Hidden v. Jordan*, 28 Cal. 303; *Smith v. Athern*, 34 Cal. 511; *Clark v. Gridley*, 35 Cal. 403; *Grigsby v. Water Co.*, 40 Cal. 405; *Association v. Willard*, 48 Cal. 619. In the case last cited it was said that the rule "has been so often repeated that it has become trite." The fact that, after the action was commenced, the administrator of the grantor paid the small balance remaining due on the judgment, does not tend to prove that the grantor had at the time of the deed any other property than that which he attempted to settle on his children and himself. For all that appears to the contrary, the administrator (who was the trustee under the deed) may have raised it on the property, or may have advanced it himself. As above stated, the positive testimony is that the grantor had nothing at the time of the deed except the property in question. And this is not contradicted.

The uncontradicted facts, therefore, are that the grantor, being heavily indebted to the plaintiff, attempted to make a voluntary settlement of the only property he had upon his children and himself. Is it not the irresistible inference from these facts that he intended to place the property beyond the reach of the plaintiff's judgment? Compare *Swartz v. Hazlett*, 8 Cal. 128. We can hardly imagine circum-

stances which would overcome the inference from the above facts. Certainly there is nothing tending to overcome it in the record before us. The defendant Lyford says that the deed was made to "protect" the grantor's children. But can a man "protect" his children against the lawful claims of his creditors? If this be the meaning of the defendant's testimony, it is itself sufficient to show that the deed was fraudulent. But, whatever may be its meaning, it certainly does not tend to overcome the inference from the above facts. And there is no other evidence. In our opinion, the uncontradicted evidence shows that Deffebach made the deed to hinder and delay his creditor, and, this being the fact, it results as a matter of law that the deed was absolutely void as against the creditor, in whom the sheriff's deed vested, not a mere equitable life-interest in the income, but all the estate which Deffebach had before he made the deed. It may be added that, as we construe the complaint, it is a complaint to remove a cloud, under the doctrine of *Hager v. Shindler*, supra. The respondents say that it is a complaint to "quiet title," by which we suppose is meant a complaint to determine an adverse claim under the statute. We do not take this view of the pleading. But, assuming that it is the correct view, we think that the facts are sufficient to support an action of that character. We therefore advise that the judgment and order appealed from be reversed, and the cause remanded for a new trial.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are reversed, and the cause remanded for a new trial.

McFARLAND, J., dissenting.

84 Cal. 485

ALBION R. R. CO. v. HEESER. (No. 12,083.)  
(Supreme Court of California. June 10, 1890.)

EMINENT DOMAIN—COMPENSATION.

A railroad company, having no positive knowledge as to the ownership of land, while guilty of a technical trespass, does not become a tort-feasor by entering on the land, and constructing a bridge and track thereon, intending subsequently to condemn it to the public use; and the land-owner, who himself was ignorant of his title at the time of the entry, is not entitled to have the value of such track and bridge allowed to him as a part of his "just compensation" for the taking of his land.

Commissioners' decision. In bank. Appeal from superior court, Mendocino county; R. McGARVEY, Judge.

J. M. Mannon and C. C. Hamilton, for appellant. T. L. Carothers, for respondent.

FOOTE, C. This action was instituted for the purpose of condemning to the public use a right of way for the plaintiff's railway track, over a portion of the defendant's land. Judgment of condemnation followed as prayed for, and the damages were assessed against the plaintiff in

the sum of \$175, as a just compensation for the property sought to be condemned, and as damages consequent to such condemnation. The defendant appeals from the judgment and order denying a new trial. The contention of the appellant is that the court erred in failing and refusing to make and give judgment in his behalf for \$8,500 more than was awarded him. The ground upon which this claim is advanced is that the railroad corporation entered upon the land of the appellant, before any condemnation proceedings had been commenced, and erected thereon a bridge and railroad track, which had become permanently attached and affixed to the soil, which was of the value of \$8,500; and, such being the fact, the defendant became the owner of these fixtures or permanent improvements upon his land, placed there by plaintiff as a trespasser, and, as a consequence, was entitled to have their value allowed to him as a part of his just compensation. The evidence shows that the corporation, at the time of its entry upon the land and the building of the bridge and track thereon, did not know positively who owned the land, nor did the defendant know that it was his land that was being thus intruded upon until he got the field-notes of it from San Francisco.

While the entry of the plaintiff may have been technically a trespass, it was not the act of a mere tort-feasor. It is, therefore, to be determined whether the bridge and track, placed upon the land under such circumstances, with the evident intention, in good faith, to put in operation the constitutional right to condemn for the public use the right of way over the land, is such an act as operates as a dedication, in law, of the materials or structures of the railroad placed upon the land to the owner of the land, so as to entitle him to include them in the assessment of his damages as a just compensation for the condemnation of the right of way over his land. In the case of *Railroad Co. v. Armstrong*, 46 Cal. 85-90, the appellate court said: "The argument on behalf of the defendant on the first point is that the plaintiffs, in constructing the railroad track, were trespassers, and that the track, being attached to the soil, became a part of the realty, and belonged to the owner of the land. Hence he claims that its value ought to be included in the estimate of damages, in like manner as though the defendant had himself built the road. But this proposition cannot be maintained. Neither the constitution nor the statute contemplates that a person whose land is taken in the exercise of the right of eminent domain shall be entitled to anything beyond a 'just compensation.' He is to be paid the damage he actually suffers, and nothing more. But, to hold that, in addition to the fair value of the land taken, and such other damages as he may suffer by severing it from the remainder of his tract, he shall also recover the value of a railroad track, in the construction of which he never expended a dollar, and which was built by the plaintiffs at their own expense, would be to defeat the obvious intent of the statute by an over-technical construction of it." Again,

the supreme court of Pennsylvania, in the case of *Justice v. Railroad Co.*, 37 Pa. St. 28-33, has said: "The very intent of an appropriation of land is to place upon it and own and use the structures necessary to carry out the charter purpose. Hence no dedication of the material can be inferred in such a case. In this we perceive how differently the common law itself must view the application of its own rules. The great merit of the common law, so often commended by the jurists, is its plasticity as a system of principles (and not merely of rigid rules) which can be adapted to new conditions in the affairs of men. Modern inventions and discoveries have so far transcended the conditions of former times that to apply the rule as to a mere trespasser, whose entry is a tort pure and simple, to the case of one authorized to enter for a great public purpose, merely because of an irregularity in the manner of proceeding, would be as vain as to attempt to dress a full-grown man in the garb of his childhood. This is not the case of a mere trespass by one having no authority to enter, but of one representing the state herself, clothed with the power of eminent domain, having a right to enter and to place these materials on the land taken for a public use,—materials essential to the very purpose which the state has declared in the grant of the charter. It is true the entry was a trespass, by reason of the omission to do an act required for the security of the citizen, to-wit, to make compensation or give security for it. For this injury the citizen is entitled to redress. But his redress cannot extend beyond his injury. It cannot extend to taking the personal chattels of the railroad company. They are not his, and cannot increase his remedy. The injury was to what the landholder had himself, not to what he had not. Then why should the materials laid down for the benefit of the public be treated as dedicated to him? In the case of a common trespasser the owner of the land may take and keep his structures, *nolens volens*, but not so in this case, for, though the original entry was a trespass, it is well settled that the company can proceed in due course of law to appropriate the land, and, consequently, to reclaim and avail itself of the structures laid thereon. *Harrisburg v. Crangle*, 3 Watts & S. 460; *McClinton v. Railroad Co.*, 66 Pa. St. 409; *Railroad Co. v. Burson*, 61 Pa. St. 379." In Illinois it is said in the case of *Railroad Co. v. Goodwin*, 111 Ill. 282: "Even if the entry had been without license or permission, of any one authorized to grant the same, so that it was a trespass at the time, the law would not require the railroad company, in seeking a condemnation of the land so entered upon for a right of way, to pay the owner of the land for structures placed upon it at its own expense, with the view of subsequently acquiring the right of way." Citing numerous cases. In a case entitled *Cohen v. Railroad Co.*, 34 Kan. 158-167, 8 Pac. Rep. 138, it is said: "It has even been held that where a railroad company enters upon land as a technical trespasser, and afterwards procures the land for its right of way by condemnation proceedings, it is

not compelled to pay for the improvements which it itself made upon the land while it was technically a trespasser, and before it legally procured its right of way." Citing many cases. In Oregon the matter has been determined in like manner in the case of *Railway, etc., Co. v. Mosler*, 13 Pac. Rep. 300-303, where it was said: "The object of the proceeding is to award just compensation to the owner of the land. The improvements made by the corporation and for the use of the road, and necessary for its successful operation, constitute no part of the damage or value of the land. The just compensation is for the injury which he may sustain for the taking of the land. 'When this is afforded the purposes of right and the constitution are satisfied. It is not intended that compensation shall extend beyond the loss and injury, including that which the land-owner had not when the property was taken, but which is an incident of the appropriation and essential to the uses for which the law confers the right of taking the property.' *Jones v. Railway Co.*, 70 Ala. 233; *Railroad Co. v. Booraem*, 28 N. J. Eq. 450." The views thus expressed in the authorities cited are well sustained by *BRICKELL, J.*, in the Alabama case, *supra*. It is true that the appellant contends that the appellate court of California, in the case of *U. S. v. Land in Monterey Co.*, 47 Cal. 515-517, has reversed the case in 46 Cal. cited heretofore, but an examination of the cases does not bear out the assertion. For the court in the later opinion says: "The law did not authorize the United States to take possession of these lands *manu forti*, and their agents, in entering upon them and ejecting the defendants, were mere tortfeasors. The case is in this important respect wholly unlike that of *Railroad Co. v. Armstrong*, 46 Cal. 85." The *Armstrong* Case was one where the land was entered upon and the structures erected pending condemnation proceedings, but they were dismissed. These condemnation proceedings were again initiated, and the defendant's claim for the value of the corporation's improvements, made before the institution of the last proceedings, was disallowed; the court putting its ruling upon the ground that the structures were erected while the corporation was in possession. The first condemnation proceedings, then pending, were afterwards dismissed. Although not altogether clearly expressed, we gather that the court thought the circumstances in the one case evinced the disposition in good faith to condemn and pay a just compensation, and the other an entry by the strong hand with no such intention. If we are wrong in this conclusion as to the distinction drawn, and it is as contended, that the two cases are irreconcilable, then we think, both upon reason and authority, the case in 47 Cal. should be declared overruled, and the case in 46 Cal. approved.

Under the facts in this case we do not think the rule of just compensation for condemned property would be subverted by holding that the defendant should make the plaintiff pay \$8,500, which the plaintiff expended in good faith to establish a public use, and when the defendant expended

not one dollar, and at the time of the construction of the track and bridges did not know that they were being built on his land. To do this would be to pay the defendant for that which he never had, and which the plaintiff, in putting it upon the appellant's land, had no intention, as a tortfeasor, to place there. All the injury the defendant suffered can be paid for, without giving him a large sum of money for injury he never suffered. We therefore advise that the judgment and order be affirmed.

We concur: BELCHER, C. C.; VANCLIEF, C.

PER CURIAM. For reasons given in the foregoing opinion the judgment and order are affirmed.

84 Cal. 651

PEOPLE v. TILEY. (No. 20,665.)

(*Supreme Court of California.* July 8, 1890.)

WITNESS—CROSS-EXAMINATION ON IRRELEVANT MATTERS.

1. On a trial for burning insured property with intent to defraud the insurers, where the keeper of a bawdy-house testifies to admissions made by defendant to her within a few days after the fire, it is error to permit defendant to be cross-examined as to whether or not he was at the house on a day six months after the fire, as such evidence is clearly immaterial, and evidently offered for the sole purpose of degrading his character, and prejudicing the jury against him.

2. Defendant on his direct examination denied that he had procured a third person to set the fire, as testified to by a witness for the people. On his cross-examination, he was asked how long he had known such third person, and answered, only six or seven days before the fire. *Held*, that the people could not show in rebuttal that defendant had known the third person for a longer period, as a party cannot cross-examine his adversary's witnesses on irrelevant matters for the purpose of eliciting something to be contradicted.

Commissioners' decision. In bank. Appeal from superior court, San Bernardino county; *J. L. CAMPBELL*, Judge.

*Peck & Taylor*, for appellant. *H. Conner* and *J. A. Johnson*, Atty. Gen., for the People.

BELCHER, C. C. The defendant was convicted of the crime of burning insured property with intent to injure and defraud the insurers; and he appeals from the judgment, and an order denying him a new trial. The property burned was a two-story wooden building and its contents, situate just outside of the limits of the city of San Bernardino, and known as the "Arctic Saloon Building." It was owned by the defendant and one Myers, and the lower story was used by them as a saloon, and the upper story as a lodging-house. The building was insured for \$1,000, and the furniture, stock, and fixtures for a like sum. The fire occurred between 1 and 3 o'clock in the morning of January 1, 1889. The defendant was not at the saloon at the time the fire was started, and had not been there for some hours before. He could not, therefore, himself have set the fire. This was not controverted at the trial, but it was claimed that he must have procured some one else to set it. The evidence against the defendant was wholly circumstantial, and

most of it was admitted against his objections and exceptions. Among other items of evidence objected to were the following: The prosecution called as a witness a woman known as Josie McFarland, who testified that she was a "sporting lady," and kept a "sporting-house" in the city of San Bernardino. She then proceeded to relate certain conversations, tending more or less to criminate defendant, some of which she said she had with him at her house eight or ten days before, and some eight or ten days after, the fire. The defendant was called as a witness in his own behalf, and denied that he had the conversations, or made the statements, related by the witness Josie, but admitted on cross-examination that he might have been at her house at the times named by her. The following questions were then asked and answered: "Question. When was the last time that you was at Josie McFarland's? Answer. The 5th of July. Q. How long did you stay there when you were there? A. I was there probably fifteen minutes. Q. Now, I will ask you the direct question: Didn't you stay there all night on the night of the 4th of July, 1889? A. I did." The objection to the last question was that it was "irrelevant, incompetent, and immaterial, and not responsive to the examination in chief, and not proper cross-examination, and is asked simply for the purpose of having a tendency to degrade the character of the witness." It is now urged for the appellant that his objections to each of the foregoing questions should have been sustained, and that the rulings against him operated to his manifest prejudice. That the rulings were erroneous is too clear, in our opinion, to admit of debate. The defendant was a married man; and the fact that he went to, and remained over night in, a house of ill fame, was greatly to his discredit, and undoubtedly tended to prejudice the jury against him. It did not, however, tend in the slightest degree to show that he caused his saloon to be burned six months before, or that he ever made any admissions relating thereto. The evidence must have been offered for the sole purpose of discrediting the witness; but for that purpose, or any other, it was clearly incompetent and inadmissible. *Sharon v. Sharon*, 79 Cal. 674, 22 Pac. Rep. 26, 131.

The prosecution also called as a witness one James Tye, who testified, among other things, that he was tending bar for Tiley & Myers during the last days of December, 1888; that, at the time of the fire, he was present in the bar-room of the Arctic saloon; and that he knew a man by the name of Brock O'Neal. He was then asked and answered as follows: "Question. Was he there at the time of the burning of the saloon? Answer. Yes, sir; he was there. He was there ten minutes before the burning of the building. Q. What was he doing there? A. He was shaking dice with me about ten minutes before the fire. He was in the saloon at the time of the fire. I, at least, saw him during the burning of the saloon. Q. Had he any relations there, or not, with Ben Tiley? A. I don't know whether he had anything to

do with Mr. Tiley. Q. Had you done anything as a go-between between him and defendant before the fire,—within a day or two? A. I brought him a package. Q. Where did you get that package? A. From the Calico saloon. Mr. Tiley told me he had a package for to give Brock O'Neal; for me to take it down. I took it down, and don't know whether I gave it to him, or told him where it was. This was a few days before fire. At time he gave me package, he wanted to know who was hanging around there, and I told him; and, among others, I mentioned name of Brock O'Neal. The package was a small soda-water bottle. It had in it a whitish liquid. In my judgment, it resembled water. I don't know what was in it." The defendant, in his examination in chief, testified that he never set the fire, or caused it to be set, and never had any knowledge whatever as to the cause of the fire, and that he never sent to Brock O'Neal any bottle or package, by James Tye, or any one else. On cross-examination, he was asked: "Question. You know Brock O'Neal, don't you? Answer. Yes, sir. Q. How long have you been acquainted with him? A. I have been acquainted with him only a little while. Q. How long had you been acquainted with him before that fire? A. Five or six days. Q. Now, then, I will ask you as a question on this trial, how long did you know Brock O'Neal before the fire occurred at the depot last January? A. How long did I know him before the fire? I should judge, five or six days. It might have been up as high as seven, but not outside of that. Q. And no longer? A. No, sir; I never saw him before." In rebuttal the prosecution called two witnesses to prove that the defendant had known O'Neal for a considerably longer time than that stated by him on his cross-examination. This testimony was objected to "on the ground that it is not proper rebuttal testimony; on the further ground that it is irrelevant and immaterial. If it is asked for the purpose of impeaching the defendant, it is wholly upon a collateral and immaterial matter, and the proper foundation has not been laid." The objections were overruled, and these rulings are assigned as error. We are unable to see that this rebuttal testimony was relevant or material for any purpose other than to discredit and impeach the defendant. But, as said in *People v. Dye*, 75 Cal. 112, 16 Pac. Rep. 537: "A party cannot cross-examine his adversary's witness upon irrelevant matters for the purpose of eliciting something to be contradicted; and, if such matters are drawn out, the court should stop the inquiry there. It is well settled that a witness cannot be impeached by contradicting him upon collateral matters." In our opinion the rulings complained of were erroneous, and the evidence thus wrongly admitted tended to prejudice the defendant before the jury.

Other errors are assigned, but we do not think it necessary to notice them particularly. For the errors above noted, we advise that the judgment and order be reversed, and the case remanded for a new trial.

We concur: HAYNE, C.; FOOTE, C.

PER CURIAM. For reasons given in the foregoing opinion the judgment and order are reversed, and the case remanded for a new trial.

84 Cal. 528

CLIFFORD V. ALLMAN. (No. 12,129.)

(Supreme Court of California. June 12, 1890.)

APPEAL—EXCEPTION—DEPOSITION.

1. Under the provision of Code Civil Proc. Cal. § 956, that on appeal from a judgment the court may review any intermediate order or decision which involves the merits, or necessarily affects the judgment, except an order from which an appeal might have been taken, the evidence may be reviewed, on appeal from a dismissal on striking out the complaint as for contempt, though the exception does not specify the particulars in which the evidence is insufficient, and the appeal was not taken within 60 days; the exception to the order to strike not being "an exception to the decision or verdict," within Code Civil Proc. Cal. §§ 648, 939, providing (section 648) that, when the exception is to the decision or verdict for insufficiency of the evidence, the objection must specify the particulars in which it is insufficient, and (section 939) that such an exception cannot be reviewed on appeal from the judgment unless the appeal is taken within 60 days.

2. It is error to dismiss an action because the plaintiff did not appear to give her deposition, continued by consent to a time of which she had no notice; her attorney having told her that he would let her know when to come.

Fox, J., dissenting.

Commissioners' decision. In bank. Appeal from superior court, Alameda county, N. HAMILTON, Judge.

T. C. Van Ness, for appellant. Metcalf, & Metcalf, for respondent.

VANCLIEF, C. This is an action for seduction, commenced in San Francisco, December 15, 1885, in which the plaintiff, a minor 16 years of age, sues by her guardian, Bridget Drysdale, who is her mother. The summons was served on the defendant March 12, 1886. On March 29, 1886, pending a demurrer to the complaint, and before answering, the defendant duly served notice on plaintiff's attorney that he would take the deposition of the plaintiff, on behalf of the defendant, before a notary in the city of Oakland on the 5th day of April, 1886; and on March 30th the notary issued a subpoena to the plaintiff, commanding her to appear and testify, and give her deposition, at the time and place appointed in the notice. The subpoena was served on the plaintiff on the day it was issued. On the appointed day (April 5th) the attorneys for the respective parties appeared before the notary, but the plaintiff did not appear, having been advised by her attorney that she need not appear until he notified her to do so, as he would have the taking of her deposition postponed; and accordingly, at the request of her attorney, and by consent of counsel for defendant, the taking of the deposition was continued until April 10, 1886, when, at the request of plaintiff's attorney, and by consent of defendant's attorneys, the taking of the deposition was again postponed until April 17th. On the morning of April 17th, plaintiff's attorney, by his clerk, notified defendant's attorneys

and the notary in Oakland that, as he would be engaged in other business in one of the courts in San Francisco, he had not notified plaintiff to appear, and that she would not appear to give her deposition on that day, and asked for another postponement of one week. To this request defendant's attorneys refused to consent, and the notary denied any further postponement; but, as plaintiff did not appear, her deposition was not, and could not have been, taken on that day. In the mean time the cause had been transferred to Alameda county for trial. On July 14th the defendant gave notice that on July 27th he would move the court to strike out the complaint of the plaintiff on the ground that she had disobeyed the subpoena issued by the notary as above stated. Pending this motion, which was continued from time to time, the defendant answered, denying all the material allegations of the complaint. September 8th the motion was heard on a report of the notary, which he made pursuant to an order of the court, and upon affidavits filed by the respective parties, showing the facts substantially as above stated. Thereupon the court ordered that the plaintiff's complaint be stricken out, and dismissed the action. This appeal is from the judgment dismissing the action, and comes here upon the judgment roll, including a bill of exceptions. The appellant asks a review of the order striking out her complaint, claiming it to be an intermediate, non-appealable order, which involves the merits, and necessarily affects the judgment, in the sense of section 956 of the Code of Civil Procedure.

1. The respondent's counsel contends, as I understand their point, that this appeal, as presented, necessarily involves a review of the evidence upon which the motion was granted, and that this cannot be done, because the appeal was not taken within 60 days after the rendition of the judgment. It is true that the appeal was not taken within 60 days after the rendition of the judgment. It is also true that the bill of exceptions contains no specification of any particulars of the insufficiency of the evidence to justify the order, but counsel express no objection on this ground. It appears, however, that an exception was duly taken to the order striking out the complaint. Section 648, *Id.*, provides that "when the exception is to the verdict or decision, upon the ground of insufficiency of the evidence to justify it, the objection must specify the particulars in which such evidence is alleged to be insufficient." Section 939 provides that an appeal from a final judgment may be taken within one year after the entry thereof, but adds that "an exception to the decision or verdict on the ground that it is not supported by the evidence cannot be reviewed on an appeal from the judgment unless the appeal is taken within sixty days after the rendition of the judgment." Section 956 provides that, "upon an appeal from a judgment, the court may review the verdict or decision, and any intermediate order or decision excepted to, which involves the merits or necessarily affects the judgment, except a decision or



order from which an appeal might have been taken." In *Coveny v. Hale*, 49 Cal. 355, it was decided that "the decision referred to in section 648 is the statement of facts found, and conclusions of law therefrom, mentioned in section 638 of the same Code;" and I see no reason to doubt that the words "verdict or decision" were used in the same sense in sections 939 and 956 as in section 648. As used in section 956, the phrase, "the verdict or decision," evidently means something different from what is intended by the phrase, "any intermediate order or decision," in the same section; for certainly the latter phrase, as there used, does not mean the written findings of fact and law required by sections 632 and 633 to be filed with the clerk as a result of a trial on the merits. From these considerations, it follows that the word "decision," as used in section 939, means the written findings of fact required by sections 632 and 633, exclusive of the intermediate orders and decisions which may be reviewed upon appeal from a final judgment, and as to which no written findings are required. This conclusion, I think, accords with the practice and general understanding of the profession in this state, and is further strengthened by the consideration that no specification of insufficiency of evidence is required or practiced on appeals from appealable orders, although such orders are as often founded upon evidence *dehors* the pleadings as are non-appealable orders. I see no reason why such specifications should be required on appeals from non-appealable orders which is not equally applicable to appeals from appealable orders. However this may be, the Code does not require them in either case. It follows that an intermediate non-appealable order or decision, excepted to, involving the merits or affecting the judgment, may be reviewed on appeal from the final judgment taken within one year from the entry thereof, and without any specification in the bill of exceptions of the particulars in which the evidence is insufficient to justify such order or decision, since the exception to such intermediate order or decision is not "an exception to the verdict or decision," in the sense of section 939 of the Code of Civil Procedure.

2. Although the complaint or answer of a party may be stricken out as a penalty for disobedience to a subpoena, (Id. § 1991: *Kelskar v. Ayres*, 46 Cal. 94,) yet such disobedience must be proved to have been willful or intentional. The affidavits and the report of the notary, on which the court made the order striking out the complaint, do not show that plaintiff intentionally disobeyed the subpoena; but, taken together,—and they are perfectly consistent with each other,—they tend to show the contrary. The subpoena commanded the plaintiff to appear and testify on April 5th. She did not then appear, because her attorney had instructed her that she need not appear until he notified her to do so, as he intended to have the matter postponed until some future day; and accordingly her attorney appeared at the time appointed, and requested a postponement until April 10th, to which defendant's attorneys consented. On April

10th, defendant's attorneys consented to another postponement until April 17th. On the day last appointed, plaintiff's attorney, by his clerk, notified defendant's attorneys that he would be engaged in court on that day, and could not attend to taking the deposition, and that he had not notified the plaintiff that she need attend on that day; and for these reasons he asked another postponement, which was denied. The plaintiff states in her affidavit that her attorney never notified her to appear on either of the days appointed, and there is no evidence tending to show that she had notice of the appointments made by agreement of counsel for the 10th and 17th of April. To justify the severe penalty imposed by the court, the disobedience must have been such as to constitute a contempt of the authority of the notary, and must have been proved by the same degree of evidence as would have been required to prove the plaintiff guilty of such contempt; yet there is no evidence tending to prove disobedience to the subpoena except the fact that she did not appear before the notary on the 5th of April, which was excused by the consent of defendant's counsel to a postponement, since it does not appear that her absence was the cause of the postponement, nor that she would not have appeared on April 5th if the postponement had not been consented to. It will hardly be contended that the notary would have been justified in attaching and punishing her for contempt after the postponement by agreement of counsel. It does not appear that she was advised by her counsel to disobey the subpoena, and it is not intended to decide that the advice of her counsel could have shielded her from the penalties of intentional disobedience. The question is, does it appear that she intentionally disobeyed the subpoena, either by advice of her attorney or otherwise? And I think this question should be answered negatively.

I think the judgment dismissing the action should be reversed, and that the trial court should be directed to restore plaintiff's complaint to its files, and to proceed in the action.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment dismissing the action is reversed, and the trial court is directed to restore plaintiff's complaint to its files, and proceed in the action.

Fox, J., dissenting.

84 Cal. 560

In re COBB. (No. 20,553.)

(Supreme Court of California. June 14, 1890.)

#### ATTORNEY AND CLIENT—DISBARMENT.

In proceedings for the disbarment or suspension of an attorney, the accusation stated that defendant, as attorney for a mortgagee, obtained judgment on the mortgage; that he agreed with C., another creditor of the mortgagor, to postpone the sale, C. putting certain moneys in the hands of defendant, to be applied on the sale in case C. should become the purchaser of the mortgaged property; that at the sale defendant became the purchaser,

and immediately afterwards sold the property to C.; and that the mortgagee repudiated the power of defendant to make such sale to C., and discharged him as attorney. The accusation further averred, upon information and belief, that, although the mortgagee demanded of defendant the moneys which C. had intrusted to him, defendant did not settle for them, except as afterwards stated, to-wit, that, the mortgagee having assigned his claim against defendant to C., the defendant settled with C. *Held*, that the accusation was insufficient.

In bank. Proceedings for disbarment. *Warren Olney and Giles H. Gray*, for relator. *Henry E. Wells, J. McKinley, and John F. Burris*, for respondent.

McFARLAND, J. On June 3, 1889, Andrew Crawford filed in this court a written accusation against Moses G. Cobb, charging him with violating his oath as attorney at law, and praying that this court "take such action in the premises as may be just and proper." Cobb filed a demurrer to the accusation, on the ground that it does not state sufficient facts to constitute an accusation or complaint. He also filed an answer, and before any ruling on the demurrer, with the consent of the parties, a referee was appointed to take and report the evidence, and his report has been filed.

The accusation was not sufficient. It states, substantially, these facts: Cobb, as attorney for one Schallard, commenced an action against the Eel River Steam & Navigation Company to foreclose two mortgages on the steamer *Ferndale*. Judgment was entered for plaintiff in the superior court for \$13,015.50, in November, 1882. Defendant appealed the case, and judgment was affirmed in the appellate court on July 15, 1886. In the mean time the relator herein, Crawford, had obtained another mortgage on the *Ferndale*, and, being desirous of buying the steamer, or, at least, having it sold when it would bring the most, and saving himself from loss, he made an arrangement with Cobb that the sale of the steamer should be delayed until a more favorable time for sale, and that he should pay Cobb certain moneys which should be applied on the sale. If Crawford should become purchaser of the steamer, and should be returned by Cobb to Crawford in case the latter should not become such purchaser. Under this contract Crawford gave Cobb moneys and obligations from time to time, until the aggregate thereof amounted to over \$5,000. Afterwards the steamer was sold under execution. At the sale Cobb bid in the steamer at \$17,500, but immediately afterwards made an agreement with Crawford to let the latter have the steamer for \$16,500,—the amount which Crawford had bid at the sale. "Thereafter the plaintiff in said action [Schallard] came from his residence at Humboldt to the city and county of San Francisco, and discharged said Cobb as his attorney, and refused to let your relator [Crawford] have said steamer for the sum of \$16,500, and repudiated the authority of said Cobb to make any arrangement for the sale of said steamer, or of the sheriff's certificate of sale." It is then averred, upon information and belief, that Schallard demanded of Cobb the money and obligations re-

ceived by the latter from Crawford, and that Cobb refused and neglected to pay the same. It is further averred that Cobb did not pay said moneys to the plaintiff, or to "your relator, or to any person for him, except as next hereinafter stated, to-wit: On May 24, 1888, and after demand made as aforesaid, the said Schallard assigned his claim against the said Cobb, growing out of said payments received by said Cobb, to your relator; and afterwards, and on the 6th day of May, 1889, the said Cobb settled with your relator, and received a receipt in full of all demands on the part of your relator."

It is clear that if Schallard repudiated Cobb's contract with Crawford, and discharged Cobb as attorney, and Cobb settled with Crawford, then there is no case here against Cobb. But if we ignore as far as possible the question of the sufficiency of the accusation, and look into the evidence, we fail to see that the grave charges made against the respondent have been sustained with sufficient degree of certainty. The averments of the accusation above referred to must still be taken as true. Schallard, as before stated, discharged Cobb as his attorney, and repudiated all contracts which the latter had made with Crawford; and it does not appear that any explicit demand was ever made by Schallard, or for him, that Cobb should pay Schallard any sum of money claimed to have been collected by Cobb as attorney for Schallard. Cobb swears that there never was such a demand, and the evidence on the point for the relator is that the attorney for Schallard and the attorney for Crawford made together a demand on Cobb, but it does not appear whether they claimed the money as due to Schallard or to Crawford. (It is to be noticed that the demand was subsequently coupled with a threat of proceedings for disbarment.) And, indeed, Schallard was not in a very sure position to demand money received on a contract which he had repudiated. Crawford had a claim against the steamer in quite a large sum of money for repairs done on it. Cobb had an unsatisfied claim for attorney's fees for prosecuting the original suit in this court. He testified, also, that all Schallard wanted was the amount, in money, of his judgment, and that he (Cobb) had the privilege of making all the steamer would sell for over that amount. As Schallard repudiated the contract between Crawford and Cobb, the latter had strong reasons for thinking that whatever liability he was under was to Crawford, with whom he never had the relation of attorney and client. The sheriff's certificate was in Cobb's name. Crawford claimed the right to purchase the steamer under the contract with Cobb, and was in possession of it. Under these circumstances, an arrangement was made by which Cobb, with Crawford's consent, assigned the certificate of sale to Schallard's agent. Schallard paid a certain amount of money to Crawford, and assigned to the latter whatever demands he might have against Cobb, although this last assignment, Cobb testifies, was without his knowledge. Schallard got ownership and

possession of the steamer, which was worth more than his judgment, and Cobb settled with Crawford. While the conduct of the respondent in the premises may be subject to some adverse criticism, we do not think that the case made out is strong enough to warrant us in disbaring or suspending an old attorney, who has practiced law more than 40 years without any previous stain upon his professional reputation. The accusation is dismissed, without costs to either party.

We concur: PATERSON, J.; Fox, J.; SHARPSTEIN, J.

WORKS, J. I concur in the judgment, on the ground that the accusation is insufficient. I do not concur in the finding that the evidence fails to show any ground for the disbarment or suspension of the respondent from practice. It is clearly shown that he received money from Crawford which he failed to pay over or account for to either his client or Crawford. The money did not belong to the respondent. Whether it belonged to his client or to Crawford was wholly immaterial, as each of them demanded its payment, and he admitted his liability, and agreed to pay the account when he could raise it. It thus appears that he had received this money as an attorney, and converted it to his own use. This was a plain and palpable violation of his duty as an attorney, which, in my judgment, this court should not palliate or excuse.

34 Cal. 624

PEOPLE *ex rel.* HACKE v. HIBERNIA SAV. & LOAN SOC. (No. 12,726.)

(Supreme Court of California. June 30, 1890.)

#### HIGHWAYS—DEDICATION.

1. The court found that in 1861 B., who was the owner of the northerly half of a block which was 275 feet wide from F. street, on the north, to E. street, on the south, and of the premises in controversy, extending through the center of the block from east to west, filed in the proper office a map of such block, in which the premises in controversy were designated as a street 35 feet wide, and called "O. Avenue;" that B. gave notice upon the map that he would thereafter make all sales in accordance therewith; that in the same year B. constructed a fence as the southerly boundary of the northern half of the block, at a distance from F. street of 120 feet; that until 1870 such fence was maintained continuously, and said premises were used as a street by the public; and that, on two official maps of the city, said premises were designated as a street. *Held*, that a conclusion of law that O. avenue was a public street was correct.

2. The fact that a deed, executed by B. a year and a half after the filing of the map, of certain lots in said block, described the block as bounded by the proper streets, but did not refer to O. avenue, or any street running through the block, did not show a revocation of the dedication.

3. Act Cal. April 25, 1862, provided that all the streets, alleys, etc., laid down on a certain official map of said city made before the filing of B.'s map, and on which O. avenue did not appear, should be considered public for the purpose of grading, macadamizing, etc. *Held*, that the omission of the act to name other streets than those laid down on such map did not show an intention to vacate O. avenue, especially as an act was passed the next day to establish the lines and grades of streets in said city, under which was prepared one of the official maps on which O. avenue was designated as a street.

Department 2. Appeal from superior court, city and county of San Francisco; WILLIAM T WALLACE, Judge.

A. H. Loughborough, *Tobin & Tobin*, and Thos. F. Barry, for appellant. Jarboe, Harrison & Goudfellow, for respondent.

McFARLAND, J. This action was brought to require defendant to remove certain obstructions from an alleged street, called "Olive Avenue," in the city of San Francisco, running from Larkin street westerly to Polk street, through the center of block 9 of the Western addition, between Ellis and O'Farrell and Larkin and Polk streets, and being of the width of 35 feet; and to have said Olive avenue adjudged to be a public highway. Judgment went for plaintiff, in the court below, and the defendant appeals from the judgment, and from an order denying a new trial.

Practically the only question in the case is whether or not the findings of fact are justified by the evidence; for those findings clearly support the conclusions of law and the judgment, and the assigned errors of law occurring at the trial are unimportant. The court finds, in brief, that, in the year 1861, Jacob Beideman was the owner of the premises described in the complaint, and of the northerly half of said block 9, which was 275 feet wide from O'Farrell to Ellis streets; that, in January of that year, Beideman made and filed in the recorder's office a map of lands, including said block 9, upon which the premises described in the complaint were delineated as a street 35 feet wide, called thereon "Olive Avenue," and that upon said map said Beideman indorsed and signed the following: "The county recorder of the city and county of San Francisco will please file in his office the above map or plan of the Beideman tract of land, according to which I shall hereafter make all sales and conveyances." It is further found that in said year (1861) Beideman inclosed the said northerly half of said block by fences, and as the southerly boundary thereof constructed a fence running parallel with O'Farrell street, and at a uniform distance southerly therefrom of 120 feet throughout the length of the block from Larkin to Polk; that said fence was maintained in that position by Beideman and his grantees continuously thereafter until the year 1870; and that thereby the premises in controversy herein, to the width of thirty-five feet, were by said Beideman and his said grantees thrown open to public use as a public street or highway, and "that continuously from said year 1861 until the year 1870 the said premises, to the said width of thirty-five feet, were continuously used by the general public as a street or highway." It is further found that the premises in controversy were delineated as a street on the two official maps known as the "City Engineer's Map," and the "Humphrey's Map;" no name to the street being given on the former map, but being designated as "Olive Avenue" on the Humphrey's map. The former map was approved and adopted by the board of supervisors in January, 1866, and the latter in October, 1870; and the court finds

that by the acts aforesaid the said Olive avenue was dedicated and accepted as a public street or highway. The obstructions complained of were placed on the said street, as found by the court, in the year of 1883.

These facts being taken as true, it is clear that the conclusion of the court that Olive avenue is a public street, and the judgment following that conclusion, is correct, under all the cases and authorities cited by counsel; and it is clear that we would not be warranted in holding that there was not sufficient evidence to support the finding of fact. Indeed, it appears that the strip of land afterwards called "Olive Avenue" was used as a public thoroughfare from an early period in the history of the city; that it had been fenced on both sides prior to the time when Beideman put up the fence mentioned in the findings; and that, several years before 1861, Beideman, who then owned the whole of block 9, sold part of the southerly half, and described it as 120 feet wide, thus leaving room in the center for a 35-foot street; for the distance from Ellis or Farrell street to the middle of the block is 137½ feet. On May 9, 1862, Beideman conveyed to Deane and Wineschanks, through whom appellant claims title, lots 4, 5, and 6 in block 9 of the Western addition. The deed described the block as bounded by O'Farrell, Larkin, Ellis, and Polk streets, but does not mention Olive avenue or any street running through the block; and appellant contends that this omission constitutes a revocation of the dedication of Olive avenue. This mere negative act of omitting in a deed something that was not necessary to a description of city lots, which are usually described by numbers, would not of itself, we think, amount, under any circumstances, to a grave act of revocation. But the deed was made nearly a year and a half after the filing of the Beideman map, and after there had been a public user; and, moreover, the court finds that the fence was continuously maintained by Beideman "and his grantees," and that the premises were continuously used by the general public as a street until 1870.

There was an official map of the city called the "Van Ness Map," upon which Olive avenue does not appear, and some significance is sought to be attached to this fact by appellant. But that map was made and approved by the board of supervisors in 1856, and ratified by the legislature in 1858. All this was several years before the filing of Beideman's map, and therefore before his offer to dedicate; and we cannot see how the absence of the street in dispute from the Van Ness map is of any importance. On April 25, 1862, the legislature passed an act (St. 1862, p. 391) amendatory of the consolidation act, in which, "for the purposes of this law," all the streets, alleys, etc., laid down on the Van Ness map are declared to be public. The "purposes" of the act were to provide for an expensive system of grading, paving, macadamizing, etc., at the expense of persons owning lots fronting on streets; and it is contended by appellants that, because Olive avenue was not

on the Van Ness map, therefore this act of the legislature must be construed as a "rejection" and "discontinuance" of said avenue as a public highway. We think this position untenable. There are no express words of discontinuance in the act; and, as its purpose was to provide for the improvement of certain streets, it would be a strained inference to hold that the omission to name other streets then open meant an intention to vacate them. Moreover, on the very next day, April 26, 1862, (St. p. 407,) an act was passed "To establish the lines and grades of streets in the city and county of San Francisco," under which, and an amendment thereto, approved in April, 1864, (St. 1863-64, p. 460,) the "engineer's map" above mentioned was prepared. This map was adopted by the board in January, 1866, and declared to be "the legal and valid official map of San Francisco, to determine the line of the streets, and the grades thereof." See *Brook v. Horton*, 68 Cal. 554, 10 Pac. Rep. 204. On this map, Olive avenue was delineated, and also on the subsequent Humphrey's map. The acts provided that the maps, when completed, were to be delivered to the board, and notice given by publication, that objections to them might be made by any property holder, and that, if no objections were made, or those made were overruled, they were to become final. In the meantime,—from the passage of the said act of April 25, 1862, relied on by appellant, until the adoption of the engineer's map, in 1866,—Olive avenue was continuously kept open by appellant's grantors, and used by the general public. Under these circumstances, we think that the dedication and acceptance was clearly continuous.

Quite a number of cases involving the dedication of streets and highways have recently been decided by this court. The facts in no two of them were exactly alike, and some of them were of difficult solution. But in none of these cases were any principles stated with which the conclusion of the court in the case at bar at all conflicts. Judgment and order affirmed.

We concur: SHARPSTEIN, J.; FOX, J.

84 Cal. 642

SAYERS v. SUPERIOR COURT. (No. 13,598.)

(Supreme Court of California. July 5, 1890.)

#### CERTIORARI.

1. Under Code Civil Proc. Cal. § 1068, providing that a writ of review may be granted when an inferior tribunal "has exceeded" its jurisdiction, and there is no appeal, nor any plain, speedy, and adequate remedy, a writ of *certiorari* will not issue to prevent a threatened excess of jurisdiction; and an order of court directing an attorney to pay over money to a client, and an order directing the attorney to show cause why he should not obey said order or be punished for contempt, cannot be so reviewed, on the ground that the first order was made without notice to the attorney, as it will not be presumed that, on the hearing of the order to show cause, the court will exceed its jurisdiction.

2. An allegation of the attorney, based upon information and belief, that the court has made an order adjudging him guilty of contempt, will not be considered.

3. Allegations as to the understanding on which the attorney got possession of the money will not

be considered, such allegation relating to matters of fact, on which the decision of the court below, if it had jurisdiction at all, would be conclusive for the purposes of the writ.

In bank. Application for writ of *certiorari*.

*King & Saufley*, for petitioner. *Harold Wheeler*, for respondent.

PATERSON, J. This is an application for a writ of *certiorari*. The petition alleges that in August, 1888, Nathan S. Sanford commenced an action for divorce against his wife, Hattie T. Sanford, in the superior court of the city and county of San Francisco; that the default of the defendant for failure to answer was duly entered on December 3, 1888, and on the following day the cause was regularly tried and submitted for decision; that a decree of divorce was entered in favor of plaintiff on February 1, 1889; that on December 18th the defendant therein employed petitioner as her counsel to represent her in the proceeding; that he gave the defendant advice, but did not contest the application for divorce, owing to a misunderstanding as to certain instructions from the defendant; that the value of his services exceeded the sum of \$500; that it was understood between all the attorneys representing the parties to the action that, if the divorce should be granted, the defendant should be allowed \$100 per month, under certain conditions, and it was further understood that petitioner should receive the sum of \$500 as counsel fees for services rendered in the action to defendant; that through fault of the attorney for plaintiff the court was misled, and, in consequence thereof, no counsel fees were allowed, but, nevertheless, petitioner received the sum of \$250 cash, and a note for the further sum of \$250 from the attorney for plaintiff, as and for his compensation for services rendered; that defendant in the divorce suit, being dissatisfied with the petitioner as her attorney, requested the substitution of another attorney, whereupon petitioner gave to Harold Wheeler a substitution of attorney, with the express understanding that the \$250 received by petitioner should be retained by him; that petitioner thereupon turned over to said Wheeler the note for \$250, above referred to, and thereupon his connection with the case ceased; that on motion of said Wheeler the default of the defendant in the suit was set aside, November 13, 1889, and the court made an order directing petitioner to pay to said Hattie T. Sanford, his former client, the sum of \$250, received by him as counsel fees, without any notice to petitioner to appear and show cause why said order should not be made; that thereupon petitioner was ordered to show cause why he should not obey said order or be punished for contempt. Petitioner alleges, upon his information and belief, that the court made a further order, adjudging him guilty of contempt for not paying over the \$250 to the defendant in this suit, and ordered petitioner to be committed to jail until such payment should be made. It is claimed by petitioner that the superior court had no jurisdiction to make said or-

ders in his absence, without notice to him, and that he has no plain, speedy, and adequate remedy at law. The respondent has moved to quash the writ of *certiorari* and order for a stay of proceedings, on the ground that the petition does not state facts sufficient to entitle the petitioner to the relief asked therein.

The writ issued herein is premature. The function of a writ of review is not to restrain the proceedings of an inferior tribunal, but to annul proceedings which have been taken without jurisdiction. It cannot be employed to prevent a threatened excess of jurisdiction. It is issued only when an inferior tribunal, board, or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board, or officer, and there is no appeal, nor, in the judgment of the court, any plain, speedy, or adequate remedy. Code Civil Proc. § 1068. Until a final determination has been reached in the court below, we must assume that the court will limit its action to its proper jurisdiction. So long as the proceedings remain *in fieri*, the petitioner has a plain, speedy, and adequate remedy by motion in the court below. We cannot assume that the court below will decide erroneously on any objection which the petitioner may make in his defense to the order to show cause. *Wilson v. Board of Supervisors*, 3 Cal. 386; *Lamb v. Schottler*, 54 Cal. 319.

We cannot consider the allegation of the petitioner based upon his information and belief that the court has made an order adjudging him guilty of contempt. It is an easy matter for the petitioner to determine whether or not such an order was made. We cannot assume that the court below has made an order which has never been filed. Furthermore, if such an order has been signed, it is not an order subject to review until it has been filed. *Mattoon v. Eder*, 6 Cal. 57, is not in point. The allegations with respect to the understanding under which the money was paid cannot be considered. If the court had jurisdiction of the matter at all, it had the right to inquire into and determine the facts, and its determination of these matters is conclusive so far as a writ of review is concerned. The writ cannot be issued on mere errors of law. *People v. Dwinelle*, 29 Cal. 632. If the proper facts existed, the court was justified in requiring the party to turn over the money. *Ex parte Hollis*, 59 Cal. 405; *Ex parte Smith*, 53 Cal. 204; *Weeks, Attys.* §§ 92, 94.

We cannot close this opinion without adverting to the fact that there has been of late an attempt in numerous cases to use writs intended only to test the question of jurisdiction for the purpose of correcting mere errors of law. The original business thus put upon the court has occasioned great labor and much annoyance, not only to ourselves, but to the lower courts, without serving any useful purpose. We do not speak of this matter in a censorious spirit, but simply to call the attention of the members of our bar to the fact, in the hope that in the future more care may be taken in applications for writs of this character. The application is denied,

and the writ heretofore issued herein is discharged.

We concur: MCFARLAND, J.; FOX, J.; SHARPSTEIN, J.

84 Cal. 639

IPSWITCH v. FERNANDEZ. (No. 12,242.)

(*Supreme Court of California*. July 5, 1890.)

NEW TRIAL—MISCONDUCT OF JURY.

Plaintiff alleged, on information and belief, as a ground for a new trial, that one of the jurors was so intoxicated during the delivery of the charge and afterwards that he was unable to discharge his duties and that he did not know of such intoxication until after the jury had retired to consider their verdict. The trial court, in passing upon the motion for a new trial, said that it must be conceded that the juror was intoxicated, but he also said that such intoxication "was patent to all parties." The juror denied fully and specifically all the charges of intoxication. *Held*, that the order denying a new trial would be sustained.

In bank. Appeal from superior court, Contra Costa county; T. K. WILSON, Judge.

Moore & Reed (Hiram Mills, of counsel,) for appellant. Chase, Chase & Miller and W. S. Tinning, for respondent.

MCFARLAND, J. Appeal by plaintiff from the judgment in favor of defendant, and from an order denying a new trial. It is unnecessary to determine the motions made to dismiss the appeal, and to strike out a portion of the transcript, which are urged by the respondent, as will appear from the conclusion reached herein. The evidence on the issues of fact involved was fairly conflicting, and we cannot disturb the verdict of the jury on the ground that it was against the evidence. The most serious ground for a new trial taken by appellant is misconduct of the jury based on the allegation that one of the jurors was intoxicated. The evidence on the point consists of two affidavits,—one by plaintiff, and the other by the juror whose intoxication is alleged. Plaintiff states in his affidavit that the trial of the case occupied several days; that the jurors were allowed to separate at all recesses; that "affiant is informed and believes, and so charges the truth to be," that during each and every recess the said juror "drank to great excess intoxicating drinks;" that, "as affiant is informed and believes, at the time the jury were charged by the court, and during their deliberations, the said juror was incompetent from intoxication to comprehend and discharge his duties as a juror; and that affiant did not learn or know these facts "until after said jury had retired to deliberate on their verdict." The affidavit of the juror fully and specifically and positively denies all the charges of intoxication. And, if we are to consider only the evidence introduced on the issue, the order denying the new trial should certainly be affirmed, because there is not only a conflict of evidence, but the evidence clearly preponderates against the allegation of intoxication. But the judge of the court below, when denying the motion for a new trial, stated in writing as follows: "That the juror was intoxicated

must be conceded. The court must take judicial notice of the fact. It was patent to all parties." He then proceeds to give as his reason for denying the new trial that, as nine jurors may render a verdict in a civil case, and as ten united in a verdict for defendant in the case at bar, therefore the verdict was valid, because it was concurred in by the requisite number, not counting the juror charged with intoxication. (This, we suppose, was on the theory that if nine sober jurors cannot be prevented from rendering a verdict by three other sober jurors, they ought not to be so prevented by one drunken juror.) Respondent contends that this statement is mere "opinion" of the court below, and under well-settled practices cannot be considered here; and appellant contends that, as it was included in the order denying the motion, it may be considered. Under any view, it would be going very far to hold what a judge may say in passing on a motion for a new trial as establishing a fact. At all events, if what he said is to be taken for that purpose, the whole of it must be so taken; and we must then take as true that part of it which states that the intoxication of the juror "was apparent to all parties." If, then, the intoxication, which plaintiff avers to have commenced at the beginning of the trial and continued to its close, was apparent to him, he could not keep quiet on the subject, take the chances of a favorable verdict, and then avail himself of it for the first time after defeat. And it may be remarked as somewhat surprising that, if this juror was so manifestly and prominently intoxicated during the whole trial that the court had to "take judicial notice of the fact," no one—neither court nor party nor attorney—made any objection to his well-known condition. Judgment and order affirmed.

We concur: SHARPSTEIN, J.; FOX, J.

WORKS, J. I concur in the judgment, on the ground that the evidence as to the drunkenness of the juror was conflicting, and the statement of the judge of the court below that he was intoxicated is no evidence of the fact, and cannot be considered by this court for any such purpose.

84 Cal. 468

PEOPLE v. HAMBERG. (No. 20,609.)

(*Supreme Court of California*. June 10, 1890.)

FALSE PRETENSES—FORMER JEOPARDY—EVIDENCE—FINE AND IMPRISONMENT.

1. An indictment charging that the defendant falsely and fraudulently represented that he was the owner of certain lots, etc.; that the prosecuting witness, relying on the truth of the statements, accepted a deed thereof, paying therefor a large amount of money and property, (stating amount,) and that defendant knew the representations were false,—sufficiently charges the crime of obtaining property under false pretenses, under Pen. Code Cal. § 532.

2. A trial and conviction of conspiracy by a court having no jurisdiction of the offense is void, and will not support a plea of former jeopardy in a subsequent trial on indictment for obtaining money by false pretenses growing out of the same transaction.

3. Under Pen. Code Cal. § 1151, it is the duty of a court before whom a plea of former jeopardy is entered to submit that issue to the jury, though the plea was incorporated in, and was the basis of, a motion to set aside the indictment for want of jurisdiction.

4. A judgment roll in an action to which defendant was a party, and in which his title to the property, which he falsely claimed to own in the transaction for which he was indicted and is on trial, was declared worthless, is competent evidence to show his knowledge of the falsity of his representations.

5. It is not error to permit the prosecuting attorney to be called as a witness, and testify to facts within his knowledge, pertinent to the issue on trial.

6. Prejudice of the prosecuting attorney against the defendant in a criminal action, made apparent by his own admission and by his method of cross-examination of defendant while on the stand as a witness in his own behalf, though to be severely criticised, did not entitle the defendant to a discharge on its discovery, nor does it furnish sufficient ground for reversal of a judgment of conviction.

7. Pen. Code Cal. § 1205, which provides that a judgment that the defendant "pay a fine" may also direct that he be imprisoned until the fine be satisfied, does not apply to those cases in which the court has imposed a term of imprisonment and also a fine, but only to those cases in which a fine is the only punishment; and a judgment that defendant be imprisoned one year, and pay a fine of \$19,000, and be detained until it is paid, will be so modified as to entitle the prisoner to be discharged at the end of one year's confinement.

Fox, J., dissenting.

Commissioners' decision. In bank. Appeal from superior court, city and county of San Francisco; D. J. TOOHY, Judge.

Appeal from judgment of conviction for the crime of obtaining money under false pretenses. Among other objections, it is urged that Pen. Code Cal. § 1205,—"A judgment that the defendant pay a fine may also direct that he be imprisoned until the fine be satisfied, specifying the extent of imprisonment, which must not exceed one day for every dollar of the fine,"—does not apply to cases in which a term of imprisonment and also a fine is imposed.

Eugene N. Deuprey, for appellant. Geo. A. Johnson, Atty. Gen., for respondent.

FOOTE, C. The defendant was jointly indicted with one Pilcher, for obtaining money under false pretenses from one F. M. Parker. Pilcher, it seems, had pleaded guilty before the present trial, and Hamberg was tried alone. The charge, in brief, is that the parties first mentioned had falsely and fraudulently represented to Parker that Hamberg was the owner and in possession of certain lots in the city of San Francisco, and Parker, relying solely upon the false representations made to him by the parties defendant, had accepted a deed from Hamberg of the lots, and given in return money and other property of the value of \$9,500; that the representations thus made to Parker were untrue, and known to be so by the defendant at the time they were made. A demurrer was filed to the indictment on the grounds—*First*, that the facts stated do not constitute a public offense; *second*, that it contains matters which, if true, contains a legal justification and excuse of the offense charged, and a bar to the prosecution. This demurrer was overruled, and

the defendant thereupon, on the 18th of February, 1888, entered a plea of not guilty. On the 28th of March, 1888, he entered a plea of former jeopardy, and made a motion to set aside the indictment, on the ground that the court had no jurisdiction to try him, as he had already been tried and convicted of the same offense. The court overruled his motion to set aside and dismiss the indictment on the 26th of April, 1888. On the 30th day of the same month the defendant was tried upon the indictment and his pleas thus filed. The jury returned a verdict that the defendant was guilty as charged in the indictment, and upon his plea of once in jeopardy they found for the people. The defendant, by his counsel, then at once moved to set aside the verdict on the ground that the plea of former jeopardy was not before the jury; that it was presented to the court only to be ruled on as a matter of law, and was ruled on before the trial. The motion was denied upon the ground, as stated by the court, that the plea was presented in open court at the trial. The defendant, on the 12th of May following, made a motion in arrest of judgment on the following grounds: Because the court had no jurisdiction to try the defendant; because he had already been tried and convicted for the same offense; because of defects in the indictment, viz., that it did not conform to sections 950-952, Pen. Code; that more than one offense is charged; that the facts stated do not constitute a public offense; that the indictment contains matter which, if true, would constitute a legal justification or excuse of the offense charged, and a legal bar to the prosecution; that the defendant was not properly arraigned upon the indictment in the case as required by law. On the same day a motion for a new trial was made upon various grounds. The motion in arrest of judgment was denied, as also that for a new trial. Thereupon, on the 19th of May, 1888, the court rendered its judgment, based upon the verdict of the jury, and sentenced the defendant to imprisonment for one year in the county jail, and to pay a fine of \$19,000, or, in default of payment of the same, to be imprisoned in the county jail until the fine be satisfied, at the rate of one day for each one dollar of the said fine; such imprisonment, in default of the payment of the fine imposed or any portion thereof, to commence at the expiration of the year's imprisonment first imposed and adjudged. From the judgment, including the orders made before entry thereof, and from an order denying a new trial, the defendant appeals.

The points apparently relied upon by the defendant for a reversal of the judgment and order, as appears from his reply brief, are that, the indictment herein being for a misdemeanor, the superior court of the city and county of San Francisco did not have jurisdiction to try him. He relies on the decision of the appellate court in the case of *Green v. Superior Court*, 78 Cal. 556, 21 Pac. Rep. 307, 541. The same point was made in *Ex parte Neustadt*, 82 Cal. 273, 23 Pac. Rep. 124. That case was where, as here, a party had been indicted, convicted, and sentenced, under section 532 of



the Penal Code, (as it stood at the date of the trial and prior to the amendment of 1889,) and where the fine imposed was over \$1,000, and the same condition imposed as to imprisonment until it should be paid as in the present instance. It was said in the opinion delivered in that case: "The case referred to [Green v. Superior Court] is not in point. The offense named in section 532 is punishable by imprisonment in the county jail not exceeding one year, and by fine not exceeding three times the value of the property. A fine must, in all cases, be imposed; there is no alternative. It must be three times the value of the property. It may be more than \$1,000. The police judge's court, therefore, has not jurisdiction of this offense." It is clear, therefore, that the misdemeanor here tried by the superior court of the city and county of San Francisco was not triable by the police judge's court, but was within the jurisdiction of the superior court.

The order denying the motion to set aside and dismiss the indictment on the ground of the want of jurisdiction to try the defendant, by reason of his having been formerly in jeopardy for the same offense, was properly denied. The former trial and conviction was for a conspiracy, a misdemeanor under section 182 of the Penal Code. It is punishable by imprisonment not exceeding one year in the county jail, or by fine not exceeding \$1,000. The superior court did not have jurisdiction to try the defendant for that offense; hence the judgment of conviction was void. *Green v. Superior Court*, 78 Cal. 556, 21 Pac. Rep. 307, 541. And the defendant had not, prior to the present trial, been placed in jeopardy.

It seems also to be contended that the court had no right, after refusing to set aside the indictment, to submit the issue to the jury raised by the plea of former jeopardy, and have it passed on by that body. To do otherwise would have been erroneous. The court's duty was to have the jury pass upon that issue under section 1151 of the Penal Code, and find either "for the people" or "for the defendant," as the evidence might warrant, in addition to the general finding upon the plea of not guilty.

The further claim is made that error was committed in allowing the introduction in evidence of the judgment roll in a certain case, (*Courtney v. Hamberg*.) The purpose of that evidence was to show that, at the time when the defendant induced the prosecuting witness to part with his property and transfer and deliver it to the defendant, the latter knew that the title was worthless to the property to which he pretended to have a good title, and which he was deeding to the prosecuting witness in exchange for what the defendant was receiving from him, and that the worthlessness of the defendant's title had been adjudged in that very suit. This evidence, taken in connection with the testimony of Mr. Dunne, who was the prosecuting attorney here and the attorney for the adverse party to the defendant in the action just mentioned, certainly tended at least to show that the defendant did not know at the time he sold to the pros-

ecuting witness that he was selling him property to which the defendant had no title. We do not see why the prosecuting attorney, who was in a situation to know of the facts tending to show guilty knowledge on the part of the defendant as to his pretended title, should not have been allowed to give his testimony in the interests of justice, and we do not perceive any error in the court allowing him to do so.

As to the manner of his cross-examination of the defendant, when a witness on his own behalf, and his declaration of bias and prejudice, it is to be said that it was unfortunate that he should have allowed himself to display and to admit it in the presence of the jury; but the declaration that he made was brought out by the objection of the defendant's counsel, who declared that the prosecuting attorney was prejudiced and biased, and demanded that, for that cause, the court should discharge the defendant from custody, which demand the court very properly refused to accord, and from that action of the court the exception was taken. After his declaration of bias, the prosecuting attorney did not proceed, as he had begun, to exhibit his prejudice to the jury by the form of his questions to the defendant, so far as the record discloses. And so far as the effect upon the jury was concerned, in this instance at least, it seems to us that the frank admission of the prosecuting attorney that he was biased and prejudiced would have tended to the advantage, rather than the prejudice, of defendant, as the jury could then know from what motives the zeal of the officer might, perhaps, proceed. We do not think this a sufficient ground for a reversal of the judgment and order, but it is proper to say that such occurrences have before been referred to with disapproval. *People v. Bowers*, 79 Cal. 417, 21 Pac. Rep. 752; *People v. Lee Chuck*, 78 Cal. 327-329, 20 Pac. Rep. 719.

We think the indictment was sufficient, under the statute, (section 532, Pen. Code,) and that it stated plainly the reliance of the prosecuting witness on the false statements of the defendant as to his title. The evidence, we think, shows very clearly that the defendant knew and believed he had no title to the property he was selling, and yet represented that he had a good title; that he did this with the intent to deceive and defraud, and succeeded by such false pretense in accomplishing his object, and cheating the prosecuting witness out of his property. But it is argued that the title (Ellis' title) which the defendant transferred to Parker was a good title, as declared by the appellate court since defendant's trial, in the case of *Association v. Knight*, 23 Pac. Rep. 207, (decided January 2, 1890.) Even if this would relieve the defendant,—which we do not decide,—considering all the facts in the case, a rehearing has been granted, and the judgment of the lower court in the case cited still stands unreversed.

But there is one part of the judgment appealed from which is manifestly void, and that is the portion ordering the retention of the defendant in custody until he pay the fine of \$19,000. The court had no legal right to impose that part of the sen-

tence, and to that extent the judgment must be modified. In re Rosenheim, 23 Pac. Rep. 372; In re Collins, Id. 374.

We perceive no further prejudicial error, but for these reasons we advise that the judgment stand so far as the imposition of imprisonment in the county jail for one year is concerned, and that the order refusing a new trial be affirmed, but that the judgment be so modified as that the defendant be released from custody on the expiration of the one-year term of imprisonment in the county jail.

We concur: BELCHER, C. C.; GIBSON, C.

PER CURIAM. For the reasons given in the foregoing opinion the order denying a new trial is affirmed. The court below is instructed to modify the judgment by striking out that part thereof which provides that in default of the payment of the fine imposed the defendant "be imprisoned in the county jail until said fine be satisfied, at the rate of one day for each one dollar of said fine, such imprisonment in default of said fine, or the payment of any portion thereof, to commence at the expiration of the one-year imprisonment therein first imposed and adjudged," and the judgment in all other respects is affirmed.

Fox, J., dissenting.

3 Cal. Unrep. 277

MOWRY v. HENEY. (No. 11,705.)

(Supreme Court of California. June 12, 1890.)

SURETY ON APPEAL—JUDGMENT—NOTICE.

A judgment against a surety on an appeal-bond, rendered more than 80 days after the filing of a *remittitur* from the supreme court, is valid, though the surety had no notice of the motion therefor; since the undertaking, as prescribed by Code Civil Proc. Cal. § 942, is that, "if the appellant does not make such payment within 80 days after the filing of the *remittitur* from the supreme court in the court from which the appeal is taken, judgment may be entered, on motion of the respondent, in his favor, against the sureties, for such amount, together with interest." This is an express waiver of further notice.

In bank. Appeal from superior court, city and county of San Francisco; T. H. REARDEN, Judge.

R. Percy Wright, for appellant. Cowdry & McCutchen, for respondent.

McFARLAND, J. Action to quiet title to certain real property situated in San Francisco. Judgment went for defendant, from which, and from an order denying a motion for a new trial, plaintiff appeals. Respondent claims title to the premises in contest under sheriff's sale and deed made under an execution issued upon a judgment against one Laura A. Mowry, who is the mother of plaintiff. This judgment was rendered against Laura A. Mowry on an undertaking on appeal executed by her on an appeal taken from the superior court to this court by the defendants in a certain action entitled Heney et al. v. Alpers et al.<sup>1</sup> The undertaking contained the covenants provided for in section 942 of the Code of Civil Procedure.

<sup>1</sup>Not reported.

The judgment in Heney et al. v. Alpers et al.—which was for \$1,344.18, with interest and costs—was affirmed by this court on March 28, 1883, and the *remittitur* was filed in the superior court May 3, 1883. The judgment on the undertaking was rendered on August 2, 1883,—more than 30 days after the filing of the *remittitur*. It is admitted for the purposes of this present appeal that the judgment against Laura A. Mowry on the undertaking on appeal was rendered without any notice of the application for judgment having been served upon or given her; and it is contended by appellant that, because such notice was not given, the judgment was void. Whether or not, for that reason, the said judgment was void is the main question in this case.

We are satisfied that a judgment on an undertaking on appeal, given under section 942 of the Code of Civil Procedure, may be properly rendered against the sureties without any further notice. Such a judgment is simply in accordance with their express contract. The language of their obligation is that, "if the appellant does not make such payment within thirty days after the filing of the *remittitur* from the supreme court in the court from which the appeal is taken, judgment may be entered, on motion of the respondent, in his favor, against the sureties, for such amount, together with interest," etc. This is an express waiver of any further notice, a direct assumption of the result of the appeal, and a disclaimer of the necessity of any further litigation on the subject. The contract of the surety is not that he "will pay" or "will be liable" if his principal fails, but that judgment may be entered against him, on motion, for the amount which has already been adjudicated to be due from his principal. The judgment to be entered against him is nothing more than the natural and anticipated consequence of his own express undertaking. The case of Coscia v. Kyle, 15 Nev. 394, has no bearing on the case at bar. There, no contract relation whatever was involved.

Moreover, we think that the point under discussion should be taken as settled against appellant's contention by the case of Meredith v. Association, 60 Cal. 617. The very point was elaborately discussed by counsel in that case, and exhaustively considered in the opinion of the court. It is contended that the Meredith Case should not be considered as binding authority, because the point was not absolutely necessary to the decision of that case. Strictly speaking that may be so; but, as nearly as the whole force of the opinion in that case was expended on the point here involved, it is certainly entitled to great consideration as authority. Moreover, we think that the views there expressed are correct. As said in that case: "There is not in this mode of procedure anything which prejudices the rights of the parties to the action; for if, in fact, the original judgment was paid, although not satisfied of record, the parties have their remedy, under section 675 of the Code of Civil Procedure, to have satisfaction entered, and, for that purpose, to recall any execution which may have been issued against

them; or they may have the judgment vacated or annulled." On this collateral attack the appellant has no standing. The case of *Davis v. Heimbach*, 75 Cal. 261, 17 Pac. Rep. 199, was about an entirely different section of the Code, and cannot be taken as weakening the doctrine of the *Meredith Case*.

The finding of the court, that the deeds from Laura A. Mowry to plaintiff were not intended to be operative unless in the event of her death from the extreme illness from which she then suffered, was, we think, fully sustained by the evidence, and correct. The objection to the judgment role is not tenable. It contained all that is required to be in it. We see no material insufficiency or defect in the findings, nor do we perceive any other material error. Judgment and order affirmed.

We concur: PATERSON, J.; SHARPSTEIN, J.; FOX, J.

84 Cal. 499

WITCHER v. CONKLIN. (No. 13,291.)

(Supreme Court of California. June 13, 1890.)

LAND-OFFICE RECEIVER'S CERTIFICATE—ASSIGNMENT.

1. A United States land-office receiver's receipt for the purchase money of lands pre-empted under Rev. St. U. S. § 2259, is a sufficient "certificate," under Code Civil Proc. Cal. § 1925, to constitute *prima facie* evidence of title, when in the following form: "Received from Albert Scherfen, of Modoc county, Cal., the sum of two hundred dollars and ——— cents; being in full for [land described,] at \$1.25 per acre,—" the words, "Pre-emption under Sec. 2259, Rev. St. Duplicate," being written across its face.

2. The absence of any record in the local land-office showing payment, does not overcome the evidence of such receipt.

3. A conveyance of the land, and delivery of the certificate, by the pre-emptor to plaintiff, was sufficient evidence of an assignment of the certificate, and all rights acquired thereby.

Commissioners' decision. Department 1. Appeal from superior court, Modoc county; G. F. HARRIS, Judge.

*Spencer & Raker* and *Clarence A. Raker*, for appellant. *Goodwin & Jenks*, for respondent.

VANCLIEF, C. The action is ejectment. Judgment for plaintiff, from which, and from an order denying his motion for a new trial, the defendant appeals. The plaintiff claimed title under a pre-emption entry made by Albert Scherfen, evidenced by a receipt for the purchase money from the receiver of the land-office at Susanville, Cal., of which the following is a copy: "No. 1,402. Receivers' Office at Susanville, Cal. Nov. 5, 1880. Received from Albert Scherfen, of Modoc county, Cal., the sum of two hundred dollars and ——— cents, being in full for the E.  $\frac{1}{4}$  of N. W.  $\frac{1}{4}$ , N. E.  $\frac{1}{4}$  of S. W.  $\frac{1}{4}$ , N. W.  $\frac{1}{4}$  of S. E.  $\frac{1}{4}$  of section No. 29, in township No. 41 N., of range No. 9 E., Mt. D. M., containing 160 acres and ——— hundredths, at \$1.25 per acre. \$200.00. ANDREW MILLER, Receiver." Across the face of this receipt were written in red ink the following words: "Pre-emption under Sec. 2259, Rev. St. Duplicate." It was stipulated by counsel that the lands described in the receipt are within the district of lands subject to en-

try and sale at the land-office at Susanville; that such lands had been surveyed by the government and the plat thereof filed in said land-office, and duly approved, prior to April, 1878, after which, in April, 1878, Albert Scherfen made a pre-emption filing on said land, which was marked and entered upon the plats and records of said land-office, but that the records of said land-office do not show that any entry of or payment for said land by Albert Scherfen was ever made; and that there is no record of any such entry or payment in said land-office. On February 19, 1884, Scherfen, by a bargain and sale deed, duly acknowledged, conveyed the land described in said receiver's receipt to the plaintiff, and delivered to plaintiff said receipt. In January, 1887, the appellant entered and settled upon the land, and on January 18, 1889, made and filed in the land-office his declaratory statements as a pre-emptor thereof, and paid three dollars as fees of the register and receiver.

1. It is contended by appellant's counsel that the receiver's receipt, in the form above quoted, is not equivalent to a "certificate of purchase," within the meaning of section 1925 of the Code of Civil Procedure, which is as follows: "A certificate of purchase or of location of any lands in this state, issued or made in pursuance of any law of the United States or of this state, is primary evidence that the holder or assignee of such certificate is the owner of the land described therein; but this evidence may be overcome by proof that at the time of the location, or time of filing a pre-emption claim on which the certificate may have been issued, the land was in the adverse possession of the adverse party, or those under whom he claims, or that the adverse party is holding the land for mining purposes." This section embodies the substance of the acts of April 13, and April 18, 1859. Hittell's Gen. Laws, §§ 703, 704. The construction given these acts and section 1925 of the Code of Civil Procedure seems opposed to the view of counsel for appellant. In *McDonald v. Edmonds*, 44 Cal. 328, it was said of a receiver's receipt to a pre-emptor, in the precise form of that relied upon by the respondent here, "whatever may be the legal effect of the certificate as between the defendant and the government, it is clear that it establishes in the defendant a right to the possession as against one who shows no title." When the plaintiff's grantor paid for the land, and took the receiver's receipt, he thereby became the equitable owner of the land; and thereafter the government of the United States had no right or power to sell it, or to hold it open to pre-emption by another. Rev. St. U. S. § 2271; *Hutton v. Frisbie*, 37 Cal. 475; *Cornelius v. Kessel*, 128 U. S. 457, 9 Sup. Ct. Rep. 122. Therefore, appellant's settlement and filing upon the land gave him no title or right whatever, and his case is no stronger than was that of the plaintiff in *McDonald v. Edmonds*, supra. To constitute a certificate of purchase in the sense of section 1925 of the Code of Civil Procedure, it is not necessary that it should contain the word "certify." The receiver's receipt in this case contains

the whole substance of an official certificate of purchase; and, that ejectment may be maintained on the title and right of possession evidenced by such certificate, there seems to be no doubt. Toland v. Mandell, 38 Cal. 30; McDonald v. Edmonds, 44 Cal. 328; Laugenour v. Henna-gin, 59 Cal. 625; Stanway v. Rubio, 51 Cal. 41; Conlan v. Quinby, Id. 413; Byers v. Neal, 43 Cal. 215; Figg v. Hensley, 52 Cal. 299. The case of Lynch v. Brigham, 49 Cal. 187, cited by appellant, is not in conflict with any of the cases above cited. In that case the only question decided related to the sufficiency of a finding. The finding was held to be wholly insufficient to show any title or right of entry in the plaintiff, "for reasons too obvious to require comment." The reason for this insufficiency of the finding may probably be seen in the point of counsel which the decision sustained, which was that "the fact found must be the very fact in issue, to-wit, in this case, title in the plaintiff at the commencement of this action, and not a fact like this one, which is, at most, merely evidence of the fact in issue, but not the fact itself. It is not sufficient for the jury, or the court sitting as such, to find facts which, however strongly, merely tend to establish the fact in issue, or from which the fact in issue might, in the absence of any contrary proof, be inferred." It was not denied by counsel, nor decided by the court, in that case, that the facts found are not *prima facie* evidence of title, which is all that is claimed in the case at bar.

2. It is contended by appellant that the absence of any record in the local land-office showing payment of the purchase money by Scherfen overcomes the receiver's receipt as evidence of such payment. But the absence of such record is not inconsistent with the fact of payment; and it is not perceived why the rights of the purchaser should be dependent upon a record which, if made, must necessarily have been made by an officer of the government, and after payment of the purchase money, and for the making of which the purchaser is in no degree responsible. The making of a record of the fact of payment seems to be a matter, between the officer and the government, having no more bearing upon the contract of purchase evidenced by the receiver's certificate than would the failure of the receiver to account to the government for the purchase money received by him.

3. The conveyance of the land and the delivery of the certificate by Scherfen to plaintiff was sufficient evidence of an assignment of the certificate, and all rights acquired thereby, (Thurston v. Alva, 45 Cal. 16; Pol. Code, § 8515;) and the certificate was sufficient evidence that Scherfen "had taken the necessary steps towards pre-empting the land," (McDonald v. Edmonds, supra.)

4. The allegations in the answer that defendant was a qualified pre-emptor, and filed his declaratory statement in the land office, etc., constitute no defense to the case as proved by plaintiff, and found by the court. It is, therefore, immaterial whether the court found upon the issues tendered by those allegations of the an-

swer or not; for, had the court found upon all of them in favor of the defendant, the judgment must still have been for the plaintiff. For all purposes of this appeal, those allegations of the answer are assumed to be true. It follows that the defendant is not injured by the failure of the court to find upon those issues.

5. As there was no evidence tending to prove any adverse possession of the land at the time Scherfen filed his pre-emption claim, the views above expressed sufficiently answer all the objections resting upon the ground that the findings are not justified by the evidence, since the certificate of purchase supplies all the specified deficiencies. There should be no question that the findings support the judgment. I think the judgment and order should be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

84 Cal. 515

MUNRO V. PACIFIC COAST DREDGING & RECLAMATION CO. (No. 12,481.)

(Supreme Court of California. June 12, 1890.)

DEATH BY WRONGFUL ACT—PARTIES—MEASURE OF DAMAGES.

1. In an action by the personal representative under Code Civil Proc. Cal. § 377, providing for the recovery, for a death caused by the wrongful act of another, of "such damages as, under all the circumstances of the case, may be just," the mother of deceased is entitled to compensation for the pecuniary loss sustained by her on account of the death of her son.

2. She is also entitled to damages for the loss of his comfort, society, support, and protection.

3. But no damages can be recovered for her grief, sorrow, and mental suffering.

4. Where the death was caused by the explosion of a blast in a thickly-settled portion of a city, it is no defense that defendant used the highest degree of skill and care in exploding the blast.

5. An instruction that plaintiff is entitled to recover if the jury find that the blast was exploded "as charged in plaintiff's complaint," and that it resulted in the death of deceased, does not withdraw from the jury the material issues necessary to establish the cause of action.

BEATTY, C. J., dissenting.

In bank. Appeal from superior court, city and county of San Francisco.

T. C. Coogan and W. W. Foote, for appellant. Cary, Sullivan & Sullivan, for respondent.

THORNTON, J. This action is brought to recover damages for death caused by the negligent explosion by defendant of a blast in the city of San Francisco, whereby the plaintiff's intestate was killed. The demurrer to the complaint was properly overruled. The allegations as to the appointment of Munro as administrator of the deceased, Stanton, were sufficient. The court committed no error in its rulings on the admission of testimony.

The court gave, at the request of plaintiff, the following instruction to the jury: "If you find from the evidence that the defendant, through its agents, servants, and

employees, fired and exploded the blast as charged by the plaintiff's complaint, and that it resulted in the death of Michael Stanton, the plaintiff's intestate, then the plaintiff is entitled to recover such damages as from the evidence and proofs, under all the circumstances of the case, you may deem to be just." To the giving of this instruction the defendant excepted. It is contended now on behalf of defendant that this direction was erroneous because it removed from the jury the consideration of all the issues except that the defendant fired and exploded the blast, and that it resulted in Stanton's death; that there were other issues in the case, but by this instruction they were brushed aside. We find no error in this instruction. The language in the first clause that "the defendant, through its agents, servants, and employees, fired and exploded the blast," is qualified by the words "as charged in the plaintiff's complaint;" and the complaint set forth a careless and negligent explosion of the blast. In our judgment the direction embraced all the material issues in the complaint, the finding on which was necessary to establish the cause of action against the defendant.

The giving of the following instruction by the court is likewise excepted to: "It is no defense or answer to an action of this character that defendant, in exploding the blast in question, used and employed skillful and experienced men, and, in everything appertaining to blasting, it used and exercised the highest degree of care; and I charge you that defendant is liable to damages for the death of said Michael Stanton, if you find that his death resulted from the firing of the blast in question, even if it used the highest and utmost care and skill in firing and exploding it." We perceive no error in the above direction. The evidence shows clearly that this blast was exploded in a thickly settled portion of the city. We are of opinion that no degree of care will excuse a person, where death was caused by such explosion, from responsibility for it. It is said that the above instructions ignore the doctrine of contributory negligence. As there was no evidence of contributory negligence in the cause, the doctrine of such negligence was properly ignored.

The court also directed the jury as follows: "(3) If your verdict shall be for the plaintiff, such damages may be given by you as, under all the circumstances of the case, may be just; and, in determining the amount of such damages, you have the right to take into consideration the pecuniary loss, if any, suffered by the mother of Michael Stanton by his death, if you find that his mother is living. And the loss which the plaintiff is, in such a case as this, entitled to recover, is what the deceased would have probably earned and accumulated by his labor in his business or calling during the residue of his life, and which would have gone to the benefit of his mother or heirs or personal representatives, taking into consideration his age, health, habits of industry, ability and disposition to labor, and the probability of his length of life. (4) I further instruct you, if from the evidence you should find

for the plaintiff, then the measure of damages is not alone the pecuniary loss and injury sustained by the mother in the loss of her son, as just explained; but, in assessing the damages, then you may, in addition, take into consideration the sorrow, grief, and mental suffering occasioned by his death to his mother, together with the loss, if any, sustained by her in being deprived of the comfort, society, support, and protection of the deceased, by reason of his death." As no question is made on the remainder of this instruction, we do not insert it. To the giving of these instructions, exceptions were reserved by defendant, and it is said on behalf of defendant that the court erred in giving them. Our attention is particularly directed to the following portion of instruction 3: "And that, in determining the amount of such damages, you have the right to take into consideration the pecuniary loss, if any, suffered by the mother of Michael Stanton by his death;" and the following portion of instruction 4: "The sorrow, grief, and mental suffering occasioned by his death to his mother, together with the loss, if any, sustained by her in being deprived of the comfort, society, support, and protection of deceased by reason of his death."

Now, in regard to the above-quoted portion of instruction 3, it is argued the mother of Michael Stanton was not the party plaintiff; that the action was not brought by the heirs of the deceased, but by his personal representative; that this action is brought under section 377 of the Code of Civil Procedure. That section is in these words: "When the death of a person, not being a minor, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or, if such person be employed by another person, who is responsible for his conduct, then, also, against such other person. In every action under this and the preceding section, such damages may be given as, under all the circumstances of the case, may be just." In connection with this section, our attention is called to the act of 1862, (St. 1862, p. 447;) and it is said that section 3 of that act prescribed that the action should be brought by the personal representative of the deceased alone, and prescribed the rule of damages in these words: "The jury may give such damages, pecuniary and exemplary, as they shall deem fair and just, *and may take into consideration the pecuniary injury resulting from such death to the wife and next of kin of such deceased person,*"—and that when enacted in the Code the words in italics were omitted therefrom. The counsel for defendant proceeds to give the reason for this change in the enactment. The reason so given by counsel is that the heirs were given the right to maintain the action, and hence its re-enactment was not necessary, because, in an action brought by them, as a matter of course, their pecuniary injuries should be taken into consideration. We do not think that such is the proper construction of section 377. In our judgment, but one action is permitted, and that action may be

brought either by the heirs of the deceased or by his personal representatives; and, when one action is brought, and the court has obtained jurisdiction of it, that is the only action which the statute permits. As, for instance, when the personal representative of the deceased brings an action to recover damages for the act or neglect causing death, if another action is afterwards brought by the heirs of the deceased, the pendency of the prior action may be well pleaded in abatement of it; or, if a judgment has been rendered in the first, such judgment may be well pleaded in bar of the second action. The question made on the instruction above pointed out must primarily relate to the circumstances which may be given in evidence on the issue of damage, and on that point the statute is very broad and general in its terms. "Such damage may be given as, under all the circumstances of the case, may be just," is the language of the statute. What these circumstances are may be a matter of difficulty, in all cases, to determine. It would be almost impossible to draw *a priori* the line which separates the circumstances which should be admitted from those which should be excluded. The exact line of inclusion and exclusion it would be hard to determine in advance of the circumstances of any particular case. Here the circumstances are defined in the instruction. As to the portion of instruction 3 objected to, we think that it was correct. The action is permitted by the statute to be maintained for the benefit of the heirs. Certainly the pecuniary loss which the heirs might sustain by the death is clearly one of the circumstances to be considered. *Chicago v. Major*, 18 Ill. 349; *Railroad Co. v. Morris*, 28 Ill. 400; *Blake v. Railway Co.*, 18 Q. B. 93. This is true under all the statutes giving an action on account of the death of a person under 9 & 10 Vict. c. 93, known as "Lord Campbell's Act," as well as under the acts of the same character which have been enacted in the various states of the Union. The damage is to the heirs, and certainly the pecuniary loss to the heirs is one of the principal elements of damage. There was no error in the portion of instruction 3 assailed by defendant.

As to the portion of instruction 4 above quoted there is more difficulty. It has been held in an English case that the jury should not be allowed to take into consideration the mental sufferings or bereavement of the plaintiff or the loss of her husband. *Blake v. Railway Co.*, *supra*. In this case the widow of the deceased, as administratrix, was the plaintiff. In the case cited, Justice COLERIDGE said: "The title of this act [referring to Lord Campbell's act] may be some guide to its meaning, and it is 'An act for compensating the families of persons killed,' not for solacing their wounded feelings. Reliance was placed upon the first section, which states in what cases the newly-given action may be maintained, although death has ensued; the argument being that the party injured, if he had recovered, would have been entitled to a *solatium*, and therefore so shall his representatives on his death. But it will be evident that this act does

not transfer this right of action to his representative, but gives to the representative a totally new right of action on different principles. Section 2 enacts that 'in every such action the jury may give such damages as they may think proportionate to the injury resulting from such death to the parties, respectively, for whom, and for whose benefit, such action shall be brought.' The measure of damage is not the loss or suffering of the deceased, but the injury resulting from his death to his family." In *Franklin v. Railway Co.*, (1858,) 8 Hurl. & N. 211, and in *Dalton v. Railway Co.* (1858,) 4 C. B. (N. S.) 296, suits were maintained on account of the death of sons for the benefit of parents, and damages allowed to be assessed on the basis of reasonable expectation on the part of the latter, or pecuniary benefit to be derived from the continuance of their sons' lives, but in the latter case the expenses of funeral and mourning were disallowed; Mr. Justice WILLES saying that "the subject-matter of the statute is compensation for injury by reason of the relative not being alive." See, also, *Railroad Co. v. Morris*, *supra*; *Bradshaw v. Railway Co.*, L. R. 10 C. P. 189; *Leggott v. Railway Co.*, 1 Q. B. Div. 599. We agree with what is said in the opinion above quoted, that the action given by the statute is a new action, and not the transfer to the representative of the right of action which the deceased person would have had if he had survived the injury. *Blake v. Railway Co.*, *supra*; *Pym v. Railway Co.*, 2 Best & S. 759; *Read v. Railway Co.*, L. R. 3 Q. B. 555; *Safford v. Drew*, 8 Duer. 627; *Railroad Co. v. Morris*, *supra*.

It may be observed that the language of the statute of this state (section 377, Code Civil Proc.) is broader than the language of the English statute. The English statute may be found in 2 Redf. R. R. (6th Ed.) 287. Under the words of the section, we are of opinion that the circumstances mentioned in it do not include the sorrow, grief, or mental suffering occasioned by the death of Michael Stanton to his mother. The extent of the sorrow, grief, and mental suffering was not shown to the jury by any testimony. It was left to be inferred as a natural result of the death of the son. Whether such grief was overwhelming, or of a light and transient character, did not appear. The extent and character of the sorrow and grief were left to be conjectured or guessed at by the jury, with the right conceded to the jury of finding such grief and sorrow to be extreme, should they so elect. The opportunity to run into wild and excessive verdicts would be allowed them, if the rule was ascended by plaintiff. The standard would be too vague and uncertain to be established as a rule of law for the admeasurement of the rights of parties. *Miseria est servitus ubi jus est vagum aut incertum*. In allowing the jury to take into consideration the loss of the comfort, society, and protection of deceased, we think we have gone far enough; but this, we think, should be allowed in the case of a wife, as in *Beeson's Case*, 57 Cal. 20, or a mother. We have found no case in which damages for sorrow, grief, and mental suf-

fering are allowed under any of the statutes. We have examined the cases cited on behalf of the plaintiff, and they affirm no such proposition. See *Blake v. Railway Co.*, supra; *Railroad Co. v. Morris*, supra. In *Beeson v. Mining Co.*, 57 Cal. 20, no such damages were allowed. The action in that case was by the widow of the deceased, as heir; and an instruction that, in estimating damages, the jury might take into consideration the pecuniary loss, and also the relations existing between the plaintiff and the deceased at the time of his death, and the injury sustained by her in the loss of his society, was approved. Page 33. In the case of *McKeever v. Railroad Co.*, 59 Cal. 294, the question did not arise. See pages 300, 301. In *Cook v. Railroad Co.*, 60 Cal. 604, no such question arose or was decided. See pages 607-610. Nor did it arise in *Nehrbas v. Railroad Co.*, 62 Cal. 320. The sorrow, grief, and mental suffering of the mother, in our judgment, was too remote a circumstance to be taken into consideration in the estimate of damages, and was not allowable under our statute. Judge Redfield, in the sixth edition of his work on Railways, states: "There seems no doubt, according to the best-considered cases in this country, that the mental anguish which is the natural result of the injury, may be taken into account in estimating damages, although not of itself the foundation for an action," (volume 2, p. 288;) and the same statement is made in the third edition of the same work, and cites to sustain his statement *Canning v. Williamstown*, 1 Cush. 451, and *Morse v. Railroad Co.*, 10 Barb. 623. In neither of these cases did the question arise. The first was an action by the party injured against a town, under a statute, to recover damages for an injury sustained by the plaintiff in consequence of a defect in a bridge in the town of Williamstown. The second case was an action brought by a passenger injured on the cars of the defendant company. Neither of the actions was to recover damages for the death of any person. In *State v. Railroad Co.*, 24 Md. 85, there is the same criticism of the remark of Judge Redfield, above quoted, in relation to damages caused by mental anguish. See pages 106, 107. And in this case from Maryland, which was an action for the benefit of the mother to recover damages for the death of her minor son, brought under the Maryland statute, it was held that the mental suffering of the mother resulting from the death of the child was a matter too vague to enter into the estimate of the damages merely compensatory. In a note on page 288 of 2 Redf. R. R. (6th Ed.) it is stated: "In a suit by a parent for the death of a child, recovery can be had only for the pecuniary injury,—services of child less cost of maintenance, (*Pennsylvania Co. v. Lilly*, 73 Ind. 252; *Railway Co. v. Freeman*, 36 Ark. 41; *Railroad Co. v. Kindred*, 57 Tex. 491; *Railroad Co. v. Delaney*, 82 Ill. 198; see *Walters v. Railroad Co.*, 41 Iowa, 71;) including medical attendance, nursing, and expenses of bu-

rial, but not grief, loss of society, etc., (*Railroad Co. v. Barker*, 33 Ark. 350; see *Barley v. Railroad Co.*, 4 Biss. 430.)" This note is by the editor of the sixth edition, Mr. J. Kendrick Kinney. We are of opinion that the court erred in including in the instruction the words "sorrow, grief, and mental suffering" occasioned by the death of the son to his mother. In thus directing the jury the court fell into an error. In our opinion the damage should be confined to the pecuniary loss suffered by the mother, and the loss of the comfort, society, support, and protection of deceased.

The court did not err in refusing the requests of defendant Nos. 1, 2, 3, 4, and 7. All of these instructions, under the facts of the case, would have been misleading. The evidence clearly showed both a wrongful act and neglect on the part of the defendant. It is a wrongful act to explode a blast of powder in a thickly-settled portion of a city, as was done in this case. The uncontradicted testimony showed a clear case of explosion in the city, where many persons were living, and where such an explosion could not take place without strong probability of its injuring some one.

The defendant requested the court to instruct the jury as follows: "The jury have no right to give exemplary or vindictive damages, but are confined to the actual pecuniary damage suffered by the estate of Michael Stanton, deceased." The court refused to give this instruction as requested, but modified the same so as to read as follows: "The jury have no right to give exemplary or vindictive damages, but are confined to the actual pecuniary damage suffered by the estate of Michael Stanton, deceased; but, in this connection, I charge you that the law also permits a jury to make allowance for such a sum as may seem fair and just for sorrow, suffering, and mental anguish occasioned to her by the death." To the refusal of the court to give the instruction as requested, and in giving the modified instruction, the defendant excepted. In refusing the request as made, the court committed no error of which the defendant can complain; but, in giving it as modified, it did fall into an error, as has been shown above.

In relation to the seventh request of defendant, we remark that it related to a matter entirely immaterial in this case. The damages recovered are for the benefit of the heir or heirs, and do not constitute any part of the estate of the deceased. *Leggott v. Railway Co.*, supra; *Railroad Co. v. Morris*, supra. The action is a new one given by the statute; and the damages recovered are, as said above, for the benefit of the heirs. Clearly, they can be no part of the assets of the deceased. For the errors above pointed out the judgment is reversed, and the cause remanded for a new trial.

We concur: MCFARLAND, J.; FOX, J.

I concur in the judgment: WORKS, J.

I dissent: BEATTY, C. J.



84 Cal. 541

CHRISTY V. SPRING VAL. WATER-WORKS.  
(No. 12,374.)

(Supreme Court of California. June 18, 1890.)

## DISCLOSURE OF TITLE—FAILURE TO FIND.

1. A defendant in a partition suit, who, after answering, but before decree, acquires an independent title by deed, must make disclosure thereof, or the decree will be conclusive as to his title, and will prevent him from setting up the deed in a subsequent action to recover possession.

2. Where, in ejectment, defendant pleaded a bar of the action, and, by cross-complaint, averred adverse possession for five years, under claim of right founded upon a written instrument, but the court failed to find upon either issue, although there was evidence tending to support them, the judgment must be reversed.

In bank. Appeal from superior court, city and county of San Francisco; WILLIAM T. WALLACE, Judge.

For former report, see 8 Pac. Rep. 849.

C. N. Fox and Kellog & King, for appellant. I. N. Thorne, for respondent.

PATERSON, J. 1. On the former appeal this court held that the decision of the court below, which was based upon evidence of a new title acquired by the defendant, after answer filed in the proceedings for partition, but before the rendition of any interlocutory decree therein, was erroneous, that the judgment in partition was conclusive upon all the parties as to any title or claim held by them at the time of its rendition. 68 Cal. 76, 8 Pac. Rep. 849. At the last trial the defendant introduced in evidence entries in the registry of actions showing that the trial of the partition proceeding began on August 15, 1871. The taking of evidence was concluded on the day following. The case was argued and submitted on September 10th following, and the interlocutory decree was entered on October 18, 1871. The deed from Turner to defendant is dated August 28, 1871. It was acknowledged October 6, 1871, and recorded October 12, 1871. Appellant insists that upon this showing it is not a case of title procured *pendente lite*, which it was bound to disclose at the hearing for adjudication in the partition proceedings, and forcible reasons are presented in support of the contention. But discussion of the proposition is foreclosed by the decision of this court on the same question when the case was here before. The facts are substantially the same as they were on the former appeal. It appeared then, as it does now, that the trial of the partition proceedings began August 15th, and that the interlocutory decree was entered October 18th. It is true, it did not appear that the taking of evidence was concluded on August 16th, but, in view of what the court said, that fact was immaterial, it being the duty of the defendant, in the opinion of the court, to "disclose its adverse claims to the land," and, if necessary, to obtain permission "to amend its answer so as to include the deed as evidence of a right in itself acquired pending the proceedings." It was held that the judgment was conclusive on all parties as to title or claim held by them at the time the interlocutory decree was entered.

2. It is claimed that the objection to the introduction in evidence of the judgment roll in the partition suit should have been sustained; that the judgment in that suit includes land not included in the complaint therein; and that the property described in the complaint herein is not included in the property described in the complaint in the partition suit. At the first trial the roll went in without objection, but when the case was presented here the point was made by respondent (now appellant) that the judgment was void on its face because the property described therein was not the property described in the complaint, or in the report of the referee, who partitioned the property under the interlocutory decree of the court. 331 Supreme Court Records, p. 219. The court evidently considered the contention without merit. It was claimed then, as it is now, that a portion of block 774 was included in the decree, and issued for herein, but is not included in the property described in the complaint in partition. The facts before the court then were the same as those before us now. The court looked at the various descriptions in both cases, and, after comparing them with one another, and with the map, properly held, we think, that "there was allotted and set over to Randall that portion of the property which is described in the complaint in the present action."

3. In addition to a general denial the defendant set up as a defense that plaintiff's right of action was barred by the provisions of sections 318, 319, 322, 323, 324, and 325 of the Code of Civil Procedure; and in a cross-complaint for cause of action alleged an exclusive and uninterrupted possession of the premises, adverse to plaintiff and all the world, for over five years, under claim of right founded upon a written instrument of conveyance. The court below failed to find on either of these issues, and for this reason we have to reverse the judgment. If there had been no evidence on the issue, the failure to find would have been immaterial, (*Himmelman v. Henry*, 23 Pac. Rep. 1098, filed May 7, 1890;) but there was. Both here and in the partition suit it appears from the pleadings and judgments that the defendant was in possession of the lands in controversy, claiming title thereto, over 20 years ago, and the evidence of defendant herein tends to establish the claim of continuous, adverse possession. The judgment and order are reversed, and the cause is remanded for a new trial.

We concur: MCFARLAND, J.; SHARPSTEIN, J.; and WORKS, J.

84 Cal. 547

LANDERS v. LANDERS *et al.* (No. 13,680.)  
(Supreme Court of California. June 18, 1890.)

## BILL OF EXCEPTIONS—REQUIREMENTS.

A judge properly refused to sign or allow as a bill of exceptions a paper indorsed upon the back, "Defendants' bill of exceptions," but not signed, and which did not show upon its face by whom, or in whose interest, it was prepared, or contain a request that it be allowed and certified as such.

In bank. *Mandamus.*

The petition was filed by defendants, and the writ issued to F. W. LAWLER, judge of the superior court of the city and county of San Francisco.

*D. L. Smoot*, for petitioner. *J. I. Bergin*, or respondent.

Fox, J. An alternative writ of mandate was issued out of this court, commanding the respondent to settle, allow and certify a bill of exceptions proposed on behalf of defendants in the above-entitled cause, or show cause before this court why he did not do so. The judge answers, and for cause shows that no proposed bill of exceptions has ever been presented to him for settlement and allowance. The paper filed here, denominated a petition for the writ, upon examination appears to be an affidavit, with venue laid in the city and county of San Francisco, concluding with a prayer that a writ of mandate be issued commanding the respondent to certify and allow a certain bill of exceptions, a copy of which is thereto annexed, or show cause before the supreme court of the state of California why he has not done so, etc. It is not entitled, either in its heading, body, or indorsement, or elsewhere, in this or any other court, and is not addressed to this or any other court; nor does it appear out of what court it is desired that the writ shall issue. Such a paper ought not to have been filed in this court, and it was an inadvertence to have issued any writ or process upon it. It is sworn to before a notary public, in the usual form of an affidavit, but is not verified in the form required by law for the verification of pleadings, and is not sworn to by a party in interest, or by anybody purporting on the face of the paper to be acting for or in behalf of a party in interest, and is neither signed nor indorsed by any one acting as attorney for the petitioners or for any party in the cause. Had these defects been noticed at the time, the writ certainly would not have been issued; but, the case being now submitted upon its merits, we look into them, and find it equally defective there. The original of the proposed bill of exceptions, a copy of which is annexed to the affidavit, was presented at the hearing. It bears the simple initials of the judge, said to be in his handwriting, and probably put there for the purpose of enabling him at any future time to identify the paper as one that he had seen before. It is indorsed on the back, "Defendant's bill of exceptions," but upon its face there is nothing whatever to indicate by whom, or in whose interest, it was prepared. It shows upon its face that it was not prepared at the time of the action to which exception was taken. That action was had August 16, 1889. This paper bears date August 26, 1889, and bears this indorsement: "Received within document this Aug. 26, 1889,"—signed by plaintiff's attorney. The paper itself contains no prayer or request that it be allowed or certified as a bill of exceptions, and has no signature or indorsement of any kind to indicate by whom it is prepared or offered. It was a paper which anybody

might present, but for which nobody would be responsible. It was not a paper upon which the judge, or any of the counsel in the cause, were called upon to act, or to which they were required to give any attention. Such a paper must be authenticated in some form, either by the signature or the indorsement of the attorney, or of the party, if he appear in person. It was an attempt to have the judge make a solemn record in the cause, in a matter whereof no record is ever made, except at the request of a party to the action, and it is the duty of the party desiring such a record to make it matter of record that he did so request. The statute itself requires (Code Civil Proc. § 650; that the party desiring a bill of exceptions certified and allowed shall "prepare drafts," etc. When such a paper is served upon opposite counsel, or presented to the judge, it is no draft, unless upon its face, or by proper indorsement, it shows that it is one prepared and presented by a party to the cause. It is only waste paper, and no one need notice it. The writ must be dismissed. So ordered.

We concur: MCFARLAND, J.; SHARPSTEIN, J.; PATERSON, J.; WORKS, J.

84 Cal. 584

*Ex parte* WALPOLE. (No. 20,710.)

(Supreme Court of California. June 13, 1890.)

*HABEAS CORPUS*—PETITION.

A writ of *habeas corpus* to release one held to answer a criminal charge will be denied where the petition merely alleges that no evidence was taken on the preliminary examination showing, or tending to show, petitioner's guilt. The petition should be verified, and the evidence set out in such form that perjury can be assigned upon the allegations, if they are false.

In bank. *Habeas corpus.*

*Spencer & Raker*, for petitioner.

PER CURIAM. Petition for writ of *habeas corpus* on the ground that the petitioner has been held to answer on a criminal charge before the superior court without reasonable or probable cause. The petition does not show what the charge is upon which he has been committed, but does allege that there is no evidence whatever taken upon his preliminary examination showing, or tending to show, that he is guilty of any offense whatever. But this is merely his conclusion, and it may be an erroneous conclusion. A petition for *habeas corpus* must be verified, and must allege facts showing an illegal imprisonment. When the ground of the petition is that the prisoner has been committed without reasonable or probable cause, it must set out what the evidence on the examination was in such form that perjury may be assigned upon the allegations, if they are false. Writ denied.

84 Cal. 585

*VAN BIBBER v. HILTON et al.* (No. 13,358.)

(Supreme Court of California. June 18, 1890.)

*RIPARIAN RIGHTS*—CROSS-COMPLAINT.

1. Plaintiff, as riparian owner, seeks to enjoin defendants, riparian owners above him, from diverting the waters of a stream, except a

certain part to which they are entitled by prior appropriation. Defendants, by cross-complaint, allege that plaintiff has drawn off the water so as to prevent it from irrigating their lands as it would do in its natural flow, and by a second cross-complaint allege that he threatens to do so as to the part to which they are entitled, and ask an injunction. *Held*, these matters are proper subjects of cross-complaint under Code Civil Proc. Cal. § 442, which provides that, when a defendant seeks affirmative relief affecting the property to which the action relates, he may file a cross-complaint. *WORKS, J.*, dissenting.

2. Although the matters in the two cross-complaints should have been stated in one, yet, since they are not unintelligible or ambiguous, it is not a ground of demurrer.

3. It was error to adjudge that the water, except as to the part to which defendants were entitled by prior appropriation, be allowed to flow unrestrained to plaintiff's land in its natural course, since defendants would thus be deprived of the reasonable use which is the right of riparian owners.

Commissioners' decision. Department 1. Appeal from superior court, Modoc county; G. F. HARRIS, Judge.

*Spencer & Raker*, for appellants. *Goodwin & Jenks*, for respondent.

FOOTE, C. This is an action to restrain the defendants from diverting the waters of a stream in the county of Modoc. The stream flows through the lands of both the plaintiff and the defendants, and they are all riparian proprietors; the defendants' land lying on the stream above that of the plaintiff. It appears by the findings that the amount of water carried by the stream is about 250 inches, under a 4-inch pressure, and that, of such amount of water, the defendants were the proprietors, by prior appropriation, of 25 inches. The court also found that the defendants had, by means of dams constructed in the stream, and ditches leading out therefrom, diverted all the water of the stream so that none of it reached, by its natural flow, the lower riparian proprietors; that all the lands of the plaintiff were irrigated by the stream flowing naturally and spreading over it; and that a portion of the defendants' land was also irrigated in the same way, as also by the 25 inches of water obtained by a prior appropriation. Finding that all the parties to the action were riparian proprietors, and that the defendants were also appropriators to the amount of 25 inches of the water running in the stream, the court below enjoined the defendants from diverting any of the waters except that to which they are entitled as such appropriators. From the judgment rendered the defendants appeal.

The pleadings of the defendants are all upon one paper, and were filed at the same time, and are signed at the end of the last part, or what is called the "second cross-complaint." The part denominated the "answer" denies the allegations of the complaint, and pleads the statute of limitations under sections 318 and 319 of the Code of Civil Procedure by way of defense. The demurrer filed to the answer was overruled. The grounds of demurrer to the cross-complaints are that they do not state facts sufficient to show a cause of action, and that they are unintelligible, ambiguous, and uncertain. It is proper to

remark, in passing, that the matters set up separately in two cross-complaints might have been stated separately in one cross-complaint, and one demurrer would then have sufficed. The plan adopted here is confusing.

The question to be determined is whether or not these cross-complaints contained matter proper for such a pleading. The first of them sets out the fact that the defendants are riparian proprietors, and as such entitled to the reasonable use of the waters of the stream; that the plaintiff has, by placing obstructions in the stream, and taking the water therefrom, prevented the flow of the same in their natural channel, and forcibly and wrongfully taken them away from the lands of the defendants, which, in their natural flow, they would have and did irrigate and make fruitful, when otherwise they would be and are unproductive; that such prevention of the natural flow of the waters has been of great damage to the lands of the defendants as riparian proprietors; and that the plaintiff threatens forcibly to continue his unlawful acts, and, unless prohibited by injunction, will cause great and irreparable damage to the defendants and their lands, and will entirely destroy their crops of grain, grass, etc., for which they cannot be entirely compensated unless permitted to use the waters flowing in their natural channel in the manner which they have been doing, etc. That called the "second cross-complaint" is to the effect that the plaintiff is doing, and threatens to do, these same unlawful acts, as against the defendants' rights to the 25 inches of water as prior appropriators, and asks for relief, etc.

Section 442 of the Code of Civil Procedure reads as follows: "Whenever the defendant seeks affirmative relief against any party relating to or depending upon the contract or transaction upon which the action is brought, or affecting the property to which the action relates, he may, in addition to his answer, file at the same time—or, by permission of the court, subsequently—a cross-complaint. \* \* \* " Did the defendants, in what are called the "first and second cross-complaints," seek affirmative relief thereby, affecting the property to which the action relates? The action relates to the waters of the stream the right to the use of which the plaintiff claimed as a riparian proprietor, and the defendants in that capacity, and as prior appropriators to the extent of 25 inches. The right to the same water, the same property right, was involved in the action as brought, as in the cross-complaints; and therefore a cross-complaint was the proper pleading, as we think, in which to set up the facts, and claim the affirmative relief. There were, then, causes of action stated in the cross-complaints proper to such pleadings, and the question only remaining is whether the causes of action were unintelligible or ambiguously stated. We do not think they were. It follows, then, that the court erred in sustaining the demurrers to the cross-complaints.

The court below found, in effect, among other things, that both parties were riparian proprietors, and that, as to 25

inches of the water of the stream, the defendants were the prior appropriators thereof. But it nowhere appears in any of the findings what amount of water it would be reasonable for the defendants to use as riparian proprietors for irrigation or other necessary purpose, domestic or otherwise. In the judgment or decree the whole of the water is ordered to be allowed to flow unrestricted to the plaintiff's lands in the natural flow of the stream, except the 25 inches given the defendants as prior appropriators. The finding once made that the defendants are riparian proprietors above on the stream, it is not allowable that a judgment be rendered which cuts them off from all reasonable use of any part of the water for irrigation or other necessary purpose as such proprietors. This is contrary to the doctrine of the appellate court in *Lux v. Haggin*, 69 Cal. 255, 10 Pac. Rep. 674; *Gould v. Stafford*, 77 Cal. 67, 18 Pac. Rep. 879; *Hellbron v. Water Co.*, 80 Cal. 189, 22 Pac. Rep. 62.

We think the finding upon the statute of limitations is sufficiently explicit. But, for the reasons stated, we advise that the judgment be reversed, and cause remanded for a new trial, with directions to the court below to overrule the demurrers to the cross-complaints, with leave to the plaintiff to answer the same if so advised.

I concur: GIBSON, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and cause remanded for a new trial, with directions to the court below to overrule the demurrers to the cross-complaints, with leave to the plaintiff to answer the same if so advised.

WORKS, J. I concur in the judgment on the last ground stated in the foregoing opinion. The whole controversy between these parties could have been fully determined under the issues raised by the complaint and answer, and the cross-complaints were entirely unnecessary. The prevailing custom of incumbering the records, and complicating the issues, by unnecessary pleadings should be discouraged; and the judgment, if right, should not be reversed for the reason the demurrers were sustained to these useless pleadings.

(84 Cal. 592)

**MURPHY V. SUPERIOR COURT OF SANTA CLARA COUNTY. (No. 18,707.)**

(*Supreme Court of California. June 20, 1890.*)

**PROHIBITION—APPEALABLE ORDER—GUARDIAN—ESTOPPEL.**

1. Under Code Civil Proc. Cal. § 1758, which provides that "every testamentary guardian must give bond and qualify," one who was appointed guardian by deed of trust, but failed to give bond, was not a legal guardian.

2. Under Code Civil Proc. Cal. § 1754, which provides that, "before the order appointing any person guardian under this chapter takes effect, \* \* \* the court must require of such person a bond to the minor," one who was appointed guardian by the superior court, but failed to give bond, was not a legal guardian.

3. Although a person appointed testamentary guardian by deed applied for and obtained letters

of guardianship, he was not estopped from questioning the validity of his own appointment on the ground that he had never given bond, when he received no money or property under the appointment, and had never acted as guardian.

4. One who has received property for the benefit of minors by a deed of trust cannot be compelled to pay for their support by an order of the superior court, directing him, as guardian, to do so.

5. Such an order is appealable under Code Civil Proc. Cal. § 963, subd. 3, and a writ of prohibition will be denied.

In bank. Prohibition to superior court, Santa Clara county; F. E. SPENCER, Judge.

J. H. Campbell and T. H. Laine, for petitioner. H. V. Morehouse and H. D. Tuttle, for respondent.

WORKS, J. This is an application in this court for a writ of prohibition. Petitioner was, by a deed from his brother, John Murphy, made a trustee of certain property belonging to the latter for the benefit of his (the brother's) children. The deed also contained this clause: "I hereby also order, decree, and appoint my said brother, Bernard, as the lawful guardian, for the purpose of support, tuition, and religious training, of my two sons above named. I also enjoin on him the duty of having them educated at the Santa Clara College, situate in the county of Santa Clara, and state aforesaid, and that the ages I wish them to enter shall be not more than twelve years respectively. I also desire my good and kind sister-in-law, Isabel Hanna, to exercise a control, in connection with my brother Bernard, over my two sons, William Patrick and Henry Bernard." The petitioner filed no bond as such guardian, but subsequently applied to the superior court of Santa Clara county for letters of guardianship, for the reason, as alleged in his petition, that the insurance company refused to pay an amount due them on a policy of insurance on the life of their father, who had since died, without the appointment of a guardian by the proper court. On the filing of the petition for appointment of such guardian the aunt, Isabel Hanna, mentioned in the deed, filed a counter-petition, alleging that the children had been and still were in her custody, and under her care, and asking that she be appointed their guardian alone or conjointly with the petitioner herein. The respondent heard the petitions, and made and entered an order that "Bernard Murphy may be, and he is hereby, appointed sole guardian of the estates of said minors, and joint guardian with Isabel Hanna of the persons of said minors, and that letters of guardianship be issued to him, accordingly, without bonds, upon taking and subscribing an oath, as required by law; the custody of the persons of the said minors to remain with said Isabel Hanna until the further order of the court." No bond was given under this appointment. It will be seen that, while the order provides that the petitioner and the said Isabel Hanna shall be the joint guardians of these children, there is no order appointing her such guardian, and it is alleged in the petition before us that she never qualified as such guardian, but that the children had remained in her custody until they arrived

at the ages of 12, respectively, when it is alleged the petitioner requested her to allow them to be placed at Santa Clara College, as provided in the deed of their father to him, but she refused to do so, and he, from the time of such refusal, or soon after, discontinued an allowance he had been making her for their maintenance. She thereupon applied to the respondent for an order requiring the petitioner to pay her the sum of \$50 per month for the maintenance of the children. The respondent assumed jurisdiction of the latter petition, made an order requiring the petitioner herein to pay said allowance, and this proceeding is to prohibit the enforcement of the order.

We are not called upon to pass upon the correctness or propriety of any of the proceedings complained of. The sole question presented by the application made to us is whether the respondent had jurisdiction to proceed in the matter. If so, the writ must be denied. So, if the petitioner has a speedy and adequate remedy in the due course of law, the writ cannot issue.

It is contended by the petitioner that the respondent had no jurisdiction to appoint him guardian of these minors on his own petition therefor, on the ground that a guardian cannot be appointed by the court where one has been already appointed by deed. The Code provides that the superior court may appoint guardians of minors "who have no guardian legally appointed by will or deed." Code Civil Proc. § 1747; Civil Code, § 243. And provision is made for the appointment of a guardian by deed of the parents of minor children. Id. § 241. But the superior court has general jurisdiction of the matter of appointment of guardians, and as an incident to this jurisdiction it must have the power to hear and determine the fact whether a testamentary guardian has been legally appointed or not. If so, its jurisdiction cannot be attacked in this collateral way. If, upon a direct appeal, it appeared that a testamentary guardian has theretofore been legally appointed, the order granting letters would no doubt be reversed, but not on the ground that the court had not jurisdiction of the subject-matter. The fact of the appointment by deed being established, an order appointing a guardian would undoubtedly be a nullity. *Robinson v. Zollinger*, 9 Watts, 169; *Holmes v. Field*, 12 Ill. 424. But in any event it is absolutely necessary for the petitioner to show, in this proceeding, that there was a guardian legally appointed by deed, in order to sustain his claim of want of jurisdiction in the court to appoint. This we think he has not done. It is not enough that a guardian be named in the deed. He must, under our Code, in order to become such guardian, qualify by giving bond. Code Civil Proc. §§ 1754, 1758; *Wadsworth v. Connell*, 104 Ill. 369. The provision that a bond must be given applies to testamentary guardians, but a guardian appointed by deed must be held to be a testamentary guardian, as such an appointment cannot take effect until the death of the parent. Civil Code, § 241. As no bond was given by him, he was not legally appoint-

ed by deed, and his contention, based on such pretended appointment, cannot be maintained.

It is further contended that he never became the guardian of these children under the appointment made by the court, because he never gave bond. This point we think is well taken. Code Civil Proc. § 1754. But it does not follow that this proceeding can be maintained. It is contended by the respondent that, whether the petitioner was legally appointed guardian or not, the court had jurisdiction to determine who should have the custody and maintenance of these minor children. This is undoubtedly true; but it does not follow that the court has the power to compel the petitioner to pay for such maintenance. In order to authorize such an order, it must appear that the court had jurisdiction over him, which could only be established by a showing that he was the guardian.

It is claimed that, the petitioner having applied for letters and acted as guardian, he is estopped to deny that he is such guardian because of his own neglect to give bond. This has been held where the guardian was attempting to avoid liability for moneys received by him as guardian. *Latham v. Wilcox*, 6 S. E. Rep. 711-714. But there is no pretense in this case that the petitioner ever received any property belonging to these minors as their guardian, or by virtue of his appointment. On the contrary, he held their property by virtue of the deed of trust above referred to. He may have collected the money due on the policy of insurance by virtue of his appointment, but this is not shown. Beside he alleges in his petition that he was informed in the beginning that his appointment was void, and that he never did act as guardian thereunder, and in failing to give bond the petitioner acted in accordance with the order appointing him, which, as we have shown, provided that no bond need be given. Under such circumstances we think no estoppel can work against his right to contest this order. But, in order to entitle the petitioner to the writ prayed for, it must appear that he has no speedy and adequate remedy in the ordinary course of law. High. Extr. Rem. §§ 770, 771. In this case he has such a remedy by appeal. The order made, of which he complains, is one from which an appeal may be taken under section 963 of the Code of Civil Procedure, and for this reason the writ must be denied. It is so ordered.

We concur: BEATTY, C. J.; MCFARLAND, J.; FOX, J.; SHARPSTEIN, J.

84 Cal. 607

PEOPLE v. HARRISON *et al.* (No. 13,369.)  
(*Supreme Court of California*. June 23, 1890.)

JUDGMENT—VACATING ON MOTION.

A judgment which recites that defendants were "regularly served with process, as required by law," is not void on its face for want of jurisdiction over the persons of defendants, and will not be vacated on mere motion, made 16 years after its rendition, though there is some evidence that defendants were not properly served with summons.

In bank. Appeal from superior court, Tulare county; W. C. VAN FLEET, Judge. *W. B. Wallace*, for appellant. *Freeman & Bates*, for respondents.

WORKS, J. This is an appeal from an order made vacating a judgment on motion. The judgment was vacated by the court below. The order was reversed in department 1, (*People v. Harrison*, 22 Pac. Rep. 1143,) and a rehearing granted. The ground upon which it was sought to vacate the judgment was that the summons was not personally served on the defendant, and was published without the affidavit for such publication required by the statute. The motion to vacate was made 16 years after the judgment was rendered. The evidence shows that all the papers in the original action, upon which the judgment was founded, were lost, and the motion was attempted to be sustained on parol testimony alone. There are cases decided by this court which recognize the right of a defendant, or his successor in interest, to vacate a judgment on mere motion after the time limited by statute. *People v. Mullan*, 65 Cal. 396, 4 Pac. Rep. 348; *People v. Pearson*, 76 Cal. 400, 18 Pac. Rep. 424; *People v. Greene*, 74 Cal. 400, 16 Pac. Rep. 197. But, as was said in *People v. Goodhue*, 80 Cal. 200, 22 Pac. Rep. 68, "We know of no provision of law which can be held to authorize the vacation of a judgment on a mere motion after so long a time." Of course a judgment void on its face may be attacked at any time, directly or collaterally; but, when the attempt is made to vacate the judgment by a proceeding in court for that purpose, it should be done by bringing an action as in other civil cases, that the opposing party may be regularly served with summons, and issues formed, and the case regularly tried.

But it is unnecessary for us to hold in this case that a judgment void on its face cannot be vacated on a mere motion; and, as the cases cited hold that it can be, we content ourselves with saying that an action regularly brought is preferable, and should be required. *Bell v. Thompson*, 19 Cal. 704. The cases referred to carefully limit this right to vacate in this informal way to judgments void on their face. Thus, in *People v. Greene*, supra, it is said: "A judgment which is void upon its face, and which requires only an inspection of the judgment roll to demonstrate its want of vitality, is a dead limb upon the judicial tree, which should be lopped off, if the power so to do exists. It can bear no fruit to the plaintiff, but is a constant menace to the defendant." \* \* \* Section 473, Code Civil Proc., is intended to apply to cases where judgment has been taken against a party by mistake, accident, surprise, or excusable neglect; to cases in which the moving party must move upon evidence *dehors* the record; to cases in which the relief to be granted is largely in the sound discretion of the court, and has no application to a pretended judgment which is shown by the judgment roll to be void for want of jurisdiction either of the person of the defendant, or of the subject-matter. \* \* \*

The judgment roll is set out in the tran-

script, and the certificate of the judge, as well as the stipulation of the attorneys, show that it was used at the hearing. By this roll it appears, as before stated, that there was no personal service on the defendants, or any of them; and, as there is no sufficient affidavit that the summons was ever in fact published, the judgment is void, and should have been set aside, and a trial had upon the complaint and answer of Hyde, on file, which answer was never stricken out or disposed of." In the case before us the judgment roll was not produced. It was shown to have been lost, except the judgment itself, and it was attempted to be shown by parol testimony that no affidavit for publication was filed. The judgment itself is set out in the record, and recites that the defendants were "regularly served with process as required by law." A judgment void upon its face is one that appears to be void by an inspection of the judgment roll. The mere absence from the roll of a paper—for example the return of the officer showing a service of the summons—cannot invalidate the judgment when the judgment itself recites the fact that the defendant was duly served with process.

Mr. Freeman, in his work on Judgments, thus states the rule, and we think correctly: "It may happen, when that part of the record containing the evidence of service shows an insufficient service, that other parts of the record, and especially the judgment, disclose the fact that the matter of jurisdiction has been considered and determined by the court. The conclusion or finding upon this subject may appear by recitals stating that defendant has been cited to appear, or that he has entered his appearance, or that his default for not appearing has been duly entered. These findings are as conclusive upon the parties in all collateral proceedings as any adjudication of the court can be. It must be presumed that they were supported by sufficient testimony not set forth in the record. Thus, though the return upon a summons against A. B. certifies a service of such summons upon C. D., and the judgment states that A. B. has been summoned, the record is not necessarily contradictory. The error in the service of process may have been corrected by service of the summons on the proper person, and, since the statement to this effect is made by the court, it will be conclusively presumed that it acted upon ample evidence, and with due deliberation, before making such statement; and the judgment will be impregnable to any collateral assault." Section 130. Tested by this rule the judgment before us was not void on its face, and the wisdom of confining the right to vacate judgments to such as appear on their face to be void is clearly exemplified in this case. The evidence tending to show the want of service consisted of the testimony of the deputy-clerk and district attorney at the time the original action was pending, who testified that no affidavit for publication had been filed, and the fact that there was no entry of such filing on the register of actions. It is clearly apparent that the witnesses had no present recollection of the facts of this

case, but testified that no such affidavits were filed in this class of cases at that time, and therefore none was filed in this case. This evidence was wholly insufficient to authorize a vacation of the judgment as against the recital of due service therein. Order reversed.

We concur: SHARPSTEIN, J.; FOX, J.

McFARLAND, J. I concur in the judgment upon the ground that the judgment sought to be set aside is not void on its face; but I do not concur in the language quoted from *People v. Goodhue*, 80 Cal. 200, 22 Pac. Rep. 66. The *Goodhue* Case was properly decided, I think, upon the ground stated in the concurring opinion therein of Mr. Justice PATTERSON; but the opinion of the court was concurred in by a majority of the justices, including myself, without, I think, giving due consideration to former decisions. In *People v. Mullan*, 65 Cal. 396, 4 Pac. Rep. 348; *People v. Pearson*, 76 Cal. 400, 18 Pac. Rep. 424; and *People v. Greene*, 74 Cal. 400, 16 Pac. Rep. 197,—it had been distinctly held that a judgment void on its face could be set aside on motion without regard to the lapse of time; and, in my judgment, there was no occasion to overrule these decisions, or to overturn the established rule on the subject. I think that *People v. Goodhue* should itself be disregarded so far as it conflicts with the other cases above named.

84 Cal. 611

PEOPLE v. BLAKE. (No. 13,370.)

(*Supreme Court of California*. June 23, 1890.)

In bank. On rehearing.

WORKS, J. This case was heard in department 2, and affirmed. 22 Pac. Rep. 1142. A rehearing was granted. After further argument and consideration of the case, we adhere to the conclusion reached by the department. *People v. Harrison*, ante, 311, (opinion this day filed.) Order affirmed.

We concur: SHARPSTEIN, J.; FOX, J.; McFARLAND, J.

PEOPLE v. HEMME. (No. 13,371.)

(*Supreme Court of California*. June 23, 1890.)

In bank. On rehearing. For former report, see 22 Pac. Rep. 1143.

Frederick S. Stratton, for appellant. R. B. Terry and W. B. Tupper, for respondent. Walker C. Graves, Amicus Curia.

WORKS, J. This case is in all material respects the same as *People v. Blake*, ubi supra, (just decided,) and on the authority of that case, and *People v. Harrison*, ante, 311, (decided this day,) the order appealed from is affirmed.

We concur: SHARPSTEIN, J.; FOX, J.; McFARLAND, J.

PEOPLE v. BRADY. (No. 13,429.)

(*Supreme Court of California*. June 23, 1890.)

In bank. Appeal from superior court, Tehama county; CHARLES P. BRAYNARD, Judge.

A. M. McCoy and John F. Ellison, for appellant. J. E. Prewett, for respondent.

WORKS, J. This case is in all material respects the same as *People v. Blake*, ubi supra, (just decided,) and on the authority of that case, and *People v. Harrison*, ante, 311, (this day filed,) the order appealed from is reversed.

We concur: McFARLAND, J.; FOX, J.; SHARPSTEIN, J.

84 Cal. 673

PEOPLE v. CLARK. (No. 20,625.)

(*Supreme Court of California*. June 17, 1890.)

MURDER—EVIDENCE—PRACTICE.

1. On trial for murder, it appeared that deceased was about to drive his cattle onto a range claimed by accused, and to thus mix the herds, which accused attempted to prevent. A quarrel ensued, during which accused shot and killed deceased. Held, that a witness could not testify whether the mingling of herds in such a way was likely to induce trouble.

2. Where there is conflict of testimony as to whether the shot was fired at close range, or while the parties were at a greater distance apart, evidence is admissible to show at what distance a rifle of the caliber used by accused will powder-burn clothes.

3. Evidence of former trespasses committed by deceased on the same land is inadmissible.

4. Where the prosecution does not attempt to prove guilty flight by the accused, he cannot give evidence to account for it.

5. It is in the discretion of the trial court to a witness to repeat in rebuttal a part of his testimony in chief.

6. The modifications of instructions requested must be shown by the indorsement of the trial judge thereon, or by a bill of exceptions, or they cannot be regarded on appeal.

7. Where all the instructions, taken together, give a correct statement of the law applicable to the facts of the case, they will be held good, though some of them do not contain in themselves the proper limitations and conditions required by the facts.

Commissioners' decision. Department 1. Appeal from superior court, Mendocino county; R. M. McGARVEY, Judge.

T. L. Carothers and Henley, Swift & Wright, for appellant. J. Q. White, Dist. Atty., G. A. Johnson, Atty. Gen., and J. A. Cooper, for the People.

GIBSON, C. The appellant, Clark, who was charged with the commission of the crime of murder, and was convicted of murder in the second degree, brings this appeal from the judgment and an order denying a new trial. At the trial the defendant admitted that he killed Garret Fitzgerald, but endeavored to show that he did it in necessary self-defense. The evidence discloses that the homicide took place in the mountains of Mendocino county, where both the defendant and the deceased were engaged in stock-raising. The deceased, with his son, step-son, and another man, were driving a band of about 200 cattle upon or near a tract of land claimed by the defendant, upon or near which the defendant's cattle were then grazing. The defendant, who came up with another man, endeavored to prevent the cattle from being mingled, and said he had a claim there, and would not permit



Fitzgerald's cattle to be driven on it. A quarrel between the defendant and Fitzgerald thereupon followed, from which the other men held themselves aloof, except as hereinafter stated. The defendant and the deceased were on horseback at the time. The defendant was upon the better horse, and had a Winchester rifle; and the deceased had a stick weighing about 20 ounces, which he was, when interrupted by defendant, using in driving his cattle. The deceased advanced upon the defendant three times, brandishing his stick in a threatening manner. From each advance the defendant retreated, and at the same time pointed his rifle at the deceased, and called upon him to stop. During the whole time they were using scurrilous language towards each other. Between the second and third advance the deceased made, he turned around to his son and step-son, and asked each for a pistol, but did not obtain one. The testimony of the prosecution tended to show that, the third time the deceased made an advance in a threatening manner, he stopped within about 15 feet of the defendant, upon the latter pointing his rifle at him, and commanding him to stop, and that after he had come to a full stop, and was at a safe distance from the defendant, the latter deliberately shot him through the left breast, and then rode away, but afterwards returned, and got the stick the deceased had threatened to use; and it further tended to show that the killing was done upon government land. While the testimony on the part of the defense tended to prove that the deceased, on his third advance upon the defendant, did not heed the command of the latter to halt, but rode rapidly towards him, and when they had come together the deceased struck at defendant with his stick, and missed him, but struck the defendant's horse in front of the saddle, and, upon lifting the stick to strike a second blow, the defendant raised his rifle and shot him; that, each time the deceased rode towards the defendant, the son and step-son of deceased would ride up a certain distance, but took no further part in the difficulty; and that the killing was done upon the claim of one Bainbridge, of whom the defendant had previously obtained a lease of it for the season then current. The jury were the sole judges of the credibility of the witnesses, whose testimony tended to establish either of these positions. They might have based their verdict upon the position assumed by the defendant; but, they having found that of the prosecution to be the true one, the verdict cannot be disturbed unless some of the causes urged by the defendant for a reversal can be sustained.

The following rulings on the evidence are assigned as errors: The son of the deceased, who had testified in chief that he was helping his father drive his cattle, and that they were being driven in the direction of a place where the defendant had some cattle, was asked this cross-question: "Well, is it desirable,—is it not apt to give rise to trouble or dispute or embarrassment in mixing cattle together that way?" to which an objection was sustained upon the ground, among others, that it called

for the opinion of the witness. This question was propounded upon the theory, which the defendant claims he tried to show at the trial, that the deceased, with his son and step-son, conspired together to drive him, by violence and intimidation, from the mountains, because he was pasturing stock upon land which they had used for the same purpose before he came, and was thereby limiting their stock range, and that the cattle of deceased were about to be mingled with those of the defendant to provoke a difficulty. We think the court ruled correctly in sustaining the objection on the ground stated. The question called for an opinion or inference, which the jury alone were competent to form upon or infer from the facts in evidence.

Subsequently, and during the cross-examination of the same witness, the following question was propounded, "Did not you know that Clark was endeavoring to prevent these two bands of cattle from mixing?" to which the prosecution objected upon the same grounds as to the preceding one. The court sustained the objection, and at the same time said: "He can state what he said, and what he was doing." If this ruling was erroneous, it was cured by the answer of the witness, who said: "It looks very much like Clark was trying to keep us from driving the cattle down in that direction. He got ahead of our cattle." The ruling next objected to is one admitting the testimony of Charles Yates, who said he had experimented with a Winchester rifle 44 caliber, and found that 15 feet was the furthest distance it would "powder-mark" clothing when discharged at such clothing. The objection to this testimony was that it was immaterial and incompetent. The rifle used by the defendant upon the deceased, who was in his shirt-sleeves—without coat or vest on—at the time, was a Winchester, 44 caliber, and that no powder-marks were found upon the clothing or body of the deceased after being shot does not appear to have been disputed. It was therefore material and competent, as tending to show, as claimed by the prosecution, that the shooting occurred while the defendant and deceased were at a distance of about 15 feet from each other, and not, as claimed by the defense, that it occurred while they were within a few feet of each other, and near enough for the deceased to strike the defendant with his 20-ounce stick. This same witness afterwards testified that his experiments showed that powder-marks would appear upon clothing when fired at from a distance of 10 feet, and another witness, who was familiar with the use of fire-arms, and had experimented in other cases, said: "From my experience, and from what I have done, I can testify as a fact as to how far a 44-caliber Winchester, loaded with ordinary shell, will powder-mark clothing. It depends upon the color, so far as that is concerned. It shows plainer on light clothing. I think it will powder-burn at eight feet on dark clothing, or any kind of clothing. It shows a foot or two further on light clothing. It shows eight feet on dark clothing."

When Bainbridge, from whom the defendant leased the claim for pasturage purposes, was being examined in chief for the defendant, the following occurred: "Question. Do you know whether or not any of Kelly's cattle—any of Fitzgerald's cattle—had ever been driven over on your claim before that? Answer. Yes, sir. Q. When? We object as not material." The objection was sustained. The ruling was, we think, correct. A former trespass upon defendant's leased land, it is clear, would not justify him in killing the deceased. If the testimony was intended to prove that it was an act done in furtherance of the conspiracy above mentioned, there was no offer to connect it with other evidence that would tend to establish such a conspiracy. The defendant having failed to make such an offer, the evidence, which was apparently immaterial, was properly rejected. See *McGarrity v. Byington*, 12 Cal. 426. Again, when the defense had reached its side of the case, it tried, for the same purpose, and also to show threats by the deceased, to elicit from W. Hoxie, a witness for the defense, that prior to the killing the witness had been instructed by the deceased to drive the sheep of the latter upon the Bainbridge claim, and that witness thereupon told the deceased that he had been informed by Clark, the defendant, that the latter had rented the claim and did not want the sheep driven on it. The court excluded this as irrelevant and immaterial. The counsel for the defendant, however, said to the court that he desired to explain why he offered it, but the court declined to hear it, saying that it was satisfied that it had ruled correctly. We see no error in this ruling. The evidence was irrelevant. It did not tend to establish the conspiracy alluded to, nor did it show any threat against the defendant. The same witness subsequently said that, on the occasion referred to, the deceased made no threat against Clark. The court seems to have admitted all the evidence offered in the case that tended to show threats by either the defendant or the deceased against the other. It may be well to remark in passing that the evidence viewed as a whole, and in the most favorable light for the defendant, does not show any conspiracy between the deceased and his son and step-son. The first was the sole owner of the cattle, and the others were employed by or were gratuitously assisting him in herding them.

During the re-examination of Bainbridge for the defense an objection on the ground of irrelevancy and immateriality was sustained to the following question: "Did Mr. Clark go to Round Valley as fast as he could, to the officers?" The defendant claims he should have been permitted to prove the fact called for, in order to meet the injurious effect of the testimony of the step-son of the deceased, which tended to show a guilty flight on the part of the defendant. On this point that witness said: "On the day of the homicide, in addition to those that I have already mentioned, I saw Frank Knight. He was about seventy yards away. I saw no one else. I did not see Archie McCauley nor Bainbridge. I know both of them. Clark said

nothing after the shooting, but rode away. He did not stop to assist in taking care of Fitzgerald. He turned his horse around, and looked at him and rode off. • • • After the killing, Clark rode back, and got the stick." This testimony did not tend to establish a guilty flight, nor was there any claim made by the prosecution that it did. Therefore, under the rule that a defendant cannot give evidence to account for his flight unless the prosecution prove the flight as tending to show his guilt, (Whart. Crim. Ev., 9th Ed., § 752,) the ruling must be sustained. Besides, the defendant, in his testimony, gave substantially the same account of how he rode away, and afterwards returned for the stick. The defendant, in his testimony, said that some time before the difficulty, while he was driving his cattle up into the mountains, he met a Mr. Masterson with his flock of sheep, and they had a conversation regarding his (defendant's) experience in the mountains, wherein he said to Masterson: "I told him Billy Kelly had stole one from me, but I expected to prosecute him when I got over there, to beat him through the law. If I could not beat him that way, I would beat him at his own game,—I would steal two for one. That was just the remark that was made." He was then asked: "Was this conversation about stealing two for one,—I will ask you if it was intended for a joke?" An objection of the prosecution to this question was, it is urged, erroneously sustained. Even assuming that the defendant meant what he said to Masterson respecting Kelly, who is the person referred to herein as the step-son of deceased, it could only have, at most, shown the defendant's *animus* towards Kelly, which was clearly irrelevant.

The last objection to the rulings of the court upon the evidence is to that where the court permitted the witness Masterson, in rebuttal, to repeat a portion of what he had testified to upon his examination in chief for the prosecution. This was a matter that was within the discretion of the court, which we think was properly exercised in admitting the testimony, especially as the court said it could not recall at the time whether it called for a repetition of his former testimony or not.

Certain exceptions to the instructions were reserved. It is contended that the court erroneously modified the eleventh and twelfth instructions given to the jury at defendant's request. The only way in which these modifications are attempted to be shown in the record is by the repetition of the last sentence of each instruction below the signature of the trial judge to each of the instructions without any indorsement of the trial judge on either of the sentences to show whether he added them to the instructions under which they respectively appear. The action of the trial judge in modifying instructions requested by either party to be given to the jury must be shown either by his indorsement thereon, or by a bill of exceptions. Pen. Code, § 1176; *People v. Thompson*, 28 Cal. 218; *People v. Martin*, 32 Cal. 91; *People v. Tetherow*, 40 Cal. 287; *People v. January*, 77 Cal. 179, 19 Pac. Rep. 258. Hence,

the modifications complained of not having been shown in either way, the defendant cannot avail himself of them on this appeal. Furthermore, an examination of a certified copy of the instructions complained of, filed in this court by the respondent, does not disclose either of the sentences referred to that appear in the printed record here. They must, therefore, have been inserted by the clerk of the trial court under a misapprehension of what constituted the record on appeal under section 1246 of the Penal Code. It is clear, as was said in *People v. January*, supra: "The clerk cannot give verity to what purports to be the instructions given or refused, by inserting them in the judgment roll. He is not in a position to know at all times what action the court has taken; and, were it otherwise, the power of verification is not, and should not for many and weighty reasons be, vested in him."

But although the modifications cannot be reviewed for the reasons stated, we shall see, however, when the instructions are considered as a whole, that the modifications did not make the instructions erroneous. The court, in addition to the instructions given at the request of the prosecution and the defense, gave certain instructions of its own, among which is the following: "If you believe that any witness has willfully testified falsely to any material fact, it is your duty to discredit him. Now, I emphasize the word 'willfully.' A witness may by mistake testify falsely to a material fact, and you should not certainly discredit him if you believed it to be a mistake. If he intentionally and willfully testified falsely to a material fact, you may disbelieve and disregard his evidence entirely. In making these remarks, I do not mean to be understood that any witness has testified falsely. It is for you to say." This instruction is excepted to because the word "discredit" is used instead of the word "distrust." By the use of the word "discredit," appellant claims the jury, in effect, were told it was their duty to discard the evidence of any witness whom they believed had testified falsely to any material fact. The verbs "discredit" and "distrust" have substantially the same meaning. See *Webst. Dict.*; *And. Dict. Law*; *Abb. Law Dict.* Read in this light, the instruction complained of is, in effect, a compliance with section 2061, subd. 3, of the Code of Civil Procedure, which provides that "a witness false in one part of his testimony is to be distrusted in others." By it the jury were told that, if they believed that any witness had willfully testified falsely to any material fact, it was their duty to regard such false testimony as sufficient to impeach and render less credible other portions of his testimony, and that they might disregard the testimony of such a witness altogether. That the jury have an undoubted right to reject all the testimony of such a witness, in a proper case, necessarily follows from requiring them to distrust it. *People v. Sprague*, 53 Cal. 491.

The remaining exceptions to the instructions are urged upon the ground that the instructions to which they severally relate do not contain the proper limitations and

conditions required by the facts. But, while some of the instructions may be defective in this respect, all the instructions, read and considered together as one charge, without straining the language, show a fair, harmonious, and correct statement of the law applicable to the facts of the case, and contain all the conditions and limitations that are omitted from the instructions complained of. This has been repeatedly held to obviate the objections mentioned. *People v. Doyell*, 48 Cal. 93; *People v. Nelson*, 56 Cal. 77; *People v. Gray*, 61 Cal. 164; *People v. Morine*, Id. 367; *People v. Hurtado*, 63 Cal. 288. We are unable to perceive anything in this case that would justify a reversal, and therefore advise that the judgment and order be affirmed.

We concur: BELCHER, C. C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

84 Cal. 420

SILVA v. CAMPBELL. (No. 12,803.)

(Supreme Court of California. June 9, 1890.)

LANDLORD AND TENANT—FORFEITURE—SUMMARY PROCEEDING.

1. In the lease of certain land it was stipulated: "Should default be made in the payment of rent when due, and for three days thereafter, the lessor might re-enter and take possession of the premises, and at his option terminate the lease." Held, that after default a summary proceeding for unlawful detainer cannot be brought, under Code Civil Proc. Cal. § 1161, subd. 1, as at the expiration of the term; but that three days notice of the lessor's intention must be given, as required in case of a tenancy at will. Subdivisions 2, 3, Id.

2. Acceptance of rent is a waiver of forfeiture, in a case where the lease provides for re-entry in the event of a breach of the obligation, only where the lessor had knowledge that the condition was broken at the time he accepted it, and it became due after the breach of condition.

Department 1. Appeal from superior court, Contra Costa county; JOSEPH P. JONES, Judge.

G. W. Bowle and A. H. Griffith, for appellant. Eli R. Chase, for respondent.

PATERSON, J. This is an action of unlawful detainer. On October 5, 1887, the defendant leased from the plaintiff certain premises in Contra Costa county, for the term of one year, at a rental of \$100 per month, payable on the 5th day of each and every month. The lease contains the following provision: "Should default be made in the payment of any portion of said rent when due, and for three days thereafter, the said lessor, his agent, or attorney, may re-enter and take possession of said premises, and at his option terminate said lease." It is alleged and found that the defendant went into possession of the property under the terms of the lease; that on the 5th of June, 1888, there became due from defendant to plaintiff the sum of \$100 rent; that it was not then paid, nor for three days thereafter, and on the 9th of June following plaintiff exercised the option given him by the terms of the lease, and notified the defendant in writing that

he terminated the lease, and on the same day gave defendant a further notice in writing that in consequence of the termination of the lease defendant was required to surrender to plaintiff the possession of the property within three days after service of the notice; that after the lease had been terminated by plaintiff, and notice to quit served upon her, defendant paid to plaintiff the sum of \$100, which was received by plaintiff as rent from the 5th of May to the 5th of June, 1888. Judgment was entered in favor of the plaintiff for the recovery and possession of the premises.

It is claimed by appellant that the acceptance by the plaintiff of the rent after the notice of forfeiture itself operated a waiver of the forfeiture. It is true, forfeitures are not favored, (equity abhors them,) and our Code provides that the party who incurs a loss in the nature of a forfeiture may, upon making full compensation to the other party, except in cases of negligence or fraud, be relieved therefrom, (section 3275, Civil Code;) but to make the acceptance of rent a waiver of a forfeiture in a case where the lease provides for re-entry in the event of a breach of the obligation, it must appear that the landlord had knowledge of the fact that the condition was broken at the time he accepted the rent, and it must further appear that the rent which he accepted became due after the breach was committed by the tenant, (Jackson v. Allen, 3 Cow. 220; Keeler v. Davis, 5 Duer. 507.) More than three days elapsed after the notices above referred to were given before the commencement of this action, and it is claimed by respondent that because of this fact, and the further fact that the defendant neglected and refused to surrender possession to the plaintiff, he is entitled to recover in this summary action under the provision of subdivision 1 of section 1161, Code Civil Proc., which reads as follows: "A tenant of real property for a term less than life is guilty of unlawful detainer (1) when he continues in possession, in person or by subtenant, of the property, or any part thereof, after the expiration of the term for which it is let to him, without permission of his landlord, or the successor in estate of his landlord; but in case of tenancy at will it must first be terminated by notice, as prescribed in the Civil Code. Unless he can recover under the provisions of this subdivision of the section, he cannot recover at all herein; because it is not claimed that the three days' notice provided for by subdivision 2, requiring payment of rent after default in the payment thereof, or the three days' notice required by subdivision 3 of the section, was given to defendant. The position of respondent, as stated in his own language, is "that this action was brought for the recovery of the possession of the leased premises the same as though the lease by its own terms, and without any forfeiture, ended on the 5th day of June, 1888. \* \* \* The parties, by their lease, have solemnly stipulated \* \* \* that at the option of the lessor it shall terminate at any time upon the failure of the lessee to pay the rent when due, or within three days there-

after. \* \* \* Our contention is, by the terms of the lease, and the exercise of the option therein granted to the lessor, that the lease was terminated and ended on the 9th day of June, 1888." The provisions of subdivision 1, supra, were taken literally from the statutes of New York, and, if we are to accept the construction placed upon them by the courts of New York at the time they were adopted in this state, the contention of the respondent cannot be sustained. In *Oakley v. Schoonmaker*, 15 Wend. 228, it was held that "the expiration of the term for which it is let to him," mentioned in the statute, means expiration by lapse of time, that is, the term named in the lease; that summary proceedings could not be instituted on the ground of the expiration of the term by forfeiture. This decision was cited and approved in *Beach v. Nixon*, 9 N. Y. 37. Mr. Taylor, in his *Landlord and Tenant*, speaking of summary proceedings, says: "These statutes are confined to the particular cases specified in them, the expiration of the term referred to meaning only an expiration by lapse of time, as specified in the lease, and not by a technical forfeiture; in which latter case a landlord cannot proceed under this statute, but must still resort to his action of ejectment." In some states it is provided that landlords are entitled to the benefit of summary proceedings "where the lease is determined by forfeiture for breach of its provisions." Sections 713, 728a, note. In this state summary process will lie upon the breach of any covenant or condition of the lease and a demand for possession, but the three days' notice required by subdivisions 2 and 3 must be given. We presume that subdivision 1, supra, was enacted in this state with an understanding of the construction which had been placed upon it in the state from which it was taken. Giving it this construction, and the plaintiff having failed to prove the notice required by the statute, we must hold that he was not entitled to recover possession of the property. Judgment and order reversed, and cause remanded for a new trial.

We concur: BEATTY, C. J.; FOX, J.

84 Cal. 322

*In re BREGARD.* (No. 12,674.)

(*Supreme Court of California.* June 9, 1890.)

INSOLVENCY — DISCHARGE — "FALSE OR FICTITIOUS DEBT."

On the petition of an insolvent debtor for discharge, it appeared that his partner in farming operations, without his knowledge or approval, mortgaged a partnership crop to secure a firm debt for supplies and one of petitioner's individual debts; that petitioner had unsuccessfully resisted the attempt of his partner, after the crop was harvested, to deliver it in payment of the debts secured; that in his schedule he claimed the debts in question among his liabilities, and his interest in the crop among his assets. *Held*, that these facts did not bring the case within Insolvency Act Cal. 1880, c. 87, § 49, providing that no discharge shall be granted where the debtor has sworn falsely in his schedule, or has admitted a false or fictitious debt against his estate.

Department 1. Appeal from superior court. Contra Costa county; JOSEPH P. JONES, Judge.

Application for discharge under Insolvency Act Cal. 1880. Chapter 87, § 49, provides that "no discharge shall be granted \* \* \* if the debtor shall have sworn falsely in his affidavit annexed to his \* \* \* schedule \* \* \* concerning his estate or his debts, \* \* \* or has admitted a false or fictitious debt against his estate."

*R. H. Lattimer*, for appellant. *EH R. Chase*, for respondent.

PATERSON, J. The petitioner was duly adjudged an insolvent debtor on October 16, 1886; and following the adjudication the usual statutory orders were made and entered. In May following, D. McKenzie, one of the creditors, and respondent herein, filed an opposition to the petitioner's application for a discharge, in which he alleged that the petitioner had failed to include in his schedule several head of horses and of cattle, a double wagon, and a pre-emption claim to 160 acres of land, all of said property being valued at about \$5,500; that he had included in his schedule three false and fictitious debts, viz., \$66.60, \$1,040, and \$135.39, in which amount he claimed to be indebted to one Shuey; that he had included in his schedule of assets a certain amount of hay, and a three-eighths interest in certain barley and wheat, which did not belong to him. After a trial of the issues the court found that the petitioner was not the owner of the horses, cattle, lumber, or pre-emption claim referred to in the opposition, but that he had included in his schedule the false and fictitious debts above referred to. The court further found that, at the time of filing his petition, he was not the owner of the hay, or of the three-eighths interest in the barley and wheat. Upon these findings the court concluded that the petitioner was not entitled to a discharge, and an order was entered denying his application.

We cannot understand how the learned judge of the court below could have arrived at the conclusion upon the evidence. McKenzie rented a ranch in Contra Costa county for the cropping season of 1885-86, and entered into an agreement with the petitioner, by the terms of which they were to farm the ranch together, each one furnishing one-half of everything needed, to perform half of the labor, and, after the rent was paid, the same being one-fourth of the crop, the profits to be equally divided between them. McKenzie testified: "I furnished the farming utensils, except one plow. Bregard was in partnership with me. Each one was to furnish one-half of everything,—teams, farming implements, seeds, and labor,—and we were to divide the profits. I was responsible for all the debts. There was no other contract between us except this one. I was to pay the debts out of the crop, and we were to divide the balance." Bregard, in his testimony, denied that McKenzie was to be responsible for his share of the debts. This is the only particular in which the evidence is at all conflicting. They bought goods of Shuey on their joint account to the amount of \$1,175.39,—being the amounts given in the schedule, \$1,040 and \$135.39,—and Bregard became indebted

to Shuey on an individual account in the sum of \$66.60. McKenzie gave Shuey a note secured by a chattel mortgage on the crop for this indebtedness and his individual indebtedness to Shuey. The goods purchased from Shuey were charged by him to the joint account of McKenzie and Bregard. Bregard had no knowledge of the fact that McKenzie had made the note and mortgage until after it had been delivered to Shuey. After the crop was harvested and sacked, McKenzie delivered the whole of it to Shuey in satisfaction of the indebtedness of the partnership, and the individual indebtedness of himself and Bregard. When Shuey attempted to take possession of the property, and remove it from the premises, Bregard met him with a shot-gun, and refused to let him enter the premises, claiming that McKenzie had no right to mortgage his interest in the grain, or to dispose of it in that way. Shuey then had the petitioner arrested, and thereafter went and removed the grain in the night-time, and kept the same in satisfaction of the debts due him from the petitioner and McKenzie. At the trial, Shuey testified that he did not consider that the petitioner owed him anything. He did not, however, testify that he never had owed him anything on the account. The account itself shows that Shuey considered both McKenzie and Bregard liable on the joint account.

Whether we accept the statement of McKenzie that he was to pay all the debts out of the proceeds of the crop, or the statement of the petitioner that there was no understanding to the effect that McKenzie should be responsible to Shuey for all goods bought on their joint account, the fact remains that McKenzie had no authority to mortgage petitioner's interest in the crop. Until the crop was harvested and sold, the petitioner had as much interest therein as McKenzie, and he had the right to insist upon the crop being sold to the best possible advantage. He had the further right,—indeed, it was his duty,—upon petitioning to be adjudged an insolvent debtor, to have all the property in which he was interested put in his schedule, and divided among all his creditors. There is nothing in the record to indicate that he acted in bad faith, or with any fraudulent purpose, in putting the debts above referred to in his schedule. They were not "false or fictitious debts," within the meaning of section 49 of the insolvent act. There is nothing to show even that he knew McKenzie had attempted to pay the debts of the partnership, and certainly nothing to show that he knew he had attempted to pay his (the petitioner's) individual debts by a transfer of the grain. The petitioner knew that he was responsible to Shuey, not only for his own individual debts, but for the entire partnership debt; and the evidence shows, we think, clearly, that he believed he was entitled to hold his three-eighths interest in the property, and have it devoted to part payment of paying the claims of all of his creditors. Doubtless, McKenzie believed that he had the right to control and mortgage the entire crop, and acted in good faith in endeavoring to pay the

debts of himself and the petitioner by transferring the property to Shuey. It is equally clear that the petitioner acted in good faith in trying to have his property divided among all of his creditors. He stated that he acted on the advice of his attorney in putting the description of the property and the list of debts in his schedules. There certainly is nothing to show—indeed, there is no claim made—that the petitioner was trying in any way to defraud his creditors, even Shuey. Even if the petitioner was not the owner of three-eighths interest in the crop, no one was injured by the fact that it was described in his schedule as a portion of his estate. Unless we can say that the insolvent debtor must at his peril interpret accurately his relations with third persons, and to all property claimed by him, and can hold him responsible for all errors in relation thereto, though acting in good faith, and upon the advice of competent counsel, the petitioner herein is entitled to his discharge. We think, upon the undisputed evidence in the case, that the petitioner is entitled to a discharge. Judgment reversed, with directions to the court below to enter an order as prayed for in the application for a discharge.

We concur: BEATTY, C. J., and Fox, J.

84 Cal. 126

BRYAN v. TORMEY. (No. 11,873.)

(Supreme Court of California. May 12, 1890.)

QUIETING TITLE—EVIDENCE—VARIANCE BETWEEN PLEADING AND PROOF.

1. Where a complaint in an action to quiet title alleges ownership and possession by plaintiff, a judgment in his favor, based on proof that he is the owner, and that defendant had forcibly dispossessed him, will be reversed, and the cause remanded, in order that the complaint may be amended so as to conform to the proof.

2. The holder of the record title of land had declared that he had promised it to his brother, but that he would not execute a deed until he had received the purchase money. The brother subsequently went into possession of the land, cultivated it, and exercised acts of ownership over it. Following this, during a period of nearly 20 years, the holder of the record title made both oral and written declarations that the land was his brother's. After his brother's death, on discovering that no deed to his brother was on record, he voluntarily conveyed the land to his son-in-law, who had knowledge of all the facts. *Held*, in an action to quiet title by the brother's grantees, that the facts established a parol agreement to convey on payment of the purchase price; that the price had been paid; that the holder of the record title thereafter held the naked legal title as trustee for his brother; and that the son-in-law would be compelled to execute a deed to the brother's grantees.

In bank. Appeal from superior court, Alameda county; N. HAMILTON, Judge.

Action to quiet title by Mary J. Bryan, executrix, etc., against Patrick Tormey. There was a judgment in plaintiff's favor, and defendant appeals. For opinion in department, see 21 Pac. Rep. 725.

*Stanly, Stoney & Hayes*, for appellant. *W. H. Hart and Aylett R. Cotton*, for respondent.

BEATTY, C. J. The land in controversy in this action is part of a Mexican grant

patented to the Peraltas in 1857. In 1859 one Jurgo, being owner by conveyance from the Peraltas of a part of the grant, sold and conveyed two adjoining parcels to the brothers John and Peter Mathews, respectively. There was a map of the Peralta grant, known as "Kellersberger's Map of the Ranchos of Vicente and Domingo Peralta," upon which the different subdivisions were designated by numbers, subdivision 56 being north of and adjoining subdivision 53. The conveyance from Jurgo to John Mathews included 53 and the south 27.41 acres of 56. The part of 56 adjoining on the north was included in the conveyance to Peter Mathews. After the conveyances from Jurgo the brothers Mathews were in possession for a time of the parcels conveyed to them, respectively, and John Mathews paid the taxes on the south 27.41 of 56. In 1861 Harmon and Opdyke purchased 53 from John Mathews, and at the same time offered to purchase the south 27.41 acres of 56, but John Mathews refused to sell them this part of 56, for the reason assigned by him that he had promised it to his brother Peter, saying at the same time that he would not give him a deed till he paid for it, and that when he did pay for it he would give him a deed. These declarations were repeated to Harmon on more than one occasion, in substantially the same terms. Subsequently, in conveying 53 to Harmon and Opdyke, John Mathews, in his deed, described the tract conveyed as being bounded on the north by land of Peter Mathews, thus distinctly declaring in writing that the southern part of 56 was his brother's land. About the same time Peter Mathews took possession of said 27.41-100 of 56, inclosed it with other lands of his own, and afterwards cultivated and used it as if it was his own. For two years prior to this date this parcel had been assessed to John, and he had paid the taxes. Ever afterwards it was assessed to, and the taxes were paid by, Peter and his grantees. From the time he so entered into the possession Peter in every way acted as if he was the owner of this parcel, and in 1872 he sold and conveyed 17 acres of it to the plaintiff's grantors. For three years he remained in possession of the part sold as tenant of his grantees, but in 1875 they leased their portion to another tenant, Garin, who occupied, used, cultivated, and resided upon it. It was not, however, separately inclosed, but remained as before in a common inclosure with Peter's other land adjoining. In 1879 Peter died, and his widow administered upon his estate as executrix. His brother John was one of the appraisers of his estate, and as such appraised as a portion of his estate the western 10 acres of the south 27.41-100 acres of 56, being the part thereof which he had not sold to plaintiff's grantors. This was John's second declaration or admission in writing that it was his brother's land. Previous to this, when third parties were endeavoring to get a road opened through this 27-acre tract, John had at their request endeavored to persuade Peter to consent to it, and had said, in effect, that Peter ought to do so because he had got the land for a small price; and at va-

rious dates, and under a variety of circumstances, down to a time subsequent to Peter's death, John had made frequent and emphatic declarations to the effect that this land was Peter's. But shortly after Peter's death record searchers made the discovery that the grantees of Peter had no record title to this particular tract of land. When John was informed of this his first acts and declarations were entirely consistent with his previous acts and declarations as to his brother's ownership, but upon second thought he and the defendant Tormey, who is his son-in-law, seem to have concluded that the claims of Peter and his successors were not as meritorious as they were previously supposed to be. They caused a careful search of the records to be made, and, after satisfying themselves that no evidence could be discovered of any conveyance from John to Peter, and after taking legal advice, concluded, or at least Tormey concluded, that it would be safe to take a conveyance from John Mathews and claim the land. He accordingly took such conveyance in 1880, paying nothing for it, and having full knowledge of the claims and possession of Peter and his grantees. Shortly afterwards he went with 8 or 10 men, and forcibly dispossessed Garin, the tenant of plaintiff, and inclosed in a separate inclosure the eastern 17 acres of the parcel which had been sold by Peter to plaintiff's grantors, but leaving out the unsold 10 acres on the west, the same that John had previously appraised as part of Peter's estate. This 10 acres he shortly afterwards conveyed to Peter's widow, gratuitously and voluntarily, without any request from her. An action of forcible entry was instituted by Garin against Tormey to recover possession of the land, but for some unexplained reason it failed, and thereafter, in 1883, this action was commenced. The action, as above stated, is one to quiet title, and the complaint alleges, among other things, ownership and possession by plaintiff, and unfounded claim by defendant. The proofs on the trial were substantially as above set forth, and the findings and judgment of the superior court were in favor of the plaintiff. Defendant appeals from the judgment and from an order denying a new trial.

The judgment of the superior court cannot be sustained, because the case proved and found is not the case made by the complaint. The facts proved show clearly enough that the plaintiff has a good cause of action, and is entitled to relief substantially as decreed, and, if the complaint had been amended at the trial so as to conform to the proofs, and to correspond with the findings, we should have found no difficulty in affirming the judgment. But this was not done, and the judgment must necessarily be reversed, and the cause remanded, in order that the complaint may be properly amended.

With a view to future proceedings in the cause, it is necessary that we should briefly indicate our views upon some of the points discussed in the briefs. The acts and declarations of John Mathews in reference to the ownership of Peter are competent, and amply sufficient to show that he sold the

land to Peter, put him in possession of it, and received the agreed price prior to the year 1869; that Peter and his grantees were from and after that date the owners of the equitable title; and that John, if he did not execute a conveyance, (which we think it highly probable he did,) thereafter held the naked legal title in trust for Peter and his grantees. The proof, to our minds, is absolutely overwhelming that Peter bought and entered into possession of the land under a parol agreement with John that it was to be conveyed when paid for, and that it was paid for prior to 1869, and that at all times after 1861, until the forcible entry of defendant, Peter and his grantees were rightfully in possession, and entitled to a conveyance, if in fact one had not been made. The acts of John Mathews and his son-in-law, Tormey, after Peter's death, bear every indication of having been prompted solely by the belief that all evidence of Peter's rights was lost, and that they could therefore despoil his grantees of their property. In this, we think, they are mistaken, and that on the facts proved, under proper pleadings, a decree should be made compelling Tormey to convey the title and deliver possession of the 17 acres to Peter's grantees, as he has already done with respect to the 10 acres remaining in possession of the widow. The judgment is reversed, and the cause remanded, with directions to the superior court to permit the parties to amend their pleadings, and thereupon to retry the case in accordance with the views herein expressed.

We concur: Fox, J.; McFarland, J.; Paterson, J.

#### SUTHERLAND *et al.* v. PUTNAM *et al.*

(Supreme Court of Arizona. April 18, 1890.)

#### APPEAL-BOND—ASSIGNMENT OF ERRORS—BILLS OF EXCEPTIONS—RULINGS ON EVIDENCE.

1. The supreme court has no jurisdiction of a case upon appeal unless an appeal-bond, in form as required by statute, or, in lieu thereof, an affidavit of inability to give bond, be filed in the lower court within 20 days after the term at which judgment was rendered.

2. Such an appeal-bond is defective in form if the judgment from which the appeal is taken be not specifically described, and the penalty thereof be not in double the amount of costs as estimated by the clerk of the lower court, and an obligee be not named therein.

3. Transcript must show affirmatively that appeal-bond was filed within statutory time.

4. The assignment of errors should be upon a separate paper, and must be signed by the appellant or his attorney, and filed in the office of the clerk of the lower court before taking out the transcript; otherwise the appeal will be either dismissed, or the judgment affirmed, unless fundamental error appear as to the judgment roll.

5. This court will not review any alleged error which might have been good ground for a new trial in the court below unless the same shall have been presented to such court by motion for new trial, the motion overruled, and such motion and ruling embodied in a bill of exceptions.

6. The minute entry of the clerk reciting the fact of filing a motion for a new trial, the ruling upon it, and that the appellant excepted, does not bring the motion, the ruling, or the exception before us. That must be done by bill of exceptions.

7. Every matter not made by statute a part of



the record of the cause must be made so by a bill of exceptions or statement of facts.

8. Exceptions to the ruling of the lower court in admitting or excluding evidence may be properly preserved by being incorporated in the statement of facts, if the requirements of the statutes relative to form, time of preparation, presentation, settling, signing, and filing of bills of exceptions shall have been complied with.

9. The transcript must show that the bill of exceptions and statement of facts were filed within the statutory time.

(*Syllabus by the Court.*)

Appeal from district court, Pinal county; W. W. PORTER, Judge.

G. H. Ouray and E. J. Edwards, for appellants. H. B. Summers and Baker & Campbell, for appellees.

KIBBEY, J. This was an action in the lower court, by J. D. Putnam against C. D. Putnam, for a dissolution of a partnership alleged to have theretofore existed between them, and for an accounting, and praying for an injunction restraining the sheriff of Pinal county from selling a band of cattle, alleged to be partnership property, which had been levied upon and advertised at the instance of the intervenor. The appellants, Sutherland et al., intervened, alleging themselves to be creditors of C. D. Putnam, denying the existence of the partnership, and claiming the property levied upon to be the individual property of C. D. Putnam, and therefore subject to levy and sale for the payment of their demands. There was a finding and judgment for the plaintiff, appellee, and against C. D. Putnam and the appellants Sutherland et al.

Upon an examination of the record, we cannot determine whether we have jurisdiction of the case. The statute requires, as essential to the right of appeal, that an appeal-bond, or affidavit in lieu thereof, shall be filed within 20 days after the expiration of the term at which the final judgment was rendered. Section 849, Rev. St. 1887. The judgment in this case was rendered on the 30th October, 1888. The appeal-bond was filed on the 6th February, 1889. We know judicially that a term of the district court for Pinal county began on the first Monday in October, 1888, but we can only know from the record when that term adjourned. The record in this case is silent upon the subject. The transcript should contain a copy of the order of adjournment of the term, in order that it may appear whether the appeal-bond was filed in time to perfect the appeal. *Burr v. Lewis*, 6 Tex. 76. It is the duty of the appellants to see that a proper transcript of the cause is prepared, and filed in this court. We cannot supply by presumption omissions of statements of facts essential to the right of appeal. The appeal-bond, as it appears in the transcript, is defective. It is as follows: "Title of the court and cause. [*sic*] Whereas, the intervenors in the above-entitled action have appealed to the supreme court of the territory of Arizona from a judgment made and entered in said cause against them in said court, and in favor of the plaintiff, on the 30th day of October, 1888, for the sum of \$205.75 costs, and also adjudged that certain property was not subject to the

demand of said intervenors, and the court having fixed the amount of the bond on appeal in the sum of one thousand dollars: Now, therefore, in consideration of such appeal, we, the undersigned residents of Pinal county, in said territory of Arizona, do hereby jointly and severally undertake and promise, on the part of the appellants, that they prosecute their appeal unto effect, and, in case the judgment of the appellate court shall be against them, that they will perform its judgment, sentence, or decree, and pay all such damages as may be awarded against them upon the appeal. Witness our hands this 9th day of January, 1889. THOMAS F. WEIDEN. JOHN C. LOSS." A simple inspection of the above instrument discloses its defects. The judgment appealed from is not described. Neither the court wherein it was rendered, nor any of the parties to the record, are anywhere mentioned. It is possible that there is a caption to the original bond filed with the clerk, reciting the name of the court, and the names of the parties, and that a reference to it might supply the defects mentioned. If so, and if those defects might be so remedied, then the caption is an essential part of the appeal-bond, and should have been copied into the transcript. The appeal-bond should state the names of all the parties to the judgment. *Jenkins v. McNeese*, 34 Tex. 189; *Chandler v. Sappington*, 36 Tex. 273; *In re Estate of O'Hara*, 60 Tex. 179. We cannot, as we have before said, supply the omission by presumption.

The bond is defective in another particular. The statute prescribed (section 863, Rev. St. 1887) that the bond shall be payable to the appellee in a sum double the amount of the judgment and costs. The bond in this case is not made payable to the appellee, nor is it for any sum whatever. The recital in the bond indicates that the court fixed the sum in which it should be given. The statute prescribes the sum, and an order of court fixing it is not only unnecessary, but it is nugatory; and, if the order fixed an amount materially in excess of the amount required by the statute, and in pursuance of such order a bond was given in such excessive sum, the bond, on account of the imposition of the excessive condition, might be void, and the party's right of appeal thereby jeopardized. The appellee is entitled to a bond that substantially complies with the statute, and that is not subject to defenses for want of such compliance. *Janes v. Langham*, 29 Tex. 414; *Janes v. Reynolds*, 2 Tex. 253. We do not decide that this bond is void because of the excess in penalty, but suggest it simply to illustrate the danger of a departure from the plain statutory provisions in such particulars.

There is no proper assignment of errors in the record. There is appended to a paper copied into the transcript, and immediately following the signature of the trial judge thereto, a statement that the "intervenors specify the following particulars wherein the evidence in said cause is insufficient to justify said decision and judgment of the court: (1) The evidence

is insufficient to justify said decision for the reason that it appears from the testimony \* \* \* that the partnership had been dissolved; \* \* \* that C. D. Putnam had disposed of his interest in said cattle prior to the levy. \* \* \* (2) That the evidence is insufficient to justify said decision for the reason that it appears from the testimony of \* \* \* that the partnership \* \* \* had been dissolved long prior to said levy. (3) The evidence is insufficient to justify said decision," etc. This statement is not signed by any one, nor do the names of the appellants appear anywhere therein, and the paper to which it is appended is indorsed: "Statement of the case to be used on appeal." The statute requires the filing of an assignment of errors by the appellant or plaintiff in error. It should be a separate and distinct paper, signed by the party assigning the errors or by his attorney, and be filed with the clerk of the court below before the appellant takes the transcript from the office, and a copy of it be attached to the transcript. Section 940, Rev. St. 1887. This statement, we think, is not an assignment of errors, either in name or in form, and the case should be affirmed for appellant's failure to file an assignment of errors. This court is not bound to notice errors not properly assigned, and will not ordinarily do so. *Gelselman v. Brown*, 30 Tex. 760; *Coburn v. Poe*, 40 Tex. 411; *Murchison v. Holly*, Id. 439. And, in the absence of an assignment of error, the court is ordinarily justified in either affirming the judgment, or dismissing the appeal. *Dyer v. Dement*, 37 Tex. 432; *Burns v. Wiley*, 35 Tex. 20; *Chevallier v. Whitaker*, 8 Tex. 204.

If, however, we could treat the statement mentioned as a proper assignment of errors, we are confronted with another important question of practice; and, for the purpose of considering it, we will assume that the errors are properly assigned. It is assigned as error that the evidence is insufficient to justify the decision of the court below. This error, if it is error, is good cause for a new trial. Our Code (section 833) provides that new trials may be granted on motion for good cause shown; and section 593, cl. 2, confers upon this court jurisdiction to review an order granting or refusing a new trial, sustaining or overruling a demurrer, or affecting a substantial right in an action or a proceeding. The only relief that appellants ask in this court, and all that this court can grant, is a new trial of the cause in the trial court. If it be true that the evidence is insufficient to warrant the decision, it is error. If it is error, we must presume that the court below would, upon application, have corrected it. If, however, the court below had denied the motion for a new trial, such ruling could have been presented here for review. It is provided by the statute that the only remedy appellants seek here may have been awarded to them by the court below on motion. That method is prompt, efficacious, and inexpensive; and we think the appellants should first resort to it before coming to the appellate court. In a very early case in Texas, the supreme court of that state (*Foster v. Smith*, 1 Tex. 70)

say: "We will here take occasion to say that, according to what is believed to be the correct rule of practice, no judgment ought to be reversed in this court, merely on the ground that the verdict was not supported by the testimony, unless a motion had been made in the court where the verdict was rendered for a new trial and overruled." And see, also, following this case, *Hart v. Ware*, 8 Tex. 115; *King v. Gray*, 17 Tex. 62; *Pyron v. Grinder*, 25 Tex. 159; *Cain v. Mack*, 33 Tex. 135; *Harrell v. Cattle Co.*, (Tex.) 11 S. W. Rep. 863; *Jacobs v. Hawkins*, 63 Tex. 1. And in *Morris v. Gordon*, 36 Tex. 71, that court, in referring to a statute which made the overruling of a motion for a new trial a prerequisite to an appeal to the supreme court, says: "And this is only a reiteration of the general rule that a party will not be heard in an appellate court until he has exhausted his remedies in the lower court." And this seems to us to be the true rule. It would be useless legislation to confer specifically upon this court jurisdiction to review orders refusing or granting new trials if it be held that, without such motion having been made and ruled upon, this court can review the very errors that are grounds for new trial upon appeal simply from the judgment. Section 833 gives the right to apply for a new trial. Section 834 provides that the grounds upon which it is founded shall be specifically stated, and that no others shall be considered. Section 842 provides that the motion, if overruled, may be embodied in a bill of exceptions, and so presented to, and the ruling thereon reviewed by, the supreme court. To hold that this court may consider errors occurring at the trial which are not urged upon motion below as grounds for a new trial, and which therefore, could not have been considered by the court below, is inconsistent and illogical. And we may remark here that there is not in the Texas Code, from which our Code is almost bodily taken, any provision similar to section 842. We think that our Code contemplates that the only method by which to obtain a new trial is by motion therefor to the trial court, and, in case of adverse ruling thereon, by appeal from that ruling. This, of course, would exclude the consideration of any error that is good cause for new trial that was not specifically urged below. We are aware that the supreme court of Texas, in many cases, under a Code of Procedure from which ours is copied, have considered errors that were apparently not urged upon motion for new trial in the court below. We say "apparently;" for, upon an examination of those cases, we are unable to determine whether such errors were or were not embodied in a motion for a new trial. This court has not before passed upon this subject; but in the case of *Dalton v. Rentaria*, (Ariz.) 15 Pac. Rep. 37, *WRIGHT, C. J.*, remarks: "Besides, the object of a motion for a new trial is to enable the appellate court to look into the evidence to see if it be sufficient to support the finding." But, nevertheless, we are of the opinion that sections 593 and 842, which are not in the Texas Code, in connection with sections 833 and 834, compel

the conclusion to which we have come, and that is that this court cannot consider any error which would be good cause for a new trial unless a motion for a new trial upon that ground had been made to the court below, and the motion had been overruled, and the ruling excepted to, and the motion embodied in a bill of exceptions, and the ruling assigned as error by a proper assignment. We have not cited the decisions of many, if not most, of the states, which, upon similar or analogous statutes, sustain the view we have taken, as a discussion of them would take too broad a scope; and for the same reason we do not notice others which seem to sustain a contrary view.

Resuming our examination of the transcript filed in this case, we find copied into it a motion for a new trial, but it is not embodied in a bill of exceptions. Section 842, Rev. St. 1887, prescribes the method of getting the motion for a new trial, and ruling upon it, into the record. It must be done by bill of exceptions. The motion, and the ruling upon it, are consequently not before us. There is also a minute entry, made by the clerk, reciting the fact that on the 30th October, 1888, the intervenors filed their written motion for a new trial, which motion was overruled by the court, and the intervenors then excepted. As we have before said, section 842 requires the motion, ruling, and exception to be brought into the record by a bill of exceptions. The minute entries by the clerk cannot serve this purpose. Section 827 provides that, where the ruling or other action of the court appears otherwise of record, a bill of exceptions shall not be necessary. The statute prescribes what shall constitute the record. It consists of the papers; that is, the summons, pleadings, verdict, and copy of the judgment, (section 810,) and bills of exception, statements of fact, (section 844,) notice of appeal, (section 849,) appeal-bond, (section 875,) assignment of errors, (section 875,) and statement of the costs, (section 875,) order of court granting time beyond term for filing statement of facts, (section 845,) affidavits of by-standers in aid of a bill of exceptions, (section 832,) the agreed statement provided by section 874, etc. The office of a bill of exceptions, under our Code, is to incorporate into the record as facts the ruling or other action of the trial court complained of and the objection of the parties thereto; and the statute, in order that these facts may be correctly stated, and be thereafter uncontrovertible, requires that they shall be stated in a bill or bills of exceptions; that it shall be done within a specified time, (generally within so short a time that the memory of the actors may not fail;) that the bill so prepared shall be presented to the trial judge for examination, and by the judge submitted to the opposite party; and finally, if correct, that it shall be authenticated by the signature of the judge. It cannot be contemplated that all these requirements, prescribed to secure accuracy, may be dispensed with, and supplied by the entry of the clerk upon his minute-book. See *Bowman v. State*, 40 Tex. 8; *Young v. Martin*, 8 Wall. 354.

At the close of a paper designated by the appellants a "statement of the case," and in which is incorporated what purports to be the evidence adduced upon the trial of this cause below, is the following: "And be it further remembered that on the 30th day of October, 1888, overruled said motion for a new trial, to which ruling and decision of the court the intervenors duly excepted, and in open court gave notice of appeal to the supreme court. *Bill of Exceptions*. Be it remembered that on said 30th day of October, 1888, the intervenors presented their bill of exceptions to the judge, excepting to the ruling and decision of the court in refusing to grant them a new trial in said cause, which said exception was duly allowed. I, Wm. W. PORTER, judge of the district court, hereby certify that the foregoing statement of facts is correct, and is dated February 6th, 1889. Wm. W. PORTER, District Judge." As we have before noted, this paper is designated in the caption as a "statement of the case." It is indorsed: "Statement of the case to be used on appeal." It is certified by the judge to be a "statement of facts." It has appended to it, and as a part of it, a specification of particulars wherein the evidence fails to sustain the decision, and it assumes the functions of a bill of exceptions. The statute (section 843) provides for the making out and filing of a statement of the facts given in evidence on the trial. Such statement shall be made out and submitted to the opposite party for inspection; and, if the parties agree upon the same, they shall sign it, and submit it to the judge, who shall, if he find it correct, approve and sign it, and it shall be filed with the clerk during the term. The court may, by order entered of record during the term, authorize the statement of facts to be made up and signed and filed in vacation, at any time not exceeding 30 days after the adjournment of the term. Section 845. On the 14th December, 1888, the court ordered that the intervenors have 30 days after the term in which to prepare the statement on appeal. The statement was filed on the 15th of February, 1889. As we have before suggested with reference to the filing of the appeal-bond, we cannot say whether this statement was filed in term time, or, if not, within 30 days after adjournment; the record not disclosing when the term did adjourn. We would consequently have to disregard the statement of facts.

We will next consider this statement in its aspect as a bill of exceptions. By a rule adopted by the supreme court of Texas, it is provided that exceptions to evidence admitted over objections made at the trial may be embraced in the statement of facts, in connection with the evidence objected. Rule 56 for district courts, Texas. In practice, in that state, the rule has become extended so that it is permitted to embrace exceptions to many other rulings than to those admitting evidence over objections. We think that the practice to allow exceptions to the admission of evidence, as well as to the rejection of proposed evidence, and other rulings and actions of court during the progress of the

actual trial of the cause, to be embraced in the statement of facts, is to be commended, as being convenient, simple, and expeditious, and as tending to render the record less cumbersome. But we cannot dispense with the formalities required in cases of bills of exceptions. The statute requires that the bill of exceptions must be presented to the judge within 10 days after the conclusion of the trial, and during the term, and that it must be filed during the term; and, if a party resorts to this method of making a record of his objections to the rulings below, he must follow the rules prescribed for bills of exceptions, and not those governing statements of facts. *Howard v. Houston*, 59 Tex. 76; *Railroad Co. v. Eddins*, 60 Tex. 656; *Lockett v. Schurenberg*, Id. 610; *Railway Co. v. Joachimi*, 58 Tex. 454; *Blum v. Schram*, Id. 523; *Morris v. Rhine*, (Tex.) 8 S. W. Rep. 315. The statement in this case was not filed in the time prescribed for filing bills of exceptions, and cannot be considered as such. We do not wish to be understood as approving the practice of embodying motions for new trials, and the rulings thereon, in the record, by incorporating them in the statement of facts. On the contrary, we do not think it authorized, and distinctly disapprove of it. A statement of facts should contain a statement of the facts pertinent to the issues joined, admitted or agreed to have been proved, and the evidence of those not admitted or agreed to have been proved, adduced at the trial. It is unnecessary and improper to embrace in the statement of facts the unnecessary verbiage of witnesses; the commissions and other formalities of depositions, unless some error is alleged concerning such formalities; the full context of deeds or other documentary evidence, when there is no dispute of them,—a statement of their legal effect as evidence being sufficient. See *Kemper v. Victoria*, 3 Tex. 135; *Wright v. Wright*, 6 Tex. 3; *Hawkins v. Lee*, 22 Tex. 544. And the statement must affirmatively show that it does contain all the facts admitted; those agreed to have been proved, and the evidence of those disputed. The instrument which is the foundation of a cause of action or defense should, however, appear in full. Exceptions to the ruling of the court in admitting or rejecting evidence may be embraced in the statement of facts, and will be as well saved in that manner as if embodied in a bill of exceptions, if the requisites of the statute relative to the preparation, presentation, allowing, and filing of bills of exceptions shall have been observed. Motions for new trials or in arrest of judgment, (section 842, Rev. St. 1887;) for continuance; for change of venue, and all incidental motions, as motions to strike out the whole or parts of pleadings; for bills of particulars, to make pleadings more specific; for abstracts of title, and the like, and the rulings thereon, and the exceptions to the rulings,—must be embodied in bills of exceptions in order that they may become parts of the record of the cause in this court. In short, every matter not otherwise made by statute a matter of record must be made so by a statement of facts or a bill of exceptions, if we

are required to review such matter. Reference to the Texas decisions will discover that many matters of practice are determined by reference to rules adopted by the supreme court of that state for the various courts of the state. But, so far as those rules are pertinent to matters we have discussed in this opinion, we regard them simply as restatements of statutory requirements, or judicial constructions of the Code, and as such are authoritative guides for us. The constitution of Texas confers upon the supreme court of that state power to make rules and regulations for the government of that and the other courts of the state to regulate proceedings, and expedite the dispatch of business, therein. Const. Tex. § 25, art. 5. While our present Code of Civil Procedure is almost a re-script of that of Texas, the legislature of this territory did not confer upon this court the power to make rules and regulations. It is for the reason that very much contained in the rules prescribed by the supreme court of Texas regulating the practice there must be supplied here by judicial construction that we have felt it our duty to announce, upon this opportunity, so far as the questions were presented by the record, our construction of the present Code. While we might have disposed of this case by dismissal, for the reason that the record does not disclose that the appeal had been perfected in time, and a decision upon subsequent matters has been unnecessary to the disposal of the case, we have been prompted to examine the whole record, and point out the defects in matters of practice appearing there, by the fact that many other causes depending on the docket are in more or less degree likewise defective. This cause was commenced while the former Code (Comp. Laws 1877) was in force, and was tried only a short time after the present Code came in force; and, not unnaturally, appellant, from mere force of habit, attempted to perfect his appeal under the former Code. Much confusion in the practice in this and the district courts has arisen from this change of our Code of Practice as it existed prior to July, 1887, to one radically different, adopted that year.

For the reason that it does not appear that this appeal was ever properly perfected, this cause must be dismissed. We can say, however, that we have read the evidence transcribed into the record; and, while it may be in some particulars contradictory and conflicting, yet, under the familiar rule in such cases, we will not disturb the finding of the court below. The appeal is dismissed.

WRIGHT, C. J., concurs. SLOAN, J., took no part in the consideration of this appeal.

#### SNEAD V. TIETJEN.

(Supreme Court of Arizona. April 18, 1890.)  
CONTRACT FOR LEASE—PAROL EVIDENCE—APPEAL—RECORD.

1. S. entered into a written agreement with T. to lease a store-room to him for the term of one year from October 1, 1888, at \$140 per month.

*Held*, the contract was complete in terms, and could not be varied by proof of contemporaneous parol agreement.

2. The statement of facts appearing in the transcript not having been signed by the trial judge, it cannot be considered by this court.

3. Before this court will review the ruling of the court below in denying a motion for a new trial, the motion must be incorporated into a bill of exceptions, and this made a part of the record.

4. At the time the court excludes testimony offered by a party, which ruling the party desires this court to review, he must state what he proposes to prove by the testimony, and that the witness will testify to such facts; otherwise, it does not appear that the party is injured by such exclusion, and this court will presume, in such event, in favor of, and not against, the ruling of the court below.

5. It must appear affirmatively that the bill of exceptions was presented to the opposite party before signing and filing, as required by section 829, Rev. St. 1887.

(*Syllabus by the Court.*)

Appeal from district court, Maricopa county; W. W. PORTER, Judge.

*Goodrich & Street*, for appellant. *Edwards & Buck*, for appellee.

KIBBEY, J. This was an action by appellee against appellant for damages for the breach of a contract for a lease of a store-room in Phoenix. Appellant demurred to the complaint, and the demurrer was overruled. Appellant pleaded the general denial, and specially that the written memorandum of the contract did not embody the whole agreement, but that a part of it rested in parol, and alleging breach by appellant. A demurrer to the special plea was sustained, and the ruling excepted to. There was a trial by the court. Finding and judgment for appellee. Motion for new trial by appellant overruled. The errors assigned are the sustaining of the demurrer to appellant's special answer, and the admission and exclusion of certain evidence. The written memorandum, which is the foundation of appellee's cause of action, is as follows: "Exhibit A. Phoenix, Arizona, Feb. 21, '88. J. S. Snead hereby guaranty to furnish A. P. Tietjen with a lease for the whole store-room which stands upon the east part of lot eight, (8,) block twenty-one, (21,) in the city of Phoenix, Maricopa county, which said building fronts to the north side of Washington street in said city. The above lease to be at least for the term of one year, at one hundred and forty dollars (\$140.00) per month rent. But this guaranty shall not hold good in case the property is sold before that time. Lease to begin Oct. 1st, 1888. J. S. SNEAD. A. P. TIETJEN." Appellant alleges in his answer that, at the time he and appellee entered into that agreement, the appellee and another were partners; that the agreement was made with the understanding that appellee and his partner should occupy the room for a particular purpose; that such occupancy was one of the main and essential conditions of the lease guarantied; that, long before the day fixed for the commencement of the proposed lease, appellee and his partner dissolved their partnership, and none of the members of the firm desired the room in question for the purpose contemplated; that, at the

time appellee demanded the lease in pursuance of the agreement, he did so for himself alone, and for another purpose; that appellant, up to the 1st October, 1888, was ready and willing to comply with his agreement as herein set forth.

We think the agreement sued on was complete and entire within itself. It was definite as to the subject-matter, price, and term; and any prior or contemporaneous verbal agreement must be deemed to have been merged in the written memorandum, and that cannot be varied by proof of such verbal understanding. The demurrer was properly sustained. This answer is further objectionable because the terms of the verbal part of the agreement are not alleged directly, but argumentatively and inferentially.

The statement of facts is not approved or signed by the judge of the district court. We cannot, therefore, consider it a part of the record. Section 844, Rev. St. 1887; *Wampler v. Walker*, 28 Tex. 598; *Witten v. Poindexter*, 25 Tex. Supp. 378. The motion for a new trial is not, nor is the ruling thereon, embodied in a bill of exceptions, as required by section 842; and hence we cannot consider any error in the ruling upon the motion. Nor can we consider any error that might have been urged as a ground for a new trial below, unless it had been so urged. See *Sutherland v. Putnam*, ante, 320, (at this term.) The bill of exceptions in the transcript does not contain enough of the evidence given at the trial to explain the objections and rulings complained of, and reference cannot be had to the statement of facts, for the reason above stated. The bill of exceptions contains none of the evidence. Sections 824, 825.

In the bill of exceptions, it is stated that at the trial the defendant "offered to introduce George F. Coats, Charles Goldman, E. Ganz, W. T. Smith, William Pimm, as witnesses for himself, to show that they knew the value of leaseholds, for the purpose of fixing the measure of damages, and showing the damages which defendant suffered by the breach of his agreement; that the court refused to allow them to testify, and refused the defendant the right to such evidence, to which defendant objected and excepted." This statement is a little confusing. There is no issue in the case making evidence to show damages to the defendant pertinent. We suppose this a clerical error in the substitution of the word "defendant" for "plaintiff." But the exception is not properly stated. It is not shown that the witnesses were competent, nor that any competent questions were propounded to them, or any of them. Their exclusion may have been proper on that account; and, until the contrary is shown, we must presume in favor of the ruling of the court. And further, it is not shown what answer would have been made by the witnesses, and we cannot assume that they would or would not have been favorable to the appellant. If the answers would have been adverse to the appellant, he would not have been injured, and cannot complain; and, if the answers would have been favorable, the

record should have shown the fact to have disclosed the error. The party alleging the error must establish it. *McAuley v. Harris*, (Tex.) 9 S. W. Rep. 679-683; *Railroad Co. v. Johnson*, (Tex.) 7 S. W. Rep. 378; *Jacoby v. Brigman*, Id. 367; *Moss v. Cameron*, (Tex.) 1 S. W. Rep. 177.

The bill of exceptions does not show that it has been submitted to the opposite party before it was signed and filed, as required by section 829. This should be shown. These rules of practice are intended for the protection of litigants, and are the result of many yearly efforts to devise means to that end. It is a matter known to all the profession, and to the courts, that many cases have been reversed which, had the entire proceedings, or that part of them pertinent to the question considered, been presented to the appellate court, would have been affirmed. The burden of establishing error is upon the appellant, and every presumption must be indulged by this court in favor of the judgment of the lower court. *Lockhart v. Keller*, (Tex.) 9 S. W. Rep. 179, 181. The judgment is affirmed.

WRIGHT, C. J., and SLOAN, J., concurring.

MARTIN *et al.* v. BOND.

(Supreme Court of Colorado. June 20, 1890.)

EXEMPTIONS—CONSTRUCTION OF STATUTES.

A merchant's stock in trade is included in Gen. St. Colo. c. 60, § 32, which exempts from levy and sale under execution or attachment the tools, implements, working animals, books, and stock in trade not exceeding \$300 in value, of any mechanic, miner, or other person not the head of a family.

Commissioners' decision. Appeal from Pitkin county court.

*Wilson & Stimson*, for appellants.

PATTISON, C. In this case it appears that some time prior to December 29, 1886, the appellants instituted an action against the appellee, in which they caused a writ of attachment to be issued and levied upon her property, which consisted of a stock of merchandise. Appellee claimed that a portion of the property levied upon was exempt from levy and sale. In support of her claim she filed an affidavit in which she stated "that she is not the head of a family; that she is a *bona fide* resident of the state of Colorado, resides at Aspen, Pitkin county, in said state, and is engaged in business in said town as a merchant, dealing in confectionery, produce, fruits, poultry, game, bottled liquors, notions, etc.; that each of the writs of attachment issued in the above-entitled action has been levied upon her said stock of goods and store furniture and fixtures." The affidavit further states that certain goods, which are particularly mentioned, "constitute a part of deponent's said stock in trade, and are used and kept by deponent for the purpose of carrying on her said business; that no part of the amount sued for in either of said actions is for the purchase price of property herein specified, or any part thereof; that the value of said property does not exceed the sum of \$300; that

said deponent claims each one and all of the articles hereinbefore specified as exempt from levy and sale under said writs of attachment, or either of them; that the plaintiffs in each of said actions deny that said property is exempt from levy and sale under said attachments. Defendant therefore demands a trial of her right to said exemption." Upon this affidavit, supplemented by a stipulation reciting certain facts, the trial was had, and resulted in a judgment declaring that the articles of merchandise mentioned in the affidavit were exempt from execution. It was agreed and stipulated by the parties that at the time of the levy of the attachment appellee was engaged in the mercantile business, and that the value of her entire stock of goods was more than \$300; that the articles specified in her affidavit constituted a part of her stock in trade, and were kept by her for the purpose of carrying on her business, and were of the value of \$299.65, and no more. It was further agreed that appellee claimed the articles mentioned were exempt when the writs were levied, and duly demanded their return; that such demand was refused; and that no part of the amount sued for was for purchase money.

The question presented to this court is clearly and well defined. Is any part of the stock in trade of a merchant, not the head of a family, kept for the purpose of sale, exempt from execution? The question involves a construction of section 32 of chapter 60 of the General Statutes of this state, relating to judgments and executions. It is generally held by courts of last resort that exemption statutes should be liberally construed. In *Thomp. Homest. & Ex.* § 731, the author says: "As already seen, the courts are united in the conclusion that statutes of this kind ought to be liberally construed, so as to advance the intention of the legislature. From this general view there are but one or two dissenting voices, among which may be named the supreme court of Pennsylvania and the early supreme court of Minnesota." The liberal policy of this state in regard to exemption laws is indicated by the organic law. Section 1 of article 18 of the constitution expressly declares that "the general assembly shall pass liberal homestead and exemption laws." The decisions of the courts should be in harmony with this policy.

In the discussion of this case, it is unnecessary to recite all of the nine subdivisions of the section mentioned. It is sufficient to say that by them liberal provision is made for all heads of families; that they apply exclusively to the heads of families; that they have no application whatever to a debtor who is not the head of a family; and that the sole protection of a citizen of the latter class is to be found in the following proviso: "And provided, also, further, that the tools, implements, working animals, books, and stock in trade, not exceeding \$300 in value, of any mechanic, miner, or other person, not being the head of a family, used and kept for the purpose of carrying on his trade and business, shall be exempt from levy and sale on any execution or writ of attach-

ment while such person is a *bona fide* resident of this state."

The intent of this proviso is manifest. By it the beneficent provisions of the statute are extended to debtors of the class mentioned. The sole question presented is whether the language of the proviso is sufficiently comprehensive to include debtors who, like the appellee, are small tradesmen or shopkeepers. If it is not, then it follows that the statute is not uniform in its application, because the great army of small merchants in the state would be entirely without protection, and no part of their property would be exempt except that specified in the thirty-first section of the statute, to-wit, "their necessary wearing apparel." As there is no reason to believe it to have been the intention of the legislature to discriminate against this class of citizens, it is clear that they should enjoy the advantages of the statute, unless excluded by its express language, or by necessary implication. The language of the proviso is sufficiently comprehensive to include merchants and tradesmen. The part to be construed reads as follows: "The tools, implements, working animals, books, and stock in trade, not exceeding \$300 in value, of any mechanic, miner, or other person," etc. Appellants insist that the words "or other person" are limited in their meaning by the specific words preceding, to-wit, "any mechanic, miner," etc. It is claimed that these words cannot be construed in their general sense, but that by force of association with the specific words which precede them they are limited to debtors who, like mechanics or miners, earn a livelihood by manual labor as skilled artisans. If this construction should prevail, it necessarily follows that the words "stock in trade" would not apply to merchandise which is bought and sold, but must be limited to the material which the mechanic or miner may keep for the purpose of manufacturing or carrying on his business. In aid of this interpretation of the statute the familiar rule of the association of words is invoked that "where specific terms are followed by general terms the general is restricted to a sense analogous to the specific;" the rule usually expressed by the words "*noscitur a sociis*." But the purpose of this rule, as of all rules of construction, is to aid in discovering and defining the intent of a statute, and is in no sense arbitrary in its character. It must, in all cases, yield to the higher principle of interpretation, to-wit, that "statutes must be interpreted according to the intent and meaning, and not always according to the letter." Potter's Dwar. St. 144. In End. Interp. St. § 410, it is said: "The general object of the act also sometimes requires that the final generic word shall not be restricted in meaning by its predecessors. The rule, in general requiring the opposite, is merely an aid in ascertaining the legislative intent, and, of course, does not warrant the court in confining the operation of a statute, be it penal or otherwise, within limits narrower than those intended by the law-maker, nor require the entire rejection of general terms, but is to be taken and applied in connection with other principles

of statutory construction, e. g., that the declared intention of the legislature is to be carried into effect." In Harrington v. Smith, 28 Wis. 43, these principles are stated in the following comprehensive language: "The true rule for the construction of statutes is to look to the whole and every part of the statute, and the apparent intention derived from the whole, to the subject-matter, to the effects and consequences, and to the reason and spirit of the law; and thus to ascertain the true meaning of the legislature, though the meaning so ascertained may sometimes conflict with the literal sense of the words." "General words in a statute must receive a general construction, unless there be something in it to restrain them, or if there be no express exception." In Woodworth v. State, 26 Ohio St. 196, McILVAINE, C. J., uses the following language: "Now, it must be remarked that the rule of construction referred to above can be used only as an aid in ascertaining the legislative intent, and not for the purpose of confining the operation of a statute within limits narrower than those intended by the law-maker. It affords a mere suggestion to the judicial mind that, where it clearly appears that the law-maker was thinking of a particular class of persons or objects, his words of more general description may not have been intended to embrace those not within the class. The suggestion is one of common sense. Other rules of construction are, however, equally potent, especially the primary rule, which suggests that the intent of the legislature is to be found in the ordinary meaning of the words of the statute." Tynan v. Walker, 35 Cal. 634. To discover and give effect to the intention of the legislature, the statute should be read in the light of these principles. If so read, the intention that its provisions should be uniform in their application seems clear and unmistakable. All the subdivisions of the section cited, except the seventh, make provision for the heads of families, without reference to the trade or business in which they may be engaged. The sixth reads as follows: "The tools and implements, or stock in trade, of any mechanic, miner, or other person, used and kept for the purpose of carrying on his trade or business, not exceeding \$200 in value." This provision, by a rigid application of the rule of *noscitur a sociis*, might be limited in its effect to persons exercising some particular trade. But this construction would not be in harmony with the spirit and intent of the legislature, as manifested in all the other subdivisions of the section, except the seventh, which is expressly confined to professional men. These subdivisions are general in language, and apply to heads of families, without reference to the particular trade, calling, or business which they may follow. The merchant, if the head of a family, would be included.

There is nothing, therefore, in the general scope of the section which sustains appellants' proposition that the proviso relating to those who are not heads of families is to be limited to any particular class of debtors. Unless, therefore, the language of the proviso has the effect of excluding



the merchant, he must be held to be included within its provisions. That its language cannot have this effect is clear. The articles enumerated are practically the same as those mentioned in the other subdivisions, except the furniture, the animals, food, supplies, etc., ordinarily kept by the head of a family. These articles are "tools, implements, working animals, books, and stock in trade." This description of exempt property is quite broad enough to show that it was the intention of the legislature to extend to this class of debtors the same protection that is afforded by the statute to heads of families. And this intention is manifested as well by the description contained in the proviso of the persons who are declared to be entitled to its benefits,—“mechanics, miners, or other persons.” That these general words may include the merchant, cannot be doubted, and, inasmuch as the entire statute reveals an intention on the part of the legislature to protect all citizens alike, effect should be given to such intention by extending its provisions to the shopkeeper as well as the mechanic. In the case of *Watson v. Lederer*, 11 Colo. 577, 19 Pac. Rep. 602, the position of appellants was stated by BECK, C. J., in the following language: “For the appellant it is urged that the appellee does not come within the class of persons herein specified, for the reason that he is neither a mechanic nor a miner, and for the further reason that the words ‘or other person’ limit the benefits of the provision to persons of like business as those named, according to the maxim *nosctur a sociis*, which excludes the plaintiff from the protection of the statute, its language not being descriptive of the business in which he was engaged. Appellant’s counsel contends that, in order to entitle a person to exemption under the designation ‘other person,’ he must follow a trade or business of the same class or kind as a mechanic or miner, and must earn his livelihood by his manual labor as a skilled artisan or handicraftsman. We are of the opinion that the statutory provision in question is not capable of such a narrow construction, and therefore cannot adopt it.” In that case it was held that “the horse, wagon, and harness of an unmarried man, engaged in the business of assaying and sampling ores, [and necessarily used in the prosecution of his business,] are exempt from execution, under the proviso at the end of Gen. St. § 32, p. 602, that the tools, etc., of a mechanic, miner, or other person, not exceeding \$300 in value, shall be exempt from levy and sale.”

The particular question here presented was expressly excepted in the case cited. The court said: “It appearing, then, that provision is made in the several subdivisions comprising the body of the act for the skilled and the unskilled, the learned and the unlearned, and these several subdivisions being grouped together in a single sentence in the proviso, the application thereto of the maxim *nosctur a sociis*, instead of limiting its provisions to skilled labor only, extends them to the members of all lawful avocations who earn their livelihood by their own exertions, whether

manual or mental, and who necessarily use, in the due prosecution thereof, specific articles of personal property of like character with those specified in the statute. This does not include articles of merchandise; and no opinion is now expressed concerning the import of the term ‘stock in trade’ as used in the statute.” The learned judge was careful not to express an opinion as to “merchandise,” and equally careful not to say anything which might tend to exclude the “stock in trade” of a merchant from the operation of the statute under consideration.

The corresponding provision of the statute of Kansas is as follows: “The necessary tools and implements of any mechanic, miner, or other person, used and kept for the purpose of carrying on his trade or business, and, in addition thereto, stock in trade, not exceeding \$400 in value.” Gen. St. pp. 473, 474, § 3. In *Bequillard v. Bartlett*, 19 Kan. 382, it was held that “this provision did not include articles of merchandise bought by a merchant to be sold again on speculation.” But in the same case it was held that watches and jewelry manufactured by a watchmaker and jeweler, whether manufactured for a particular customer upon special orders, or for customers generally, and for sale to any person who might wish to purchase, whether completed or not completed, are exempt from levy and sale. It is difficult to see upon what principle the stock of the watchmaker, who manufactures his watches for sale, is to be distinguished from that of the jeweler, who, in addition to the manufacture of watches, may purchase them and keep them for sale. In the one case, the watch made by the watchmaker for sale would be exempt from execution, while the watch bought by him for sale would not be exempt. So nice a distinction is hardly consonant with the elementary principle of construction that exemption statutes should be construed liberally. The question was directly involved in the case of *Grimes v. Byrne*, 2 Minn. 89. (Gil. 72.) The language of the statute of that state is the same as that of Kansas. It was held that the stock of a merchant was not exempt from execution. But in Wisconsin a different construction prevails. In *Wicker v. Comstock*, 52 Wis. 315, 9 N. W. Rep. 25, it was held that “the statute which exempts from execution ‘the tools and implements, or stock in trade, of any mechanic, miner, or other person, used or kept for the purpose of carrying on his trade or business, not exceeding \$200 in value,’ held to apply to the stock of goods kept on sale by a merchant.” In the course of the opinion LYON, J., says: “Looking through these statutes, we find no adequate provision in favor of merchants or shopkeepers as a class, unless it is contained in the statute under consideration. Their little stocks in trade may be as indispensable to the support of their families as are the tools of the mechanic or miner, the press and types of the printer, or the library of the lawyer. Why should they not have the same protection as the others? And, when we find language in a statute which may fairly be construed as giving them the same protec-

tion extended to other classes of debtors, why should not that construction be adopted?"

There is no reason to be found, either in the letter or the spirit of the statute, or in the general policy of the law of this state, as expressed in the constitution, why the construction which prevails in Wisconsin should not be adopted by this court, and the statute held to apply to the merchant or shop-keeper as well as the mechanic. The judgment should be affirmed.

We concur: REED and RICHMOND, CC.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is affirmed.

#### GUTSHALL V. HELM.

(Supreme Court of Colorado. June 13, 1890.)

##### APPEAL—ASSIGNMENT OF ERRORS.

Where the verdict is sustained by the evidence, and the charge to the jury is correct, the judgment will be affirmed.

Commissioners' decision. Appeal from district court, Lake county.

A. W. Stone, for appellant. Rucker & Ewing, for appellee.

REED, C. This suit was brought by appellee (plaintiff) against the appellant (defendant) to recover the amount due on three several promissory notes. The notes were made by the defendant, and payable to the order of the plaintiff. There was no question in regard to the consideration for which the notes were made, nor as to the amount due upon them. Their execution was admitted. The defendant, by answer, set up several matters as set-offs and counter-claims. The testimony regarding them was conflicting and contradictory. No errors are assigned to the admission or rejection of testimony. Exceptions to the charge of the court to the jury were not reserved in such manner as to entitle them to be renewed on appeal. Keith v. Wells, 14 Colo. —, 23 Pac. Rep. 991. An examination of the charge, however, shows it to have been substantially correct as to the law of the case, fair, clear, and easy to be understood. The questions to be determined by the jury were those of facts. There was sufficient evidence to warrant the finding. It was not against the weight or preponderance of evidence, hence it should not be disturbed; and, the instructions being substantially correct, as above stated, the judgment should be affirmed.

RICHMOND and PATTISON, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is affirmed.

#### GREELEY IRRIGATING CO. et al. v. HOUSE.

(Supreme Court of Colorado. June 20, 1890.)

##### IRRIGATION COMPANIES—LIABILITY FOR OVERFLOW—NEGLIGENCE—PROXIMATE CAUSE.

1. Defendants permitted the water to overflow the banks of their ditch, and flood plaintiff's land,

though they had been warned that the ditch was running too full, and that the water was in danger of escaping unless the flow was diminished. After this warning the superintendent, at the request of one of the trustees of the company, raised the head-gates, and increased the flow. Held, that defendants were liable under Gen. St. Colo. §§ 312, 1728, 1738, requiring the owners of ditches and canals to keep them in good condition, so as to prevent the escape of water to adjacent property.

2. Defendants' liability arises from their failure to exercise ordinary care in preventing the escape of the water.

3. Defendants cannot avoid the consequences of their own negligence on the plea that gophers burrowed the banks, and that therefore the overflow was the result of unavoidable accident.

Appeal from district court, Weld county.

J. M. Freeman and C. A. Bennett, (Ralph Talbot, of counsel,) for appellants. H. N. Haynes and J. W. McCreary, for appellee.

RICHMOND, C. This action was brought to recover damages resulting from the alleged negligence of defendants, appellants herein, in the use and maintenance of an irrigating canal. By the complaint, it is alleged that the plaintiff, appellee herein, was the owner of a certain lot of land in the city of Greeley, upon which she had set out apple trees, raspberry canes, and strawberry plants; that the defendants, the Greeley Irrigating Company and the city of Greeley, were the owners of, and were operating, an irrigating ditch known as "Canal No. 3;" that said irrigating ditch was constructed along and near the premises of plaintiff; that on or about June 16, 1885, the defendants negligently and wrongfully caused and permitted the water to run in said canal, bank full, and beyond the capacity of said canal to carry water; that, solely by reason of the negligence and wrongful management of said canal by said defendants, the water overflowed the banks thereof, and flowed down a steep decline and land below, forming a pond of about five acres in extent and about two feet deep, from which point the water gradually flowed and found its way through the intervening land to and upon the land of plaintiff; that about three acres of plaintiff's land became submerged, and so remained submerged for a period of about two months, which resulted in the destruction of the apple trees, raspberry canes, and strawberry plants, to plaintiff's damage in the sum of \$1,340. The defendants answer, denying negligence, or that they caused or permitted the water to run in said canal beyond the capacity of said canal to safely carry water. They admit that on or about the 16th of June, 1885, there was a breach or washout in the bank of their said canal, but deny that it was of the extent alleged in the complaint, and aver that the stream of water which flowed through the breach ran down a steep decline, and into a pond which had existed long prior to the 16th of June, 1885; that said pond is the identical pond or submerged area mentioned in plaintiff's complaint; and further aver that the break was an unavoidable accident caused by gophers burrowing in the bank; that no degree of skill or foresight of defendants

could have prevented the same; and deny that any water from said canal, on account of said break, ever found its way upon the land of plaintiff, or that plaintiff was damaged on account of said break in said canal. Plaintiff replies to the answer, and denies that the breach was an unavoidable accident, or that it occurred without fault of defendants, or was caused by the burrowing of gophers in the bank of the canal. The cause was tried to a jury, who returned a verdict against defendants for the sum of \$750. Motion for a new trial was denied, and judgment entered against the defendants for the amount of the verdict. To reverse this judgment, defendants prosecute this appeal.

There are several assignments of error, but appellants in their brief discuss but two: "(1) That the verdict was contrary to the law and the evidence; (2) that the court erred in its instructions to the jury."

The testimony tends to prove that appellee's property was seriously injured. Apple trees, raspberry canes, and strawberry vines, with the growing fruit thereon, were destroyed by means of the water escaping from the irrigating canal owned and managed by appellants. E. P. House, testifying on behalf of the plaintiff, says that four days prior to June 17, 1885, the ditch had been running bank full of water, or within an inch and a half of the top; that on Saturday, June 13th, he informed the superintendent, Levi Cole, of the danger, and expressed to him his apprehensions of serious injury to his wife's property; that Cole replied, "I have been ordered by the trustees to run the ditch bank full until they get through irrigating," to which House remarked, "It will burst pretty soon, and drown us out." Cole responded that he "did not care if it flooded the whole damn town; the trustees would have to pay the damages." House testified to a further conversation, in which Cole stated that two of the trustees of the irrigating company, J. E. Davis and Dr. Camp, were urging him to supply more water, and that Cole informed them that the water was running as high or higher than the ditch would safely carry, and mentioned a break west of appellee's land, and another break above the land of Alex. Moore. The trustees replied that they wanted him to run more water to them, if it broke the ditch from one end to the other. Joseph Stowell testified that Supt. Cole had said a day or two before the break: "I know I am running too much water, but I have to obey orders of those fellows on the delta." Charles Nichols testified on behalf of plaintiff that on the morning on which the break occurred the main ditch was running as much as the bank would carry. At his place they had to lay down planks to get to the stable, owing to the water running out of the ditch, and flooding between his house and barn. "The water came to the top of the ditch bank at our place, and overflowed. The water at the break was running over the top of the bank, and ran for about two feet before it reached the hole." Supt. Cole, on cross-examination, testified that on Sunday, immediately preceding

the break, he went to the head-gates of the defendants' ditch in company with Dr. Camp, one of the trustees of the company, and raised the head-gate a trifle. This was the next day after Mr. House had called his attention to the fact that he was running the ditch too full, and that he was afraid the ditch would break. That he raised the head-gate, at the request of Dr. Camp, and expressed the opinion that the ditch was running then as full as it would stand. That Dr. Camp replied, "I think we will try a little more water." If, instead of raising the head-gate, he had lowered it, it would have had a tendency to prevent danger from a certain rise in the river, or the ditch becoming too full. Various exhibits were introduced at the trial of the cause, and the attention of witnesses were directed to these exhibits, and the exact locality of the break was pointed out to the jury. Several witnesses testified on behalf of the plaintiff in addition to those above named; and their testimony, as we view it, tends to support the testimony of House, Nichols, and Stowell. Supt. Cole, as far as the abstract discloses, does not deny having used the language testified to by House. This and other testimony, it seems to us, was amply sufficient to warrant the jury in finding for the plaintiff.

Section 312, Gen. St. 1883, provides as follows: "Every ditch company organized under the provisions of this act shall be required to keep their ditch in good condition, so that the water shall not be allowed to escape from the same to the injury of any mining claim, road, ditch, or other property. \* \* \*" Section 1728, Id., provides that "the owner or owners of any ditch for irrigation or other purpose shall carefully maintain the embankments thereof, so that the waters of such ditch may not flood or damage the premises of others. \* \* \*" Section 1733, Id., provides that the "owner of any irrigating or mill ditch shall carefully maintain and keep the embankments thereof in good repair, and prevent the water from wasting." It is admitted by appellants, in argument, that the above sections of the statute, properly construed, impose upon the owners a duty, and that "every ditch company is required to keep their ditch in such good repair and condition that the water of the same cannot readily and easily escape therefrom to the injury of any property; and, especially, such owners must not allow or permit the water to escape therefrom to the damage of other property." Accepting this admission as being the true interpretation of the spirit and purpose of the sections above referred to, one cannot escape the conclusion that the plaintiff is entitled to recover for such injuries as resulted from negligence of defendants in the use and maintenance of the ditch. True it is that in the maintenance of the ditch the defendants were engaged in a lawful pursuit, and it is not necessary for us to extend the operation of these provisions beyond appellants' admission, so far as this case is concerned. The conclusion of the court in *Ditch Co. v. Anderson*, 8 Colo. 131, 6 Pac. Rep. 515, was that, for injuries resulting from an exer-

cise of lawful power in an improper, careless, or negligent manner, a remedy may be had. *Water Co. v. Middaugh*, 12 Colo. 443, 21 Pac. Rep. 565, (of opinion;) 1 Thomp. Neg. 101. It can, without doubt, be said that the defendants are responsible for any damage occasioned to plaintiff's property by reason of their failure or neglect to keep the ditch in a state of preservation and repair, and to so maintain and manage the ditch as to prevent injury to plaintiff's property while they so use and control the same; and for any injury to the plaintiff's property caused by overflow of the waters entering the ditch, resulting either directly or indirectly from the negligence of defendants in keeping the same in good repair, or in the manner of its use while under their control, they are responsible in damages. *Richardson v. Kier*, 37 Cal. 263. If there was a failure on the part of the defendants to comply with an express requirement of the statute in the construction, maintenance, or use of this irrigating ditch, whereby injury resulted to the plaintiff, there can be no question but plaintiff is entitled to recover. In *Wilson v. Turnpike Road*, 21 Barb. 68, it was held that an omission to comply with the statutory requirement is a nuisance for which a party injured without negligence on his part may claim damages. *City of Pekin v. Newell*, 26 Ill. 320. The evidence and the authorities above recited satisfy us that the findings of the jury in this case were not contrary to the law and the evidence.

The next question presented for our consideration is the alleged error in the instruction of the court to the jury. In support of this contention the appellants call our attention to a certain portion of the charge given to the jury by the judge, and insist that it was wholly unwarranted by the evidence and by the law. It is a matter of no great difficulty for one to extract certain portions of a charge given by a trial judge, and to argue that such portions were wholly unwarranted by the law and the evidence in the case. The rule of this court, established by a number of cases, is, however, that the charge should be considered as a whole; and, when so considered, if it shall appear that the jury could not have been misled thereby, the cause will not be reversed. We will consider the instruction under this rule. It is insisted that the court erred in not charging that the defendants were only liable for want of ordinary care and diligence in maintaining the banks of their ditch, and the flow of water therein, and that by the charge he imposed an additional burden upon the defendants, who were carrying on a lawful enterprise of public necessity. The court, in substance, instructed the jury that, under the provisions of the statute, it was the duty of the defendants to keep their ditch in good condition, so that the water shall not be allowed to escape from the same to the injury of other property; that the object and intention of the various provisions of the statute is that, while ditch companies in towns and cities have a right to have irrigating ditches constructed, and to maintain and operate them, yet they must see to it that they so construct the banks

of their ditches, and that they so operate and maintain the ditches, that the water thus found in the artificial channels shall not escape over or through the banks of the ditch, and flood the premises of others, and do damage and injury to the property of others; and if, by reason of the negligence of the defendants in this case, either by leaving the banks in an improper condition, or by reason of suffering the water to run at so great a height that it would be liable to break over even good embankments, a quantity of water either great or small, provided it was of sufficient volume to do considerable damage, did so escape from defendants' irrigating ditch, and flooded the premises of plaintiff, and injured her property, then she is entitled to recover from defendants the amount of damage that she thereby sustained. Further, that the burden of proof was on the plaintiff to show that this water broke through by the mismanagement or imperfect construction, repair, or management of the ditch, and damaged property of the plaintiff; and the burden devolves upon the plaintiff to show the amount of damage to her property, or the value of the property destroyed. Taking the charge to the jury as a whole, we are unable to escape the conclusion that the court instructed the jury correctly. It seems to us that the judge particularly called the attention of the jury to the fact that the plaintiff's right of recovery was based upon the negligence of the defendants, and that it was the duty of the plaintiff to prove to the satisfaction of the jury the extent of such negligence, and the value of the property destroyed by reason of such negligence. The instruction, taken as a whole, does not go beyond the admitted liability of the defendants in appellants' brief. It does not extend the liability beyond the limits of the statute. It does not go to the extent of saying that a non-compliance with the statutory requirements is a nuisance, and a party injured thereby may recover his damages without proof of negligence, as was held in *Wilson v. Turnpike Road*, and *City of Pekin v. Newell*, supra.

In reference to the defense based upon the claim that the accident was unavoidable, and occurred wholly without fault on the part of the defendants, but resulted from the burrowing of gophers in the banks of the canal, it is sufficient to say that it is contrary to the testimony. The evidence shows that the defendants were grossly negligent; that they wholly disregarded timely warnings as to the inevitable result of their conduct in attempting to carry water beyond the capacity of the ditch; and, being themselves in fault, they cannot be permitted to take refuge under the plea of unavoidable accident.

The question of negligence was a question for the jury. It was for them to determine whether the defendants had kept, maintained, and used the ditch according to the spirit and intent of the statute; and we are not prepared to say, after a careful review of the testimony embraced in the abstracts furnished by appellants and appellee, that their conclusion was incorrect. Satisfied as we are that the evi-

dence warranted the verdict, and that the jury were not misled by the instruction of the court, we think the judgment should be affirmed.

REED and PATTISON, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is affirmed.

Mr. Justice ELLIOTT, having presided at the trial in the court below, did not sit in this cause.

**BERNHEIMER v. CITY OF LEADVILLE.**

(*Supreme Court of Colorado.* June 20, 1890.)

**INSURANCE AGENTS—BROKERS.**

An insurance agent employed by one company to represent it in soliciting applications for insurance, with authority to write and issue policies, is not an insurance broker, nor subject to a city ordinance requiring insurance brokers to pay a license fee.

Commissioners' decision. Error to county court, Lake county.

*S. D. Walling and J. R. Mosby*, for plaintiff in error. *J. D. Fleming and Chas. H. Weusell*, for defendant in error.

PATTISON, C. It appears from the record in this case that on September 2, 1885, plaintiff in error was arrested for the violation of § 10, c. 11, of an ordinance of the city of Leadville. The offense charged was that plaintiff in error "did engage in, pursue, and carry on the business and occupation of an insurance broker, without first having obtained a license from the city of Leadville, as required by the ordinance," etc. He was duly tried by the police magistrate, adjudged to be guilty, and fined \$13 and costs. Subsequently, upon appeal to the county court of Lake county, a new trial was had, and he was again convicted, and a fine of five dollars and costs was imposed. A review of this judgment is sought in this court.

The proceeding was had under section 10 of an ordinance entitled "An ordinance for compiling the general ordinances of the city of Leadville, adopted January 2, 1885. By this section the amount of the license fees is fixed, which are required to be paid to the clerk of that city, for the privilege of exercising certain trades and avocations. The part of the section presented for consideration reads as follows: "The several amounts to be paid to the said clerk for licenses imposed by the said council upon the applicant shall, in addition to the fee for issuing the same, of 50 cents, to be paid to the city clerk, be as follows, [among others:] Insurance brokers, \$50 per annum." To enforce the ordinance, it was provided that, upon conviction for a violation of its provisions, a fine of not less than \$5, nor more than \$200, should be imposed, etc. Was plaintiff in error subject to this provision?

The city of Leadville was organized under the statute relating to towns and cities which was in force in 1877. The office performed by the provisions of that and similar statutes is clearly and well de-

fined. These statutes confer upon communities within this state authority to exercise the powers of municipal corporations upon compliance with their provisions. When the necessary steps have been taken to secure the privileges and franchises offered by the law, and proper proof has been made of compliance therewith, then such community becomes a municipal corporation, and is authorized to exercise all the powers, rights, franchises, and privileges particularly mentioned in the act under which the organization was perfected. It is a well-settled elementary principle that the charter of a municipal corporation, or, if organized under a general law, that such general law, is the instrumentality by means of which the legislature of the state delegates to the municipal body the right to exercise such franchises, and such legislative power and authority, as may be essential to the safety, well-being, and prosperity of the community. It is equally well settled that the charter or the law by which the municipal body is created is to be strictly construed, and that no powers are to be exercised except those which are expressly conferred, or which exist by necessary implication. This principle of the law is expressed with extraordinary clearness in 1 Dill. Mun. Corp. § 89: "It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: *First*, those granted in express words; *second*, those necessarily or fairly implied in, or incident to, the powers expressly granted; *third*, those essential to the declared objects and purposes of the corporation,—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied. Of every municipal corporation the charter or statute by which it is created is its organic act. Neither the corporation nor its officers can do any act, or make any contract, or incur any liability, not authorized thereby. All acts beyond the scope of the powers granted are void." Of the power to license, it is needless to say that it exists perforce of the statute alone.

To determine whether plaintiff in error could be required to pay a license fee, a review, not only of the statute of 1877, but other legislation had in relation to the authority of cities and towns to license, regulate, and control business of the nature of that carried on by him, may be instructive. Subdivision 21, § 1, art. 3, c. 84, of the territorial laws relating to towns and cities, expressly confers upon the board of trustees of such towns and cities the right to "license, tax, and regulate commission merchants, innkeepers, brokers, money brokers, insurance agents, auctioneers, hawkers," etc. This chapter of the territorial laws was expressly repealed in 1877. Gen. Laws 1877, § 2745. Sections 2654 and 2655 of the General Laws of 1877 define the powers of towns and cities organized under the new act. Authority to license, etc., is expressly conferred by subdivisions 13-16, 28, and 61 of section 2655. It is unnecessary to recite any of these subdi-

visions except the sixty-first. It reads as follows: "To tax, license, and regulate auctioneers, distillers, brewers, lumber yards, livery stables, public scales, money changers, and brokers: provided, that the exercise of their powers shall not interfere with the sales made by sheriffs, constables, tax collectors, \* \* \* or any other person required by law to sell real or personal property at auction." It will be observed that by this provision no authority is expressly conferred to license an "insurance agent." By the territorial law, express authority was granted to license such agents. The provisions of the General Laws of 1883 in respect to the power to license are the same as those of 1877, and need not be recited. The use by the territorial legislature of the phrase "insurance agents," and also the word "brokers," indicates that in the judgment of that body the two were not synonymous in meaning, and that the word "broker" did not include insurance agents. The subsequent action of that body in striking out the phrase "insurance agents" shows an intent to withdraw the authority previously conferred as to this class of persons.

But, discarding for the present the foregoing consideration, we are of the opinion that under the authority to license brokers a license fee could not be exacted from plaintiff in error. As has already been shown, defendant in error was without express authority to license an "insurance agent." It necessarily follows that if plaintiff in error was an insurance agent within the meaning of the law, and such agency be not covered by the term "broker," he was not subject to the provisions of the ordinance, and that the proceeding against him was unauthorized. By the agreed statement of facts submitted to the court below the question of plaintiff in error's capacity is relieved of all doubt and difficulty. It appears that "said Bernheimer was duly authorized and commissioned by the commission of said company, [the Travelers' Life & Accident Insurance Company,] issued to him under the hands of the proper officers and the seal of said company, within certain territory, in said commission described, including the territory within the corporate limits of the said city of Leadville, in said county and state, to solicit and receive, as agent of said company, applications for insurance and policies of insurance to be issued by and in the name of said company, and as such agent to write and issue for and by the authority of, and in the name of, said company, policies of insurance, insuring and indemnifying all persons procuring the same, and named in such policies of insurance, against death and accident," etc. Other facts need not be recited. Such an insurance agent is certainly not an insurance broker. In 1 Bouv. Law Dict., brokers are defined to be "those who are engaged for others in the negotiation of contracts relative to property with the custody of which they have no concern." The same author states that "insurance brokers procure insurance, and negotiate between insurers and insured." In Anderson's Dictionary of Law an "insurance broker" is defined as "a person who nego-

tiates contracts of insurance. He is agent for both parties. An insurance agent is ordinarily an employee of the insurer only." An insurance agent clothed with the authority of plaintiff in error, as shown by the statement of facts, is not regarded as the agent of the insured. It is unnecessary for the purposes of this case to define the office of an insurance broker. It is sufficient to say that he usually acts for both parties. He represents no particular company. He is employed for a specific purpose. It is his business to act upon particular occasions. Plaintiff in error was the acknowledged agent and representative of a particular company. He was acting under a commission issued to him under the hand and seal of the Travelers' Life & Accident Insurance Company. He was the representative of that company within a particular district. He was authorized not only to take applications for insurance, but in the name of the company to make contracts of insurance and issue policies. The company was bound by his acts. It can hardly be said that, in the conduct of this business, plaintiff in error was the agent of such citizens as might apply to him for insurance. He was not an insurance broker, within the purview of the statute. Further discussion is unnecessary. The ordinance in question was not applicable to him. The proceeding was therefore unwarranted. The judgment of the court below should be reversed.

REED and RICHMOND, CC., dissenting.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment is reversed.

STATE INS. CO. OF DES MOINES, IOWA, v. TAYLOR.

(Supreme Court of Colorado. June 20, 1890.)

FIRE INSURANCE—APPLICATION—PLEADING—CONDITIONS.

1. A fire insurance policy indorsed with a copy of an application purporting to have been signed by the insured, and referring to it as made by him, is not avoided by untrue answers, which he did not give, contained in the application, written by an agent with power to solicit insurance, receive premiums, and deliver policies, and by him signed in the name, but without the knowledge or consent, of the insured.

2. A complaint set out a fire policy, and added: "On the back is a copy of the application made for the insurance, as follows." The answer averred that material statements made in it were not true; the replication, that the plaintiff did not make or sign it, but that it was written without his knowledge or consent by an agent of the company. This reply was not attacked by demurrer or motion, and the case went to trial. Held, that the admission in the complaint, if any, that the plaintiff made the application, was waived.

3. A condition of a policy, that the house insured is occupied by the owner as a private dwelling, is not broken because travelers were received, more or less, owing to the want of other place of entertainment, and some boarders kept; the special and general agents of the company having knowledge of this use of the property, which did not contribute in any way to the loss.

4. Under a provision that the policy, shall be void if the hazard is increased without the consent of the company in writing, it is not avoided by

an increase in the risk caused by explosives kept in an adjoining house not under the control of the insured, this in no way contributing to the loss.

5. In a suit on an insurance policy on a house destroyed by fire, the measure of damages is the value at the time of the loss; and, to arrive at that, the original cost, the cost of a like building at the time of the trial, and the difference in value between the house burned and a new one, by reason of age and use, are all proper subjects of inquiry.

**Commissioners' decision.** Appeal from district court, Chaffee county.

On the 30th day of January, 1885, appellant issued to appellee a policy of insurance on his frame house, used as a residence, in the village or town of Hancock, Chaffee county, and its contents, including wearing apparel, family stores, and provisions, for the sum of \$1,200,—\$800 being on the building and \$400 on the contents; insuring against fire and lightning for one year for a premium of \$48. In the body of the policy appears the following: "And it is expressly understood and agreed by the parties hereto that application and survey No. 183,956, made by the assured, is hereby made a part of this policy and a warranty on the part of the assured, and that this policy is issued upon the faith of the statements in said application and survey as they thus appear in writing therein, only." Also: "Any false statement in the application shall make this policy void." "In case of loss, any attempt at false swearing or fraud of any kind shall be a forfeiture of all claims against the company on this policy." And: "This company reserves the right to rebuild and repair in all cases of loss." Of the various provisions contained therein these are thought to be all that are involved in, or necessary to a determination of, the case. Upon the back of the policy is what purports to be an application for insurance made by appellee, with his name attached, in which it is stated, among other things, that the house was "frame;" "one to three years old;" "in good repair;" "cash value, \$1,500;" "finished;" "west and north side painted." "It is a two-story frame building, 18x36; one addition 10x22, and one 10x16;" "it is occupied by owner as a private dwelling;" "Shingle roof." "Chimneys corrugated or double iron;" "start below ceiling and roof." Number of stoves, "two in use, two others occasionally." "Pipes do not enter brick flues;" "do not pass through partitions or floors." "They are secured by double thimbles of sheet iron." That the "barn was distant from the house about 90 feet." "South 8 feet, a one and 1-2 story log residence, now vacant." "East 90 feet to stable, frame 16x30." On the 3d day of November of the same year, the house took fire in the upper part (ceiling or roof) from a stovepipe, and was destroyed, with most of the contents. On the next day appellant was notified of the loss; and, shortly after, proper proof was made of the loss, and demand for payment, which was refused, and a suit was instituted. In the complaint the policy of the insurance is set out in full, and on the back of it the supposed application of appellee for insurance.

In the answer the defendant admitted

the making and delivering of the policy, denied that the loss was \$1,200 as shown by proofs of loss submitted, and said it ought to be not to exceed \$524.62. The defense relied upon was, the application for insurance made and signed by the plaintiff was the basis of the contract upon which the policy was made, and that it was false or fraudulent in many particulars, notably (1) in the value of the house, stated to be \$1,500 when in fact it did not exceed in value the sum of \$300; (2) that the building was not occupied as a private dwelling, but as a public inn and boarding-house; (3) that the chimneys in said house were not of corrugated or double iron, and that there were no chimneys in said house, and never was; (4) that the chimneys in said house did not start below the ceilings and roof in said house, and no chimneys whatever were in said house, or were ever used by the plaintiff, at any time; (5) that the stovepipes did not pass through partitions, floors, ceilings, and roof of the house, and were unprotected; (6) that the stovepipes were not secured at all as stated in the application; (7) that the barn was not 90 feet distant from the house, and not to exceed 20 feet; (8) that the log house was not 8 feet distant from the insured premises,—not to exceed five feet,—and at one point connected with the house; (9) that there was an addition to the house, 8x16 feet, not mentioned in the application at all." And as a special defense that the log-house adjoining was at the time of the fire, and for two months previous had been, occupied as a grocery store, and that the proprietors kept in stock quantities of kerosene oil and giant powder, which greatly added to the risk, and that appellee failed to notify defendant of the fact. All the averments in the several special answers were traversed by the replication of the plaintiff. The case was, by agreement of parties, tried by the judge of the district court without a jury. He found for the plaintiff in the sum of \$1,045, and judgment was entered for that amount.

*Stuart Bros., for appellant. W. I. Decker and C. A. Allen, for appellee.*

REED, C., (after stating the facts as above.) It is contended by appellant in argument that the appellee, by setting out in his complaint the application for insurance from the back of the policy, upon which his name appeared, indorsed it as his act, and make it a part of the contract sued upon, and was estopped from denying it. The pleader set out the policy of insurance as the basis of his action, and then says: "On the back of the policy is a copy of the application made for the insurance, in writing and print, as follows." It is neither indorsed as correct, nor adopted as, or stated to be, the application of the insured. The appellant, in its amended answer, states that appellee made his application for a policy of insurance in writing, setting forth the alleged application, and avers that material statements in the application were not true, and for that reason seeks to avoid liability for the loss. The appellee, in his replication, says he did not make or sign



any written application, but that the one referred to was made by Van Arsdale, the agent of the company, without his knowledge or consent. There was no demurrer or motion filed to this reply, and the case proceeded to trial upon the issues made by the complaint, answer, and replication. By these pleadings the responsibility for the written application was made a material issue in the case, and the court properly allowed appellee to testify that he did not make any written application, and also to give his version of what actually took place between the parties in reference to the transaction. It is apparent from the evidence that the application for insurance upon which the policy was issued was incorrect in many important particulars; so far from being a true statement of the facts in regard to the insured property as to render a policy void if established by proof to be the act of the insured.

The first question to be determined from the evidence and the law applicable to the facts is whether the application was that of the insured, or for which he was responsible, or the application and act of the insurer by its agent, for which it was responsible. That A. D. Van Arsdale was the agent of the appellant to the extent of soliciting insurance, sending the applications for insurance to the company, obtaining policies, delivering them to the insured, and collecting the premiums, was established by its own evidence and that of J. A. Dubbs, the general agent for the state of Colorado. That in this instance he solicited the insurance is shown by the evidence of the appellee, and is undisputed. In regard to the application, there is no great conflict between the testimony of appellee and Van Arsdale. It plainly appears that no application was made out by appellee, or in his presence, nor submitted to him, nor signed by him, and no authority given to the agent to sign his name; that the application was not seen by him, and that he was not informed of its character or contents; that the interview between him and the agent occurred late at night in a saloon, without a blank form of application, and with no copy of the questions to be asked and answered. Van Arsdale says: "I asked questions, and took his answers, and put them down from memory, as nearly as I could, next morning." Appellee specifically denies the making of any of the important statements contained in the application relied upon to defeat a recovery; and, in regard to several of them, he is corroborated by Van Arsdale, and in no important point is he contradicted by him. Van Arsdale, in making up and forwarding the application, cannot be regarded as the agent of the insured, as supposed and contended by counsel for appellant. "Where an insurer intrusts applications in blank for insurance to a person who forwards the same to the insurer, and is the medium through whom the insurer delivers the policy and receives the premium, the person so intrusted therewith is treated as clothed with the requisite authority to effectuate the duties confided to him, and to that extent represents the company,

and can bind it. \* \* \* The assured has a right to rely upon it that the agent has authority to explain the inquiries put in the application, and to determine what facts are required to be stated, as well as how they shall be stated, and, acting upon his direction, if any error is committed, it is chargeable to the insurer, and not upon the assured; and, if he fills out the application, and, being correctly informed of the facts, misstates them, or omits to state them, the consequences are not to be visited upon the assured." Wood, Ins. § 384; Malleable Iron-Works v. Phoenix Ins. Co., 25 Conn. 465. "When a person is in fact the agent of the insurer in procuring a policy, a clause in the policy that persons so acting are agents of the insured, and not of the insurer, does not change the fact. He is still the agent of the company as to the acts which are done in its behalf." May, Ins. § 140. In Insurance Co. v. Ives, 56 Ill. 402, the court, in commenting upon the effect of such a provision in the policy, very pertinently says: "The words have no magic power residing in them capable to transmute the real into the unreal, nor had they power to make the agent of the company an agent of the insured. May, Ins. § 140; Insurance Co. v. Chipp, 93 Ill. 96; Ellenberger v. Insurance Co., 89 Pa. St. 464. "If at the time of the application the latter [the insured] states facts material to the risk, and the agent neglects to communicate them to the company, in consequence of which a policy is issued in ignorance of the fact, the neglect is not imputable to the applicant, so as to make him responsible as for a concealment. That the agent is instructed to regard himself as the agent of the applicant rather than of the company, these instructions not being known to the applicant, does not alter the case." May, Ins. supra; Bebee v. Insurance Co., 25 Conn. 51. Wilson v. Insurance Co., 4 R. I. 141, was a case where the facts were very similar to those disclosed by the testimony in this case, where the agent sent an application he was not authorized by the applicant to send. He was held to be the agent of the company, so far as to estop it from denying the contract, and from setting up its mistakes as misrepresentations as working a forfeiture. It was said: "He was at least the agent of the company for forwarding the application; and his misconduct in that regard was imputable to his principal, and could not be allowed to prejudice the rights of the applicant, who did not know of it." See, further, May, Ins. § 141; Denny v. Insurance Co., 13 Gray, 492; Ames v. Insurance Co., 14 N. Y. 258; Malleable Iron-Works v. Phoenix Ins. Co., supra; Woodbury Sav. Bank v. Charter Oak Ins. Co., 31 Conn. 517. In May v. Insurance Co., 25 Wis. 291, the question of agency presented in this case was ably discussed, and it was said: "The recent cases upon this subject fully sustain the position that upon this state of facts the company is responsible for the accuracy and omissions of its agent, even without any express undertaking to be so, and that it cannot avoid liability by reason of any discrepancy between the real facts as disclosed to him, and his presentation of

them in the papers. The tendency of modern decisions has been strongly to hold these companies to that degree of responsibility for the acts of the local agents which they scatter through the country that justice, and the due protection of the people, demand, without regard to private restrictions upon their authority, or to cunning provisions inserted in policies with a view to elude just responsibility." See, also, *Rowley v. Insurance Co.*, 36 N. Y. 550; *Insurance Co. v. Cooper*, 50 Pa. St. 331; *Viele v. Insurance Co.*, 26 Iowa, 9; *Insurance Co. v. Schettler*, 38 Ill. 166; *Eames v. Insurance Co.*, 94 U. S. 621.

Applying the law to the facts as proved, we must conclude that the employment of Van Arsdale by the appellant, in the capacity and for the purpose he was shown to have been employed, made him the agent for the company to the extent of receiving, making out, and forwarding to the company correct and proper applications for insurance, and that when, as in this instance, he entered upon the duty, and attempted to discharge it, any misstatements, errors, or omissions, the results of his own fraud, carelessness, or neglect, are to be deemed those of the insurer, and not those of the insured. Contracts of insurance, notwithstanding the intricate and complicated provisions contained in the policies,—perhaps found necessary to protect companies from fraud,—are to be considered and construed by the same rules of law and interpretation as other contracts, so as to carry out the intention of both parties, and hold each party responsible for his own wrong. Where there is on the part of the assured such intentional concealment, misrepresentation, or omission as amounts to fraudulent conduct on his part in procuring the insurance, it should vitiate and avoid the contract, and he should suffer the direct results of his own misconduct; but where, on the other hand, there is shown no fraudulent or wrongful representation or omission on the part of the assured, and the wrong is perpetrated through the fraud or negligence of the accredited agent of the insurer, it would be neither just nor equitable to hold the insured responsible for it. In explaining our views in the present case, we can do far better by adopting and quoting from so eminent a jurist as FOLGER, J., than by any efforts of our own. In *Rohrbach v. Insurance Co.*, 62 N. Y. 63, in a case presenting similar questions to the one under discussion, he said: "It is to be regretted that corporations of the power and extended business relations with all classes in the community which insurance companies have should prepare for illiterate and confiding men contracts so practically deceptive and nugatory, and should, in cases as free from fraud and wrong on the part of the insured as this is, hold their customers to the letter of an agreement so entered into. I am aware that often the companies are made the victims of dishonest and designing persons, but I cannot agree that the remedy for that is to refuse to be bound by the acts of agents of their own selection when dealing with simple and unlettered men. If there should be less greediness for busi-

ness, and such care in the selection and appointment of agents as would insure the confidence of the companies in their capability, discretion, and integrity, it would not need that there be laid upon unwise policy-holders an agreement to take the burden of the opposite qualities in those put forward to them as actors for the insurers." Under the evidence, it must be held that the application which was forwarded was the act of the agent, and consequently the act of the insurer, for which it alone was responsible, and that the company is estopped to set up any statements contained in the application to defeat a recovery. To hold otherwise would be to place every simple or uneducated person seeking insurance at the mercy of the insurer, who could, through its agent, insert in every application, unknown to the applicant, and over his signature, some false statement which would enable it to avoid all liability, while retaining the price paid for supposed insurance. Courts, while careful not to discriminate against insurance companies, should give to their contracts such interpretation, and to the acts of their agents such construction, as to afford some security to those with whom they contract.

It is contended that the policy was avoided by the assured keeping an inn or boarding-house. It does not appear from the evidence that the character of the house in that particular was changed after the insurance was effected. It appears from the evidence of the appellee that the agent was informed that persons were entertained at the place, more or less, owing to want of other places of entertainment, and that some boarders were kept at times. This is admitted by the agent, Van Arsdale, who says he communicated the fact to the general agent. Both the special and general agents having been informed that parties were kept, and it not having been shown that such business was more extensively done after than before insurance, or that the loss by fire was in any way caused by people having been entertained, it should not be considered of sufficient importance to reverse the judgment.

It is also urged that the occupancy of the adjoining log-house as a store, carrying in stock kerosene and giant powder, greatly increased the risk, and that the failure of appellee to notify the company worked a forfeiture of the policy. It is not claimed that appellee owned or exercised any control over the building, or that the statement that the building was vacant at the time of the insurance was untrue. The proof shows it to have been occupied only two months before the fire occurred. It is provided in the policy that, if the "hazard is increased without the consent of the company in writing," the policy shall be void. This should be construed as only applying to the insured premises, or to property under the control of the insured. There is nothing in the language used which would extend it to the property not under his control, and the acts of others, and hold him responsible for the acts of his neighbors or of contiguous owners, and require him to

keep informed as to the manner in which other persons in the neighborhood used their property, or to communicate the facts to the insurer. The contract of insurance being mutual, good faith should require that he give information of any fact or act of his own, or with his consent, on property insured or adjoining, and under his control, whereby the risk was increased. Further than that he could not be expected to go. The statement that at the time of the application the building was vacant must be regarded only as a statement of its condition at that time, not a warranty that it should remain so. He, not being the owner, could not be presumed to have intended to take possession and control of the property. *May, Ins. §§ 244, 247; Wood, Ins. § 237.* In this case it is shown that the use of the log building owned by a third party in no way contributed to the destruction of the insured property or the loss; that the fire originated in the roof of the insured building, extended to and consumed the log building, but not until the goods, including oil and giant powder, had been removed.

The only remaining question is as to the rule of damage in arriving at the value of the building destroyed. It is contended that the amount allowed was excessive; that the true value was what the property would have sold for in the market. Counsel do not say whether, in fixing the value, the house is to be considered a chattel, and its value what it would bring severed from the realty, or whether its value was to be estimated in connection with the land on which it stood. The rule contended for cannot be the correct one. If so,—if there was no market demand for the property so it could be sold,—it would have no value, and there would be, consequently, no loss. Another trouble is as above suggested: It would make the value of the house insured to depend upon the market ability of the uninsured land. A farmer might have an insured building of the value of \$5,000 on a large farm, and yet be held to have sustained no loss by its destruction because there was no demand for land in that location, and the farm could not have been sold. While the price for which the property could be sold might be admissible in evidence to assist in arriving at its value, it was not the only, nor a safe, criterion. If not salable at all, it might have a value to the owner as a home for himself and family, or for business purposes. Where, as in this case, the policy was "valued," (amount of insurance fixed,) the rule is indemnification to the owner not exceeding the sum insured; the question, not what some one would have paid for the building, but what amount would indemnify the owner for the loss sustained. The rule of damages is the value of the property lost, and not the cost of replacement. *Steward v. Insurance Co., 5 Hun, 261.* It is for the jury to determine how much money will make good to the insured his loss. *Brinley v. Insurance Co., 11 Metc. 195.* "It is for the jury to say what the actual value of the building was, in view of all the facts, and their finding is conclusive." *Wood, Ins.*

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§ 446. Counsel seem to have confounded the measure or rule of damage for merchandise or goods destroyed with that for buildings. In the former the value in market is correct. In the latter it must be "the actual value of the property in the condition it was in at the time of loss, taking into consideration its age and condition, and not necessarily what it would cost to erect a new building. The assured should be allowed the value of his building at the time of loss; and if, by reason of age or use, it is less valuable than a new building erected upon the same plan, of similar materials and of the same dimensions, the insured should be allowed for such difference arising from deterioration." *Wood, Ins. § 446; Insurance Co. v. Sennett, 37 Pa. St. 205.* It follows that the original cost of the building, the cost of constructing a like building at the time of trial on the same land, and the difference in value between the building destroyed, by reason of its age and use, and a new one, were all proper inquiries to assist the court in arriving at a just conclusion in regard to the loss sustained; and the admission of evidence upon these points was not erroneous, as supposed by appellant. In our view of the case, no serious errors occurred upon the trial, and the judgment should be affirmed.

RICHMOND and PATTISON, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is affirmed.

DIXON v. AHERN. (No. 1,321.)

(*Supreme Court of Nevada.* July 12, 1890.)

LANDLORD AND TENANT—RELATION.

Occupation of lands by a person without a recognition of the owner as his landlord, or any agreement, express or implied, to hold under and in subordination to him is merely a trespass, and does not create the relationship of landlord and tenant.

Appeal from district court, Eureka county; A. L. FITZGERALD, Judge.

*Thos. Wren*, for appellant. *Baker & W'ims*, for respondent.

MURPHY, J. This case came before this court on appeal from the refusal of the judge of the district court to give an instruction asked for by the appellant (respondent here) on that hearing, and was remanded for a new trial. 19 Nev. 425, 14 Pac. Rep. 598. The issues involved are the same. It is therefore unnecessary to state the facts of the case for the purposes of this opinion.

This appeal is taken from a judgment of nonsuit entered upon defendant's motion. The only question for us to determine is, are the facts introduced by the plaintiff in this case sufficient to establish the relationship of landlord and tenant. We think not. All the elements requisite to create the relationship of landlord and tenant are lacking; that is, the assent of the landlord on the one side, and the recognition of the landlord's title by the tenant. The defendant in this case entered upon the premises without the knowledge

or consent of the plaintiff, and never did, by word or act, so far as the record shows, recognize the plaintiff's title. Defendant was a trespasser, and not a tenant; and the mere fact that he said, "If I owned the wood, I would pay the rent," does not create the relationship of landlord and tenant. In order to have that effect, the defendant should have recognized the plaintiff's title, and agreed to hold under him, and in subordination to it. 1 Wood, Landl. & Ten. § 1; Tayl. Landl. & Ten. § 21; Central Mills v. Hart, 124 Mass. 125; Leonard v. Kingman, 136 Mass. 124. To create the relation of landlord and tenant, an agreement, either express or implied, must exist. Neither appears from the facts in this case. All the authorities establish the principle that where a person occupies the land of another, not as tenant, but adversely, or where the circumstances under which he enters show that he does not recognize the owner as his landlord, this form of action will not lie. Pico v. Phelan, 77 Cal. 86, 19 Pac. Rep. 186.

From the evidence introduced on the part of the plaintiff on the trial of this cause, he could not recover; therefore the nonsuit was properly granted. Judgment affirmed.

#### *In re PARKER.*

(Supreme Court of Kansas. July 3, 1890.)

#### BASTARDY—PROCEEDINGS BEFORE JUSTICE OF THE PEACE—DISCHARGE.

The proceedings before a justice of the peace under the bastardy act, where a person is charged with being the father of an illegitimate child, are of a preliminary nature; and the adjudication of the justice of the peace discharging the defendant is no bar to a subsequent complaint and hearing before the same or another justice upon the same charge.

(Syllabus by the Court.)

Original proceeding in *habeas corpus*.

John E. Hessin, for petitioner. F. L. Irish and G. W. Jones, for respondent.

JOHNSTON, J. This is an original proceeding in *habeas corpus*, through which the petitioner, Ernest C. Parker, seeks to be released from an imprisonment which he alleges is illegal. The return made by the respondent shows that the petitioner has been arrested, and is in custody, upon a charge that he is the father of a bastard child. It appears that on August 31, 1889, Maggie Green made complaint before a justice of the peace of Riley county, charging Parker with being the father of a bastard child of which she was delivered on the 31st day of July, 1889. Upon this complaint a warrant was issued, and Parker was brought before the justice of the peace, where a hearing was had, in which numerous witnesses were sworn and testified in behalf of both parties. The relatrix was represented by the county attorney; and, upon the evidence adduced, the justice of the peace determined and adjudged that the petitioner was not the father of the bastard child, and discharged him from custody. On October 19, 1889, the mother of the child made another complaint before the same justice of the peace, charging the petitioner with being the

father of the same child, and thereupon a warrant was issued, upon which the petitioner was arrested, and taken before the justice of the peace; and on November 18, 1889, another hearing was had, in which evidence was produced by both parties, and in which the relatrix was again represented by the county attorney. The defendant filed a plea of former acquittal, claiming that the previous trial, and the judgment discharging him from custody, was a bar to the second action. This plea was overruled; but the justice of the peace, upon the evidence adduced by the parties, again determined that the defendant was not the father of the child, and discharged him from custody. The state took an appeal to the district court, but at the May term, 1890, of that court, the appeal was dismissed upon the ground that the district court had no jurisdiction to entertain an appeal from the judgment of the justice of the peace in the bastardy case. On April 15, 1890, a third complaint was filed by Maggie Green before the same justice of the peace, again charging Parker with being the father of her bastard child; and upon this complaint another warrant was issued, under which he was arrested and taken into custody. He immediately instituted this proceeding for a release from imprisonment, and now insists that his discharge at the former hearing before the justice was a final adjudication, which constitutes a bar to a like proceeding before the justice of the peace upon the same charge.

Is the hearing and determination of a justice of the peace in a bastardy case, where the defendant is discharged, conclusive, and a bar to a second arrest and prosecution before a justice of the peace for the same cause? The statute is somewhat ambiguous, and the proceeding therein provided for is anomalous, not being, distinctively, either criminal or civil. The proceeding or prosecution is instituted before a justice of the peace, who issues a warrant upon a complaint; and, when the defendant is arrested and brought before him, a preliminary hearing is had, and the testimony of the mother is to be reduced to writing by the justice, carefully read to her, which, when signed, is to be transmitted to the district court. If, upon this hearing, the defendant is adjudged to be the father of the child, he is required to enter into a recognizance for his appearance at the next term of the district court to answer the same complaint, and to abide the judgment and orders of that court; and if he fails to give the recognizance, the justice is to commit him to jail. After such hearing, the justice is required to transmit the recognizance and other papers to the district court without delay, the same as is done in criminal cases where the defendant is recognized upon a charge of felony. It is not expressly provided what the order shall be where the justice finds that defendant is not the father of the child. In the district court, if the defendant denies the charge, a trial is had by the court or a jury; and, if it is found that he is the father of the child, or if he shall confess the same, a judgment is rendered by the court that he stand charged

with the maintenance and education of such child, which shall specify the amount to be paid, and the terms and times of payment. Upon such judgment an ordinary execution may issue, which is to be executed as in other cases. The only provision prescribing what shall constitute a bar to further prosecution before the final judgment is rendered, is found in section 16 of the act, where it is provided that, if the mother shall enter of record an admission that provision has been made to her satisfaction, it shall constitute a bar to all other prosecutions for the same cause and purpose. In section 19 of the act it is provided that even the death of a bastard child before or during the pendency of the proceedings shall not be cause of abatement or a bar to any prosecution for bastardy. It is obvious that the proceedings before the justice of the peace are only preliminary in character, and that his finding and determination cannot be regarded as a final adjudication that it is conclusive upon the parties. Before an adjudication can be held as conclusive and a bar, there must have been a final determination by a competent court upon the merits of the case. *Auld v. Smith*, 23 Kan. 66; *Wells, Res. Adj.* § 440. An interlocutory judgment or order, or one made in a preliminary proceeding not involving the merits, is not *res adjudicata*, for the reason that it does not finally dispose of or terminate the cause. The hearing before the justice in a bastardy case is preliminary in name and nature. He was no authority to determine the amount or the extent of the defendant's liability. The proceedings before him are closely analogous to a preliminary examination upon a charge of felony, where he only has authority to hold to bail or to discharge. It is immaterial, however, whether the proceeding before him be regarded as criminal or civil in its nature. In either event, his determination on a preliminary hearing—not upon the merits, and not final—will not operate as a bar. All that he can do, if he adjudges the defendant to be the father of the child, is to recognize him to appear in the district court for final trial and judgment. Should the defendant confess the paternity of the child, the justice would be powerless to adjudge that the defendant stand charged with the maintenance and education of the child, or to fix the amount for which he would be liable. His only duty, in such case, would be to certify the cause to the district court. At the trial on the merits a jury may be called to finally determine the facts, but a jury trial cannot be had before the justice. The district court alone can render the final judgment; and, as we have seen, a judgment must be final to operate as a bar. A proceeding in bastardy cannot be originally instituted in the district court, and the only way in which it can be vested with jurisdiction in such cases is through the preliminary proceedings before the justice. The purpose of the legislature in requiring a hearing before the justice was evidently to furnish a prompt and convenient method of bringing and holding the defendant for a final trial and adjudication before the district court. To that

end it is provided that process and proceedings adapted to criminal prosecutions may be employed. As counsel suggested on the argument, the proceeding for the purpose of securing the attendance of the defendant before the court, and to compel compliance with the judgment determining his civil liability, are to that extent criminal, and in all other respects it is a civil proceeding; and therefore, in analogy to a criminal prosecution, the preliminary examination of the justice, and his determination, are not final or conclusive. It will hardly be contended that the finding and determination of the justice that the defendant was the father of the child would be conclusive against him in the trial before the district court; and, if such determination is not conclusive against him, a finding and determination that he was not the father of the child should not be a bar against the state. If the principle is applicable at all, it applies equally to both parties; and, if the determination in the one case is not a bar against the defendant, then the determination in the other case is not a bar against the state. The bastardy act of Indiana is very similar to ours, and it has been there held that a discharge of the defendant is no bar to a further prosecution. *Davis v. State*, 6 Blackf. 494; *State v. Barbour*, 17 Ind. 526. The same court, however, has held the determination of the justice of the peace to be in a certain sense final, by deciding that an appeal by the state lies from a decision rendered by a justice of the peace in favor of the defendant. *Galvin v. State*, 56 Ind. 51. This right in favor of the state is not based on any express provision of the bastardy act, but upon some general provision of their Code authorizing appeals. The supreme court of Minnesota has also held that the discharge of a defendant by a justice of the peace after an examination under the provisions of the bastardy act of that state is no bar to a subsequent complaint and examination before another justice. *State v. Linton*, 43 N. W. Rep. 571. A contrary view seems to have been taken by the supreme court of Wisconsin in *State v. Braun*, 31 Wis. 600. That case was decided, however, upon other grounds; and what was there said was *obiter*, and not essential to the decision of the case.

A strong appeal is made by the petitioner to be relieved from the repeated and harassing arrests and prosecutions to which he has been subjected. It is insisted that a full inquiry has been made, which shows his entire innocence of the charge brought against him, and that the present prosecution is not begun in good faith, nor because there are any reasonable grounds for believing that he is the father of the child. If this be true, he is still not without remedy. The law does not permit or tolerate a perversion of its provisions and process for any purpose, much less for the accomplishment of the unworthy object which the petitioner suggests is intended by this prosecution. All prosecutions under the act are within the control of the county attorney, and it is his duty to see that no one is vexed and harassed in the manner alleged; and he should discontinue any prosecution which

is not begun in good faith, and based upon reasonable grounds. He can prevent the proceedings and process of the law from being abused, and should exercise his power and control in that respect when occasion requires. There are probably other remedies to prevent the continuance of proceedings under the act after a discharge of the defendant, and when it is shown that they are not based on sufficient grounds, and are conducted in bad faith, and to accomplish a bad end. No proof, however, of any unworthy design was offered in the present case, and none will be presumed. The petitioner will be remanded. All the justices concurring.

**POMEROY COAL CO. v. EMLÉN, County Treasurer.**

(Supreme Court of Kansas. May 10, 1890.)

**TAXATION—VALUATION—ADDITION OF PROPERTY TO LIST.**

The county commissioners, sitting as a board of equalization, may raise or lower the valuation placed upon the personal property statement of the owner by the assessor, who received and returned such statement, but as such board they have no power to add to such personal property statement, as returned by the assessor, any additional property not already listed therein.

(Syllabus by Strang, C.)

Commissioners' decision. Error from district court, Atchison county; ROBERT M. EATON, Judge.

B. F. Hudson, for plaintiff in error. T. M. Pierce and W. W. & W. F. Guthrie, for defendant in error.

STRANG, C. This is a proceeding in which the plaintiff in error, who was plaintiff below, on the 22d day of November, 1889, filed, in the district court of Atchison county, his petition, praying the court to allow an order restraining the collection of certain taxes therein set out. The court heard the application December 2, 1889, upon the petition and oral evidence, and took the same under advisement until December 7th, when it rendered judgment refusing to allow the order prayed for by the plaintiff in his petition, to which ruling rendering said judgment the plaintiff objected and excepted, and comes here by its case made, alleging that the court below erred in refusing said order, and asks that the judgment of the said court be reversed. This case grows out of the action of the county commissioners of Atchison county, sitting as a board of equalization, by which they increased the assessment of the plaintiff for purposes of taxation. The assessor, whose duty it was to assess the plaintiff, called on the company and received from J. H. Fisher, who was secretary and treasurer thereof, the personal property statement of said company. Mr. Fisher, on behalf of the plaintiff, listed the average of stock on hand at the sum of \$6,000, and listed furniture worth at its alleged true value \$450. The assessor, pursuant to an agreement entered into by all the assessors of the county to value property at one-third its true value, placed upon the property of the plaintiff an aggregate valuation of \$2,150,—\$2,000 upon the

average amount of stock, and \$150 upon the item of furniture. The county commissioners of Atchison county met as a board of equalization on the 3d of June, 1889, and, while sitting as such board, on the 12th day of June added to the assessment of the plaintiff the sum of \$7,850. This was done arbitrarily by the commissioners, or two of them, and without any notice to the plaintiff. Now the plaintiff claims that such addition was a new and additional assessment of the plaintiff's property made by the county commissioners sitting as a board of equalization, and avers that the board had no power, as such, to make any additional assessment. If the plaintiff is right in its contention as to the fact, we think its conclusion of law is correct. The commissioners were in session as a board of equalization. It is admitted that as such board they added to the assessment of the plaintiff the sum of \$7,850. Now, what did such action of the board amount to? Was it a new assessment by them, or was it simply a raising of the valuation of the property of the plaintiff already listed? If it was the making of a new assessment, it was without authority of law. If it was simply a raising of the valuation put upon the plaintiff's property as listed by the assessor, then it was within the authority of the board, and of the very purpose for which they met, and entirely proper if not raised higher than the property of the rest of the tax-payers of the county. Mr. Wilcox, chairman of the board, when asked how much the board increased the valuation of the first item in the plaintiff's assessment, as given in by itself to the assessor and returned by him, to-wit, the average of stock on hand during the preceding year, answered, "We didn't talk about the first item,—the average stock. There was nothing said about it." When asked if he believed the plaintiff had failed to list the full amount of its average stock, he answered, "I did, sir. I did not believe they had returned enough." Again, Wilcox testified that the board did not complain of the average of stock so far as the retail business of the company given in Atchison was concerned, but said they believed the company should be assessed for the wholesale business it did, and the business it had in Topeka, Omaha, and other places. It is apparent from the testimony of Mr. Wilcox, to say nothing of the other testimony in the case, that the board did not think they were raising the value of the plaintiff's property already listed above the one-third valuation agreed upon by the assessors, but that they believed the plaintiff had other personal property that it had not listed. Just what form such property was in they evidently did not clearly understand, as they called it capital invested in business outside of the city of Atchison, and which they believed should in some way be reached and assessed in the city of Atchison, where the plaintiff company had its home office and headquarters. If there was no evidence of witnesses upon this question, it would, in our judgment, clearly appear from the proceedings of the board of equalization, as shown by the record offered and re-

ceived in evidence in the case. The entire amount of property listed by the plaintiff was \$6,000, average amount of mercantile stock, and \$450 worth of furniture. The board was satisfied with the furniture as listed, which left but one item on the personal property statement of the plaintiff to be considered, and that was the stock in trade of the company.

The law requires the assessor to value the property listed at its true value. Where the personal property to be listed consists exclusively of stock in trade, the statute declares what shall constitute the property to be listed. It is the average of stock on hand during the preceding year, and the statute also points out the method by which such average may be ascertained. The sum in money represented by such average is the true value of such personal property. If, therefore, the assessor values the average of stock, and returns the same at a sum of money less than the amount represented by such average, the board of equalization may, for purposes of equalization, raise the valuation placed upon said average to a sum equal to, but not greater than, the sum represented by said average. In this case, the board of equalization added to the valuation placed upon the property listed a sum greater than the true value of all the property listed, which shows that they did not raise the valuation of the property listed as placed thereon by the assessor who made the assessment, but that they added to the personal property statement of the plaintiff property not listed. This they had no power to do. Such an addition is a new assessment. The statutes point out the mode by which both real and personal property is to be assessed, and by whom the assessment is to be made, but nowhere do they in any way authorize the county commissioners, sitting as a board of equalization, to act as assessors. Property, both real and personal, is assessed for purposes of taxation by township and city assessors. Section 4, c. 107, Gen. St. 1889, points out by whom personal property is to be listed for assessment and taxation. Section 59, same chapter, requires the township and city assessors, between the 1st of March and 1st of May of each year, to call upon all persons, companies, corporations, and listing agents, for their personal property statements. Section 14 requires the said assessors to value the property listed. Section 66 requires the assessors to return to the county clerk the statements of personal property of persons required to make them. These statements are returned with the valuation placed upon the items of property therein listed by the assessors, and such returns constitute the assessment of the personal property of the county, subject to the power of the board of equalization to raise or lower the valuation placed upon the property therein listed, unless the county clerk or board of county commissioners have reason to believe that some person whose duty it was to make a personal property statement has given to the assessor a false statement, or no statement at all, of his personal property, in which case said county clerk, or board of

county commissioners, may proceed, at any time before final settlement with the treasurer, to correct the returns of the assessor, and charge such person for taxation with whatever property he should have listed. Section 70, c. 107, Gen. St. 1889. To enable the county clerk or board of county commissioners to successfully correct such returns, the county clerk is authorized to issue compulsory process, and bring before him any persons whom he may suppose has knowledge upon the subject; and, if any person fails to appear, he is guilty of a misdemeanor, and subject to fine and imprisonment. But, before the county clerk or board of county commissioners shall proceed to correct any return of the assessors, they must give the property owner five days' notice, to be served as required by section 70. It will thus be seen that ample provision is made for the assessment of personal property; that it is to be made, in the first instance, by the township and city assessors, and by them returned to the county clerk; and any corrections of said returns are to be made by the county clerk, or board of county commissioners, after five days' notice to the property owner to be affected thereby, but never by the board of equalization. Section 73 creates the board of equalization, while section 74 defines their powers and duties. An examination of these two sections will disclose that the word "assessment" is not to be found therein. This board is to fairly and impartially equalize the valuation of the personal and real property of the county; that is, if horses are assessed in one township in the county at \$15 each, and in another township at \$25 each, the board of equalization may raise the valuation of the horses as returned by the assessor in the first township to \$20 each, and lower the valuation as returned by the assessor in the latter township to \$20 each, in order to equalize the valuation on horses in the two townships. But the board may not add to the assessment as returned by the assessor an additional horse or horses. Or, if land in one township is assessed at three dollars per acre and in another at seven dollars, as shown by the returns of the assessors, the board, to equalize the valuation in the two townships, may raise the three-dollar valuation to five dollars, and lower the seven-dollar valuation to five dollars, but may not add to the return of any assessor an additional piece of land not already listed.

In the case at bar there was no want of power properly lodged to enable the proper authorities to secure an assessment of all the personal property of the plaintiff. If the county clerk or board of county commissioners had reason to believe that the plaintiff had not listed for taxation all of its personal property, they had ample power, under section 70, above referred to, to secure a full assessment of all its personal property. They could have served notice on the plaintiff, issued process, and brought the officers of the plaintiff company, or any other persons having knowledge upon the subject, in to testify under oath, and thus learn all about the plaintiff's property, and after such hearing add



to its assessment as returned by the assessors or any other personal property they found the plaintiff possessed of. The object of the commissioners seemed to be to secure a fair assessment of the property of the county for taxation; but they mistook the method. The legislature has not, and likely will not, confer arbitrary power upon the commissioners, or any other body or person to arbitrarily assess property owners for taxation. The power lodged with the assessors, county clerk, and board of county commissioners by the legislature is ample for all proper purposes of assessment and taxation, and we do not think the power should be extended to any tribunal not already in possession thereof. The defendants in this case rely on the case of *Gillett v. Treasurer*, 30 Kan. 166, 1 Pac. Rep. 577, and the court below seems to have regarded it at least as somewhat controlling in the case. We think a careful examination of that case will show it to be in perfect harmony with the conclusions herein reached. In that case the facts show that the assessors of Lyon county met pursuant to statute, and agreed upon a common basis of valuation for the property of their respective townships. Afterwards the assessors of some of the townships ignored the agreement so made by the body of the assessors, and valued the property in their townships lower than the valuation agreed upon, and consequently lower than like property was valued in other townships of the county. When the board of equalization met, they, in order to equalize the assessments for the several townships of the county, raised the valuations of the assessors who had ignored the agreement to make them correspond with those of the other townships. The plaintiffs in that case held cattle in one of the townships, the assessor of which had ignored the agreement, and valued such property at a sum less than the common basis; and, when the board of equalization raised the valuation on their cattle, they commenced suit to enjoin the collection of taxes, alleging that the board of equalization had no power to raise the valuation as returned by the assessor on their cattle without notice to them. This court held that the board of equalization had, since the act of 1876, (chapter 107, § 74, Comp. Laws 1879,) power to equalize the assessments of personal property made by the several assessors of the county by raising the assessment in the township where the plaintiff's cattle were assessed to correspond with the common basis agreed upon by the township assessors, without notice to the owners of property, the valuation of which the board had raised. That is all the court decided. In this case the power of the board of equalization to raise or lower the valuation of the property as returned by the assessors is not challenged. That is not the question in this case. A hasty reading of the opinion in *Gillett v. Treasurer*, 30 Kan. 166, 1 Pac. Rep. 577, or a reading of the syllabus without an examination of the opinion, might mislead. In the syllabus the word "assessment" is used, in a limited sense, as meaning valuation. With this understanding of the sense given

to the word "assessment" the syllabus properly represents the opinion, and what was decided thereby. The term "assessment," employed in connection with general taxation, means more than mere valuation. When we speak of an assessment of property as the basis for levying and collection of taxes, we mean more than valuation. "Assessment," so used, is defined by Welty on Law of Assessments (page 3) as "an official listing of persons and property, with an estimate of the value of the property of each for the purpose of taxation." Here, it will be seen, assessment includes the listing, together with the valuation, of property, and the syllabus above referred to, read in the light of this definition of assessment, and giving the word "assessment" therein this meaning, would be misleading, and, so understood, would not correctly represent what was decided in said case. We recommend that the case be reversed and remanded, with instruction to allow the order of injunction.

PER CURIAM. It is so ordered; all the justices concurring.

McCRIE v. EMLIN, County Treasurer.

(*Supreme Court of Kansas*. May 10, 1890.)

Commissioners' decision. Error from district court, Atchison county; ROBERT M. EATON, Judge. *B. F. Hudson*, for plaintiff in error. *T. M. Pierce*, and *W. W. & W. F. Guthrie*, for defendant in error.

STRANG, C. The questions in this case are identical with those in *Coal Co. v. Emlin*, ante, 340, (just decided.) That case and this were tried and submitted together, and upon the authority of that case the judgment of the district court will be reversed, with directions to the court below to allow the order of injunction.

PER CURIAM. It is so ordered; all the justices concurring.

CHICAGO, K. & W. R. CO. v. PALMER.

(*Supreme Court of Kansas*. May 10, 1890.)

EMINENT DOMAIN—DAMAGES—INSTRUCTIONS.

On the trial of an appeal from the award of commissioners, made in condemnation proceedings for a right of way for a railroad company, it is error for the trial court to instruct the jury that they may take into consideration, as tending to depreciate the market value of the land through which the right of way is located, the damages for stock liable to be killed by moving trains, and for fires liable to be set out by locomotives, passengers, and employees, without making any distinction between what may be negligently done, and what may occur accidentally, and without negligence.

(*Syllabus by Simpson, C.*)

Commissioners' decision. Error from district court, Chase county; FRANK DOSTER, Judge.

*George R. Peck*, *A. A. Hurd*, and *C. N. Sterry*, for plaintiff in error. *J. G. Waters* and *Madden Bros.*, for defendant in error.

SIMPSON, C. The defendant was the owner of 2,960 acres of land in Chase county, lying together in one compact body, except that 160 acres was separated from the balance by a public highway. That

part of the land that was cultivated consisted of about 100 acres of bottom land on the south fork of the Cottonwood river. The remainder of the farm consisted of an eastern and western pasture and feed lots for stock. This farm was used for stock and crop purposes. Three hundred and sixty-five acres of the farm was bottom land including timber, and the balance was upland, devoted to pasturage. The farm consists of the S.  $\frac{1}{4}$  of sections 28 and 27, and the S. E.  $\frac{1}{4}$  of section 28, and the S.  $\frac{1}{4}$  of the N. E.  $\frac{1}{4}$  of section 28, and the N.  $\frac{1}{4}$  of the N. E.  $\frac{1}{4}$  and N. W.  $\frac{1}{4}$  of section 34, all of section 35, in township 20 of range 8, and all of sections 2 and 11 in township 21 of range 8. It is thus two and one-half miles from east to west, and three and one-half miles from north to south, at extreme points. The dwelling-house, barn, cattle-yard, and scales are near the N. W. corner of the S. E.  $\frac{1}{4}$  of section 28. The railroad enters the land from the north, about one-fourth of the distance from the N. E. corner of the S.  $\frac{1}{4}$  of the N. E.  $\frac{1}{4}$  of section 28, and runs diagonally through that 80 acres, and through the S. E.  $\frac{1}{4}$  of section 28, and passes out at the S. E. corner of said S. E.  $\frac{1}{4}$  of section 28. This leaves about one-tenth of the farm to the west, and nine-tenths to the east, of the railroad line. The dwelling-house and other improvements mentioned are situated about 40 rods west of the right of way. The length of the right of way through the farm is 4,471 feet. The landowner appealed from the award of the commissioners to the district court, and a jury trial was had.

We will first examine and see what elements of damage were considered and passed upon by the jury in their special findings. The jury estimates no damage for the water standing on the west side of the right of way; nor for flooding the land by reason of any ditch, holes, or barrow-pits on the east side of the right of way; nor for building any ditch to drain surface water accumulated on the right of way; nor for making culverts under the farm crossings; nor for the ditch made for the purpose of strengthening the draw. They do estimate damages for the following causes: For extra labor in opening and shutting gates in crossing the right of way; for hauling feed from the land on the west side to the *corrals* on the east side; for extra time in going to the different farm crossings; to the use of the land east of the south fork, as and for pasture; for loss in market value to the land bordering on the south fork, and east of it, by location of the right of way through it; for the increased cost of cultivation by reason of extra labor, outside of the extra labor necessary in making additional turns; and for extra labor in cultivation. They do not state any definite sum as the amount to be awarded by reason of these various elements of damage. No motion was made or effort recorded to make their answers more definite and certain. The only definite sum (that of \$100) that was assessed in the answers to the special questions submitted was for the value of the land that will have to be used for turn-rows along the side of the right of way.

Their general verdict was the value of the right of way, \$512.50; damages to the land not taken by reason of the right of way, \$2,750; interest, \$380.62.

1. The railroad company brings the case here, and insists, first, that the damages awarded by the jury to the land not taken were so excessive as to show that the same were allowed by the jury under the influence of passion and prejudice. To enforce this contention it is urged by counsel for plaintiff in error that the only real damage there could be was—*First*, in cutting off stock kept in pasture "B" from the water in the south fork, remembering that such stock was already cut off by a 60-foot public highway; and, *second*, the extra time required in the cultivation of that part of the farm used for raising corn west of the right of way; and, *third*, the extra time required in hauling stuff from one part of the farm to the other in reaching railroad crossings. It is further said that it appears from the evidence of all the witnesses examined for the land-owner that, in estimating the elements of damage, the extra turns made necessary by the right of way cutting the crop land into irregularly shaped pieces, in the preparation and cultivation of the land, and in gathering the crop, constituted the great bulk of damages sustained by the land-owner. And it is further urged that it is conclusively shown by the evidence contained in this record that this particular item of damages, at the highest possible figure, could not exceed \$775, and that the aggregate of all the items of damage taken into consideration by a jury could not, in any event, exceed the sum of \$1,975; and hence it appears that this allowance was excessive in at least one-fourth of it, to-wit, \$675. We cannot go into the details of all this evidence, and incumber an opinion with it. It may be a sufficient answer to the claim of the counsel for the plaintiff in error to say that the court at their request submitted to the jury special interrogatories about fifteen different things that were claimed to have been elements of damage in this case. The jury say, by their special findings, that in estimating damages they do not base anything on six of these elements. They do say that they take into consideration nine of them, and in one they fix the sum of \$100 as the amount of damages occasioned by that particular one, and as to the other eight return no definite sum. So that the actual result of that trial, so far as the jury are concerned, is that they estimate the damages to the remainder of the tract at \$2,750, and that this estimate is arrived at by grouping together the nine items specified in the special findings that contributed to the damages, and the other items included in the instructions of the court, but not contained in the special interrogatories. Now, in this state of the record, we are asked to assume that one particular item alone constitutes the great bulk of the damage. The jury heard all the evidence. They viewed the premises, and applied it in the light of that inspection, and we would hesitate long before reversing this case on account of a belief that the amount awarded was so large as neces-

sarily to create the belief that the jury was swayed by passion and prejudice. It seems to be admitted that there is ample justification in the evidence preserved in this record to support a verdict for \$1,975. But this apparently excludes the consideration of some elements that the jury had a right to consider. There are in cases of this character some elements of damage that may be reduced to a certainty in dollars and cents by a purely mathematical process; but take, for instance, the effect of all these things on the market value of the farm, and all a jury can do is to arrive at a conclusion founded on the opinion of witnesses. How much they all affect the market value can never be determined with mathematical precision. In the judgment of the writer of this opinion, the verdict is a very liberal one, but not so large as to induce a belief that it is excessive.

2. The next contention of counsel for the railroad company is based upon the following instruction given by the court to the jury: "No conjectural or suppositious elements of damage can be considered so far as allowing for them specific sums of money. Nothing can be allowed as an item of special damages, unless it can be attributed to some cause known to exist, the effect and consequence of which is not speculative in character, but can be calculated in dollars and cents with reasonable certainty. Hence, the liability of stock being frightened and stampeded or killed by moving trains, or fires set out by locomotives or passengers or employees, does not constitute a basis for special compensation, and are not items which can be calculated in dollars and cents. These and such like matters may, however, be considered as tending to the general depreciation of the value of the land, by impairing its use for that which it was specially adapted, and disinclining purchasers to pay what it would otherwise be worth." The court, in plain words, told the jury that certain elements of damage that do not constitute a basis for special compensation, and cannot be calculated in dollars and cents, may be considered as tending to the general depreciation of the value of the land by impairing its use for that which it was specially adapted, and disinclining purchasers to pay what it would otherwise be worth. These elements were: *First*. Liability of stock being frightened and stampeded. *Second*. Liability of stock being killed by moving trains. *Third*. Liability of fires set out by locomotives or passengers or employees. As to the first of these, it was said by Chief Justice HORTON, in the case of *Railway Co. v. Lyon*, 24 Kan. 745: "In assessing damages done to land by reason of the appropriation of a right of way through it for a railroad, the liability of teams being frightened, or that additional care by the land-owner may be necessary in the future as to such teams, by reason of the proximity of the railroad, does not of itself constitute any basis for special compensation. Such damages are speculative, and not the proper subject of inquiry and damage." This case is made the subject of a short note by Mr. Wood in his work on *Railway Law*, vol. 2, p. 917, note 4. In

this note he couples together the frightening of the teams and extra care necessary in the use of the teams, and applies the language of the court only to the extra care. This construction of the decision leaves it as sustaining his text that the liability of frightening teams by passing trains is a proper element of damage. While such construction seems to be warranted by the language of the instruction given by the trial court to the jury, that was assigned as the error complained of in that case, its language being: "I will say that the fact of the liability of teams being scared, and the additional care necessary to be used in using such teams by the plaintiff upon the land in question, is an element of damage you can take into consideration," yet the court undoubtedly meant both the liability to frighten stock as well as the extra care. The trial court combined the two propositions, and treated them as one element, and this court say this direction to the jury permitted speculative damages, for which no compensation is properly recoverable. From this it is manifest that this court has passed on the naked question of the liability of stock being frightened against this instruction. Considering this item in connection with the second one enumerated in the instruction, to-wit, the liability of the killing of stock by moving trains, while it may be said that there is a well-founded distinction between the statutory remedy for stock negligently killed by passing trains and the liability of stock being frightened and killed by the operation of the road, yet this distinction is not clearly made in the instruction; or, it may be said, is not made at all. As to the remaining item of liability of fires, the case of *Railroad Co. v. Kregelo*, 32 Kan. 613, 5 Pac. Rep. 15, is broad enough to cover all phases of the question. This case recognizes and clearly expresses the distinction that is claimed as to the other items. The court say: "The general current of authority is to the effect that, in awarding damages to the owner of land taken for a railroad, the exposure of his remaining land and buildings to fire from the company's trains or engines is a proper element to be considered in making the estimate; this upon the ground that the increased exposure to fire depreciates the \* \* \* land. \* \* \* But \* \* \* it is competent only to take into consideration the risk of fire set out \* \* \* without the fault of the company, and by reason of the operation of the road through the premises. If fires occur through the negligence of the company, it would be liable to the owner, and this element should not be taken into account in estimating the compensation." Since that opinion, the legislature of this state, in 1885, has provided a statutory remedy for the recovery of damages occasioned by fire that occurs by the negligent operation of the road. This case makes clear the distinction between the actual loss by fire and the liability to loss that affects the value of the property. This same distinction may possibly exist in the consideration of the other items, but if it does the language of the instruction seems to be broad enough to allow

the jury to estimate all the negligent killing of stock and the setting out of fires, as well as those not negligent. It does not seem to us that as to those items of damage that permit the distinction contended for, assuming, for the purposes of this opinion, that such a distinction exists, is not expressed; but the general language of the instruction would authorize the jury to take into consideration each one of these specific items of damage, without regard to the negligence of the railroad company, and to take into account at least one item that this court has said is speculative, and not to be considered. The jury were misdirected by this instruction, and it was material error to give it.

It is recommended that the judgment of the trial court be reversed, and the cause remanded, with instructions to grant a new trial.

**PER CURIAM.** It is so ordered; all the justices concurring.

**BROWN, Sheriff, v. STATE ex rel. WARD,**  
County Attorney.

(*Supreme Court of Kansas. July 3, 1890.*)

**COUNTY-SEAT—LOCATION—ELECTION.**

Where an election has been held for the permanent location of the county-seat in a newly-organized county, and the returns made, and such vote has been duly canvassed by the board of county commissioners, and the place receiving a majority of all the votes cast has been proclaimed by said board the permanent county-seat, and no proceeding instituted to test the validity of such election, the sheriff of said county has no authority to issue a proclamation for a second county-seat election in said county; and all proceedings thereunder are void.

(*Syllabus by Green, C.*)

Commissioners' decision. Error from district court, Wichita county; V. H. GRINSTEAD, Judge.

*C. N. Sterry and J. S. Caldwell*, for plaintiff in error. *C. H. Coan*, for defendant in error.

**GREEN, C.** Wichita county was organized December 29, 1886, and Leoti city was designated as the temporary county-seat. The county officers selected by the governor called an election to be held on the 8th day of February, 1887, for the purpose of electing the county and township officers, and choosing a permanent county-seat. The election was held to choose county and township officers, but the election for designating the permanent county-seat was postponed, on account of the passage by the legislature of chapter 120 of the Laws of 1887, being an act to provide for the registration of voters at elections for county-seats. The election was subsequently held, under the provisions of said law, on March 10, 1887. The returns were made to the board of county commissioners of said county, duly canvassed, and result declared in favor of Leoti city as the permanent county-seat; and it has remained the county-seat ever since said election. In June, 1888, the plaintiff in error, a sheriff of said county, issued his proclamation and notice to the voters of said

county for an election to be held at the various voting places on the 18th day of July, 1888, for the purpose of choosing the permanent county-seat of said county. The sheriff posted his proclamation of said election throughout the county, and issued a notice to the voters requiring them to meet at the various voting places and select persons to act as registration boards. In pursuance of said proclamation and notice, certain persons met at some of the places designated, and organized registration boards and made registration lists, and some of the voters of the county assembled at the voting places on the 18th day of July, 1888, and voted upon the question of the permanent location of the county-seat.

On the 14th day of July, 1888, the state, upon the relation of the county attorney of said county, commenced this action to restrain the board of county commissioners of said county from receiving or canvassing any returns or any votes of this election, and from making any declaration of any result of the election, and from making any order or entry, or doing any act touching or concerning, such election; and that the county clerk should be restrained from receiving any returns, votes, or papers of any kind concerning the election, and from entering any order or making any record concerning the election, and from receiving any ballots, poll-books, tally-sheets, or other papers from any board of registration, election board, or other officers or persons, touching said election; and that M. P. Brown, as sheriff, be enjoined from issuing or publishing or posting any proclamation, notice, or other paper touching the holding of any election for the relocation or removal of the county-seat of Wichita county; and that the defendants be enjoined from doing any acts towards or concerning the relocation or removal of the county-seat of said county, within five years from March 10, 1887. The district judge of Wichita county, upon the filing of said petition, granted a temporary restraining order. The defendants below answered the petition of the county attorney, setting up substantially the facts as detailed, admitting that an election had been held on the 10th of March, 1887, but claimed that said election was fraudulently conducted, and void. A demurrer was filed to this petition, assigning that the answer did not state facts sufficient to constitute a defense to plaintiff's petition, which was sustained by the court below, and judgment was rendered in favor of the state, and against the plaintiff in error, for the costs of the action, and permanently enjoining the sheriff from making any proclamation calling for an election prior to the expiration of five years from March, 1887.

The pleadings in this case admit that an election was held for the permanent location of the county-seat of Wichita county on March 10, 1887; that the board of county commissioners and other officers were elected February 8, 1887, and duly qualified, and entered upon the discharge of their duties; and that the commissioners, 90 days prior to the 10th of March, 1887, made an order designating a place in each of the

three townships in the county where the voters might assemble for the purpose of registration, and that they caused the order to be published, as required by section 3, c. 120, of the Laws of 1887; and that the township officers elected in all the townships in Wichita county on February 8, 1887, were acting as boards of registration, as required by law. It is further admitted by the pleadings that there was an election held for the purpose of locating the permanent county-seat, and that the returns were made to the county clerk, and that said returns were duly canvassed, and the result was declared, and that Leoti city received 426 votes, and the city of Coronado 120 votes. No effort was made to contest the validity of this election. The declaration of the result was made a matter of record by the board of county commissioners of the county, and still remains in full force, and is final. The sheriff of the county could not sit in judgment upon the question as to whether the election of March 10, 1887, was legal or not, and could not attack that election in a collateral proceeding. The sheriff had no authority to call a second election after the result had been declared in the first, showing that Leoti city had received a majority of all the votes cast for the permanent county-seat of Wichita county. The statute settles this question in favor of the plaintiff below. Section 2778, Gen. St. 1889, reads: "Providing, however, that in no case shall the validity of any election be inquired into beyond the one last had, and upon which the proceeding is based." *Light v. State*, 14 Kan. 489; *County-Seat of Linn Co.*, 15 Kan. 526. We think the court below committed no error in sustaining the demurrer of the plaintiff to the answer of the defendant, and recommend that the judgment be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

#### STATE V. CREDITOR.

(*Supreme Court of Kansas. July 3, 1890.*)

#### CONSTITUTIONAL LAW — REGULATING PRACTICE OF DENTISTS.

Chapter 123, Laws 1885, "An act to regulate the practice of dentistry, and punish violators thereof," is not repugnant to either section 2, art. 4, or to section 1, of the fourteenth amendment of the federal constitution.

(*Syllabus by the Court.*)

Error from district court, Sedgwick county; C. REED, Judge.

*Dale & Wall*, for appellant. *L. B. Kellogg*, Atty. Gen., and *W. S. Morris*, for the State.

JOHNSTON, J. E. H. Creditor was convicted in the district court of Sedgwick county for practicing dental surgery without authority, and in violation of the provisions of chapter 123 of the Laws of 1885, entitled "An act to regulate the practice of dentistry, and punish violators thereof." He appeals, and challenges the validity of the statute.

The act provides that it shall be unlawful for any person to practice dentistry or

dental surgery without having a diploma from some reputable dental college, school, or university department in which there was, at the time the diploma was issued, annually delivered a full course of lectures and instruction in dentistry or dental surgery. It enacts that the requirement of a diploma shall not apply to those engaged in the practice of dentistry or dental surgery within the state at the time of the passage of the act. A board of examiners is created, who are granted authority to issue certificates to persons engaged in the practice of dentistry at the time of the passage of the act, and to decide upon the validity of such diplomas as may be presented for registration. All persons engaged in the practice of dentistry within the state at the time of the passage of the act are required to register their names and place of business with the board of examiners within six months; and when that is done the board is authorized to issue to such persons certificates authorizing them to continue the practice. All persons desiring to begin the practice after the passage of the act are required to present to the board of examiners a diploma, or a duly-authenticated copy of the same, which, if found by the board to be valid, is accepted, and the person holding the diploma is granted a certificate authorizing him to practice. A charge of \$3 is made for the certificates issued to persons practicing in the state at the time the act is passed, and for the certificates issued to persons commencing to practice after the passage of the act a charge of \$10 is imposed. It is finally provided that any person who engages in the practice of dentistry in violation of the provisions of the act shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in a sum not less than \$10 nor more than \$100. The appellant contends that the act is repugnant to section 2 of article 4 of the federal constitution, which declares that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states," and is also in conflict with section 1 of the fourteenth amendment of the constitution of the United States, which provides that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

The power of the legislature to regulate the practice of medicine, dentistry, or surgery is undoubted. It is an exercise of the police power of the state for the protection of the health, and the promotion of the comfort and welfare, of the people. It may provide that only those possessing skill, and learned in these professions, shall be permitted to practice; may prescribe the nature and extent of the qualifications required, and the rules for ascertaining and determining whether those proposing to practice come up to the statutory standard. If the regulations and conditions are adopted in good faith, and they operate equally upon all who may desire to practice, and who possess the required qualifications, and if they are adapted to the legislative purpose of promoting the health and welfare of the people by excluding from the practice those

who are ignorant and incapable, then the fact that the conditions may be rigorous, impolitic, and unjust will not render the legislation invalid. The authorities uniformly support the exercise of this power by the state, and statutes similar to the one under consideration have been repeatedly sustained. *Dent v. West Virginia*, 129 U. S. 114, 9 Sup. Ct. Rep. 231; *State v. Vandersluis*, (Minn.) 43 N. W. Rep. 789; *Hewitt v. Charlier*, 16 Pick. 353; *Eastman v. State*, 109 Ind. 278, 10 N. E. Rep. 97; *People v. Phippin*, (Mich.) 37 N. W. Rep. 888; *Richardson v. State*, 47 Ark. 562, 2 S. W. Rep. 187; *Ex parte Spinney*, 10 Nev. 323; *Harding v. People*, 15 Pac. Rep. 727; *Antle v. State*, 6 Tex. App. 202; *Musser v. Chase*, 29 Ohio St. 577; *Thompson v. Hazen*, 25 Me. 104; *State v. Gregory*, 83 Mo. 123; *State v. Board*, 32 Minn. 324, 20 N. W. Rep. 238. Although not specifically declared in the act, the manifest purpose of the legislature was to exclude from a profession requiring learning, skill, and experience those who are unfit to practice, and thus protect the public from ignorance and incompetency. No arbitrary or capricious conditions are imposed. The profession and practice are open to every citizen of the United States who is qualified, and who can produce evidence of the same. The legislature saw fit to permit those practicing in the state when the act was passed to continue to practice without diploma or other evidence of competency. It may be, as contended, that the fact of being in the practice is not the best test or evidence of skill and capability; but the courts have nothing to do with the expediency or wisdom of the standard of qualification fixed, nor with the tests adopted for ascertaining the same. The legislature proceeded upon the theory that the fact that they had been engaged in the practice within the state was sufficient evidence of their proficiency in the profession. This fact is made by the legislature an evidence of skill and competency equivalent to a diploma from a dental college, and the wisdom of either test is a question for the legislature, and not for the courts. The act cannot be held to unduly discriminate between persons or classes, and unconstitutional, because it exempts those engaged in the practice within the state when the law was enacted from the necessity of obtaining a diploma. *Fox v. Territory*, 5 Pac. Rep. 603; *Ex parte Spinney*, supra; *People v. Phippin*, supra; *State v. Vandersluis*, supra. All who enter the profession after the passage of the law are subject to the same conditions. No distinctions are made between citizens of this and other states. There is no discrimination between graduates from dental colleges in Kansas and those graduated from colleges located in other states, or in foreign countries. No higher qualification is required, nor any different test of competency prescribed, nor any higher charge for a certificate imposed on the appellant, who came into the state after the law was enacted, than was required of or imposed on one who resided in Kansas at that time, but was not engaged in the practice of dentistry. It may be unfortunate for the appellant that he had not begun the

practice in the state when the law was enacted, and thus have had that evidence of qualification essential to the obtaining of a certificate without a diploma; but, when no more is required of him than is required of all other citizens of the United States proposing to begin the practice within this state, he has no cause to complain. A charge of \$3 is made for a certificate issued to those who were practitioners when the law was passed; and, while a charge of \$10 is made for a certificate to those who are not engaged in the practice, and who presented diplomas as evidence of their fitness, the charges are trifling, and in each case it is probably commensurate with the trouble and expense of attending the examination, and the granting of the certificate. Those who were practicing when the law was passed obtained a certificate upon the mere registration of their names in a book provided by the board of examiners, but in the other cases the board is required to examine the validity of the diplomas offered as evidence of the qualification of the applicant; and the increased charge for a certificate in such case probably corresponds with the increased trouble and expense in making the inquiry. The difference in the charge is not an undue discrimination, and is not invalid, for the same reason that the exemption of those engaged in the practice from the requirement of the diploma does not render the act invalid.

The cited case of *State v. Hinman*, 18 Atl. Rep. 194, is not an authority against the validity of our statute. The New Hampshire statute which was there held to be invalid was an act regulating the practice of dentistry. It required a dentist practicing in one part of the state to undergo an examination, and to pay a certain license fee, while dentists residing elsewhere in the state were exempted from these requirements. There was a discrimination between persons residing and practicing in the state, founded solely upon the accidental circumstance of residence, or a change of residence, and for that reason was held to be unconstitutional and void. No such discrimination is found in our statute, and we do not think that it is repugnant to the federal constitution upon either of the grounds relied upon; and therefore the conviction of the defendant must stand. Judgment affirmed. All the justices concurring.

(44 Kan. 261)

#### STATE V. LADENBERGER.

(*Supreme Court of Kansas. July 8, 1890.*)

#### INTOXICATING LIQUORS—ILLEGAL SALES—INFORMATION.

Where an information for unlawfully selling intoxicating liquors in violation of the prohibitory liquor law is verified by the county attorney according to the best of his knowledge and belief, and no motion is made to set aside the warrant under which the defendant was arrested, it is error for the district court to quash the information and dismiss the case upon the ground that the oath to the information does not state that the allegations and facts therein contained are true. *State v. Blackman*, 32 Kan. 615, 5 Pac. Rep. 173; *State v. Clark*, 34 Kan. 289, 8 Pac. Rep. 528.

(*Syllabus by the Court.*)

Appeal from district court, Barton county; J. H. BAILEY, Judge.

*L. B. Kellogg*, Atty. Gen., and *E. C. Cole*, for the State. *Diffenbacher & Banta*, for appellee.

HORTON, C. J. An information, containing one count, was filed by the county attorney of Barton county against Frank Ladenberger for selling intoxicating liquors in violation of the prohibitory liquor law. The information was verified by the county attorney according to the best of his knowledge and belief. There was also filed with the information an affidavit of R. Wehr stating that, at the time and place alleged in the information, he purchased intoxicating liquors of the defendant as a beverage, and paid for the same. The defendant was arrested, and afterwards filed a motion to dismiss the case, and for his discharge, upon the following grounds: "(1) Because there is no information on file in this court charging the defendant with any offense; (2) because the pretended information filed in this cause does not state facts sufficient to charge the defendant with a public offense; (3) because the pretended information was not verified as required by law." Upon the hearing of the motion the district court sustained the same. The state appeals to this court.

The information states an offense. The verification of the county attorney is sufficient for every purpose, except merely for the issuing of a warrant. *State v. Blackman*, 32 Kan. 615, 5 Pac. Rep. 173; *State v. Clark*, 34 Kan. 289, 8 Pac. Rep. 528; *State v. Brooks*, 33 Kan. 708, 7 Pac. Rep. 591. No motion was made to set aside the warrant. The attack of the defendant was upon the information,—nothing else. The judgment of the district court must be reversed. All the justices concurring.

(44 Kan. 94)

#### FORBES V. HIGGINBOTHAM.

(*Supreme Court of Kansas*. May 10, 1890.)

INDIANS—CONVEYANCES—BONA FIDE PURCHASERS.

1. The dates of a certain deed had first been written April 30, 1867, and afterwards changed to August 30, 1868. If the deed was executed on April 30, 1867, it was valid, but if not executed until August 30, 1868, it was void as to one of the grantors, for prior to that time he died. The trial court found that the deed was executed on April 30, 1867. *Held*, that the evidence is sufficient to sustain such finding.

2. The grantors in the above mentioned deed were Pottawatomie Indians, and the land conveyed by them was Indian land, and the grantees mentioned in such deed afterwards conveyed the land to the defendant in this case, who was an innocent and bona fide purchaser of the land for a valuable consideration, and who afterwards took the actual possession of the property, and held the quiet and undisturbed actual possession thereof for more than three years, and made lasting and valuable improvements thereon. *Held* that under section 3, c. 79, of the laws of 1874, (Gen. St. 1889, par. 3305) the defendant has obtained the full, complete, and absolute title to the property.

(*Syllabus by the Court*.)

Error from district court, Shawnee county; JOHN GUTHRIE, Judge.

This was an action in the nature of ejectment, brought in the district court of

Shawnee county on August 4, 1885, for the recovery of certain land hereafter described. The case was tried before the court below without a jury, and the court made the following findings and conclusions of fact and law, and rendered the following judgment:

"*Findings of Fact*. *First*. That Je-Mahn and Louisa Je-Mahn were husband and wife, and both of them were members of the Pottawatomie tribe of Indians. *Second*. That said Je-Mahn and wife had born to them two children, named 'See-bus-sum' and 'Pee-quash-ken.' *Third*. That prior to 1867, the N. E.  $\frac{1}{4}$  of sec. 7, town 11, range 15, in Shawnee county, Kansas, was allotted to Je-Mahn, as one of the allottees of the Pottawatomie tribe of Indians, under a treaty with the United States and said tribe of Indians. *Fourth*. That on the 30th day of April, 1867, Je-Mahn and Louisa, his wife, executed a warranty deed to the land described in the plaintiff's petition to George L. Young and Josetta Young, his wife, and acknowledged the same before A. R. BUTTON, justice of the peace; that this deed was duly filed for record in the office of the register of deeds of Shawnee county, Kansas, on the 17th day of September, 1868. *Fifth*. That on the 30th day of April, 1867, George L. Young and Josetta Young, his wife, executed to the defendant, John Higginbotham, a warranty deed to the land described in the plaintiff's petition, and acknowledged the same before A. R. BUTTON, a justice of the peace, which deed was duly filed for record in the office of the register of deeds of Shawnee county, Kansas, the same day. *Sixth*. That on the 21st day of August, 1868, a patent was issued by the government of the United States to Je-Mahn for the N. E.  $\frac{1}{4}$  of section 7, township 11, range 15, in Shawnee county, Kansas; that said patent was issued in pursuance of the allotment previously made to the said Je-Mahn; that the patent was filed for record in the office of the register of deeds of Shawnee county, Kansas, on the 17th day of September, 1868. *Seventh*. That Je-Mahn died in the fall of 1867, and left surviving him a wife and two children, Louisa, his widow, and See-bus-sum and Pee-quash-ken, his two children. *Eighth*. That on the 10th day of April, 1868, Louisa, widow of Je-Mahn, married Eli Shearer in Shawnee county, Kansas. *Ninth*. That on the 23d day of July, 1880, Louisa Shearer executed to the defendant, John Higginbotham, a warranty deed for the premises described in the plaintiff's petition, which deed was filed for record on the 3d day of September, 1880. That the Louisa Shearer mentioned in the deed was formerly Louisa Je-Mahn. *Tenth*. That on the seventh day of July, 1880, N. M. Juneau was appointed by the probate judge of Shawnee county, Kansas, guardian of See-bus-sum and Pee-quash-ken, minor heirs of Je-Mahn, deceased. *Eleventh*. That on August 2, 1880, N. M. Juneau, guardian, as aforesaid, of See-bus-sum and Pee-quash-ken, minor heirs of Je-Mahn, deceased, sold the undivided one-half of the land described in plaintiff's petition to the defendant, John Higginbotham, for the sum of \$495, having first obtained the necessary and proper authority from the probate



court of Shawnee county to sell the same as such guardian; that the plaintiff, Robert Forbes, was present at such sale and bid upon said land at said guardian's sale; that the sale so made was reported to the probate court, and said sale so made was confirmed on August 21, 1880; that N. M. Juneau, as such guardian, in obedience to the order of said probate court, executed to the defendant, John Higginbotham, a guardian's deed for the undivided one-half of the premises described in the plaintiff's petition, which deed was filed for record in the register of deeds' office on August 21, 1880; that the two minor children mentioned in this deed were the two children of Je-Mahn, deceased. *Twelfth.* That under and by virtue of the said deed executed by Je-Mahn and wife to George L. Young and Josetta Young, and a deed from Young and wife to the defendant, John Higginbotham, and the deed from Louisa Shearer to the said Higginbotham, and the said guardian's deed, executed as aforesaid, the said John Higginbotham, in the fall of 1880, took actual possession of the land described in plaintiff's petition, and fenced the same in the fall of 1880, and broke about 100 acres, and that during all of the time since the fall of 1880, the defendant, John Higginbotham, has been in the quiet and undisturbed actual possession of all of said land; that the said John Higginbotham then took possession of the land in good faith, and believing that he was the owner thereof; that he bought the same for a valuable consideration, and in good faith. *Thirteenth.* That the petition in this case was filed and this suit commenced on the 4th day of August, 1885. *Fourteenth.* That on the 8th day of May, 1880, Louisa Shearer and Eli Shearer executed to Robert Forbes, plaintiff, a warranty deed to the land described in the plaintiff's petition, which deed was duly filed for record in the office of the register of deeds of Shawnee county on the 24th day of May, 1880. *Fifteenth.* That on the 21st day of May, 1880, Peter Wash-ko-no-bee and See-bus-sum and William E. Thompson executed to Robert Forbes a warranty deed to the land described in the plaintiff's petition, which deed was duly recorded on the 24th day of May, 1880. *Sixteenth.* That at the time of the execution of the deed by Peter Wash-ko-no-bee, See-bus-sum, and Wm. E. Thompson, and dated May 21, 1880, the said Peter Wash-ko-no-bee and See-bus-sum were minors, of the age at that time of from 14 to 16 years, and signed their names by marks. *Seventeenth.* That after N. M. Juneau had been discharged by the probate court as guardian, Robert Forbes, the plaintiff in this case, was appointed guardian by said court of the two minors of Je-Mahn, namely, See-bus-sum and Pee-quash-ken, on the 19th day of January, 1881, and on the 16th day of March, 1881, commenced suit in the district court of Shawnee county, Kansas, as guardian of said minors, to set aside said guardian's deed made by Juneau to the defendant, John Higginbotham, and on the — day of —, 188—, said suit was decided on demurrer to plaintiff's petition in favor

of said John Higginbotham, and judgment rendered accordingly. *Eighteenth.* That at the time of the commencement of the suit by Robert Forbes, as guardian, against John Higginbotham, he had the deed upon which he now seeks to recover the one-half of this land. *Nineteenth.* That said Peter Wash-ko-no-bee and See-bus-sum were the children of said Je-Mahn and his wife, Louisa Je-Mahn, now Louisa Shearer, and the heirs of Je-Mahn, and on the death of Je-Mahn one undivided half of the land in controversy descended to said two children, and the other one undivided half of said land descended to their mother, Louisa Shearer, widow of Je-Mahn. *Twentieth.* That all of the deeds and conveyances heretofore referred to were duly acknowledged and delivered before being recorded. *Twenty-First.* That when N. M. Juneau, guardian of See-bus-sum and Pee-quash-ken, filed his petition in the probate court praying for an order of said court to sell the undivided one-half of the premises in controversy as the property of said minor children, referred to in finding of fact No. 11, the said guardian caused the notice of the time and place of hearing said petition to be given as herein-after stated. Said petition of said guardian for such order of sale was filed in the probate court July 17, 1880, and, among other proceedings of said court, the following were had, viz.: [Here follows various proceedings.] That such further proceedings were had that such real estate in controversy was sold and conveyed by such guardian according to the forms of law to the defendant, John Higginbotham, as found in conclusion of fact No. 11, aforesaid. *Twenty-Second.* That the plaintiff and defendant are both white men, and are not, nor ever were, members of the tribe of Pottawatomie Indians.

*"Conclusions of Law. First.* That the plaintiff's cause of action did not accrue within three years before the commencement of this action, and that this action is within section three of an act entitled 'An act to protect bona fide purchasers of Indian lands,' approved March 7, 1874, and plaintiff's cause of action is barred by said act of the legislature. *Second.* That the issues are with the defendant, and said defendant is entitled in law to judgment against the plaintiff for his costs paid, laid out, and expended in this action.

*"Judgment.* It is therefore, on consideration, ordered, adjudged, and decreed by the court that the plaintiff take nothing by his said action, and that the defendant have and recover of and from the plaintiff his costs paid, laid out, and expended, taxed at \$——."

The plaintiff below, as plaintiff in error, brings the case to this court for review.

Wm. P. Douthitt and W. C. Webb, for plaintiff in error. Hazen & Isenhurt, for defendant in error.

VALENTINE, J., (after stating the facts as above.) The first and principal question involved in this case is whether the fourth finding of fact made by the court below is sustained by sufficient evidence or not. On the trial of the case a deed of conveyance was introduced in evidence,

answering to the description of the deed described in the fourth finding of fact in every particular, except that *prima facie* it purports to have been executed on August 30, 1868, instead of April 30, 1867. If such deed was in fact executed on April 30, 1867, then the finding is correct, and no valid objection can be urged against the regularity or validity of the deed as a deed. But if it was executed on August 30, 1868, then it must have been a forgery so far as one of the grantors, Je-Mahn, is concerned, for he was dead at that time, although it may have been the valid deed of, and may have been executed and acknowledged by, the other grantor, Louisa Je-Mahn, for she was still alive, and as competent to execute a deed as she ever was. Both this deed and the deed described in the fifth finding of the court below, to-wit, a deed executed for the same land on April 30, 1867, by the grantees mentioned in the first deed, George L. Young and Josetta Young, his wife, to John Higginbotham, were introduced in evidence, and also A. R. BUTTON, the justice of the peace before whom these deeds were acknowledged, was introduced as a witness on the trial. So, also, was Higginbotham. But for some unexplained reason neither Young nor his wife nor Louisa Je-Mahn nor Ben Payne or B. T. Payne was introduced as a witness in the case by either party, nor was the testimony of any one of them given on the trial. Payne was the person who wrote these deeds or did the writing in filling them up, and who witnessed the Je-Mahn deed, and was present when it was acknowledged. The evidence introduced on the trial shows that where the dates occurred in the Je-Mahn deed such dates were originally April 30, 1867; but they had afterward been erased, or partially erased, and the dates August 30, 1868, were written over them. The plaintiff claims that the dates were altered before the execution of the deed, and therefore that it was not executed until August 30, 1868, and therefore that the deed was necessarily void and a forgery as to Je-Mahn, who was then dead. He also claims that it was a forgery as to Louisa Je-Mahn, but there is no reason why it should be considered a forgery as to her except Je-Mahn's death, and she was then married to Eli Shearer. On the other side, the defendant claims that the deed was properly executed on April 30, 1867, and that all the changes made in the deed were made after its execution and delivery to the Youngs, and after Young and wife's deed to Higginbotham had been executed and delivered to him. There is no positive evidence as to when these changes were made, and therefore the whole thing is left for inference from the surrounding facts and circumstances. That the grantees mentioned in this deed, George L. Young and Josetta Young, on April 30, 1867, executed their deed for the same land to Higginbotham cannot be questioned; and it would hardly seem probable that Higginbotham would want such a deed, unless he believed that Young and wife had at that time, or prior thereto, received their deed from Je-Mahn and wife. Higginbotham's deed from the Youngs would be worth nothing except

for the Je-Mahn deed to the Youngs. Both of these deeds were introduced in evidence, and the court below had an opportunity of seeing them. The court could see whether the same blanks were used for both deeds or not; whether the same person had written or filled up both deeds or not; whether the two deeds had been written or filled up from the same ink or not. In the deed executed by George L. Young and wife they wrote their own signatures. In the deed executed by Je-Mahn and wife their marks only were made. Both deeds were acknowledged before A. R. BUTTON, a justice of the peace of Shawnee county, and he wrote his own signature. The court below had an opportunity of seeing whether all these signatures and marks were made from the same ink or not; and also whether the ink used in making these signatures and marks was the same kind of ink that was used in filling up the deeds originally, or in making the changes afterwards. If the changes were made by using a different kind of ink from that used in making these signatures and marks, the inference would be strong that the changes were made after the execution of the deeds. If Je-Mahn had been living on August 30, 1868, the presumption would be that the changes were made before the execution of the deed; but there is also a presumption, and a strong presumption, in favor of the validity and truthfulness of the acknowledgment attached to the deed. In the acknowledgment, the justice of the peace, BUTTON, certifies: "Personally came Je-Mahn and his wife, Louisa, to me personally known to be the identical persons," etc., who executed the deed. Now as Je-Mahn was dead on August 30, 1868, but was living on April 30, 1867, there would be a strong presumption on that account, and in favor of the validity and truthfulness of the acknowledgment, that the acknowledgment was in fact taken on April 30, 1867, and not on August 30, 1868. Besides, the justice of the peace had seen Je-Mahn, or "Steamboat," as he was sometimes called, and also slightly knew his wife, Louisa, and probably could not have been mistaken as to their identity. It would seem strange that he would or could have been mistaken, on August 30, 1868, as to Louisa, and should have taken an acknowledgment from some other woman, who was there pretending to represent Louisa, when in fact he had only the April before performed the marriage ceremony in marrying her to Eli Shearer. While the justice's memory upon this whole subject is not very strong, yet he believes that Je-Mahn and Louisa Je-Mahn did in fact appear before him when the acknowledgment was taken; and, as before stated, this could not have so occurred, so far as Je-Mahn is concerned, on August 30, 1868, but it could have so occurred on April 30, 1867. As we understand the case, it could be of but little benefit to the plaintiff to suppose that Louisa and some other person pretending to be Je-Mahn appeared before the justice of the peace on August 30, 1868; for at that time, as Je-Mahn was dead, and as she was his wife at the time of his death, she took one undivided half of his real estate, and could convey such

undivided half of the property. As to the other half, see finding of fact No. 11.

It does not seem that the Pottawotamie Indians are very particular with reference to names. Louisa's original name was Louisa Pa-ya. She married a man by the name of Wash-ko-no-bee. He died, and then she married Je-Mahn. He died, and then she married Shearer. Yet one of her sons, born while she was the wife of Je-Mahn, executed a deed to the plaintiff, Forbes, while she was the wife of Shearer, executing such deed in the name of Peter Wash-ko-no-bee, the surname of his mother's first husband, and for land in which he could have no possible interest, unless he was the son of Je-Mahn. The theory of the plaintiff is that the deed from Je-Mahn and wife to Young and wife is an absolute forgery. But, if so, why did the persons forging the same in 1868 first use the dates April 30, 1867? and why did they afterwards change these dates to August 30, 1868? Unquestionably Ben Payne, or B. T. Payne, filled up the deed claimed to be a forgery, and also witnessed its execution, and he possibly also filled up the deed executed by Young and wife to Higginbotham. Now what possible motive or interest could Payne have had in forging the deed in question? Besides, it appears that at the time the deed was acknowledged Young and Payne and several others were present. Now if the deed was actually a forgery, why should the parties forging the same have obtained its acknowledgment before such a number of people? Would they not have attempted to accomplish this result by more secret methods? Probably the true theory of the case is this: The two deeds were executed and acknowledged at the same time. They were first filled up at the office of Payne or Young, and by Payne, and then all the parties—Payne and Young and wife, and Je-Mahn and wife, and possibly Higginbotham, and perhaps others—went before the justice of the peace, and then and there both deeds were signed and acknowledged, and the acknowledgments certified to by the justice and the deeds delivered. The one to Higginbotham was probably at once delivered to him, or, if he was not present, then sent to him; and the one executed to Young and wife was probably then delivered to them, and retained by them until after August 21, 1868, when the patent was issued to Je-Mahn, and then Young or some other person thought that the deed executed to Young and wife should bear date subsequent to the date of the patent, and changed the dates of the deed so as to make it appear that it was executed after the date of the patent, and then both the deed and the patent were filed with the register of deeds for record at the same time, to-wit, on September 17, 1868. Higginbotham never received this deed from Je-Mahn, and wife to Young and wife until after it was recorded, and he had nothing to do with making any of the changes. It does not appear from anything in the case that any person had any real interest in making these changes unless possibly Young and wife had. It may have been supposed that the deed would not be good

unless it was dated subsequently to the date of the patent, and that unless the deed was good Young and wife would be liable on their covenants contained in their deed to Higginbotham, for their deed to Higginbotham was a general warranty deed, with all the usual covenants. But as Higginbotham had already purchased the property from Young and wife, and had obtained his deed from them, any change in the deed from Je-Mahn and wife to Young and wife after that time, and without Higginbotham's consent or knowledge, could not affect Higginbotham's title. Presumptively Higginbotham was an innocent, honest, and *bona fide* purchaser of the property at the time he obtained his deed from Young and wife. The consideration expressed in that deed is \$600, and there is nothing in all the case tending to show that such was not the real consideration. Higginbotham also took the actual possession of the property in controversy in the fall of 1860, and had the quiet and undisturbed actual possession thereof up to the commencement of this action, which was on August 4, 1885, and during that time he made lasting and valuable improvements thereon. This we think unquestionably gave to him the absolute title to the property under section 3, c. 79, Laws 1874, even if he did not have such title before. Gen. St. 1889, par. 3805. This section relates to titles procured to Indian lands by a purchaser in good faith for a valuable consideration from the Indian himself, or from his heirs or his or their grantees, and the section reads as follows: "Sec. 3. That three years' quiet, undisturbed, actual possession of any such lands by any purchaser thereof, in good faith, as aforesaid, under color of title, shall be a complete bar to any action for the recovery of said lands by the holders of any adverse title to the same, and such possession shall be deemed to vest in the possessor a full and complete title to the same in fee-simple." After the patent was issued by the United States, and after all the title had passed from the United States to Je-Mahn's heirs or grantees, then the limitation for the commencement of actions contained in the aforesaid section had full opportunity to operate, provided, of course, that the purchaser took the actual possession of the property; and Higginbotham, in this case, did take the actual possession of the property in 1860, and thereby brought this limitation into active operation, and it so operated before this action was commenced as to fully and completely bar all action founded upon any adverse title. This view in no way conflicts with the view taken in the case of McGannon v. Straightlege, 32 Kan. 524, 4 Pac. Rep. 1042.

It is perhaps unnecessary to extend this opinion further, for what we have already decided will give to Higginbotham the title to the property in controversy, and will affirm the judgment of the court below. But Higginbotham has other and further muniments of title. He has the deed of Louisa Shearer, formerly Louisa Je-Mahn, executed on July 23, 1880, and also the deed of the guardian of the two children of Je-Mahn, executed on August

21, 1880, and he took the actual possession of the property under these two deeds as well as under the deeds from Je-Mahn and wife to Young and wife, and from Young and wife to himself. The judgment of the court below will be affirmed. All the justices concurring.

(44 Kan. 68)

SOUTHERN KAN. RY. CO. v. GOULD.

(Supreme Court of Kansas. May 10, 1890.)

ACCOUNT STATED.

Where a claim or demand for money arises out of contract, either express or implied, and is for something furnished or performed by one party for another, but is not founded upon a promissory note or other instrument in writing, and a statement of such claim or demand is made out in detail and in writing by the claimant or demandant, and presented to the other party, such statement constitutes an account, within the meaning of section 84 of the justices' act, and section 108 of the Civil Code.

(Syllabus by the Court.)

Error from district court, Sumner county; J. T. HERRICK, Judge.

George R. Peck, A. A. Hurd, and Robert Dunlap, for plaintiff in error. Ray & Neustadt, for defendant in error.

VALENTINE, J. This was an action brought before a justice of the peace of Sumner county, by A. C. Gould, against the Southern Kansas Railway Co., in which action the plaintiff filed the following bill of particulars, omitting title and signature, to wit: "The plaintiff, A. C. Gould, states that he is a *bona fide* resident of the state of Kansas, and has a family which he supports wholly by his wages or salary earned from his personal services as brakeman, in which capacity he has been working for the defendant for four months last past, which defendant is a corporation doing business by virtue of and under the laws of the state of Kansas; that said wages, when earned, are necessary for the maintenance and support of his family; that the defendant is indebted to the plaintiff in the sum of sixty dollars and sixty cents for services rendered as brakeman at the special instance and request of the defendant for the month of January, 1887, and ten days in the month of February, 1887, at fifty-five dollars per month, making a total of sixty dollars and sixty cents, which sum is just, due, and unpaid, and which defendant refuses to pay, although often requested to do so. Wherefore plaintiff prays judgment against the defendant for the sum of sixty dollars and sixty cents, and for all costs." This bill of particulars was duly verified by the oath of the plaintiff. No verified denial, nor indeed any denial, was ever filed in answer to the plaintiff's bill of particulars. Upon this bill of particulars the justice of the peace rendered judgment in favor of the plaintiff, and against the defendant, for the amount claimed by the plaintiff; and the defendant appealed to the district court, where a like judgment was rendered. When the case came on for trial in the district court, a jury was waived, and the plaintiff, without introducing any evidence, moved the court orally for a judgment in his favor for the amount

claimed in his bill of particulars. This motion was sustained by the court, and judgment was rendered accordingly, the defendant excepting. A motion was then filed by the defendant to set aside the judgment, and for a new trial, which motion was overruled; and the defendant excepted, and then, as plaintiff in error, brought the case to this court, making the plaintiff below the defendant in error.

The only question involved in this case is whether the bill of particulars of the plaintiff states an account within the meaning of section 84 of the justices' act, and section 108 of the Civil Code. These two sections are substantially the same. Section 84 of the justices' act reads as follows: "Sec. 84. In all actions, allegations of the execution of written instruments, and indorsements thereon, of the existence of a corporation or partnership, or any appointment or authority, or the correctness of an account duly verified by the affidavit or affirmation of the party, his agent or attorney, shall be taken as true unless the denial of the same be verified by the affidavit of the opposite party, his agent or attorney." The word "account" has various meanings and shades of meaning, and is used in various ways. Where it is used alone, and without words of limitation, extension, qualification, or explanation, it is almost equivalent to the word "claim" or "demand;" but the word is generally so used that it can be known precisely what is meant by it. Among others, we have accounts, mutual accounts, book accounts, bank accounts, long accounts, open accounts, running accounts, accounts current, accounts closed, accounts rendered, and accounts stated. The words "an account" are used in section 84 of the justices' act, and the words "any account" are used in section 108 of the Civil Code. These words are as broad and comprehensive as they well could be, and there do not appear to be any other words in these sections limiting their signification. There are other statutes in which the word "account" is used. In section 28 of the act relating to counties and county officers, (Gen. St. 1889, par. 1647,) that word is used as the equivalent of the word "claim" or "demand;" for the word in that section includes every kind of claim or demand against a county which could legally be presented to a board of county commissioners for allowance. See, also, Gen. St. 1889, pars. 5953, 6586. Just how the question presented in this case should be decided is not clear, but it is believed by this court that we should give the word "account," as used in the aforesaid sections 84 and 108, its broadest signification. Whenever a suit is brought before a justice of the peace for money, if not brought upon a promissory note, nor upon any other written instrument, it would be said, in nine cases out of ten, that it was brought upon an account; and this although the claim or demand was neither a book-account, nor mutual accounts between the parties. In our opinion, it is not necessary, in order that the claim or demand sued on should be an account, within the meaning of said sections 84 and 108, that it should be a book-

opinion, whenever any claim or demand for money arises out of contract, either express or implied, and is for something furnished or performed by one party for another, but is not founded upon a promissory note or other instrument in writing, and a statement of such claim or demand is made out in detail and in writing by the claimant or demandant, and presented to the other party, such statement constitutes an account, within the meaning of section 84 of the justices' act, and section 108 of the Civil Code. We think this proposition might, perhaps, be enlarged or varied in its terms so as to comprehend still other particulars, and still be correct. We have made the proposition, however, just broad enough to cover the present case; and, while we have some doubts as to its correctness, yet we think it is correct. Of course, the defendant below had the right, in both the justice's court and the district court, to introduce evidence to prove any set-off or counter-claim which it might have had; but no such question was raised in either of such courts, nor has any such question been raised in this court. We suppose that the defendant did not have any set-off or counter-claim to present in any court. The judgment of the court below will be affirmed. All the justices concurring.

(44 Kan. 411)

**McALPINE v. POWELL.**

(Supreme Court of Kansas. July 8, 1890.)

**HOMESTEAD—CONVEYANCE—RECOVERY—ESTOPPEL—EVIDENCE.**

1. When the owner of a tract of land in Wyandotte county, occupied by his family, exchanges it for a tract of land in Woodson county, and he and his family voluntarily relinquish the possession of it in pursuance of the terms and conditions of the exchange, that are well known to his wife, and they all move to Woodson county and take possession of the land conveyed to them by the exchange, and remain in possession of it and enjoy its benefits for years, and some years after the death of the husband, and after the wife acquired title to the Woodson county land, and sold it and received and enjoyed the proceeds of the sale, she commences her action in ejectment to recover possession of the Wyandotte land, it is error for the trial court to instruct the jury at the trial of the action of ejectment "that the only question to decide in this case is whether the plaintiff did in fact execute and acknowledge the deed from Daniel Powell and Mary A. Powell, dated January 23, 1875; and if you find that the plaintiff did not execute and acknowledge said deed, you will find for the plaintiff." And it is error for the trial court to exclude from the jury evidence tending to show that the wife had knowledge of the terms and conditions of the exchange; that she assented thereto; that she voluntarily relinquished possession of the Wyandotte county land; and that she received and enjoyed the benefits of the exchange.

2. At the trial of such an action it is competent for the defendant below to prove every act and declaration of the plaintiff that tends to show that she is equitably estopped from now claiming an interest in the Wyandotte county land.

3. The facts of this case, as established at the trial, do not justify the application of those strict rules governing the alienation of homesteads to the conveyance made by Powell to Bartlett to complete the exchange of the tracts of land.

(Syllabus by Simpson, C.)

Commissioners' decision. Error from district court, Wyandotte county; O. L. MILLER, Judge.

James M. Mason, for plaintiff in error.

v.24p.no.6—23

*Hutchings & Kephling*, for defendant in error.

**SIMPSON, C.** This action was commenced in the district court of Wyandotte county, February 8, 1886, under section 595, Civil Code, by Mary A. Powell against Nicholas McAlpine, to recover the possession of one undivided half of 10 and a fraction acres of land. Prior to the 15th day of January, 1875, Daniel Powell, the husband of the plaintiff below, owned and occupied with his family the certain 10 acres and a fraction which is the subject of this controversy. Besides himself and wife, the family consisted of their sons, Joseph, (since dead,) Alexander, James, and Thomas, Powell. Of these four sons, named in the order of their birth, Thomas, the younger, was about 17 years old at the date above mentioned, to-wit, January 15, 1875. According to the theory of the plaintiff below,—and the evidence she offered tended strongly to support it,—Mary A. Powell left Wyandotte county on the 15th day of January, 1875, for Woodson county, to reside on a tract of land, arrived there in due time, took possession of it, and lived thereon for years. This land in Woodson county was obtained by Daniel Powell by an exchange of the 10 and a fraction acres in Wyandotte county with one A. B. Bartlett for 80 acres in section 9, township 25, range 15, in Woodson county. Bartlett conveyed the 80 acres, and gave some money in addition for the land in controversy. The Powells lived on the land in Woodson county for about 12 years, the old man dying in 1882, and finally sold it. A title to a part of this land was in Mary A. Powell, and she enjoyed the benefits of all the land, knowing that it came to them by the exchange with Bartlett. She avers that she never signed or acknowledged a conveyance of the 10 and a fraction acres to Bartlett. It is on this theory that she brought the action, and that it was tried in the court below. It was claimed that the property in Wyandotte county was her homestead, and that she never gave her consent to its alienation, and the trial court held strictly on that question that the joint consent of the husband and wife to an alienation of their homestead consists in a deed signed by them, at the same time and before the same officer, and duly acknowledged. At the trial the plaintiff in error offered a deed that purported to be signed and acknowledged by Daniel and Mary A. Powell. This deed, she testifies, she never did sign and execute. It was dated on the 23d day of January, 1875, and she states that on that day she was in Woodson county, or on her way there, to take possession of the land traded to them by Bartlett. The whole theory of her case, as tried in the court below, (and there was evidence to sustain it,) was that at the time this deed purported to be executed by her she was not in Wyandotte county, but in Woodson county, or on her way there. The trial court instructed the jury "that the only question to decide in this case is whether said plaintiff, Mary A. Powell, did in fact execute and acknowledge the deed from Daniel Powell and Mary A. Powell, dated January 23, 1875; and if you find that the plaintiff did not execute

and acknowledge said deed, you will find for the plaintiff." During the trial the plaintiff in error offered to prove what the plaintiff below said about the exchange of lands with Bartlett; from whom the title and possession of the 80 acres in Woodson county had been obtained; about the Powells delivering up the possession of the land in controversy to Bartlett; about a team being turned over to Powell in part consideration of the exchange. But all of this was ruled out, and the court excluded from the jury a large amount of testimony tending to show that, at and before the exchange of lands with Bartlett, Mary A. Powell knew of the exchange, expressed satisfaction with it, acted in accordance with its terms, and enjoyed for years all the benefits of the Woodson county lands, with a full knowledge of all the terms and conditions of the exchange. All this evidence was excluded by the trial judge, and the defendant below not allowed to present the details of the exchange and Mrs. Powell's knowledge of them, and her satisfaction with them. We think this case was tried on the wrong theory, and that the exclusion from the jury of all these things was error. According to Mary A. Powell's own statement she had abandoned her homestead in Wyandotte county and taken another in Woodson county, at the date of the execution of this deed, and the case does not call for the application of the strict rules that are so often invoked in the alienation of a homestead. At the exact moment of the execution of the deed from her husband to Bartlett she was in the possession of a homestead in Woodson county, and therefore the controlling question in the case is not whether she signed that deed, or whether it was executed with all the formalities that are invoked by an attempt to convey away a homestead, but whether or not she had full knowledge of the exchange of lands by Bartlett and her husband, and tacitly, if not expressly, assented thereto, and received and enjoyed the benefits of that exchange, and is now equitably estopped from claiming an interest in the Wyandotte county property. It can very safely be asserted that she could not enjoy two homesteads, one in Wyandotte county and another in Woodson county. If she and her husband and their family were in the actual possession of a piece of land in Woodson county, living thereon, occupying it at the date of the execution of their deed to the Wyandotte property, the land so occupied by them and their children in Woodson was their homestead. It is clear from the record that the Woodson county land was their homestead until about the time this suit was brought. According to her own sworn statement she voluntarily removed to Woodson county, and hence necessarily abandoned her homestead in Wyandotte county. There can be no possible foundation for a claim of homestead on the Wyandotte county land under all the facts recited in this record. In the years intermediate the execution of the deed and the institution of this action Daniel Powell, one of the grantors, died, the notary before whom the deed was acknowledged died, and A. B. Bartlett, the man who

made the exchange of property with Powell, died. Under these circumstances, the admission of facts tending to show Mrs. Mary A. Powell's knowledge of the exchange, her participation in its benefits, and all her acts and expressions with reference to it, seems to us to be so imperatively demanded in the furtherance of justice that grave errors were committed by the trial court. The only theory upon which they could in any aspect of the case be excluded was that adopted by the trial court. If Mrs. Mary A. Powell had resisted the specific performance of the exchange, or had retained possession of the Wyandotte county property, and repudiated the attempt of her husband to alienate it, then the ruling below, excluding these various facts, might be sustained. The fundamental error that entails a succession by excluding a proof of her knowledge and acquiescence in the exchange is the adoption by the court of the theory of the defendant in error that the conveyance of the land by Daniel Powell to Mrs. Bartlett must be viewed in the light of those strict rules that apply to the alienation of a homestead. For this error, and the others generated by it, the judgment of the district court of Wyandotte county should be reversed and a new trial granted.

PER CURIAM. It is so ordered; all the justices concurring.

(44 Kan. 310)

#### STATE V. WAIT.

(Supreme Court of Kansas. July 8, 1890.)

#### LIBEL AGAINST ATTORNEY—BRIBING JURY—JUSTIFICATION—EVIDENCE.

1. A newspaper containing an alleged libelous article was published in Lincoln county, but held that sufficient evidence was introduced to sustain a finding by the jury that the newspaper and the alleged libelous article were also published in Saline county.

2. An article published in a newspaper concerning an attorney at law, which would tend to injure his character and reputation as an honest and honorable attorney at law and citizen, would, like any similarly injurious article published against any other person, be *prima facie* libelous; and the fact that it had some connection with judicial proceedings, though not a report of any portion thereof, would not render it privileged or conditionally privileged. Nor would the burden in a criminal prosecution, founded thereon against the publisher for libel, be devolved upon the state to prove express malice, but malice would be presumed, and nothing would be a complete defense to the action except a showing that the alleged defamatory matter was true in fact, and published for justifiable ends; and such a showing would, under the constitution and statutes of Kansas, be a complete defense, and in such a case the supposed libelous matter would not be libelous.

3. A part of the alleged libelous article was that the person alleged to be libeled who was an attorney at law assisting in the defense in a criminal prosecution for murder, had at the time no possible hope of being able to clear his client with a fair jury, but his only hope lay in a packed jury, and that his manner of conducting the trial showed that he relied upon hanging the jury by a "fixed man," or, in other words, by a bribed juror; and evidence was introduced tending to prove these matters; and the defendant in the libel case then, for the purpose of showing that one of the jurors was "fixed" or bribed, and that he did in fact hang the jury in the murder case, offered to introduce other evidence to show the conduct of this juror in the jury-room while the jury were deliberating upon their verdict in the murder case,

and what he then and there said and did, and what he omitted to say and do, and how he voted, and how the other members of the jury voted, and that in fact he did hang the jury, but the court excluded all this evidence. *Held error.*

4. In a criminal prosecution for libel, where the defendant justifies upon the ground that the alleged libelous matter was and is true, and was published for justifiable ends, it is necessary for him to prove, or in some manner to show, only its substantial truth, and that it was published for justifiable ends; and it is not necessary for him to prove or show the truth of any of the alleged libelous matter, except such as would in fact be libelous if not true, and it is not necessary for him to prove or show the truth of even that portion of the alleged libelous matter by a preponderance of the evidence, but only by evidence sufficient to create a reasonable doubt in the minds of the jury. His proof, however, should extend to all the alleged libelous matters that would in fact be libelous if not true.

5. In a criminal prosecution for libel, the court permitted the counsel for the state in his closing argument to read to the jury, from an opinion published in the Supreme Court Reports, statements with regard to certain matters in another criminal case as evidence of certain facts in the libel case. *Held error.*

(*Syllabus by the Court.*)

Appeal from district court, Saline county. Garver & Bond, for appellant. L. B. Kellogg, Atty. Gen., and E. W. Blair, for the State.

VALENTINE, J. This was a criminal prosecution, commenced in the district court of Saline county, in which it was charged upon information that the defendant, Walter S. Wait, published in "The Lincoln Beacon," a weekly newspaper published in the city of Lincoln, in Lincoln county, and having a circulation in Saline county, a libelous article concerning J. G. Mohler, the prosecuting witness. A trial was had before the court and a jury, and the defendant was found guilty, and sentenced to pay a fine of \$10, and the costs of suit, taxed at \$723.25; and from this sentence the defendant appeals to this court. It appears that on January 3, 1888, in Lincoln county, Patrick Cleary shot and killed Jesse Turner; that afterwards he was charged with murder in the first degree, and tried therefor, and convicted of murder in the second degree, and sentenced to imprisonment in the penitentiary for the term of 20 years; that the sentence was afterwards reversed by the supreme court, and a new trial granted, (*State v. Cleary*, 40 Kan. 287, 19 Pac. Rep. 776;) that on May 16, 1889, and succeeding days, he was again tried in the district court of Lincoln county for murder; that during such trial J. G. Mohler, an attorney at law residing in Saline county, assisted in the defense; that on May 29, 1889, the jury retired to deliberate upon their verdict, but, failing to agree, they were discharged on June 1, 1889; that on June 3, 1889, Cleary was taken by a mob in Lincoln county and hung until he was dead; that on June 13, 1889, the present defendant, Walter S. Wait, published in a weekly newspaper edited and published by him in Lincoln county, and known as "The Lincoln Beacon," an article which reads as follows: "Sentimentalists cannot arouse sympathy for Pat Cleary by appealing to the heart, or saying that the murder was committed in self-defense. Pat was a mur-

derer on at least three occasions, was a highway robber plying his vocation from Salina to Denver, and ought to have been killed years ago. \* \* \* Kansas people ought now to be convinced of the necessity of capital punishment. Men commit the most cold-blooded murders imaginable, and, after spending thousands of dollars, a sentence of from three to twenty years is the result. We do not want the legislature abolished until after they pass a suitable law on this subject. \* \* \* Senator Mohler is getting a great deal of free advertising these days. We will have to spring his name as a candidate for the senate, not against Ingalls, but against Burton, if this thing continues."—*Salina Daily Republican*. The number of people in Lincoln county who would have raised a finger to remove Pat Cleary had his attorney been content to have let him serve his first sentence of only twenty years could have been counted on the fingers of one hand. That Pat Cleary is dead can be laid at the door of his attorney, J. G. Mohler, whose insatiable greed to secure not only the last dollar that Pat's family had, but the last penny his relatives and friends had, and also a \$400 judgment covering what they might hereafter earn, must be satisfied. He had no possible hope of being able to clear Cleary with a fair jury. His only hope lay in a packed jury, and his manner of conducting the last trial showed that he relied upon hanging the jury by a 'fixed man.' His effort before the jury was so weak that it was noticed by nine out of ten who heard it. His whole effort was constituted of abuse of the witnesses and Mr. Downey, one of the attorneys for the state. The people felt that it was absolutely necessary that Pat Cleary should be where he could take the lives of no more men; and they would have been satisfied had he been imprisoned for even twenty years, for that would virtually have been a life term. Society would then have been safe from depredations by him. But a mob could not imprison him. They had but one alternative, and Jerry Mohler forced that upon them. If he likes the advertising, he is welcome to it." The newspaper in which this article was published, also had a circulation in Saline county. On June 17, 1889, this present criminal prosecution was commenced in the district court of Saline county, J. G. Mohler being the prosecuting witness. Only that portion of the aforesaid article commencing with the words, "The number of people in Lincoln county," etc., and closing with the end of the article, is complained of. The case was tried in the manner and with the result aforesaid. Section 11 of the bill of rights of the constitution, reads as follows: "Sec. 11. The liberty of the press shall be inviolate, and all persons may freely speak, write, or publish their sentiments on all subjects, being responsible for the abuse of such right; and in all civil or criminal actions for libel the truth may be given in evidence to the jury, and, if it shall appear that the alleged libelous matter was published for justifiable ends, the accused party shall be acquitted." Sections 270, 272, and 275 of the act relating to crimes and punishments (*Gen. St. 1889, para. 2444, 2446, 2449*) read



as follows: "Sec. 270. A libel is the malicious defamation of a person, made public by any printing, writing, sign, picture, representation, or effigy, tending to provoke him to wrath, or expose him to public hatred, contempt, or ridicule, or to deprive him of the benefits of public confidence and social intercourse, or any malicious defamation, made public, as aforesaid, designed to blacken and vilify the memory of one who is dead, and tending to scandalize or provoke his surviving relatives and friends." "Sec. 272. In all prosecutions or indictments for libel, the truth thereof may be given in evidence to the jury; and, if it appears to them that the matter charged as libelous was true, and was published with good motives, and for justifiable ends, the defendant shall be acquitted." "Sec. 275. In all indictments or prosecutions for libel, the jury, after having received the direction of the court, shall have the right to determine, at their discretion, the law and the fact." That portion of section 272 above quoted, requiring the defendant, in order to make a good defense of justification, to prove that the alleged libelous matter was published "with good motives," has been held to be in violation of the constitution, and void. *State v. Verry*, 36 Kan. 416, 13-Pac. Rep. 838.

It is claimed by the defendant that there was no proof of the publication of the aforesaid article in Saline county. The newspaper was published in Lincoln county, and the proof is meager of any publication or circulation thereof by the defendant, or at his instance, in Saline county. We think, however, the evidence was sufficient to go to the jury, and sufficient to sustain a finding by the jury that the article was published in Saline county.

The defendant also claims that the publication of the article belongs to a class which is privileged, or at least conditionally privileged. Now, it is generally true that a newspaper publisher may, without committing libel, publish judicial proceedings, although such proceedings may contain false statements injurious to individual persons. In such a case he merely publishes the proceedings as judicial proceedings, without giving the statements contained therein any credit on his own account, and without reference to whether such statements are true or false; and in such cases he need not publish the entire proceedings, or publish them *verbatim*; but he may publish merely their substance. But this he should do fairly and truthfully. He may also make comments upon the proceedings, but the comments should also be fair, and should be such only as the proceedings themselves, or as the proceedings and the actual extrinsic facts, would fairly warrant. He cannot assume to be true extrinsic defamatory matters which are not true, nor can he assume to be true anything in the proceedings which is still controverted, or which has not yet been judicially determined. To the extent already mentioned, the publication and comments respecting judicial proceedings may go to all persons connected with such proceedings,—to the judges or justices, to the jurors, witnesses, sheriffs, constables,

and bailiffs, and to the parties and their attorneys or counsel. There are also many other kinds of privileged publications or communications, and conditionally privileged publications or communications, including such as have reference to the official conduct of public officers, and to the qualifications and fitness of candidates for public office, etc.; but the matters published in the aforesaid article do not come within any of them. As to candidates for public office, see *State v. Balch*, 31 Kan. 465, 2 Pac. Rep. 609. It is true that the matters published in the aforesaid article had some connection with judicial proceedings, but such matters were not the proceedings themselves, nor were they determined to be true by such proceedings. It is claimed that Mohler relied upon hanging the jury by a "fixed man." This "fixed man" was the juror J. P. Harman, who, it is claimed, was bribed. Now the fixing of this juror, and the procuring of a hung jury by means thereof, was no part of the judicial proceedings. Nor was the procuring of the last dollar that Pat Cleary's family had, and the last penny that his relatives and friends had, and the \$400 judgment covering what they might subsequently earn, any part of the judicial proceedings; neither was the hanging of Cleary, for which it is claimed that Mohler is responsible, any part of such proceedings. Now, upon the theory that these matters as published in the aforesaid article are false, we think they are also libelous, and not privileged or conditionally privileged. *Weeks, Attys.* §§ 136, 137, et seq.; *Odger, Stand. & Lib.* 7, 29, 30, 99, 253, 254; *Newell, Defam.* pp. 184-186, §§ 18-22; *Id.* pp. 544-559, §§ 147-167; *Id.* pp. 580, 581, §§ 19-21; *Townsh. Lib. & Stand.* §§ 230, 252; *Ludwig v. Cramer*, 58 Wis. 193, 10 N. W. Rep. 81; *Hetherington v. Sterry*, 28 Kan. 426. It is claimed, however, that attorneys at law are to some extent public officers, and this for the reason that they are often spoken of as "officers of the court," and therefore it is inferred that false and defamatory matters may be published of and concerning them with impunity, provided, of course, that the publisher does so in good faith. Now an attorney at law is not, except in a very limited and remote sense, a public officer. His business or vocation is to him a private matter. It is the means by which he procures his livelihood, and with reference to it, and to his good character and reputation, he is treated just as other persons are treated with reference to their private business or vocation and their character and reputation. He is treated in these respects just as a physician or farmer or artisan or mechanic would be treated. The authorities seem to universally sustain this view, and not a single authority, so far as we are informed, can be found that promulgates or enunciates any different doctrine. It is also stated that the public is vitally concerned in knowing the truth with reference to the conduct of attorneys at law, and therefore it is inferred that a newspaper publisher may publish falsehoods of a defamatory character concerning attorneys at law with impunity, provided, of course, that the newspaper pub-

lisher does so in good faith. This is hardly the law. The authorities seem universally to lay down the doctrine that a newspaper publisher has no greater right to publish falsehoods of a defamatory character concerning attorneys at law, or concerning any one else, than any other person has. All are equally required to tell the truth. We have already stated that newspaper publishers have a right to publish judicial proceedings, and to make fair comments thereon; but, when they resort to extrinsic matters, they should be sure that such extrinsic matters are not false and defamatory. Innocent persons should not be defamed by falsehoods, nor should the public be deceived by the same. Each is entitled to demand that whatever is published should be the truth. The public is certainly interested in knowing the conduct of attorneys at law as well as of all other persons whose acts or conduct might in any manner affect the public; but the vital interest of the public in this respect is in knowing the truth, and not in being deceived by falsehoods, and the public interest is not fairly satisfied by the publication of falsehoods instead of the truth. The publication of falsehoods is like giving stones, or something worse, where bread is wanted. In our opinion, an article published in a newspaper, concerning an attorney at law, which would tend to injure his character and reputation as an honest and honorable attorney at law, would, like any similarly injurious article published against any other person, be *prima facie* libelous; and the fact that it had some connection with judicial proceedings, though not a report of any portion thereof, would not render it privileged, or conditionally privileged. Nor would the burden, in a criminal prosecution founded thereon against the publisher for libel, be devolved upon the state to prove express malice, but malice would be presumed; and nothing would be a complete defense to the action except a showing that the alleged defamatory matter was true in fact, and published for justifiable ends, and such a showing would, under the constitution and statutes of Kansas, be a complete defense, and in such a case the supposed libelous matter would not be libelous.

The defendant further claims that the court below erred in refusing to permit evidence to be introduced on the trial tending to show the conduct and actions in the jury-room of the juror J. P. Harman, who, it is claimed, was a "fixed man," or, in other words, was bribed to prevent, and who did prevent, the jury from agreeing upon a verdict that Patrick Cleary was guilty of murder, or of any other offense charged against him. That portion of the aforesaid newspaper article which had reference to this matter, with the innuendoes explaining the same, as set forth in the information in this case, reads as follows: "He [meaning the said J. G. Mohler] had no possible hope of being able to clear Cleary [meaning the said Patrick Cleary] with a fair jury. His [meaning the said J. G. Mohler's] only hope lay in a packed jury, [meaning thereby a jury composed of one or more persons unduly or dishonestly

biased or prejudiced in favor of said Patrick Cleary.] and his [meaning the said J. G. Mohler's] manner of conducting the last trial [meaning the trial aforesaid of said Patrick Cleary] showed that he [meaning the said J. G. Mohler] relied upon hanging the jury by a "fixed man," [meaning that said J. G. Mohler, either by himself, or others with his knowledge, did unlawfully bribe or induce a member of the jury on said trial corruptly not to agree to a verdict of guilty against the said Patrick Cleary on said charge of murder in the first degree, and relied as his defense of his said client, Patrick Cleary, on said trial, upon a jury composed of one or more persons unduly or dishonestly or corruptly biased or prejudiced in favor of said Patrick Cleary.] His [meaning the said J. G. Mohler's] effort before the jury [meaning the jury in the case aforesaid] was so weak that it was noticed by nine out of ten who heard it, [meaning that the said J. G. Mohler did not labor all in his power as an advocate, attorney, and counselor before the jury aforesaid, and in the case aforesaid, and on the trial thereof, because that the said J. G. Mohler knew that one or more of said jury was unduly or dishonestly or corruptly biased or prejudiced or influenced in favor of said Patrick Cleary, or against rendering a verdict in said cause against said Patrick Cleary of guilty of any of the offenses of which he stood charged in said cause.] "Some evidence was introduced on the trial of this case tending to show that Mohler did rely upon some one hanging the jury in the Cleary Case. Other evidence was introduced tending to show that an improper effort was made, presumably by bribery, to procure some one to hang the jury in that case. And evidence was also introduced tending to show that J. P. Harman, one of the jurors in that case, acted very strangely, to say the least. He refused to have his photograph taken along with the other jurors, and gave as a reason therefor that "there might be some hard feelings against the jurors by some people, and if they had their photographs they could very easily hunt them out, and they would know the jurors, and the jurors would not know them." And when a fellow-juror said to him during the trial that the judge was very strict, and did not intend that they should be tampered with, Harman said: "No, you might have an envelope slipped into your hand with a hundred dollar bill in it." And although Harman, upon his *voir dire*, while the jury were being impaneled, qualified as a competent and an impartial juror, and one who knew nothing about the case, yet it was shown on the trial of this case that he was and had been a subscriber to the Lincoln Beacon, that gave a full report of the proceedings of the former trial. The defendant further attempted to show in this case what Harman said and did, and what he omitted to say and do, while the jury in the Cleary Case were in their room deliberating upon their verdict; but the court refused to permit anything of the kind to be shown. It is claimed that all the jurors except Harman voted for conviction, and that Harman voted constantly for ac-

quittal, and that he did in fact hang the jury. But the court refused to permit anything of the kind to be shown. The court refused to permit anything to be shown which transpired in the jury-room during the deliberation of the jury, although it was stated that what did transpire in the jury-room had come to the knowledge of the defendant in this case before he published the alleged libelous article. The court excluded the foregoing evidence upon the following ground, as stated by the court, to-wit: "If that kind of evidence is admissible, it would be necessary to recall to this court every witness who testified in that case, and to show whether or not he had reasons for taking the position he did upon the jury. I do not believe that evidence ought to be admitted."

It will be noticed that the evidence was not excluded because no sufficient foundation for its introduction had been laid, but because its introduction would involve the calling as witnesses of all the witnesses who had previously testified in the Cleary Case. Now we do not think that the introduction of this kind of evidence would necessarily, or even probably, involve any such consequences; but, even if it would, it would hardly be a sufficient reason for its exclusion. In proving Harman's conduct in the jury-room only so much of it could be proved as might tend to show that he was a "fixed man," or, in other words, to show that he had been bribed or tampered with; and this might not have required the calling of a single witness who had previously testified in the Cleary Case. We think the evidence should have been admitted.

The defendant claims that the court erred in giving a certain instruction to the jury, wherein the court said: "But the truth so shown must be as broad as the libelous publication, and the proof of one of these matters alone does not constitute a defense in such a case." This, however, was modified by another instruction given to the jury, wherein the court stated that the defendant must be found guilty, "unless you further find that said article was substantially true, and was published for justifiable ends; but, if you find that it was both substantially true and published for justifiable ends, then you should acquit the defendant." And the court also gave full instructions with respect to "reasonable doubts." Taking all these instructions together, we think no material error was committed, nor was the jury probably misled. As to the first of the above instructions, see *Newell, Defam.* p. 796, § 45; as to the second, see the case of *State v. Verry*, 36 Kan. 416, 13 Pac. Rep. 838. Where the defendant in a criminal prosecution for libel justifies upon the ground that the alleged libelous matter was and is true, and was published for justifiable ends, he is required to prove, or in some manner to show, only its substantial truth, and that it was published for justifiable ends; and he is not required to prove or show the truth of any of the alleged libelous matter, except such as would in fact be libelous if not true, and he is not required to prove or show the truth of even that portion of

the alleged libelous matter by a preponderance of the evidence, but only by evidence sufficient to create a reasonable doubt in the minds of the jury. His proof, however, should extend to all the alleged libelous matters that would in fact be libelous if not true; and in this sense the proof should be "as broad as the libelous publication." In this state in every criminal action it devolves upon the state to prove beyond a reasonable doubt every fact, ingredient, or element necessary to constitute the offense charged. *Crim. Code*, § 228; *State v. Crawford*, 11 Kan. 32, 42, et seq.; *State v. Child*, 40 Kan. 482, 20 Pac. Rep. 275. It may be different with respect to such defenses as admit, in effect, that the offense charged may have been originally committed, as once in jeopardy, a former acquittal, a former conviction, or a pardon. These are affirmative defenses, that admit substantially that the offense charged may have once been committed, and are not negative defenses included in the general plea of "not guilty," which, in substance, denies that the offense charged was ever committed. If the alleged libelous matter was true, and published for justifiable ends, then no offense was ever committed; and if, upon the whole of the evidence introduced, with all the relevant legal presumptions, the jury cannot say that they are convinced beyond a reasonable doubt that the alleged libelous matter was not true, or was not published for justifiable ends, the defendant should be acquitted.

The defendant further complains of the following matters that occurred in the closing argument of counsel for the state, to-wit: "In the closing argument upon the part of the state by J. R. Burton, after referring to the position taken by defendant and his counsel that the juror Harman had been bribed, and that Pat Cleary was a murderer, he said: 'The supreme court takes a different view from what they do as to Cleary's guilt,' and thereupon, taking up the 40th Vol. of the Kansas Reports, and turning to the case of the State, vs. Pat Cleary, that he would read what the supreme court said as to the guilt or innocence of Cleary. Thereupon counsel for defendant interrupted Mr. Burton in his argument, and objected to the court to counsel's reading from the report of the case which he had just referred to. The court overruled said objection, remarking that 'counsel for defendant had been allowed great latitude in presenting the case to the jury,' to which ruling defendant excepted. Thereupon said J. R. Burton read from the decision of the court in the case referred to above, on page 299, as follows: 'We are loath to express an opinion on the merits of this case, but we are compelled by an unavoidable necessity to say that the evidence preserved in this record does not so strongly impress us with the guilt of the defendant as to incline us to the opinion that the substantial rights of the defendant have not been invaded by this erroneous ruling. On the contrary, we think, as the case is one of fact entirely, and grave doubt might be fairly entertained, that the district court should have given the defendant the bene-

fit of the doubt, and sustained the motion for a new trial, for the reason that the jury was not fairly constituted.' Counsel stated to the jury that that was the language of the decision of the supreme court upon the evidence in that case. Thereafter, and in another part of this argument, said J. R. Burton read from the alleged libelous article: 'He had no hope of being able to clear Cleary with a fair jury,'—again took in his hands said report of the case of *The State vs. Cleary*, and said to the jury, 'The supreme court says that he has.' And again, in another part of his argument, said J. R. Burton again referred to said report and said expression of opinion in said report of said case, and said to the jury: 'Cleary may have been guilty, or there may have been a grave doubt, as the supreme court says there was.'

The views, or supposed views, of the supreme court, referred to by counsel for the state in the closing argument, are found in the opinion prepared by one of the commissioners of the supreme court in the case of *State v. Cleary*, 40 Kan. 288, 19 Pac. Rep. 776 et. seq. These views, however, have nothing to do with the law of the present case, nor, indeed, with any law. They are really only an expression of opinion with regard to the facts of the *Cleary* Case, as deduced from the evidence introduced on the first trial of that case. This report of the views of the supreme court was not introduced in evidence in the present case, except by counsel for the state in his closing argument; and it was then introduced for the purpose of rebutting any opinion that might be deduced from the evidence in this case, or be entertained, "that the juror Harman had been bribed," or "that Pat Cleary was a murderer," or that Mohler "had no hope of being able to clear Cleary with a fair jury." It was an attempt to make the supreme court testify in the present case with regard to some of the facts of the *Cleary* Case supposed to be involved in the present case; and it was new evidence not introduced on the trial of the present case, nor in the case at any time prior to the closing argument of counsel for the state, and it could not properly have been introduced at all. We think the court committed error when it permitted this to be done. Some of the decisions which have some application to this question are as follows: *Huckell v. McCoy*, 38 Kan. 58, 59, 15 Pac. Rep. 870, and cases there cited; *Wolfe v. Minnis*, 74 Ala. 386; *Bulloch v. Smith*, 15 Ga. 395; *Dickerson v. Burke*, 25 Ga. 225; *Forayth v. Cotheran*, 61 Ga. 278; *Tucker v. Henniker*, 41 N. H. 317; *Bullard v. Railroad Co.*, (N. H.) 5 Atl. Rep. 838, 844, and note; *Railroad Co. v. Boyd*, (Md.) 10 Atl. Rep. 315; *Hall v. Wolff*, 61 Iowa, 559, 16 N. W. Rep. 710; *Henry v. Railroad Co.*, (Iowa,) 30 N. W. Rep. 630, 632, and note; *Ricketts v. Railway Co.*, (W. Va.) 10 S. E. Rep. 801; *Coble v. Coble*, 79 N. C. 589; *Paper Co. v. Banks*, 15 Neb. 20, 16 N. W. Rep. 833; *Railroad Co. v. Bragonier*, 13 Ill. App. 467; *Kinnaman v. Kinnaman*, 71 Ind. 417; *Rudolph v. Landwerlen*, 92 Ind. 34; *School Town of Rochester v. Shaw*, 100 Ind. 268; *Campbell v. Maher*, 105 Ind. 383, 4 N. E. Rep. 911; *Hoxie v. Insurance Co.*, 33 Conn. 471; *Bedford v. Penny*,

58 Mich. 424, 25 N. W. Rep. 381; *Rickabus v. Gott*, (Mich.) 16 N. W. Rep. 384; *Railroad Co. v. Nichols*, (Tex.) 9 Amer. & Eng. R. Cas. 361; *Willis v. McNeill*, 57 Tex. 465; *Railroad Co. v. Cooper*, 70 Tex. 67, 8 S. W. Rep. 68; *Railroad Co. v. Kutac*, (Tex.) 11 S. W. Rep. 127; *Insurance Co. v. Cheever*, 36 Ohio St. 201; *Brown v. Swineford*, 44 Wis. 282; *Bremmer v. Railroad Co.*, 61 Wis. 114, 20 N. W. Rep. 687; *Baker v. City of Madison*, 62 Wis. 137, 22 N. W. Rep. 141, 583; *Koelges v. Insurance Co.*, 57 N. Y. 638; *State v. Balch*, 31 Kan. 465, 2 Pac. Rep. 609. The judgment of the court below will be reversed, and cause remanded for a new trial.

JOHNSTON, J., concurring.

HORTON, C. J. I fully concur in the reversal of the judgment of the district court, but I am not satisfied with all that is stated in the opinion. I do not agree with all the limitations placed on the publication of judicial proceedings, or matters directly connected therewith. I think that every newspaper has a right to comment on matters of public concern, provided it is done fairly and honestly. I do not think that such comments are libelous, however severe in their terms, unless they are written and published maliciously. I think the administration of the law, the verdicts of juries, the conduct of suitors, their lawyers and witnesses, are all matters of lawful comment by newspapers as soon as the trial is over. Attorneys at law are officers of the court in which they practice, and are admitted by its order, upon evidence of their possession of sufficient legal learning and good moral character. They hold their office during good behavior, and can only be deprived of it for misconduct. Therefore, any attorney can be protected from libel for anything occurring upon a trial, or for any matter connected directly therewith, to the same extent as any other officer of the court. That, and nothing more. Of course, if a publisher of a newspaper writes and publishes maliciously any false or libelous matter against an attorney, or any other officer of a court, there is no danger but what the publisher may be properly punished, even if express malice must be proved. The jury have the authority to take all the matters into consideration, and, if express malice is established, or if malice is found from the circumstances attending the publication, the jury will be justified in rendering a verdict of guilty. When it is said that malice must be shown in the case of privileged communications, the term "malice" is used in its legal, not in its popular, sense. It is legal malice if one publishes as true what he knows to be false, or what, by proper investigation, he might have assured himself was false. The case of *State v. Cleary* was a public trial. The state and the people of the state were greatly interested in its result. If justice miscarried from the act or conduct of any officer of the court during the trial, it was a subject of legitimate newspaper comment. The jury could determine, under the facts and circumstances of this case, whether the comments of the

newspaper were made from good or honest motives upon reasonable grounds, or whether they were maliciously written and published. If the defendant, in referring to the trial, or any matters directly connected with the trial, acted solely from good and honest motives, and upon reasonable grounds, he ought not, in my opinion, to be criminally liable.

**CALLEN V. CALLEN.**

(*Supreme Court of Kansas. July 3, 1890.*)

**DIVORCE—CRUELTY—PLEADING.**

1. It is error by the trial court to overrule a motion to make the petition, in an action for divorce, more definite and certain, that charges "that during the time the defendant lived with the plaintiff as his wife he was guilty of gross neglect of duty and extreme cruelty towards the plaintiff."

2. In a petition for divorce for gross neglect of duty and extreme cruelty the particular acts complained of, and the dates of their commission, should be stated with reasonable certainty.

(*Syllabus by Simpson, C.*)

Commissioners' decision. Error from district court, Montgomery county; **GEORGE CHANDLER**, Judge.

*Joseph Chandler*, for plaintiff in error.  
*A. B. Clark*, for defendant in error.

**SIMPSON, C.** Artie M. Callen commenced her action for divorce against Samuel H. Callen in the district court of Montgomery county on the 7th day of June, 1887, and in her petition alleged causes for divorce in these words: "That during the time she lived with Callen as his wife he was guilty of gross neglect of duty, and was guilty of extreme cruelty towards the plaintiff, without cause or provocation on the part of the plaintiff. And the plaintiff further alleges that on, to-wit, the \_\_\_\_\_ day of May, 1886, the defendant, disregarding his marital obligations, willfully and without cause deserted and abandoned the plaintiff, and ever since has, and still does, continue to abandon the plaintiff and live separate and apart from her, without any just or sufficient cause therefor, and against her will and consent." The defendant filed a motion to require the plaintiff to make her petition more definite and certain in the following particulars: That she be required to allege the facts constituting the charge of gross neglect of duty, and the dates at which the acts were committed; also the same in respect to extreme cruelty. The court overruled this motion, stating that it had not been the practice in that judicial district to require the petition charging extreme cruelty and gross neglect of duty to set out the acts complained of, but the bar must take notice that hereafter such petitions must set out the particular acts complained of. The defendant answered, and the cause came on regularly for trial at the March term, 1888, and the court ordered a jury to be called, and submitted to them certain questions of fact. The jury answered these questions as follows: "(1) Was the plaintiff married to the defendant? If yea, when? Answer. Yes. February 14, 1885. (2) What has been the conduct of the plaintiff towards

the defendant during the time she has lived with him? A. Good. (3) Has the defendant been guilty of gross neglect of duty towards the plaintiff? If yea, when? A. Yes. For two years. (4) If you answer the third question in the affirmative, state fully in what such gross neglect of duty consisted. A. Not providing for her maintenance. (5) Has the defendant been guilty of extreme cruelty towards the plaintiff? If yea, when, and under what circumstances? A. Yes. When he threw the hatchet at her, and using unbecoming language, at Pueblo. (6) If you answer the fifth question in the affirmative, state fully in what such cruelty consisted. A. Answered above. (7) Has the defendant abandoned the plaintiff? If yea, when, where, and under what circumstances? Answer fully. A. Yes. When he forced her to sign that contract, and left for parts unknown to her. (8) Did the defendant have any just cause or excuse therefor? A. No. (9) Did the defendant leave the plaintiff against her will and consent? A. Yes. (10) Did the plaintiff in any way contribute to the cause of the alleged wrongs of which she complains? If yea, how, and in what manner? A. No. (11) Is the plaintiff the owner of any real estate in her own name? If yea, where is it located? Describe it. A. Yes. As set forth in the petition of plaintiff. (12) Has the plaintiff condoned the acts of the defendant? A. Yes. (13) What was the maiden name of the plaintiff? A. Artie M. Morgan. (14) Where was the plaintiff living at the time she commenced this action? A. Montgomery county, Kansas, with her mother. (15) How long had the plaintiff lived in the state of Kansas just prior to the commencement of this action? A. Over one year." The court called the attention of the jury to their answer to special question No. 12, and said: "I suppose you will understand the force and effect of your answers to special question No. twelve, that it does not give plaintiff a divorce?" To this the jury gave no reply. In the instruction of the court to the jury, with reference to special question No. 12, it was said: "Condoned is defined by Bouvier as follows: It is forgiveness by the husband of his wife, or by the wife of the husband, of acts committed with the implied condition that the injury should not be repeated, and that the other party should be treated with conjugal kindness." When the jury returned their answers, the plaintiff made a motion for judgment in her favor on the special findings, regardless of the answer to the twelfth special question. This motion was sustained by the court, and a decree for a divorce rendered in favor of the plaintiff below. This decree recites that the court finds all the allegations in the petition of the plaintiff to be true. A motion for a new trial was filed and overruled, and all necessary exceptions saved. It should have been stated in regular order that at the trial the defendant below objected to the evidence tending to show extreme cruelty; but all objections were overruled.

The first error assigned is the adverse ruling on the motion to make the petition

more definite and certain as to the extreme cruelty and gross neglect of duty. The Code requires that the petition must contain a statement of the facts constituting the cause of action. In the case of Prather v. Prather, 26 Kan. 275, this court say: "An action for divorce is a civil proceeding, and the pleadings in it are to be construed by the ordinary laws governing a civil action. The facts should be fairly and reasonably stated, so that defendant can be clearly and fully apprised of the claim." Separate and apart from these authorities, and as a matter of elementary principle, it is a part of the alphabet of the law that the pleadings must state facts, and not conclusions. It was material error in the trial court to overrule the motion to make the petition more definite and certain. This error was aggravated by the trial court permitting the plaintiff below to offer evidence tending to prove acts of extreme cruelty committed at various times by the defendant, of which he had no notice in time to make a defense. For these errors we recommend that the judgment be reversed and the cause remanded, with instructions to grant a new trial.

PER CURIAM. It is so ordered; all the justices concurring.

WATKINS v. HOUCK *et al.*

(Supreme Court of Kansas. July 3, 1890.)

QUIETING TITLE—FRAUDULENT JUDGMENT—RIGHTS OF MORTGAGEE.

1. The general rule is that, where a real-estate mortgage has been executed, containing full covenants of warranty, a subsequently acquired title by the mortgagor inures to the benefit of the mortgagee. But where the mortgagor, after the execution of the mortgage, obtains judgment fraudulently quieting his title to the mortgaged land against one who is the owner thereof, and such judgment is subsequently vacated, with the consent of all the parties thereto, on account of the fraud, neither the mortgagor nor the mortgagee acquires any benefit or title under the fraudulent judgment.

2. A person who is the owner in fee-simple of a tract of land may buy in a pretended title with the view to quiet the enjoyment of his land, and the purchase of such a title cannot impair or disturb his prior title.

(Syllabus by the Court.)

Error to district court, Lyon county; CHARLES B. GRAVES, Judge.

This was an action brought by J. B. Watkins against Peter P. Houck, Mary L. Hall, Joseph Wheat, Laura B. Wheat, Edward F. Murray, Warren & Harrison, Kellogg & Sedgwick, and J. M. Campbell, to foreclose a mortgage given by Peter P. Houck and wife upon the following described premises: The N. E.  $\frac{1}{4}$  of section No. 29; also the N. W.  $\frac{1}{4}$  of the S. W.  $\frac{1}{4}$  of section No. 28,—all in township 15, range No. 12 E. of the sixth P. M., in Lyon county, Kan. Trial had on the 11th day of February, 1888, before the court without a jury.

The court made the following findings of fact: "(1) On and prior to June 29, 1858, Jacob Hall owned the land in controversy, and also a large amount of other lands, in Johnson and other counties in the

state of Kansas. (2) On July 22, 1861, one Munkers sued the said Jacob Hall and one Porter, as Hall & Porter, in Lyon county, Kan., and attached the land in controversy. Said attachment was dissolved October 24, 1861; and another writ of attachment was thereupon issued and levied upon said land, October 26, 1861. (3) October 8, 1861, Jacob Hall gave a warranty deed of all his Kansas lands, including the land in controversy, to McCoy & Waldo, which was intended as a mortgage to secure a large debt due to them from said Jacob Hall. This deed was recorded in Lyon county, Kan., on November 21, 1861. (4) On August 3, 1863, the sheriff of Lyon county, Kan., upon an order of the court made after judgment, sale, and confirmation duly had in the suit mentioned in conclusion No. 2 hereof, conveyed the land in controversy to one Munkers, who was the plaintiff in said suit. Said deed was duly recorded in said Lyon county, September 14, 1863. (5) On November 22, 1865, said Munkers received an *alias* deed to said land, upon the sale and order aforesaid, which was duly recorded in said Lyon county on April 13, 1866. (6) On August 27, 1869, said McCoy & Waldo began suit in the Johnson county district court to foreclose said warranty deed mentioned in conclusion No. 3 hereof. Said Munkers was a party to said suit, and appeared and filed an answer therein. In said suit said McCoy & Waldo obtained a decree of foreclosure, and an order to sell said lands, including the land in controversy, and that the proceeds of said sale be applied to the payment of the debt due to said McCoy & Waldo. The said Munkers, in said suit, was decreed to have a first lien on the land in controversy to the amount of \$1,800, which lien was subsequently paid by the said McCoy & Waldo. (7) On February 2, 1871, said Munkers conveyed the land in controversy to the defendant Peter P. Houck by usual warranty deed. The deed constituting said conveyance was duly recorded in said Lyon county May 30, 1871. (8) On November 2, 1874, the defendants Peter P. Houck and wife mortgaged said land to one M. L. Ross. Said mortgage was duly recorded on the same day in said Lyon county. Said mortgage, by its terms, became due November 2, 1879, or whenever any part of the principal or interest was due and unpaid. On May 1, 1878, a semi-annual payment of interest fell due. It is yet due and unpaid. A copy of which said mortgage is attached to plaintiff's petition herein, marked 'B.' (9) On October 12, 1876, the defendant Peter P. Houck began suit in said Lyon county, against the said McCoy & Waldo to quiet his title to the land in controversy. He gave said defendants notice by publication only, they being then non-residents of the state of Kansas. They had no notice of said suit other than said publication. On March 13, 1877, said Houck obtained his decree on default. (10) On April 25, 1877, said Houck conveyed the land in controversy to William McCoy, of the firm of McCoy & Waldo, by warranty deed. Said deed was duly recorded in said Lyon county on June 2, 1877. (11) On July 25, 1877, said William McCoy received

a sheriff's deed to the land in controversy, and other lands, after decree, sale, and confirmation duly had in the suit in Johnson county, mentioned in conclusion No. 6 hereof. This sheriff's sale was made on October 8, 1876. (12) On April 18, 1879, the said Ross began suit in Lyon county, Kan., to foreclose the mortgage in this suit against Peter P. Houck, Mary Hall, and William McCoy, and obtained a decree of foreclosure and an order of sale against Peter P. Houck only. At the sale made in pursuance of said order, the plaintiff herein purchased the land in controversy, and obtained a sheriff's deed therefor January 13, 1881. (13) On June 18, 1885, the heirs of Jacob Hall conveyed the land in controversy to the said William McCoy. The deed was duly recorded August 7, 1885. (14) On March 12, 1886, said William McCoy conveyed said land to Joe Wheat. The deed was duly recorded April 21, 1886. (15) June 5, 1886, the plaintiff began this suit; the note and the mortgage sued on having been assigned to him by the said Ross before maturity. (16) The defendant Peter P. Houck has been a non-resident of, and absent from, the state of Kansas ever since April 1, 1879. (17) M. L. Ross, in his said foreclosure proceedings, dismissed his suit as to the defendants McCoy and Hall before trial and before judgment, and prosecuted it to personal judgment on September 3, 1879, and decree against the defendant Peter P. Houck alone, who had been served by publication as aforesaid. (18) At the March, 1881, term of the district court in said Lyon county, a decree by confession purporting to vacate and set aside the decree obtained by Peter P. Houck, mentioned in conclusion No. 9 hereof, was entered in said court. The decree thus sought to be vacated recites 'that at the commencement of this suit, and up to the time of this decree, Peter P. Houck was the owner of, and in the actual, peaceable, and quiet possession of, the land in controversy, and that the defendants David Waldo and William McCoy claimed jointly and severally an estate, judgment lien, and interest in, upon, and to said real estate above described, adverse to the possession and ownership of the plaintiff, and that said claim of said defendants, and each of them, is absolutely void as against the ownership and possession of the plaintiff herein, and to said real estate. Wherefore, upon motion by Ruggles & Sterry, plaintiff's attorneys in said cause, it is by the court considered and adjudged that the plaintiff is the owner of, and in the actual possession of, the above-described land, and that the adverse claim of the interest, judgment lien, and estate therein by the said defendants, and each of them, is wholly void, and of no force or effect, as against the title and ownership of the plaintiff therein and thereto.' (19) Neither the said Ross nor the said Watkins were parties to the above-mentioned decree by confession; nor did they, or either of them, have any notice or knowledge thereof until after its rendition. Neither were they, or either of them, parties to the decree of March 17th, mentioned in conclusion No. 9 hereof; nor did they, or either of them,

have any notice or knowledge thereof until after its rendition. (20) The decree obtained by the said Peter P. Houck, and mentioned in conclusion No. 9 hereof, and the decree by confession mentioned in conclusion No. 18 hereof, were both between the same parties and in the same suit,—the one vacating the other; and, after the entry of the decree vacating the former judgment, the suit in which such former judgment was obtained was dismissed by Peter P. Houck without prejudice. (21) The said decree by confession was based upon a confessed finding therein to the effect that the suit in which the decree sought to be vacated was obtained was begun by the said Houck with the fraudulent intent on his part to deprive the said Waldo & McCoy of their title, interest, and estate in the land which they obtained through the Johnson county suit, hereinbefore mentioned, and with a full knowledge of all the facts, and for the purpose of defeating and annulling said Johnson county judgment and decree. (22) On February 11, 1888, there was due from the said Peter P. Houck to plaintiff, on the note and mortgage in this suit, the sum of \$2,623, including \$49.52 taxes paid by plaintiff. (23) On March 5, 1886, Joe Wheat and wife mortgaged the land in controversy to Warren & Harrison for \$2,500. The note and mortgage were by them duly assigned to the defendant Murray, and there is now, February 11, 1888, due him on said note and mortgage the sum of \$3,080, with interest at the rate of 12 per cent. per annum from February 11, 1888. On the 7th day of March, 1886, said Wheat and wife mortgaged said land to said Warren & Harrison for the sum of \$1,800, upon which there is now due the sum of \$2,214. Both of said mortgages were duly recorded March 9, 1886. (24) On May 7, 1886, the said Wheat and wife conveyed the undivided one-half of said land to John Campbell. Mrs. Mary L. Hall has no interest whatever in the land in question. (25) On April 25, 1887, the said Wheat and wife mortgaged said land to Kellogg & Sedgwick for the sum of \$500, upon which there is now, February 11, 1888, due the sum of \$530, with interest at the rate of 8 per cent. per annum. (26) On March 5, 1886, the said Joe Wheat and wife mortgaged said land to said Warren & Harrison for the sum of \$250, upon which there is now due the sum of \$308, with interest at the rate of 8 per cent. per annum."

And thereupon the court made and filed the following conclusions of law: "(1) When the defendant purchased of Munkers, he took subject to whatever decree might be entered in the Johnson county suit then pending, and he got nothing. (2) The decree obtained by the defendant Peter P. Houck, quieting his title to said land, was vacated by the parties thereto, and the suit dismissed, which left the defendant, as before, with nothing. (3) The plaintiff has no vested right in said decree which would prevent the parties thereto from vacating the same. His right to the land after the decree was the same as it was when his mortgage was given. (4) The defendants Murray, Warren & Harrison, and Kellogg & Sedgwick, are each



entitled to judgment and decree as prayed for. (5) The proceeds arising from the sale of said land ought to be applied as follows, viz.: *First*, to the payment of the judgment in favor of the defendant Murray; *second*, to the payment of the judgment in favor of the defendants Warren & Harrison; *third*, to the payment of the judgment in favor of the defendants Kellogg & Sedgwick. (6) The proceedings in the attempted foreclosure by M. L. Ross were void, and his dismissal as to all the defendants except Houck, and such foreclosure proceedings, did not in any wise affect this plaintiff."

The plaintiff filed his motion for judgment upon the findings of fact, which was overruled. He also filed a motion for a new trial, which was overruled. Thereupon the court rendered judgment in favor of the defendants, as follows: "It is thereupon considered, ordered, and adjudged by the court that the defendant Joseph Wheat is hereby adjudged and decreed to be the owner of said land; that the defendant Joseph Wheat has a paramount title to, and is the owner of, said land, as against the plaintiff herein, and that the plaintiff has no interest, title, or estate or claim thereto whatever; and that said defendant Joseph Wheat hereby recover his costs of said plaintiff herein, taxed at \$46.13. It is further decreed that the defendant E. F. Murray recover of and from his co-defendants Joseph Wheat and Laura B. Wheat, his wife, the sum of \$3,080, with interest thereon at the rate of twelve per cent. per annum from February 11, 1888, and that the defendants Warren & Harrison recover of their co-defendants Joseph Wheat and Laura B. Wheat, his wife, upon their first mortgage, the sum of \$2,214, with interest thereon at the rate of twelve per cent. per annum from February 11, 1888, and that they recover of Joseph Wheat and Laura B. Wheat, upon their second mortgage, the sum of \$308, with interest thereon at the rate of twelve per cent. per annum from February 11, 1888; that the said sums, respectively, are a second and third lien upon the said land described in plaintiff's petition; and that the defendants Kellogg & Sedgwick do have and recover of and against the defendants Joseph Wheat and Laura B. Wheat, his wife, the sum of \$530, and interest thereon at the rate of twelve per cent. per annum from February 11, 1888; that said judgment is a fourth lien upon the said land; that the judgment herein rendered in favor of said defendant E. F. Murray is a first and prior mortgage lien upon said land; that all of said mortgages are hereby foreclosed, and, if said several judgments are not paid within six months from this date, the said real estate will be sold according to law, without appraisal, and the proceeds of such sale be applied—*First*, to the costs and expenses of sale; *second*, to the costs of suit, except the amount of costs taxed to plaintiff; *third*, to the payment of judgment in favor of defendant Murray; *fourth*, to the payment of judgment in favor of defendants Warren & Harrison; *fifth*, to the payment of the judgment in favor of the defendants Kellogg & Sedgwick. And hereof let execution

issue." The plaintiff excepted, and brings the case here for review.

*W. J. Patterson and Buck & Feighan*, for plaintiff in error. *T. N. Sedgwick*, for defendants in error.

HORTON, C. J., (after stating the facts as above.) This was an action brought by J. B. Watkins to foreclose a mortgage upon real estate, executed and delivered by Peter Houck and wife on the 2d of November, 1874, to M. L. Ross to secure the payment of \$1,000 and certain interest notes. The real estate described in the mortgage is as follows: "The north-east quarter of section twenty-nine, also the north-west quarter of the south-west quarter of section twenty-eight, in town fifteen, range twelve, containing two hundred acres, situate in Lyon county, in this state." Before the maturity of the mortgage, or the notes secured thereby, they were assigned to J. B. Watkins, the plaintiff. In the trial court, the defendants Peter P. Houck and Mary Hall did not file any answer or pleading, or otherwise appear. The defendants Joseph Wheat and Laura B. Wheat being subsequent purchasers, filed an answer alleging "(1) a general denial; (2) that plaintiff was not the owner of the note and mortgage; (3) that the proceedings in a suit of M. L. Ross v. Peter P. Houck et al. were a bar; (4) that the five-year statute of limitations had run." The other defendants, Edward F. Murray, Warren & Harrison, and Kellogg & Sedgwick, filed substantially the same answer, with the addition of cross-petitions asking the foreclosure of mortgages executed subsequently to the mortgage of plaintiff. To these answers plaintiff filed replies containing a general denial, and matters in avoidance. The trial court decided that the plaintiff had no interest, title, or claim in the real estate described in the mortgage, and rendered judgment in favor of the defendants Murray and Warren & Harrison and Sedgwick as prayed for by them. The plaintiff excepted, and brings the case here.

It appears from the findings of fact of the trial court that in 1858 Jacob Hall obtained from the United States a grant of the land in controversy, and other lands lying in the counties of Johnson, Osage, Lyon, and Morris. The patent was issued to him for the lands on the 10th day of October, 1862. Prior to the issuance of the patent, and on the 8th of October, 1861, Hall conveyed the lands, by a deed absolute upon its face, to William McCoy and David Waldo. This deed was intended as a mortgage to secure a debt due to them from James Hall. It was recorded in Lyon county on the 21st of November, 1861. On July 22, 1861, James C. Munkers brought an action against Jacob Hall in the district court of Lyon county, and attached the land in controversy; but this attachment was dissolved October 24, 1861. An *alias* writ of attachment was issued and levied upon the land October 26, 1861; but this was after the execution of the deed intended as a mortgage, to McCoy & Waldo. James C. Munkers prosecuted his action commenced on July 22, 1861, to final judgment; and on August 3, 1863, the sheriff of Lyon county, after a sale of the land,

and a confirmation thereof, conveyed the land to Munkers. This deed was recorded in Lyon county on September 14, 1863. On November 22, 1865, James C. Munkers, upon the foregoing sale, obtained another deed to the land, which was recorded in Lyon county on April 13, 1866. On August 27, 1869, McCoy & Waldo began an action in the district court of Johnson county to foreclose their deed or mortgage of October 8, 1861; and James C. Munkers was made a party to that action. He appeared, and filed an answer. In the action McCoy & Waldo obtained a decree of foreclosure, and an order to sell all the lands described in the deed, including the land in controversy. Munkers was decreed to have the first lien on the land to the amount of \$1,800, which was paid by McCoy & Waldo. On February 2, 1871, James C. Munkers conveyed the land in controversy to Peter P. Houck by warranty deed. This deed was recorded in Lyon county May 30, 1871. Subsequently, Peter P. Houck and wife executed the mortgage to M. L. Ross heretofore referred to. On October 12, 1876, Peter P. Houck commenced an action against McCoy & Waldo in Lyon county to quiet his title to the land conveyed to him by Munkers. The defendants, being non-residents, were notified by publication. On March 13, 1877, Houck obtained a decree on default. On April 25, 1877, Houck conveyed the land to William McCoy. This deed was recorded in Lyon county on June 2, 1877. After McCoy & Waldo obtained a decree of foreclosure in their action of August 27, 1869, the land in controversy was sold at sheriff's sale on October 8, 1876; and, after a confirmation of the sale, William McCoy received a sheriff's deed to the land on July 25, 1877. On April 18, 1879, M. L. Ross commenced an action in Lyon county to foreclose the mortgage set forth in the petition in this action. He obtained a decree of foreclosure and an order of sale against Peter P. Houck only. J. B. Watkins, the plaintiff, purchased the land in controversy at a sale made under that decree, and obtained a sheriff's deed on January 13, 1881. On June 18, 1885, the heirs of Jacob Hall conveyed the same land to William McCoy. This deed was recorded August 7, 1885. On March 12, 1886, William McCoy conveyed the land to Joseph Wheat. This deed was recorded April 21, 1886. At the March term of the district court of Lyon county for 1881, the judgment obtained by Peter P. Houck on October 12, 1876, in that court, against McCoy & Waldo, to quiet his title to the land, was by agreement set aside, and declared void. Neither M. L. Ross nor J. B. Watkins were parties to the vacation of that judgment, nor did either of them have any notice or knowledge thereof until after it was entered. Neither Ross nor Watkins were parties to the action brought on October 12, 1876, by Houck against McCoy & Waldo. On June 5, 1886, J. B. Watkins, the plaintiff, began this action. The defendant Peter P. Houck is a non-resident of the state, and has been absent from the state ever since April 1, 1879. After Joseph Wheat obtained a conveyance of the premises, he executed several mortgages thereon. There are the

mortgages upon which the district court rendered judgments in favor of some of the defendants. It fully appears from these findings that James C. Munkers had no title to the premises in dispute on November 2, 1874, when he conveyed the land to Peter P. Houck, because his attachment, upon which the property was sold, was not levied until after the deed or mortgage of October 8, 1861, to McCoy & Waldo, and because McCoy & Waldo had satisfied any and all liens he had on the land, amounting to \$1,800. The deed or mortgage from Jacob Hall to McCoy & Waldo was on record in Lyon county on November 21, 1861, of which Peter P. Houck had notice. Therefore, on November 2, 1874, when Peter P. Houck and wife executed the mortgage to M. L. Ross, Houck had no title or interest to convey, transfer, or mortgage.

The contention of the plaintiff is that the judgment obtained in the district court of Lyon county by Houck on March 13, 1877, against McCoy & Waldo, quieting his title to the land, inured immediately to the benefit of M. L. Ross, the mortgagee, as the mortgage contained covenants of warranty. Of course, the general rule is that a subsequently acquired title inures to the benefit of the mortgagee. *Boone, Mortg.* § 105; 2 *Herm. Estop.* § 662; *Railroad Co. v. Cowdrey*, 11 Wall. 459; *Lincoln v. Emerson*, 108 Mass. 90. The judgment, however, of Houck v. McCoy & Waldo was a fraudulent judgment, as it could only have been obtained by fraud and perjury. *Laithe v. McDonald*, 7 Kan. 254. Houck had no title, or claim of title, to quiet. Subsequently, with his assent, this judgment was vacated and set aside. The findings of the court in reference to the vacation of that judgment are as follows: "The decree obtained by the said Peter P. Houck, and mentioned in conclusion No. 9 hereof, and the decree by confession mentioned in conclusion No. 18 hereof, were both between the same parties and in the same suit,—the one vacating the other; and, after the entry of the decree vacating the former judgment, the suit in which such former judgment was obtained was dismissed by Peter P. Houck without prejudice. The said decree of vacation was based upon a confessed finding therein to the effect that the suit, in which the decree sought to be vacated was obtained, was begun by the said Houck with the fraudulent intent on his part to deprive the said Waldo & McCoy of their title, interest, and estate in the land which they obtained through the Jackson county suit, hereinbefore mentioned, and with a full knowledge of all the facts, and for the purpose of defeating and annulling said Johnson county judgment and decree." Upon these findings, we do not think it can be held that M. L. Ross or his assignee, the plaintiff, obtained any benefit whatever on account of the fraudulent decree or judgment. Neither Ross nor Watkins accepted the mortgage upon the faith of that decree or judgment, and as it was fraudulent in its inception, and subsequently set aside, by consent of all the parties thereto, on account of such fraud, nothing can be claimed for it. No title or benefit can be claimed under it or through it.

The plaintiff contends, further, that as Peter P. Houck and wife conveyed the land in controversy to William McCoy by deed on April 25, 1877, and as McCoy accepted the same, he thereby recognized Houck's title; that he and all persons claiming under him are estopped from denying such title; and that the defendants acquiring any title to the property through McCoy, or Watkins, his grantee, took the same subject to Houck's title and the mortgage in the suit. This argument is fallacious in that Houck had nothing but a fraudulent judgment upon which to found any deed. This judgment was set aside, and must count for nothing. McCoy had title to the land before he obtained the deed from Houck and wife. The sheriff's deed to him was dated July 25, 1877, but related back to the sale of October 8, 1876. He had the right to buy the pretended title of Houck, with the view of quieting the enjoyment of his land. Clearly, the deed from Houck to McCoy, if it did not strengthen, did not have the effect to impair or destroy, his prior title. By accepting the deed from Houck, McCoy did not forfeit or lose his own title. He obtained the deed simply to purchase his peace. "It is not the policy of the law to deter persons from buying their peace, and compel them to submit to the expense and vexation of lawsuits, for fear of having their titles tainted by defects which they would gladly remedy by purchase, where it can be done with safety." *Coakley v. Perry*, 3 Ohio St. 344; *Donahue v. Klassner*, 22 Mich. 252; *Gardner v. Greene*, 5 R. I. 104. The judgment of the district court will be affirmed. All the justices concurring.

SCHOOL-DIST. No. 3 OF REPUBLIC COUNTY  
v. HOWELL *et al.*

(*Supreme Court of Kansas*. July 3, 1890.)

MECHANICS' LIENS—STATEMENT—FINDINGS OF  
REFeree.

1. In a statement of lien filed for materials furnished in the construction of a school-house the first page shows the quantity and dimensions of lumber furnished, but not the price of each particular lot in detail, but there is a general footing of \$1,639. It was proved at the trial that the lumber described on this page was sold as a lump lot at a discount on yard prices, and under these circumstances the statement is not so uncertain and indefinite as to be void.

2. A referee who makes general findings of every material fact in issue is not required to answer numerous questions about minute details.

(*Syllabus by Simpson, C.*)

Commissioners' decision. Error from district court, Republic county; E. HUTCHINSON, Judge.

*W. T. Dillon*, for plaintiff in error. *Caldwell, Ellis & Cook*, for defendants in error.

SIMPSON, C. On the 10th day of April, 1886, Howell Bros. commenced this action in the district court of Republic county against W. C. Schull and School-District No. 3 of said county. In their petition they ask for a personal judgment against Schull for \$570.47, and a foreclosure of a material lien on the school-house situate in district No. 3. It was alleged that the school-district had made a contract with

Schull to erect a school-house, agreeing to pay him the sum of \$3,000 therefor. Howell Bros. sold and delivered to Schull, to be used in the construction of the school-house, a quantity of lumber and other building material, amounting to \$2,119.35; the sum sued for remaining unpaid. That the school-house and buildings were fully completed on the 1st day of January, 1886. On the 18th day of January, 1886, they filed their statement of a material lien. The answer of the school-district admitted its ownership of the land and building described in the statement of lien, admitted its contract with Schull as stated in the petition, admitted that the plaintiffs furnished lumber and material to Schull to the amount of \$1,420, but denies that the plaintiffs furnished Schull any other lumber or material that was used in the construction of the school-house, and denies that the plaintiffs have filed such a statement of lien as is required by law. The plaintiffs file a reply, containing a general denial of such allegations as are not admitted by the answer.

It will be seen that two issues are made,—one of law, as to whether the statement of lien is sufficient; and the other of fact, as to whether the plaintiffs below furnished lumber and other material to Schull, to be used in the construction of the school-house, in excess of \$1,420. These issues were sent to a referee for trial, who reported as follows:

"I find as matter of fact: *First*. That the defendant school-district number three, in the county of Republic and state of Kansas, is, and was during the year 1885, a corporation created, organized, and doing business under the laws of the state of Kansas, and that on the 4th day of September, A. D. 1885, it was the owner of the following described real estate situated in the town of Wayne, in said county of Republic and state of Kansas, to-wit: Commencing at the point of intersection of the north line of Randolph street, in the town of Wayne, with the west line of Third street of said town; thence north, in a continuation of the west line of Third street aforesaid, three hundred feet; thence west, parallel with the north line of Randolph street, three hundred feet; thence south, in a continuation of the east line of Second street, in said town, three hundred feet, to intersect the north line of Randolph street; thence west on said north line to the place of beginning,—containing two and six-hundredths acres, more or less, and being a part of the north-west quarter of the south-west quarter of section nine, (9,) in township four (4) south, of range four (4) west of the sixth (6) principal meridian; same land being described in the petition of the above-named plaintiffs, and ownership admitted in the answer of said school-district number three, defendant above named. *Second*. That on the 29th day of August, A. D. 1885, defendant school-district number three, above named, and defendant W. C. Schull, above named, entered into a written agreement and contract with each other, whereby W. C. Schull agreed that for and in consideration of two thousand nine hundred and fifty (\$2,950) dollars, he

(W. C. Schull) would furnish the material, and erect, according to certain plans and specifications, a school-house on the land heretofore mentioned and described, for which school-district number three agreed to pay said W. C. Schull the said sum of two thousand nine hundred and fifty (\$2,950) dollars. I further find as a matter of fact that there was an oral or verbal contract by and between said school-district number three and W. C. Schull, the aforesaid defendant, made and entered into on or about the 1st day of December, A. D. 1885, whereby said W. C. Schull agreed to furnish the material and erect certain outhouses, platform to school building, and extra cornice and other extra fixtures thereon, to the amount of three hundred and nineteen and 35-100 (\$319.35) dollars, for said school-district number three, above mentioned, and on the lot heretofore described as owned by said school-district in the town of Wayne and county aforesaid. *Third.* I further find as a matter of fact that in pursuance of said contract by and between said school-district number three and W. C. Schull, the defendant in this action, that W. C. Schull, defendant and contractor, did agree to purchase, and did purchase, of the above-named plaintiffs, Howell Brothers, lumber and other material for the erection of said school building, outbuildings, and platform and other extras to the amount of two thousand one hundred and nineteen and 35-100 dollars, (\$2,119.35,) and that the above-named plaintiffs, Howell Brothers, did, in pursuance of said contract made by and between said school-district number three and W. C. Schull, contractor, contract to furnish, and did furnish in pursuance thereof, to said W. C. Schull, contractor, lumber and other material for the erection of said school building, outbuildings, platforms, and other extras, all to be used on the land heretofore mentioned and described, and under the contract heretofore mentioned and described, to the amount and of the value of two thousand one hundred and nineteen and 35-100 dollars, of which lumber and material there was used by said contractor, W. C. Schull, in the erection of said school building, outhouses, and improvements, placed on the land above described, to the amount and of the value of one thousand one hundred and eighty-two dollars and 37-100. That the said plaintiff has received pay on said bill as follows:

By return of lumber and material.....	\$ 128 88
By cash.....	1,420 00
Total.....	\$1,548 88

"That there was one hundred and eight and 10-100 dollars' worth of the material received from this plaintiff by defendant W. C. Schull, to be placed in said school building and other improvements heretofore mentioned, that was not used by said W. C. Schull, nor was the same returned to the plaintiff, nor to any other person for them. *Fourth.* It was agreed by and between C. A. Campbell, Thomas Lupert, and George A. Hovey, the three constituting the members of the school board, that they would look after the building and

see that the material was used for the building; and it was agreed that George A. Hovey was to oversee the building of the school-house, he having a business within about three hundred feet of where the school building was then being erected, and time sufficient to look after the school building. And I further find that certain members of the school board above mentioned took and used a part of the one hundred and eight and 10-100 dollars' worth of material, just above referred to, and the same was so done without the knowledge or consent of the plaintiffs. *Fifth.* That all said material and lumber was furnished by the above-named plaintiff, to be used in school building and other improvements heretofore mentioned on the land heretofore described, and not otherwise, and was so furnished between the 9th day of September, A. D. 1885, the last being furnished on the 7th day of December, A. D. 1885; and that said building and improvements were all completed on the 1st day of January, A. D. 1886, and accepted by the school-district number three, one of the above-named defendants. *Sixth.* That on the 1st day of January, 1886, there was a balance due and owing from W. C. Schull, contractor, to the above-named plaintiffs, who I find to be, as a matter of fact, subcontractors, for lumber and material furnished by said plaintiffs, subcontractors, as heretofore set forth, in the sum of five hundred and seventy and 47-100th dollars, (\$570.47.) And I further find that said sum of five hundred and seventy and 47-100th dollars still remains due and owing to said plaintiffs from W. C. Schull, contractor. *Seventh.* I further find that on the 18th day of January, 1886, the plaintiff filed in the office of the clerk of the district court of Republic county, Kan., a material-men's lien and affidavit, same containing an itemized account and value of said lumber and building material, with credits. I further find that on the 17th day of January, 1886, the plaintiffs served a full, true, and complete copy of said material-men's lien, just referred to, with credits, on Charles A. Campbell, director of said school-district number three, in Republic county, Kan. I find as matter of law: *First.* That the lien statement filed in the above-entitled action by the plaintiffs sets forth the amount claimed, and the items thereof, sufficiently definite to give reasonable notice to purchasers and creditors of the existence and extent of the lien, and therefore complied with article twenty-seven of lien of mechanics and others, of chapter eighty, Gen. St. Kan., and that said lien statement was duly filed in the office of the clerk of the district court in and for Republic county, Kan., and copies served as required by section 631 of statutes just above mentioned. *Second.* That the referee has the power, and that under the reference of this case it became his duty upon good cause shown, to allow any and all amendments to the pleadings that may be necessary to justly determine the matters in issue between the parties before him; and therefore, upon good cause being shown, allows the plaintiff to amend his petition by attaching a copy of the mechanic's lien filed in this case to

same. *Third.* That there is due plaintiff from defendant W. C. Schull the sum of five hundred and seventy and 47-100th dollars, (\$570.47,) with interest at seven per cent. from and after the 1st day of January, 1886, for which said plaintiff is entitled to judgment in this action against said defendant, together with costs; and that said plaintiffs are entitled to have a lien upon the land, school building, and improvements just aforementioned, to the amount of five hundred and seventy and 47-100 dollars, with interest at seven per cent. per annum from and after the 1st day of January, 1886, and costs of this action."

There were exceptions to the report of the referee, and a motion for a new trial, and all questions raised by the plaintiff in error properly saved. Several of these questions are unimportant, and are made on side issues. Those that are important, in view of the issues made by the pleadings, we will proceed to notice.

1. It is claimed that there was no sufficient statement of lien filed. This particular contention is based upon the fact that the statement is indefinite, uncertain, and void, and because the first page of the statement does not give in detail the dimensions of the lumber, or the price of each particular kind of lumber, and therefore does not contain, in the language of the statute, "the amount claimed, and the items thereof, as nearly as practicable." The amount of the material furnished, as stated on this page, is \$1,639.60. There is evidence in the record tending strongly to show that this was a lump purchase; that by the agreement of Schull and the plaintiffs below this bill of material included on the first page was sold at a discount from yard prices; and that Schull promised to pay the sum of \$1,639.60 for all that was included on the first page of the statement. The statement shows, among other items, on the first page, 8,000 feet of siding, 1,000 feet of fencing, 4,000 feet of flooring, and many other items, giving number, size, and length; but the price of each is not carried out, because all these were grouped together, and sold for a lump sum. It is apparent that the statement, so far as this particular page is concerned, is not so indefinite and uncertain as to be void. Objection is made to the use of abbreviations that are almost universally used by business men, but their significance is so apparent that it would be a waste of time to comment at length on such criticisms. The statement of the lien is definite and certain enough for all practical purposes, and served every purpose of notice to the officers of the school-district, and is as near a substantial compliance with all the requirements of the statute as the nature of the transaction will allow.

2. There is some evidence to sustain the findings of the material facts as made by the referee, and they are approved by the trial court, and are conclusive here; but in view of the objections urged by counsel for plaintiff in error, that the referee refused to answer many special questions propounded, and assuming, without deciding, that he can be required to do so to the same extent as a jury, yet it appears

that every material fact was found by the referee, and that the numerous questions propounded involved unnecessary details, and were in the nature of a cross-examination.

One other objection is deserving of a passing note. It appears that after most of the evidence was in it was discovered that the plaintiffs below had failed to attach to the amended petition a copy of the statement of lien filed in the office of the district clerk, but it was referred to in the petition "as hereto attached, and marked 'Exhibit A.'" The referee permitted this to be attached to the petition, and this is characterized by the plaintiff in error as a material amendment that the referee had no power to make. We regard it as an act of neglect that might be remedied by the permission of the referee. It did not change the issue in any respect, and could not by any possibility affect any substantial right of either party. It is not permitting an amendment of the pleadings so as to change any issue made, as that would be clearly without the power of the referee. We think substantial justice has been done, and no material error committed that ought to bring about a reversal, and recommend that the judgment be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

#### WALCOTT v. WELLS. (No. 1,322.)

(Supreme Court of Nevada. July 12, 1890.)

PROHIBITION—JUDGE DE FACTO—QUO WARRANTO.

1. A writ of prohibition will not issue to prevent an inferior court from trying an action once properly before it, but claimed to have been afterwards dismissed, or, if not dismissed, then transferred to the United States courts, as the question of the dismissal or transfer is one for that court to determine, and error in so doing is only reviewable on appeal.

2. Where a person was appointed by the governor as district judge under St. Nev. 1889, c. 118, providing for the redistricting of the state, and for the appointment of an additional judge "of the judicial district of Nevada," to hold office until the next general election, and for more than a year thereafter the appointee officiated as judge, and still acts as such in the locality assigned to him, with the acquiescence of the people, the law originally creating the office of district judge being of unquestioned validity, he is a judge *de facto*, though the statute under which he was appointed be unconstitutional and void; and his official acts are valid so far as the rights of third persons or the public are concerned. BELKNAP, J., dissenting.

3. The constitutionality of St. Nev. 1889, c. 118, authorizing the appointment of additional district judges by the governor, and the authority of a person officiating as judge *de facto* by virtue of his appointment thereunder to entertain and try a cause pending in his court, cannot be questioned by proceedings for a writ of prohibition. *Quo warranto* is the exclusive remedy. BELKNAP, J., dissenting.

Application for writ of prohibition.

A. C. Ellis, for petitioner. Wren & Cheney and Henry Rives, for respondent.

HAWLEY, C. J. This is an application by the petitioner for a writ of prohibition to prevent the trial of the case of Walcott

**v. Watson et al.** in the district court of White Pine county.

1. Petitioner claims that the court has no jurisdiction to try the case (1) because it has been dismissed; (2) that, if not dismissed, it has been transferred to the circuit court of the United States. The writ of prohibition is an extraordinary remedy, and should be issued only in cases of extreme necessity. Before it should issue, it must appear that the petitioner has applied to the inferior tribunal for relief. The object of the writ is to restrain inferior courts from acting without authority of law in cases where wrong, damage, and injustice are likely to follow from such action. It does not lie for grievances which may be redressed, in the ordinary course of judicial proceedings, by appeal. It is not a writ of right, but one of sound judicial discretion, to be issued or refused according to the facts and circumstances of each particular case. Like all other prerogative writs, it is to be used with caution and forbearance, for the furtherance of justice, and securing order and regularity in judicial proceedings in cases where none of the ordinary remedies provided by law are applicable. The writ should not be granted except in cases of a usurpation or abuse of power, and not then unless the other remedies provided by law are inadequate to afford full relief. If the inferior court has jurisdiction of the subject-matter of the controversy, and only errs in the exercise of its jurisdiction, this will not justify a resort to the extraordinary remedy by prohibition.

The district court has unquestioned jurisdiction of the subject-matter of the action of *Walcott v. Watson et al.* Petitioner, after submitting her cause to the jurisdiction of that court, sought to dismiss the action. A controversy arose as to whether or not the action was dismissed before the filing of defendant's answer setting up a counter-claim. This was a question for the district court to decide. It may have erred in deciding it adversely to petitioner; but if it did, the petitioner would have redress by an appeal to this court, if the final judgment should be rendered against her. The same principle applies to the second ground relied upon. It was within the jurisdiction of the court to determine whether or not the case had been transferred. If the court erred in its ruling upon this question, petitioner could have redress in the same manner, by appeal, or she might apply by petition to the circuit court of the United States to have the case transferred,—a proceeding involving but little, if any, greater expense or delay than will be incurred by this application. Moreover, that question ought not to be raised by this extraordinary remedy in this court. The decision thereon would not be final. If it was considered and decided by this court that the cause was transferred, the circuit court might, when it came up in that court, decide otherwise, and send it back to the state court for trial. It is a principle which lies at the very foundation of the law of prohibition that the jurisdiction is strictly confined to cases where no other remedy exists; and it has always been held to be a sufficient

reason to refuse to issue the writ where it clearly appears that the petitioner therefor has another plain, speedy, and adequate remedy at law.

In *Martin v. Sloan*, after a temporary injunction was dissolved in an action brought by an administrator, the defendant therein moved for an assessment of damages on the injunction bond. During the proceedings a new administrator was substituted. One of the sureties on the injunction bond instituted this proceeding, and applied for a writ of prohibition to prevent the court from proceeding any further upon the motion for damages, on the ground that the original suit had abated, and the jurisdiction of the court terminated. The court said: "This is plainly no case for the issue of a writ of prohibition. Should the trial court enter a finding and judgment for damages against petitioner, and the other sureties on the injunction bond, any one of them aggrieved may review that result by appeal or writ of error, on taking proper steps to that end. Any error that court may make in determining the proper limits of its jurisdiction in the premises can be effectively corrected by any of the usual modes of reviewing judgments. The writ of prohibition should issue only in circumstances where the ordinary remedies are inadequate to the ends of justice. Where, as here, an appeal or writ of error furnishes a complete and effective remedy for an error of the court below prejudicial to the rights of a party, this extraordinary remedy should be denied." 11 S. W. Rep. 558. See, also, *People v. District Court*, 11 Colo. 574, 19 Pac. Rep. 541; *Buskirk v. Judge*, W. Va. 91; *Fleming v. Commissioners*, 31 W. Va. 619, 8 S. E. Rep. 267; *Supervisors v. Wingfield*, 27 Grat. 333; *State v. Houston*, 40 La. Ann. 393, 4 South. Rep. 50; *State v. Rightor*, 40 La. Ann. 839, 6 South. Rep. 102; *Wilson v. Berkstresser*, 45 Mo. 283; *People v. Westbrook*, 89 N. Y. 152; *Turner v. Mayor*, 78 Ga. 687, 3 S. E. Rep. 649; *People v. Circuit Court*, 11 Mich. 403; *People v. Hills*, 16 Pac. Rep. 405; *Powelson v. Lockwood*, 82 Cal. 615, 23 Pac. Rep. 143; *High, Extr. Rem.* § 765 et seq.

2. Petitioner next contends that the writ should be issued to prohibit respondent, Wells, from acting as judge upon the trial of said cause, upon the ground that he is not one of the district judges authorized to try cases in the district court of the state of Nevada; that he is acting as a judge without any authority of law; that he has, in defiance of law and without any jurisdiction, "usurped the authority and power to try said cause, in that the law under which he was appointed and commissioned by the governor is wholly void, and of no effect." On the other hand, it is claimed that the right of respondent, Wells, to exercise and perform the functions of a district judge, and his title to the office of district judge, cannot be raised, tried, or determined in this proceeding; that the constitutionality of the act of the legislature under which he was appointed to the office is not involved, and cannot be attacked, and should not be considered or decided herein; that the

validity of the act, in so far as it involves respondent's title to the office, can only be considered and determined in proceedings in the nature of *quo warranto*, instituted as provided by statute, for the purpose of determining his right to hold said office; that until such a proceeding is instituted, and until it is decided therein that he has no right or title to the office, he is, as to third persons and the public, at least a *de facto* officer; and that all his acts as such are valid and binding, and that there is no valid reason why he should not be permitted to try petitioner's case, as well as the cases of other litigants pending in the court over which he presides. Which contention is correct? First, let us consider the facts upon which the respective claims are based.

The act supplemental to and amendatory of an act entitled, "An act to redistrict the state," etc., approved March 4, 1885, was approved March 12, 1889; and section 1 of said act reads as follows: "The number of district judges in the judicial district of the state of Nevada shall, from and after the passage of this act, be four; and the governor of said state shall, immediately upon the passage of this act, appoint a district judge from said judicial district to hold such office under such appointment until the next general election, when four district judges from said judicial district shall be elected." St. 1889, p. 122, c. 118. There was, at the time of the passage of this act, a district court, legally constituted, constitutionally organized, and existing by virtue of law, to be held in every county of the state. The office of district judge also legally existed. There was but one judicial district for the entire state, but one district court, and one judicial office in connection therewith to be filled, to-wit, the office of district judge of the district court of the state of Nevada. This office was then filled by three district judges, each having equal and co-extensive jurisdiction and power throughout the state to hold the district court in any county, and to exercise and perform the powers, duties, and functions of the court, and all other duties pertaining to the office of district judge. These judges were authorized to elect a presiding judge, who had, among other things, the power to direct the district judges to hold court in the several counties as the public business might require. St. 1885, p. 60; *State v. Atherton*, 19 Nev. 332, 10 Pac. Rep. 901.

The legislature, in 1889, deeming it to be necessary for the proper and speedy transaction of judicial business in the district court, and believing that they were authorized to increase the number of district judges, passed the act in question, authorizing the governor to appoint another judge. This act did not create any new court or new officer. It simply provided for an increase of judges. There were to be more officers,—an additional district judge to preside in the district court, and perform the functions and exercise the powers of a district judge throughout the state. The governor, pursuant to the provisions of the supplemental act, appointed and commissioned the respondent

as a district judge. There was no first, second, third, or fourth judge. But there were four district judges, each commissioned to fill the one office of district judge; each, apparently at least, authorized to hold court, not in any particular county, but in each and every county in the state. We are bound to take judicial notice of the fact that, after respondent was commissioned and sworn into office, he was assigned by this presiding judge of the judicial district to hold the district court in the county of White Pine, and certain other counties; that immediately thereafter he commenced to discharge the duties pertaining to the office of district judge; and that for more than a year past he has been recognized by the state and county officers, and by the people of this state, as one of the district judges, and that his right to perform the duties of the office of district judge, and receive the salary pertaining thereto, has never been questioned until this proceeding was instituted. It is a general rule, of universal application, that the acts of an officer *de facto* are valid and binding as to third persons and the public, and cannot be questioned except in a direct proceeding instituted for that purpose by *quo warranto*.

In *Coyle v. Com.*, the defendant, on trial for murder, contended that the judge was acting under an unconstitutional law, and that he had no jurisdiction to try the case. The supreme court said: "The question sought to be raised by the prisoner's special plea to the jurisdiction is not properly before us. The rightful authority of a judge, in the full exercise of his public judicial functions, cannot be questioned by any merely private suitor, nor by any other, excepting in the form especially provided by law. A judge *de facto* assumes the exercise of a part of the prerogative of sovereignty, and the legality of that assumption is open to the attack of the sovereign power alone. If the question may be raised by one private suitor, it may be raised by all; and the administration of justice would, under such circumstances, prove a failure. It is not denied that Judge McLEAN was a judge *de facto*; and if so he is a judge *de jure* as to all parties except the commonwealth. The attorney general, representing the sovereignty of the state, by a writ of *quo warranto*, might properly present this constitutional question for our consideration; but it cannot come before us from any other source, or in any other form." 104 Pa. St. 130. See, also, to same effect, *Clark v. Com.*, 29 Pa. St. 129; *Com. v. McCombs*, 56 Pa. St. 436; *People v. Sassovich*, 29 Cal. 485; *Buckner v. Veuve*, 63 Cal. 304; *Carleton v. People*, 10 Mich. 251; *People v. White*, 24 Wend. 524; *Fowler v. Bebee*, 9 Mass. 281; *Sheehan's Case*, 122 Mass. 445; *Com. v. Taber*, 123 Mass. 253; *In re Boyle*, 9 Wis. 264; *State v. Bloom*, 17 Wis. 521; *Ex parte Johnson*, 15 Neb. 512, 19 N. W. Rep. 594; *Trumbo v. People*, 75 Ill. 565; *State v. Meehan*, 45 N. J. Law, 192; *State v. Vickers*, 51 N. J. Law, 180, 17 Atl. Rep. 153; *Keith v. State*, 49 Ark. 442, 5 S. W. Rep. 580; *State v. Fuller*, 96 Mo. 167, 9 S. W. Rep. 583; *In re Cleveland*, 17 Atl. Rep. 772; *Jewell v. Gil-*



bert, 64 N. H. 14, 5 Atl. Rep. 80; Baker v. State, 69 Wis. 37, 33 N. W. Rep. 52; Hull v. Superior Court, 63 Cal. 177.

But petitioner contends that respondent is not a *de facto* officer, that the conditions necessary to constitute such an officer do not exist, that there is no office to be filled, that it is a legal impossibility for a fourth judge to fill the office of district judge, "because the office has always been full," and that for these reasons the rule above stated has no application to this case. We admit that there can be no officer, either *de jure* or *de facto*, if there be no office to fill; that an office attempted to be created by an unconstitutional law has no existence, and is without any validity; and that any person attempting to fill such a pretended office, whether by appointment or otherwise, is a usurper, whose acts would be absolutely null and void, and could be questioned by any private suitor, in any kind of an action or proceeding. It would be a misnomer of terms to call a person an "officer" who holds no office. A public office cannot exist without authority of law. An office cannot be created by an unconstitutional act, for such an act is no law. It confers no rights, imposes no duties, affords no protection, furnishes no shield, and gives no authority. It is in legal contemplation to be regarded as never having been possessed of any legal force or effect, and is always to be treated as though it never existed. *State v. Tuffy*, 20 Nev. —, 22 Pac. Rep. 1054; *Norton v. Shelby Co.*, 118 U. S. 442, 6 Sup. Ct. Rep. 1121. If, therefore, the contention of counsel for petitioner has any solid foundation for its support, the conclusions to be drawn therefrom should be sustained. But, if the contention is wholly unsupported and unwarranted by the facts, then the entire fabric upon which the claim is made must fall; it having nothing to support it.

The case of *Ex parte Roundtree*, 51 Ala. 40, wherein a writ of prohibition was issued to a circuit judge to prohibit him from proceeding in a case, is relied upon by petitioner's counsel to sustain his position. That case, however, is wholly different in its facts, and is plainly distinguishable, from this. There the legislature of Alabama passed an act, by its terms creating a new court, to be known as the "Law and Equity Court of Morgan County," and provided "that the judge of the fourth judicial circuit of Alabama shall be the judge of said court of law and equity." This act was held to be unconstitutional because it took from the qualified electors of Morgan county the power of electing a judge. The court attempted to be created by an unconstitutional law had no legal existence. Here the district court in which respondent is presiding had a legal existence prior to and at the time of his appointment, and was not created by virtue of the act authorizing his appointment. We refer to two other decisions, similar to the Alabama case, for the purpose of illustrating the particular character of cases to which the argument of petitioner's counsel would apply, and to show the distinction in the facts between such cases and the one under con-

sideration. The legislature of Kentucky attempted, in an unconstitutional manner, to abolish the constitutional court of appeals, and to create a new court of appeals, in direct violation of the plain provisions of the constitution of the state. The constitutional court of appeals, in *Hildreth's Heirs v. McIntire's Devisees*, 1 J. J. Marsh. 206, held that there could be but one court of appeals, and that such a thing as a *de facto* court of appeals could not exist under the constitution, and as no such court existed the gentlemen appointed to preside over such a court were not *de facto* officers. In *Norton v. Shelby Co.*, 118 U. S. 426, 6 Sup. Ct. Rep. 1121, on writ of error from the supreme court of Tennessee to the supreme court of the United States, the legislature had attempted, by an unconstitutional act, to abolish what was known as the "Quarterly Court," composed of the justices of the peace of Shelby county, and to create in its stead a board of commissioners consisting of three members. It was held that, as this board of commissioners never had a lawful existence the members thereof were not *de facto* officers, and that all the acts of the pretended board were null and void. The distinction in the facts between the cases referred to and the present one is so clear, plain, and manifest that no one ought to be misled in applying the legal principles which control the respective classes of cases. In each of the cases referred to, no court or office known to the law existed, to be filled by any one. Here the court and the office existed by virtue of the constitution and a valid law. There the right of the pretended officers to perform the functions of the pretended office was not admitted by any one, but, on the contrary, was directly disputed and drawn in question when the respective persons attempted to act. In *Norton v. Shelby Co.* the members of the quarterly court not only denied the right of the supervisors to act, but instituted proceedings by *quo warranto* to remove them from office; and such proceedings were pending in the courts at the time the acts under review in that case were performed. Here the right of respondent to act as district judge was never disputed, and his authority to act was publicly recognized and acquiesced in.

What constitutes a *de facto* officer? This court in *Mallett v. Mining Co.*, 1 Nev. 197, said that an officer *de facto* is on the one hand distinguished from a mere usurper of the office, and on the other hand from an officer *de jure*. In *Meagher v. Storey Co.*, 5 Nev. 245, it was said that acts performed by a city recorder as a committing magistrate, though the statute authorizing him to so act is unconstitutional and void, are to be regarded as the acts of a *de facto* officer, and valid as to third persons and the public. In *State v. Curtis*, 9 Nev. 338, we had occasion to examine and discuss, to a limited extent, the question as to what constitutes an officer *de facto*. The rules taken from the authorities were there announced as follows: (1) One who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law; (2) one who actually

performs the duties of an office, with apparent right, and under claim and color of an appointment or election; (3) one who has the color of right or title to the office he exercises; (4) one who has the apparent title of an officer *de jure*. In *State v. Carroll*, Chief Justice BUTLER gave the following complete definition of a *de facto* officer: "An officer *de facto* is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid so far as they involve the interests of the public and third persons, where the duties of the office were exercised: *First*. Without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people, without inquiry, to submit to or invoke his action, supposing him to be the officer he assumed to be. *Second*. Under color of a known and valid appointment or election, but where the officer had failed to conform to some precedent requirement or condition, as to take an oath, give a bond, or the like. *Third*. Under color of a known election or appointment, void because the officer was not eligible, or because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise; such ineligibility, want of power, or defect being unknown to the public. *Fourth*. Under color of an election or appointment by or pursuant to a public unconstitutional law, before the same is adjudged to be such." 38 Conn. 471. This definition has been accepted, approved, and followed, in its entirety, in all the numerous subsequent cases where the question has been discussed, and was referred to with approbation by this court in *State v. Blossom*, 19 Nev. 317, 10 Pac. Rep. 430.

In *Taylor v. Skrine*, decided in 1815, it was sought to set aside a decree on the ground that it was made by a person who was not constitutionally qualified to preside as judge. There was an act in South Carolina authorizing the governor to appoint and commission some fit and proper person to sit as judge in case any of the judges on the circuit should happen to be sick or unable to hold the court, in his circuit. The judge who made the decree was appointed pursuant to the provisions of that act. After the rendition of the decree the act was declared void by a decision of the supreme court. The question was whether all the acts of the judge so appointed were necessarily void. The court, in answering this question, said: "The judge in this case acted under color of legal authority. He had a commission under the seal of the state, signed by the governor, and authorized by an act of the legislature. \* \* \* The public acts of officers *de facto* are often valid although the authority under which they act is void. Public convenience, as well as public justice, requires that they should be supported. It would lead to incalculable mischief if all the proceedings under the several judges who have been thus appointed should be declared null and void." 3 Brev. 516. The cases of *State v. Carroll*, *supra*, and *Ex parte Strang*, 21 Ohio St. 610, are similar in their facts to that of *Taylor v.*

*Skrine*; the difference being only that in the South Carolina case the law authorizing the appointment of a temporary judge had been declared unconstitutional before the decision in *Taylor v. Skrine* was rendered, and in the other cases the court declined to pass upon the constitutional question, holding it to be unnecessary so to do, as the temporary presiding judge was at least a *de facto* officer, and that his acts were valid and binding as to the public and third persons. We are of opinion that the facts of the present case bringing respondent clearly within the definition of a *de facto* officer, as given in *State v. Curtis* and *State v. Carroll*, even if the act authorizing his appointment is unconstitutional, and that the case comes clearly within the principle of law as stated in the three cases above quoted from or referred to. In those cases the office was full. There was no vacancy. The law authorizing the appointment of a temporary judge had either been declared unconstitutional, or, for the purposes of the decisions, admitted to be unconstitutional. The temporary judge acted in the place of the judge *de jure*, under color of authority derived from an unconstitutional statute by virtue of his commission, etc. Here respondent did not take the place of either of the three other judges, for there was no separate place for either to fill, except by the assignment of the presiding judge. He was acting by virtue of his commission, in his own right, by the consent of the other judges, and was assigned to the place by the presiding judge, and was the only judge presiding in the district court of the state in and for the county of White Pine. He acted as a district judge, filled the office, and presided in court, under as much color of authority as either of the temporary judges in the cases referred to. Why should not the same shield of protection to the public be given to his acts? "The doctrine which gives validity to acts of officers *de facto*, whatever defects there may be in the legality of their appointment or election, is founded upon considerations of policy and necessity, for the protection of the public and individuals whose interests may be effected thereby. Offices are created for the benefit of the public, and private parties are not permitted to inquire into the title of persons clothed with the evidence of such offices, and in apparent possession of their powers and functions. For the good order and peace of society, their authority is to be respected and obeyed until, in some regular mode prescribed by law, their title is investigated and determined. It is manifest that endless confusion would result if, in every proceeding before such officers, their title could be called in question." *Norton v. Shelby Co.*, 118 U. S. 441, 6 Sup. Ct. Rep. 1121.

In *Leach v. People*, 122 Ill. 420, 12 N. E. Rep. 726, the legislature having passed an act in violation of the constitution of the state of Illinois, taking the management of county affairs under township organizations from the supervisors of the several towns, consisting of 15 members, and vesting the same in a board of supervisors consisting of only 5 members, it was con-

tended, as it is contended here, that there was no *de jure* office for the supervisors to fill; and Norton v. Shelby Co. was relied upon to sustain this position. Chief Justice SHELTON, speaking for a majority of the members of the supreme court, in answer to this contention, said: "Wherever township organization prevails, there is in every county a board of supervisors for the transaction of the affairs of the county. The act in question merely changed the number of the members of the board from fifteen to five, and the mode of election from towns singly to two or more towns unitedly, and the term of office. Nothing was added to or taken from the powers or duties of the board. After the passage of the act there still remained the board of supervisors of Wayne county, the official body for the management of the county's affairs, and the persons elected as members under the act went on, under the sanction of the statute, and exercised the powers and duties of the board of supervisors of Wayne county without question. There was no rival board, but it was the sole acting board of supervisors in Wayne county." There was all the while the legally established office or official body of the board of supervisors. It appeared in that case that the new members of the board were elected in pursuance of the act, and entered upon the duties of their office, and went on and exercised the powers and duties of the board of supervisors of Wayne county for years, without question of their right to do so. They had the sole management and transaction of the affairs of the county, and did all the official legislative business of the county, just as respondent, Wells, had the sole management of the affairs of the district court in White Pine county, and did all the judicial business of the county that was done. There was no other official body ready and willing to do it. Upon this state of facts, the court said: "They were recognized and acquiesced in by all the public as the board of supervisors of Wayne county; and to hold their acts to be invalid would be most disastrous to the public interest, and that of individuals who were justified in relying upon such acts as the acts of the board of supervisors of the county. There are present here all the elements which, from considerations of public policy, and for the avoiding of public inconvenience, have been recognized as going to make up the character of *de facto* officers, whose acts should be held valid as officers by virtue of an election as such under an act of the legislature; reputation of being public officers, and public belief of there being such; public recognition thereof, and public acquiescence therein; and action as such unquestioned, during a series of years, with no other body ready and willing to act as the board of supervisors. We are therefore of opinion that this act \* \* \* in relation to the board of supervisors of Wayne county, even if it be unconstitutional, was sufficient to give color of title that the official board, elected and acting under the law, were officers *de facto*, and that their acts should be held valid, so far as the public and third persons are concerned."

In State v. McMartin, 43 N. W. Rep. 572, there was an act of the legislature establishing a justice's court in one of the wards of the city of St. Paul, and providing for the election of such justice at the next general city election. There was a section of the act authorizing the mayor of the city to appoint the first justice to have the office until the next election. Respondent, McMartin, was occupying the office, and performing its duties, under appointment by the mayor, pursuant to the provisions of this act. A civil action was commenced in the court, and the defendant therein applied for a writ of prohibition to restrain McMartin from proceeding in the action, on the ground that he was not a justice of the peace, and had no authority to act as such, for the reason that the provision of the act assuming to confer the power on the mayor to fill the office by appointment is unconstitutional. The court said: "This part of the act is entirely separate and distinct from the provisions creating the court or office; and hence, even assuming that the former is invalid, the latter are valid. We have, then, a case where the court or office was legally created; and the illegality, if any, consists in an attempt to fill it by appointment for the period indicated in a way not authorized by the constitution. On these facts, according to all the authorities, the respondent is a justice *de facto*. That his title to the office cannot be tried on a writ of prohibition, but only on information in the nature of *quo warranto*, is too well settled to require discussion." Counsel in that case, as well as in the case under consideration, argued that petitioner had no other available remedy for the wrong and injustice that was about to be done him, and that, inasmuch as there must be a remedy for every wrong, therefore a writ of prohibition ought to be issued. But, said the court: "The fallacy consists in the assumption that relator is threatened with any wrong. Respondent being a justice *de facto*, his acts are as valid as if he was a justice *de jure*. In fact, as to everybody except the state, in proceedings by *quo warranto* to test his right to the office, he is, in effect, a justice *de jure*."

In support of the views we have expressed we cite the following additional authorities: Rives v. Pettit, 4 Ark. 582; In re Ah Lee, 6 Sawy. 410, 5 Fed. Rep. 899; Campbell v. Com., 96 Pa. St. 347; Brown v. Lunt, 37 Me. 429; Dugan v. Farrier, 47 N. J. Law. 385, 1 Atl. Rep. 751; Carl v. Rhner, 27 Minn. 293, 7 N. W. Rep. 139; In re Parks, 3 Mont. 431; Fitchburg Railroad Co. v. Grand Junction Railroad and Depot Co., 1 Allen, 557; Petersilea v. Stone, 119 Mass. 467; Clark v. Easton, 146 Mass. 45, 14 N. E. Rep. 795; People v. Staton, 73 N. C. 546; Hamlin v. Kassafier, 15 Or. 453, 15 Pac. Rep. 778.

The construction of petitioner's counsel "that, when a law is unconstitutional under which a person claims to exercise authority, such authority may be attacked and disregarded in any form of proceeding," is not sustained by reason or authority. The legal existence of the district court of the state of Nevada, and of the office of district judge of said court,

cannot be questioned. Neither the court nor the office was created by the act which is claimed to be unconstitutional. The question raised in this proceeding is not, therefore, one touching the jurisdiction of the court; but it is an inquiry into the right of a particular person to hold the office of district judge, which is a question absolutely distinct from that of the jurisdiction of the court. The only question that is before us for consideration is whether or not the reputed or colorable authority required by law to constitute an officer *de facto* can be derived from an unconstitutional statute. From a review of the authorities bearing directly on the question, it clearly appears that it is sufficient if the officer claims and holds the office under some power having color to appoint, and that a statute, though it should be found repugnant to the constitution, will give such color.

The question of the constitutionality of the act increasing the number of district judges to four will not be considered. It is not properly before us for decision. It was not discussed by counsel for respondent, and is simply assumed to be unconstitutional by petitioner's counsel. This question, in so far as respondent's right to hold the office of district judge is concerned, can only be raised in a direct proceeding, by *quo warranto*, to determine by what authority he exercises the right. The alternative writ of prohibition heretofore issued in this case is vacated, and the temporary writ asked for denied.

MURPHY, J., (*concurring*.) I was not present, and did not hear the oral arguments made by the attorneys on the hearing of the writ. But from an examination of the briefs filed, and all the authorities having any bearing upon the subject, I am of the opinion that the application for the writ should be denied. I therefore concur in the opinion of Chief Justice HAWLEY.

BELKNAP, J., (*dissenting*.) At the session of 1885 the legislature constituted the state one judicial district, and provided that there should be three judges of the district court. Pursuant to this law, three judges were elected at the general election of 1886 for the term of four years. Their terms will not expire by limitation until the first Monday in January, 1891. At the session of 1889 the legislature enacted that the number of district judges should be increased to four, and authorized the governor of the state to forthwith appoint a fourth judge. Respondent was commissioned under this authority in the month of March, 1889. This enactment, in so far as it attempts to increase the number of district judges during the term of the judges elected in 1886, is in direct violation of the provisions of the constitution, which require that the number shall not be increased or diminished "except in case of a vacancy, or upon the expiration of the term of an incumbent of the office." Const. art. 6, § 5. The enactment, being unconstitutional and void in the respect stated, created no office or judgeship to be filled. It was as inoperative as though it had never been passed. No *de jure* judge could

be created by virtue of its provisions; and, if there could be no *de jure* judge, there could be no *de facto* judge, for the reason that the *de facto* doctrine presupposes provision by law for a *de jure* officer. It is considered, however, by the majority of the court, that if the law of 1889 be unconstitutional, the office of district judge created by the constitution and laws passed in pursuance thereof remains; that respondent is an incumbent of this office, and therefore a *de facto* officer. In my view the case does not admit of the application of the *de facto* doctrine. At the time of respondent's appointment the office of district judge was, and continuously since has been, filled by the three judges before mentioned. A *de facto* officer, as the term implies, is one who is in fact the officer. It is evident that there is no room for such an officer if the number of the officers fixed by the law are in the actual possession of the office. *McCahon v. Commissioners*, 8 Kan. 437; *Boardman v. Halliday*, 10 Paige, 232; *Morgan v. Quackenbush*, 22 Barb. 80; *Cohn v. Beal*, 61 Miss. 399; *State v. Blossom*, 19 Nev. 312, 10 Pac. Rep. 430.

The cases cited by the chief justice fall short, it seems to me, of establishing the conclusion that respondent is a *de facto* officer. In *State v. Carroll*, *Taylor v. Skrine*, and *Ex parte Strang*, the legal incumbent was temporarily incapable of discharging the duties of the office, and had surrendered it and its instrumentalities to the possession of the appointee. There was, therefore, in each of these cases, a vacancy, or that which was tantamount to one. In *State v. McMartin*, 43 N. W. Rep. 572, the office was vacant when the appointment was made. In *Leach v. People*, 122 Ill. 420, 12 N. E. Rep. 726, the legislature had passed an unconstitutional act providing for the election of a board of supervisors for the management of the affairs of Wayne county, consisting of 5 members only, instead of 15. "The real cause of complaint," said the court in its opinion, "is that the office legally existing was illegally filled." The question in all of these cases was whether an officer appointed or elected under an unconstitutional act to a vacant office was a *de facto* officer. This question is not involved in the present case, because there was no vacancy in the legal organization of the court to be filled. I think respondent should not be considered a judge *de facto*, and that the writ of prohibition should issue.

ALEXANDER V. ARCHER. (No. 1,314)

(Supreme Court of Nevada. June 18, 1890.)

CONSTITUTIONAL LAW—JURISDICTION OF JUSTICE—ESTOPPEL—CERTIORARI.

1. St. Nev. 1881, p. 56, § 3, provides that, in all cases of attachment, etc., any miner, mechanic, etc., may serve upon the officer executing the same a sworn statement of his claim at any time before the sale, and shall also notify the creditor at whose instance the writ was issued, and the debtor, if he be found in the county where the property is situated, and if he be not found, then service upon the officer shall be sufficient; and unless, within five days after receiving such notice, either the creditor or debtor disputes the claim, the officer

shall pay the amount thereof as a first lien upon the proceeds of the sale. *Held*, the statute does not provide for the taking of private property without due process of law, and is constitutional.

2. Where, in a suit in a justice's court, such notices were served upon the attaching creditor, and upon the sheriff who made the levy, the debtor being not found, and, although the claim was not disputed within five days, the sheriff failed to pay it, but applied the proceeds of the sale to the satisfaction of the execution, the justice had jurisdiction, upon showing by the claimant, to enter an order requiring the sheriff to pay the amount of the claims. *BELKNAP, J.*, dissenting.

3. The judgment creditor, whose judgment was satisfied in full from the proceeds of the attached property, is estopped from objecting to such order, on the ground that his own complaint was in reality insufficient, or that the proceedings were irregular.

4. On a return by the lower court to a writ of *certiorari* no evidence will be considered which does not constitute part of the record sent up.

#### *Certiorari.*

*J. H. Macmillan and W. E. F. Deal*, for petitioner. *L. A. Buckner and R. M. Clark*, for respondent.

**MURPHY, J.** The petition in this case is for a writ of *certiorari* to review the proceedings of the justice of the peace of Union township, Humboldt county. It appears from the transcript from the justice's docket that on the 7th day of March, 1889, the petitioner filed in the justice's court a complaint on a promissory note against the Cliff Mining Company for the sum of \$276.47, signed by "N. FRAYER, Supt.;" that on the same day a writ of attachment and summons were issued, placed in the hands of a deputy-sheriff, and service made on the superintendent and managing agent of the said mining company, and certain personal property attached to satisfy whatever judgment that might be obtained. On the 11th day of March, 1889, the petitioner appeared in court, and, there being no appearance on the part of the Cliff Mining Company, judgment was entered in favor of the plaintiff (petitioner here) for the amount claimed to be due. Execution issued, and on the 16th day of March, 1889, the property was sold, and on the 29th day of March, 1889, said execution was returned by the sheriff satisfied. On the 15th day of March, 1889, one Lawrence Walsh made out, subscribed to, and had filed in the justice's court a preferred claim against the Cliff Mining Company, under the provisions of an act of the legislature to protect the wages of labor, approved February 23, 1881, (St. 1881, p. 56,) and served a copy thereof on each of the parties to the action of *Alexander v. Cliff Mining Company*, and on the officer executing the writs of attachment and execution; and, the defendant whose property had been attached and levied upon not being in the county, the said Walsh delivered, at the same time and place, one of the notices to the officer serving the writs, in lieu of the Cliff Mining Company, and also one of said notices to William S. Bonnfild, as attorney for the said Cliff Mining Company. On the 9th day of October, 1889, Lawrence Walsh served a written notice on F. M. Fellows, sheriff of Humboldt county, demanding of

said sheriff the payment of the sum of \$150.50, the amount alleged to be due Walsh on his preferred claim, and on the same day a citation was issued out of the justice's court, directed to the said sheriff and his sureties, requiring them to appear before the said justice on the 16th day of October, 1889, and show cause, if any they had, why an order should not be made requiring the said sheriff to pay to Walsh the said sum of \$150.50 realized from the sale of property belonging to the Cliff Mining Company. Service of the papers was made on the sheriff. On the 23d day of October, 1889, to which time the hearing had been continued, the parties appeared before the justice of the peace. Walsh introduced his documentary evidence, and F. M. Fellows, the sheriff, appeared and objected to the jurisdiction of the court. The ground of the objection is not stated. Whereupon the justice made an order that F. M. Fellows, as sheriff, pay to Lawrence Walsh \$150.50, United States gold coin, of the money he made on attachment in the action of *L. W. Alexander v. Cliff Mining Company*, the amount due on Walsh's preferred claim, and the sum of \$3.75 costs.

Section 3 of the act under which the above proceedings were had, reads as follows: "In all cases of execution, attachments, and writs of a similar nature, against the property of any person or persons or chartered company or corporation, it shall be lawful for such miner, mechanic, salesman, servant, clerk, and laborer to give notice of their claim or claims, and the amount thereof, duly certified and sworn to by the creditor or creditors making the claim, to the officer executing either of such writs, at any time before the actual sale of property levied upon. The creditor or creditors making the claim shall at the same time give notice in writing to the creditor or creditors at whose instance the property has been levied upon, or his or their attorney, of their said claim or claims, and the amount thereof, duly certified and sworn to by such claimant or claimants. A copy of said notice shall also be served upon the debtor, if he be found within the county where the property levied upon is situated; provided, that if the debtor cannot be found within the county where the property levied upon is situated, then said notice may be served upon the officer executing either of such writs, in lieu of said debtor. Upon the filing in the court where the action or actions against the debtor is or are pending, of an affidavit of the claimant or claimants showing his or their compliance with the foregoing provisions of this section, the officer executing either of said writs shall pay to such miners, mechanics, salesmen, servants, clerks, or laborers, out of the proceeds of the sale, the amount each is justly and legally entitled to receive for services rendered, within ninety days next preceding the levy of the writ of execution, attachment, or other writ, not exceeding two hundred dollars, in gold coin of the United States: provided, that either the creditor or debtor may dispute the claim of any person seeking and claiming preference under this section; and in

such case the party or parties disputing such claim shall serve a written notice that they dispute such claim upon the claimant or claimants, and upon the officer executing such writs, within five days from the time of service upon such creditor or debtor of the notice of the claim by the claimant seeking preference as hereinbefore provided for." The petitioner contends that the act under consideration is unconstitutional, in that it is an attempt to deprive a person of his property without due process of law, and they rely upon the decision in case of *Coscia v. Kyle*, 15 Nev. 395. The court in that case did not hold the law to be unconstitutional. The record showed that the plaintiff presented his claim, duly verified, to the sheriff, before the sale of the property; but as no notice had ever been served upon the creditor or debtor, except as to Huntington, Hopkins & Co., it was to be inferred that the sheriff notified them, and they denied the preferred claims, and the sheriff notified the claimant that his claim was disputed. Upon those facts the court below set aside the verdict of the jury, and granted a new trial on the ground that the claims were disputed, and no suit was ever brought to establish said claims. On appeal the attorney for appellant contended that the notice to the sheriff was sufficient, and, neither the creditor nor debtor having disputed the claim by serving upon the claimant a written notice of their objections, the sheriff was in duty bound to pay the preferred claim. The majority of the court held that, if such was to be taken as the intention of the law, it would be unconstitutional, as it would deprive the judgment creditor of his property to the extent of his judgment lien, and the judgment debtor for whatever money might be in the officer's hands after paying said judgment. The court then said: "We do not think that in this instance the legislature has attempted anything of the kind. As we construe the statute, it clearly implies, although it does not expressly say so, that notice of the claims must not only be given to the sheriff, but also to the debtor and creditor, for how otherwise can they dispute the claims?" Intimating that if the claimant had served notices of his claim on the debtor and creditor, the law would have been complied with, and, if the claim was not disputed, the claimant would be entitled to his money. Since the decision in the case *Coscia v. Kyle* was rendered, the statute has been amended, removing all ambiguity. In California, where they have a statute similar to our own, the supreme court said, in the case of *Mohle v. Tschirch*, 63 Cal. 382: "It is contended by appellant that section 1206 of the Code of Civil Procedure is unconstitutional, in that it provides for taking private property without due process of law, and that it is special legislation. The section provides for notice to the attaching creditor, and the latter knows that his attachment will hold the property for the benefit of the claims of the preferred class which may be established. Our attention has not been called to any subdivision of section 25 of article 4 of the state constitution which prohibits such legislation as is

enacted in section 1206 of the Code of Civil Procedure."

There are two points to be considered in the construction of all remedial statutes,—the mischief and the remedy; and it is the duty of courts so to construe acts of the legislature as to suppress the mischief and advance the remedy. The object of the law under consideration being to secure the claims of the miner, mechanic, salesman, servant, clerk, and laborer, who have by their labor contributed to enhance the value of their employers' property, should receive the most liberal construction to give full effect to its provisions. In the majority of cases the laborers are men of limited means, depending entirely upon their daily wages for the support of themselves and families. The legislature, knowing this to be the case, enacted the above law, as being the most expedient and least expensive, and to secure to the class named their pay, which they could not do, if required to pursue the ordinary course of law, as the first attachment or the first writ of execution would exhaust all the property of the judgment debtor, leaving the man who by his labor created the property without any redress whatever. Walsh, having made out his preferred claim, duly certified and sworn to, filed the same in the justice's court, where the action of *Alexander v. Cliff Mining Company* was instituted, served copies thereof on the parties to the suit, and the officer serving the writs, as required by the statute, and, his claim not being disputed within the five days, as required by the law, it became and was the duty of the sheriff, after selling the property and receiving the money, to pay Walsh's preferred claim. That officer, not having done so, is liable to Walsh for the amount found to be due. Walsh's claim not being disputed, he is not required to bring an additional action for the recovery of the amount due him. The filing of his preferred claim, and the service of copies thereof on the judgment creditor, judgment debtor, and the officer serving the writs, is in the nature of a petition of intervention; it is a notice to the creditor and debtor that the claimant has an interest in the action commenced as against both plaintiff and defendant, and claims a lien on the money coming into the officer's hands from the sale of the property. If either the debtor or creditor objects to the claim, they must within five days serve written notices upon the claimant and the officer executing the writs, that they, or either of them, dispute the claim, or some part thereof. If such notice is served, then it becomes the duty of the claimant within 10 days to commence an action in a court having jurisdiction to establish his claim. The notice served upon the officer serving the writs and receiving the money is in its nature a garnishee. It is a notice to him that the claimant claims a portion of the money in his hands. He has notice of the proceedings, and knows, or should know, what is required of him. At the expiration of five days after the service of notice of the preferred claim upon him, if he has not been notified in writing that the claim is disputed, he must pay

the claim, for by the silence of the judgment creditor and debtor they confess the justness of the claim. If he should be notified within the time and in the manner, as required by the statute, that the claim is disputed, he shall retain the money in his hands for 10 days from the service of such notice. If suit has not been commenced by the claimant within the 10 days, it is an admission that his claim is not a just one, and the officer will pay the money over to the judgment creditor. If the suit has been commenced as required by the act, the officer should retain possession of the money until the final termination of the suit, and pay it out in accordance with the orders of the court. Money received by an officer by virtue of a writ of attachment or garnishee is in the custody of the law, and the officer is in duty bound to pay it out as the law and the court directs; and the law in this case said that the sheriff should have paid Walsh's claim, as the same had not been disputed. The sheriff not having done so, the only course left for Walsh to pursue was to petition the court, and the court had the power to make the order. This is the only reasonable and logical construction that can be placed upon the act. The act is not subject to the objection that it deprives a person of his property without due process of law. The act provides for the serving of notices, and gives the judgment debtor and creditor an opportunity to be heard in court; and if they do not avail themselves of that privilege, it is their own fault, and not the fault of the law. The officer cannot complain, as he has no interest in the subject-matter whatever except to obey the law and the orders of the court out of which the writs issued, and enforce their mandates. In the case of *McCauley v. Fulton*, 44 Cal. 360, the court said: "The form and mode of service of process by which parties defendant are brought into court, whether it be an inferior or superior court, so as to give the court jurisdiction of their persons, are matters of legislative discretion." And in the case of *Dent v. West Virginia*, 129 U. S. 114, 9 Sup. Ct. Rep. 231, Mr. Justice FIELD, in delivering the opinion of the court, said: "Legislation must necessarily vary with the different objects upon which it is designed to operate. It is sufficient, for the purpose of this case, to say that legislation is not open to the charge of depriving one of his rights without due process of law, if it be general in its operation upon the subjects to which it relates, and is enforceable in the usual modes established in the administration of government with respect to kindred matters; that is, by process or proceedings adapted to the nature of the cases." Jurisdiction is the power to hear and determine causes between parties and to carry judgments into effect. Petitioner also claims that Walsh cannot recover because there was no suit pending; no writ of attachment issued in any action wherein the Cliff Mining Company was a defendant; that there was no judgment against the Cliff Mining Company; and he bases his objections on the ground that the note sued upon was not the note of the Cliff Mining Company. These objec-

tions will not be considered. Petitioner, having obtained judgment against the Cliff Mining Company, and, by legal process, collected the amount of the judgment, is estopped from making any objections to the sufficiency of his complaint, or to the regularity or legality of any of the proceedings by virtue of which he obtained the judgment and succeeded in collecting the full amount of his claim. The petition for the writ of *certiorari* was filed in this court on the 11th day of January, 1890. On the 3d day of March the writ issued, and was made returnable on the 15th day of March. On the 13th day of March two *ex parte* affidavits were made on behalf of petitioner, and we are asked to consider them as part of the record before us. The court to which a writ of *certiorari* is addressed is required to comply by returning and certifying the record of its proceedings. No more of the facts of the case will be required to be returned than those which are necessary to determine the point of jurisdiction, and the return is treated as conclusive. No evidence will be received and examined unless it is embodied in the record received from the court against which the writ is issued. *State v. Board*, 7 Nev. 87. The justice of the peace had jurisdiction of the subject-matter. The writ will therefore be dismissed.

Since writing the above, the case of *Carter v. Mining Co.*, has been reported in 23 Pac. Rep. 317, and it supports the views herein expressed.

BELKNAP, J., (*dissenting*.) I dissent from the judgment of the court upon the ground that the court of the justice of the peace had no jurisdiction to make the order requiring the sheriff to pay the claimant the amount of his preferred claim. A court of record, out of which an execution has issued, may, in the exercise of its common-law powers, determine the application of the proceeds of the execution. But courts of justice of the peace possess no common-law powers. Their functions are such, and only such, as the legislature has conferred upon them. The statutes of the state make no mention of orders of the character of the one under review. Applying the well-established principle that courts not of record, and not proceeding according to the course of the common law, derive all their powers from the statute, and take nothing by implication, I am of the opinion that the order of the justice is void. This conclusion is strengthened by a consideration of the provisions of the practice act relating to appeals. Section 3352 of the General Statutes provides, among other things, that an appeal may be taken from any special order of the district court made after final judgment, but the statutes make no provision for appeals from orders of a similar nature made by the justices of the peace. If justices have the authority exercised in the present case their orders are final, while those of the district court are reviewable by appeal. This result is contrary to the general plan of procedure established by our laws, and tends to show that the exercise of the authority was not contemplated by the legislature.



3 Cal. Unrep. 279

**PERKINS v. COOPER et al.** (No. 13,179.)  
(*Supreme Court of California.* July 8, 1890.)

**BROKER'S COMMISSION—EVIDENCE—APPEAL.**

1. Under Civil Code Cal. § 1624, providing that an agreement authorizing an agent to sell real estate for a commission must be in writing, a real-estate agent cannot recover from executors, as individuals, commissions for selling property, when the contract produced is contained in letters from one of the executors only, which show that he was acting as executor, and not individually.

2. When an appeal is taken within 60 days after judgment, a bill of exceptions, containing the evidence, may, even though there is no motion for a new trial, be looked into to determine whether it is sufficient to support the verdict under Code Civil Proc. § 989, providing that such exceptions cannot be reviewed unless the appeal be taken within 60 days.

3. An appeal is taken under Code Civil Proc. § 940, when notice of appeal is served and filed, though the undertaking by which the appeal is perfected is not filed till afterwards.

In bank. Appeal from superior court, Santa Barbara county; R. M. MILLARD, Judge.

*E. B. Hall, J. W. Taggart, and R. B. Canfield*, for appellants. *B. F. Thomas*, for respondent.

**SHARPSTEIN, J.** Action to recover a broker's commission for effecting a sale of the property known as the "Arlington Hotel," in the city of Santa Barbara. Verdict and judgment for plaintiff. Defendants appeal from the judgment. The record contains a bill of exceptions which, respondent contends, cannot, in the absence of a motion for a new trial, be looked into for the purpose of determining whether the evidence is sufficient to justify the verdict. Such was the rule under the practice prior to the adoption of the Code, which contains the following provision: "An exception to the decision or verdict on the ground that it is not supported by the evidence cannot be reviewed on an appeal from the judgment unless the appeal is taken within sixty days after the rendition of the judgment." Code Civil Proc. § 939. The implication is that, if the appeal be taken within 60 days after the rendition of the judgment, such an exception may be reviewed. *Balch v. Jones*, 61 Cal. 236; *In re Crowey*, 71 Cal. 300-302, 12 Pac. Rep. 230. It is contended, however, that the appeal in this case was not taken within 60 days after the rendition of the judgment, because no undertaking on appeal was filed within that period of time. An appeal is taken when a notice of appeal is served and filed. Code Civil Proc. § 940. The filing of an undertaking perfects an appeal, but is not a part of the taking in the statutory sense. *Lowell v. Lowell*, 55 Cal. 318. Coming to the question, "Is the verdict supported by the evidence?" we are perfectly satisfied that it is not. As we construe the complaint, the action is not against the defendants as executors or trustees of the Hollister estate, but as individuals. This is expressly conceded by the learned counsel of respondent, who states in his brief that the action "was not brought against the defendants as executors of W. W. Hollister, deceased." \* \* \* The defendants were sued as individuals. This being so, it is

Cal. Rep. 23-25 P.—34

difficult to see how a judgment can be sustained which is payable in the course of administration upon the estate of W. W. Hollister, deceased. Assuming, however, in favor of respondent, that this portion of the judgment ought to be treated as surplusage, and treating it as a personal judgment against the defendants, the evidence is not sufficient to support such a judgment. The complaint alleges that "the defendants, by an agreement in writing, employed plaintiff as an agent to procure for them a purchaser," etc. This allegation was denied by the answer, and it devolved on the plaintiff to prove it. The Code provides that an agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation or a commission must be in writing. Civil Code, § 1624. The only writing introduced in evidence in this case is that of defendant Cooper alone. The other defendants are clearly not liable; nor do we think defendant Cooper is. His letters show (what is apparent from all the evidence) that he was acting as an executor of the Hollister estate, and in no other capacity, and he promised nothing which could make him personally responsible. *Blanchard v. Kaul*, 44 Cal. 440; *Haskell v. Cornish*, 13 Cal. 45. There being no "note, memorandum, or writing" of any contract sufficient to bind any of the defendants, there can be no recovery against them. *McCarthy v. Loupe*, 62 Cal. 299; *Myres v. Surryhne*, 67 Cal. 657, 8 Pac. Rep. 523. Judgment reversed, and cause remanded for a new trial.

We concur: *McFarland, J.*; *Fox, J.*; *Paterson, J.*; *Works, J.*

84 Cal. 141

**SPAULDING v. WESSON et al.** (No. 12,391.)  
(*Supreme Court of California.* May 12, 1890.)

**DEDICATION—EVIDENCE—ASSESSMENTS.**

1. Where the issue in an action to recover an assessment for grading a street was whether the street had been dedicated, findings by a court that the supervisors "had no authority or jurisdiction" to order the work done; that the superintendent of highways, etc., "did not legally make, sign, or issue any assessments" therefor; that the land was not "lawfully assessed" for any sum,—do not amount to a finding upon the fact of dedication.

2. The street in question had been an open street long before the grading was ordered; more than two blocks had been previously graded; the superintendent of streets had recommended the grading of the part in question; legal notice of a resolution of intention had been given, and no objections had been filed by abutting property owners. *Held*, that the board of supervisors acquired jurisdiction to order the work under St. Cal. 1871-72, c. 562, art. 4, § 4, which provides that the supervisors can order the completion of the grading of a street, two blocks of which have been previously graded, "without a petition therefor," upon the filing of the recommendation of the superintendent of streets, and the publication of notice of intention, and the overruling of objections filed by abutting property owners.

In bank. Appeal from superior court, city and county of San Francisco; M. A. EDMONDS, Judge.

This action was to foreclose a street assessment, amounting to \$249.17, upon a lot on the south-westerly corner of Union

and Polk streets, in the city and county of San Francisco, for grading Union street from Larkin street to the westerly line of Franklin street. The complaint contains all the allegations necessary to entitle the plaintiff to recover. The answer denies that the defendants, except J. W. and Abby C. Wesson, owned the lot in question; denies that the lot was assessed, and alleges that the board of supervisors never acquired jurisdiction to order the work of grading to be done, or make any assessment therefor; that Union street from Larkin street to westerly line of Franklin street runs over and upon a lot of the defendants', which, before the grading, was inclosed, and is not and never has been a public street or dedicated to public use. The evidence established, *prima facie*, the regularity of the proceedings of the board and of all the acts of the superintendent of streets; that for a long time prior to the grading thereof the street had been laid down on the official map as a public street; that more than two blocks of the street had been graded, and the superintendent of streets had recommended the grading of the balance thereof, including that in question; that on his recommendation a resolution of intention to order the work was passed by the board of supervisors, and notice thereof duly published, and thereafter the order for the work was entered by the board of supervisors; that the defendant did not file objections to the proceedings, nor object to the subsequent grading of the street; that the street had since been one of the oftenest used streets in the city; that the lot over which the street was laid was not the one on which the defendants lived, but another which came by a line of title from the same grantor as the other, and that such grantor obtained the one in the street from an alcalde, after having already received the first one and another; that the territorial acts of November 22, 1835, prohibited an alcalde from granting more than one lot (of 100 varas) to one person. The court sitting as a jury found as follows: (1) That the board of supervisors of the city and county of San Francisco had no authority or jurisdiction to order to be done the work described in the complaint herein; (3) that said superintendent of public streets, highways, and squares did no duly or legally make, sign, or issue any assessment for said work, or for \$8,419.15, or otherwise; (6) that the lot of land No. 18 on said alleged assessment and diagram, and described in complaint, was not assessed for \$249.17, or lawfully assessed for any sum; (18) that all the other allegations in the answer of defendants (and amendment thereto) are true, as therein stated. And on those findings judgment was rendered, from which the plaintiff appeals.

St. Cal. 1871-72, c. 562, art. 4, § 3, provides: "The board of supervisors are hereby authorized and empowered to order the whole or any portion of" streets which have been opened or dedicated, "graded," etc. Section 4 provides: "The board of supervisors may order any work authorized by section 3 of this act to be done after notice of their intention so to do, in

the form of a resolution, \* \* \* has been published for a period of ten days: \* \* \* provided, that no such notice shall be given, or order made, \* \* \* unless the majority of the frontage of the lots and land fronting on the work proposed to be done \* \* \* shall have been represented by the owners thereof \* \* \* in a petition to the said board of supervisors, \* \* \* requesting that such improvements or street work shall be done. \* \* \* At the expiration of any notice of intention the board of supervisors shall be deemed to have acquired jurisdiction to order any work to be done. \* \* \* And it is further provided that where any public street shall have been graded \* \* \* for the distance of two or more blocks \* \* \* it shall be the duty of the board of supervisors, upon the recommendation of the superintendent of public streets, highways, and squares, to order the notice provided in this section to be given without the petition provided first aforesaid; and if the owners of three-fourths of the frontage of the land and lots fronting on such portions of said streets to be graded or improved, shall, within the time prescribed in said notice, file written objections to the improvement of the said street, the board of supervisors shall duly consider said objections before ordering said work; and, if said board of supervisors shall decide and declare by an entry in the minutes of said board of supervisors that the objections so made are not good, thereupon the board of supervisors shall be deemed to have acquired jurisdiction to order any such street work to be done."

Wm. H. H. Hart and D. H. Whittemore, for appellant. J. C. Bates, for respondents.

Fox, J. A vital issue in this case is whether or not Union street, between Larkin and Franklin streets, had ever been dedicated as a public street. Upon that issue there is no finding whatever, unless it be held that the finding "that all the other allegations of the answer of defendants, and amendments thereto, are true as therein stated," covers that issue. If there is no finding covering the issue, the error is fatal. If the omnibus finding quoted covers it, then, in our judgment, the finding upon this point is not supported by the evidence. In either event the order must be reversed.

The first, third, and sixth findings are mere conclusions of law. An allegation that the board had no authority or jurisdiction to order the work to be done raises simply an issue of law. The facts should be alleged and specifically found. *Spaulding v. Bradley*, 22 Pac. Rep. 47. But if the finding in this case on that subject be considered as a finding of fact it is not supported by the evidence. It appearing that two or more blocks on each side of the street had been graded, that the work had been recommended by the superintendent of streets, and that the resolution of intention had been duly passed and published, it was not necessary to jurisdiction that there should be a petition by owners. St. 1871-72, pp. 804, 805, art. 4, §§ 3, 4. Neither the facts nor the

questions raised in *Spaulding v. Bradley* are the same as those involved herein. Order appealed from reversed, and cause remanded for a new trial.

We concur: MCFARLAND, J.; PATERSON, J.; SHARPSTEIN, J.

(84 Cal. 216)

CURTISS v. BACHMAN *et al.* (No. 12,884.)

(*Supreme Court of California.* May 31, 1890.)

**INJUNCTION BOND—PLEADING—DEMURRER.**

1. In an action upon an injunction bond a complaint is insufficient which contains no allegation of the non-payment of the money claimed under the contract; and such an allegation cannot be implied from an averment that plaintiff has been injured by reason of the issuance of the injunction in the sum named in the bond.

2. Code Civil Proc. Cal. § 472, provides that a demurrer is not waived by filing an answer at the same time. *Held*, that a demurrer to a complaint is not waived by the subsequent filing of an answer upon leave given by the court.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; T. K. WILSON, Judge.

W. B. Sharp, for appellants. Charles F. Hanlon, for respondent.

FOOTE, C. On March 26, 1890, Nettie Gilman instituted an action against Gilbert L. Curtiss, the plaintiff in the present action, and the Aetna Life Insurance Company, in order to recover a certain life policy issued by that company to the mother of plaintiff, and assigned by her to him, and also to restrain the company from paying over the money due on the policy to any one but Nettie Gilman, and seeking to have Gilbert L. Curtiss required to assign the policy in question to her. A temporary restraining order was made by the court upon the execution of a bond by the plaintiff in that action in the sum of \$500. A motion was made to dissolve this temporary injunction. That motion was denied on the 30th day of July, 1890, the court at that same time continuing in force the temporary injunction until the final determination of the case, upon the plaintiff in that action giving a bond for \$5,000 within five days, which instrument is the one on which the present action is predicated. The injunction first referred to was dissolved, and judgment for costs given in favor of Gilbert L. Curtiss, on April 9, 1895. Thereupon the present action was brought on the 7th of June, 1896, by Gilbert L. Curtiss, against the defendants here, as the sureties on the injunction bond of \$5,000 heretofore mentioned. The defendants demurred to the complaint, the second ground of which was that such pleading did "not state facts sufficient to constitute a cause of action." The demurrer was overruled, and the defendants granted "ten days to answer." They duly filed their answer in accordance with the permission of the court, and upon a trial being had before the court, a jury being waived, that tribunal decided in favor of the plaintiff, and rendered judgment in his favor for the sum of \$3,452, and costs. From that and an order denying a new trial the defendants prosecute this appeal. It becomes unnecessary to determine the

questions raised upon the appeal from the order, as the complaint here states no cause of action which will support the judgment. The action was upon a contract to pay money. In such a case the complaint must show a breach of the contract, or it states no cause of action. "A party suing upon a contract to pay money must show a breach of the contract, or his complaint states no cause of action. Therefore it is held that the complaint must, in such cases, allege the non-payment of the money claimed under the contract." *Richards v. Insurance Co.*, 80 Cal. 506, 22 Pac. Rep. 939, and cases cited. The complaint here under consideration contains no allegation of non-payment, nor is there anything alleged in it from which such non-payment can be implied. The allegation "that the plaintiff, Gilbert L. Curtiss, has been injured and damaged by reason of the issuance and continuance of said injunction in the sum of \$5,000," certainly does not allege anything from which non-payment can be held to be in the remotest degree even impliedly, much less directly, alleged. But the respondent claims that inasmuch as, after their demurrer was overruled, the defendants answered, that such action on their part was a waiver of the demurrer. It seems to have been formerly held that the filing of an answer after the overruling of a demurrer is a waiver of the demurrer. *De Boom v. Priestly*, 1 Cal. 206; *Pierce v. Minturn*, Id. 470; *Brooks v. Minturn*, Id. 481. But section 472 of the Code of Civil Procedure, as amended, provides, among other things, that "a demurrer is not waived by filing an answer at the same time." Thus it is expressly enacted that a demurrer is not waived by the filing of an answer at the same time; and a *fortiori* it is not waived by the filing of an answer, upon leave given by the court, subsequently to the filing and overruling of the demurrer. Ever since this amendment the practice has been to review rulings on demurrer, on appeal from a judgment, notwithstanding a subsequent answer. Hundreds of cases have been reviewed in this way; and in view of this universal practice, we are somewhat surprised that counsel should have made the point. For the prejudicial error thus shown the judgment and order should be reversed, and the cause remanded with directions to the court below to sustain the demurrer on the ground as herein indicated.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are reversed, with directions to the court below to sustain the demurrer on the ground as herein indicated.

(84 Cal. 276)

PEOPLE v. CHOY AH SING. (No. 20,617.)

(*Supreme Court of California.* June 2, 1890.)

**ASSAULT WITH DEADLY WEAPON—FLIGHT—EVIDENCE.**

1. Where, upon the trial of a defendant for assault with a deadly weapon, the evidence is conflicting as to the character of his flight immediately after delivering the blow it is error for

the court to instruct that such flight "is a circumstance tending to establish his guilt," to be taken into consideration with all the other circumstances and testimony.

2. To charge that, if the evidence is "sufficient to satisfy the minds of the jury" that the circumstances relied on to excuse or mitigate the offense existed, they should find the defendant guilty of a simple assault, will not be held prejudicial error, as leading the jury to believe that they must find him guilty unless satisfied of those facts, where, at the end of the charge, they were instructed that they might find the defendant not guilty "in case of a reasonable doubt \* \* \* as to the facts offered in evidence being sufficient to establish his guilt."

3. It is error to permit the prosecuting witness to be asked whether "any person" had spoken to him about dismissing the case, and to permit him to testify that persons other than the defendant had approached him, and offered him a bribe not to prosecute the case. The prosecuting attorney should have first stated that he intended to connect defendant with the attempted bribery, and then framed his question so as to confine the answer to overtures made by the defendant or his authorized agent.

Fox, J., dissenting.

Commissioners' decision. In bank. Appeal from superior court, city and county of San Francisco; F. W. VAN REYNOM, Judge.

Indictment and conviction for assault with a deadly weapon. Among other instructions, the giving of which is assigned as error, was the following: "When the defendant, to excuse or mitigate an act, claims it was in self-defense, the particulars of the transaction may be given in evidence, and if sufficient to satisfy the minds of the jurors that the circumstances were such as to excite the reasonable fears of the defendant that his life was in danger, or that he was in serious danger of great bodily harm, at the time of using the weapon by him, you may find him guilty of simple assault, if you believe from the evidence that he began the difficulty; or you may find him not guilty, in case of a reasonable doubt in your minds as to the facts offered in evidence being sufficient to establish the guilt of the defendant."

*Thos. D. Riordan and Jas. F. Smith, for appellant. Geo. A. Johnson, Atty. Gen., for respondent.*

FOOTE, C. The defendant was convicted of an assault with a deadly weapon. From the judgment in the premises, and an order denying a new trial, this appeal is prosecuted. The first ground of error alleged is that the court instructed the jury wrongfully with reference to the running away of the defendant, after the striking of the blow with a deadly weapon, which he was found, by the jury, to have feloniously inflicted upon the person of one Ah Mow. The part of the charge of the court to which objection is made reads as follows: "The flight of the defendant is a circumstance tending to establish his guilt, but is not of itself alone sufficient to justify a verdict of guilty. The jury may take the evidence of such flight into consideration in connection with the other circumstances and the testimony in the case." The record shows that upon the trial there was evidence of the running away of the defendant from the place

where he had stricken the prosecuting witness, Ah Mow, with an iron bar; but while the prosecution contended that this running away was a flight from the scene, as of one guilty of the crime charged, the defendant claimed in his testimony that he did so to avoid the friends of Ah Mow, who were chasing the former. Such being the facts in evidence, of a conflicting nature, as to the character of the flight, it was for the jury to say whether it was a flight such as tended to show guilt, or a flight merely to avoid injury. The instruction assumes that it was a flight of the defendant of a kind which tended to establish his guilt. This was, under the facts of this case, an instruction which in effect excluded the defendant's account of the nature of his running away from the jury, and was therefore erroneous. Another portion of the charge to which the defendant makes objection is to be found in the transcript at folios 47 and 48. The counsel for defendant contends that "it is not necessary that the particulars of the transaction given in evidence by the defendant to sustain the plea of self-defense should be sufficient to satisfy the minds of the jury. It is sufficient if they raise a reasonable doubt in the minds of the jurors as to the guilt of the defendant, and, if they do raise such reasonable doubt, then the defendant is entitled to an acquittal." While the language used, to which objection is thus made, is not so clear as it might have been, we do not think it prejudicial error, in view of the last clause thereof, which contains a statement of the rule that to find the defendant guilty the jury must have no reasonable doubt as to the sufficiency of the facts offered in evidence to establish the defendant's guilt. It is further assigned as error that the court, over the defendant's objection, permitted this question to be put to the witness Ah Mow: "Did any one speak to you about a dismissal of the case?" The answer was that two persons other than the defendant had approached the witness, and offered him a bribe not to prosecute the defendant. The answer made to the question was in response to it, because the question was one which called for the acts of "any one" in relation to speaking about "the dismissal of the case." The evidence brought out in the answer was irrelevant, because it did not connect the defendant, or any one authorized to act for him, with the alleged attempt to bribe the witness to have the prosecution dismissed. The court should have required the prosecution to state whether they proposed to connect the defendant with it, and the question to be so framed as that it would have directed the witness to state if he knew what the defendant, or an authorized agent, had done in the matter, and not have allowed it to be put in such a way as that the acts of any person whatsoever, even an unauthorized one, could be given in evidence. The ruling of the court was right in afterwards excluding similar evidence as to what the cousin of Ah Mow, the prosecuting witness, had done and said with a view to getting money from Toy Sing Ang, a witness for the defense, and settle the case. For the reasons here-

tofore stated we advise that the judgment and order be reversed.

GIBSON, C., concurring.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are reversed.

Fox, J., dissenting.

84 Cal. 107

*In re GRIFFITH'S ESTATE.* (No. 13,528.)

(*Supreme Court of California.* May 9, 1890.)

ADMINISTRATOR—APPOINTMENT—REMOVAL.

1. An order granting letters of administration is an adjudication that all facts existed that were necessary to give the court jurisdiction of the decedent's estate, and that all steps had been taken that were necessary to the issuance of such letters.

2. Code Civil Proc. Cal. § 1373, provides that upon the filing of a petition for letters of administration the clerk must post notices thereof in certain public places 10 days before the hearing. *Held* that, on an application to remove an administrator, the plaintiff, in the absence of averments that such notices were not posted, will not be permitted to deny that he had notice of the application.

3. In a proceeding to remove an administrator, six affidavits that the deceased was not a resident of the county where the appointment was made were filed with the petition, but were not refuted with the amended petition. Four affidavits to the contrary were filed upon the amended petition, and the fact was found for the defendant. *Held*, that there is no ground for disturbing the finding.

4. The fact that an applicant for letters of administration "offered" to divide commissions with a relative of the deceased if the latter would allow him to procure the appointment, and that he knew deceased was not a resident of the county in which the application was made, and failed to so inform the court, is not sufficient to maintain an action to set aside the appointment on the ground of fraud.

5. Where the deceased had property in two counties, a valid appointment of an administrator in one rendered void a subsequent appointment in the other.

BEATTY, C. J., dissenting.

On rehearing. For former report, see 23 Pac. Rep. 528.

PER CURIAM. Upon the argument of this case in bank, we are satisfied with the decision heretofore rendered as correct, and the same will stand as the decision of the court. Order affirmed. So ordered.

I dissent: BEATTY, C. J.

84 Cal. 511

FALLON v. BRITTAN *et al.* (No. 13,846.)

(*Supreme Court of California.* June 12, 1890.)

PARTITION—APPEAL—STAY OF PROCEEDINGS.

In a suit for partition of lands the supreme court will not order a stay of proceedings pending the hearing of an appeal from the action of the lower court in correcting the description, as set out in the complaint and the decrees, by changing "Terrine" and "Theresa" street to "Terraine" street, the proper spelling, and from an order appointing referees to conduct the sale to succeed others, who resigned.

In bank. On application for order to stay proceedings in partition in the superior court of the city and county of San Francisco; F. W. LAWLER, Judge.

James L. Crittenden, for petitioner.  
Daniel Titus, for respondents.

Fox, J. Action for the partition of five several parcels of land held by the parties as tenants in common,—two situate in the city and county of San Francisco, two situate in the city of San José, and one situate in the county of Santa Cruz. Interlocutory decree entered January 5, 1888, determining the interests of the respective parties, adjudging that as to two of said parcels,—one situate in San Francisco, and one in San José,—partition could not be made without material injury to the interests of the parties, and directing that, as to these two lots, they be sold for purposes of partition, and that, as to the remaining lots, they be partitioned in due course, and appointing three referees to make sale of the two lots, and the partition of the others. From this decree appeal was taken, January 6, 1888, to this court. On the appeal this decree was affirmed, and the appeal dismissed February 6, 1890.<sup>1</sup> Upon the going down of the *remittitur*, the referees originally appointed to make the partition and conduct the sale resigned, and the court by order appointed other referees in their stead. It was also then discovered that, in describing one of the lots in the city of San José, there was a clerical error in the complaint, which spelled the name of an abutting street on the west as "Terrine," when it should have been spelled "Terraine." The court ordered the complaint amended so as to correct this clerical error, and properly spell the name of the street, "Terraine." It was also discovered that, as to the same lot and the same boundary, a clerical error had crept into both the findings and decree, and in each the street abutting on the west was described as "Theresa Street." The court ordered this mistake corrected by amending both the findings and decree by striking out the word "Theresa" wherever it occurred, and inserting in lieu thereof the word "Terraine." From these orders, and from this decree "as amended," one of the defendants again appealed to this court, May 7, 1890. Subsequently, the appellant finding that, notwithstanding the perfection of her appeal, the referees had advertised for sale the lots which by the decree were ordered to be sold for purposes of partition,—of which, however, the one affected by these so-called amendments is not one,—she applied to this court for a *supersedeas*, or order staying all proceedings in said case pending the hearing of her appeal. An order to show cause was issued May 13, 1890, and meantime proceedings were stayed. Upon the hearing of such order, the facts as above stated are made to appear by affidavit; and on the facts appellant insists that the amendments made make this a new decree, from which she has a right of appeal, and pending appeal to have all proceedings stayed.

These amendments, other than the appointment of new referees in the place of those who had resigned, are the mere correction of clerical errors patent upon the

<sup>1</sup>No opinion.

face of the record. The lot affected by them was amply described in divers ways, to fix its identity, giving abutting streets on all sides, giving distances on each line, and winding up by declaring that it is the property known as the "Fallon Homestead." It is also shown upon this hearing that there is no street in San José, the name of which is spelled "Terrine," but there is one spelled "Terraine," and that it is situate at the point called for by the other portions of the description given. It is also, in like manner, shown that there is no street in San José named "Theresa Street." There is a street called "Santa Teresa Street," but it is some 500 feet west of Terraine street. To extend the lines to that street, Terraine street must be crossed, and several hundred feet added to the lines given in the description. While it is true that monuments control distances, they must not be fictitious monuments, nor monuments not called for; and a monument which will conform to distances must not be ignored simply because a single letter has been omitted in spelling its name. The court had the right at any time, in furtherance of justice, to authorize the correction of this mistake in the complaint,—a mistake which was merely clerical, and did not go to the merits of the cause. See Code Civil Proc. § 473, and cases cited in the note to the section in Deering's edition. And it had the right to correct clerical errors in its judgment, where it could be done from the record. *Dreyfuss v. Tompkins*, 67 Cal. 340, 7 Pac. Rep. 732; *Swain v. Naglee*, 19 Cal. 127; *Freem. Judgm. § 71 et seq.* And this might be done even after an appeal, and affirmance of the judgment. *Rousset v. Boyle*, 45 Cal. 64. And such correction did not operate to extend the time for taking an appeal from the decree. *Society v. Horton*, 63 Cal. 310.

The appointment of new referees in place of those who had resigned was the mere designation of proper and competent persons to carry into effect the decree of the court already entered. Their proceedings would be subject to review by the court upon the coming in of their report, and the action of the court thereon might be reviewed in this court upon an appeal from the final judgment of partition; but we cannot conceive that it is the right of a party, every time the court, by reason of death, resignation, or other disability, finds it necessary to appoint a new referee to carry its interlocutory decree into effect, to stay all proceedings by appeal from such an order. Such a course might lead to interminable litigation, and utterly defeat the execution of the judgment of the court. Even where referees have acted and reported, if the court does not approve their report, it may appoint new referees (Code Civil Proc. § 766;) and the order appointing referees does not, of itself, seem to be an order from which appeal may be taken. The motion for *superseas* or stay of proceedings is denied, and the order heretofore made, staying proceedings, is discharged.

We concur: BEATTY, C. J.; SHARPSTEIN, J.; MCFARLAND, J.; PATERSON, J.

# EVERSDON V. MAYHEW. (No. 12,517.)

(Supreme Court of California. July 8, 1890.)

## TRUSTS—PLEADING—NOTICE—EVIDENCE.

1. Plaintiff's mother, a widow, purchased town lots from one in possession, taking the title in an assumed name, entered into possession, and lived upon the property until her second marriage, when her husband lived with her. The mother died intestate, leaving as her heirs her husband and plaintiff. Prior to her second marriage the United States issued a patent to the town-site to the county judge, in trust for the several use and benefit of the occupants, according to the respective interests. After her death the husband applied for and obtained a certificate of title to the whole of the property in his own name, which title by conveyances became vested in defendant. Plaintiff commenced ejectment, claiming the entire property; the complaint alleging that the husband had obtained the title by fraud. On the first appeal the court held that the complaint stated a cause of action in ejectment. On the second appeal the husband was held to have taken the title in trust for plaintiff to the extent of her interest, by virtue of the relationship between them as co-heirs, and decreed to plaintiff a half interest therein. *Held*, that the sufficiency of the complaint, as stating a cause of action for the enforcement of a trust, was established by that appeal, and, no specific objection having been raised as to misjoinder of causes or variance, the objection will not be considered on the third appeal.

2. On the second appeal the defendant was held to have had constructive notice of plaintiff's rights, but that the answer failed to present the defense. On the third trial the answer was amended, and, while the record introduced failed to show the husband's application, it contained the certificate of title, which recited that the husband duly made claim and application in writing. *Held*, that the defendant had notice that an application had been filed, and that it would be presumed that it was on file when defendant purchased, and that it set forth the only title the husband had, which was a claim through the wife. BEATTY, C. J., dissenting.

3. It is not error to admit in evidence a copy of a deed without producing the original, where only a general objection is made to its admissibility.

In bank. On rehearing. For statement of facts, see former opinion, 21 Pac. Rep. 431.

John F. Ellison and J. Chadbourne, for appellant. Chipman & Garter, for respondent.

WORKS, J. This case was affirmed in department 1, and a rehearing granted. We have again given it our careful attention, and are satisfied that the correct conclusion was reached on the former hearing, for the reasons stated in the opinion of Commissioner HAYNE. It was claimed in the petition for a rehearing that the statute of 1868, (St. 1867-68, p. 489,) referred to and relied upon in the opinion of the learned commissioner as affording notice to the defendant of the plaintiff's title, was not the one under which the deed of the county judge to Wesson was made. We think counsel are right in this contention, and that the wrong statute was referred to by mistake. But in our opinion this does not materially affect the question of notice. There was a deed of record from one Stafford to Mrs. Wasson, by the name of Ann Watson, before her marriage. This deed showed the conveyance of the property to another than the defendant's grantor, Wasson, and was suffi-

cient to put him upon inquiry as to the true condition of his title. And the evidence clearly shows that a very slight degree of inquiry and diligence would have apprised him of the fact that the plaintiff was the equitable owner of one-half of the property in controversy. In all other respects the opinion of Commissioner HAYNE is approved. Judgment affirmed.

We concur: PATERSON, J.; FOX, J.; SHARPSTEIN, J.; MCFARLAND, J.

(84 Cal. 228)

ABEEL *et al.* v. CLARK. (No. 13,511.)

(Supreme Court of California. May 31, 1890.)

CONSTITUTIONAL LAW—TITLES OF LAWS—POLICE POWER.

1. The subject of an act, providing for the vaccination of children before they shall be admitted to any of the public schools, is sufficiently expressed in the title, "An act to encourage and provide for a general vaccination in the state of California," (St. Cal. 1889, p. 82.) within the meaning of Const. Cal. art. 4, § 24, declaring that every act shall embrace but one subject, which shall be expressed in its title.

2. The act operating uniformly on all who attend the public schools of the state is general in its scope, though it does not include all classes of individuals in the state.

3. Vaccination being the most effective method known of preventing the spread of a deadly and highly contagious disease, the legislature can, under Const. Cal. art. 19, § 1, giving it power to protect the state from persons suffering from contagious diseases, enact that the scholars of the public schools, constituting a general class, shall be subjected to it.

Commissioners' decision. In bank. Appeal from superior court, Santa Cruz county. F. J. McCANN, Judge.

E. E. Bacon, for appellant. Wm. T. Jeter, Dist. Atty., for respondent.

GIBSON, C. This was a proceeding for a writ of *mandamus* to compel the defendant, who is the principal of a public school in the city of Santa Cruz, to admit James Abeel as a scholar. The trial court gave judgment for the defendant, and the plaintiffs appeal. The only ground upon which admission to the school was refused was that said James Abeel had not complied with the provisions of what is known as the "Vaccination Act." This act provides, in substance, that the trustees of the several common-school districts and boards of common-school government of the cities and towns in this state shall "exclude from the benefits of the common schools therein any child or any person who has not been vaccinated, until such time when said child or person shall be successfully vaccinated: provided, that any practicing and licensed physician may certify that the child or person has used due diligence, and cannot be vaccinated so as to produce a successful vaccination, whereupon such child or person shall be excepted from the operation of this act." It is further provided that the trustees, etc., shall provide vaccine virus for children whose parents are not able to have them vaccinated, and that the expenses thereof shall be defrayed out of the school fund; and if there is not sufficient money in such fund to meet such expenses, a tax

shall be levied for that purpose. St. Cal. 1889, p. 32. The appellants contend here that the act is unconstitutional, for two reasons: (1) The subject of the act is not expressed in its title; and (2) it is special, and not general, in its scope.

1. The constitution declares: "Every act shall embrace but one subject, which subject shall be expressed in its title. But if any subject shall be embraced in an act which shall not be expressed in its title such act shall be void only as to so much thereof as shall not be expressed in its title." Article 4, § 24. The main object of this provision is to prevent legislators and the public from being entrapped by misleading titles to bills whereby legislation relating to one subject might be obtained under the title of another. *Kurts v. People*, 38 Mich. 282; *Boyd v. State*, 53 Ala. 605; *Hannibal v. Marion Co.*, 69 Mo. 575; *Robinson v. Skipworth*, 23 Ind. 317; *Commissioners of Marion Co. v. Commissioners of Harvey Co.*, 26 Kan. 197; *Howell v. State*, 71 Ga. 227. And it must receive a reasonable, and not a narrow or technical, construction. See *Stone v. Brown*, 64 Tex. 342; *Breen v. Railroad Co.*, 44 Tex. 305; *State v. Ranson*, 73 Mo. 86; *In re Public Parks*, 86 N. Y. 439, 440; *Larned v. Tiernan*, 110 Ill. 177; *Mills v. Charleton*, 29 Wis. 410; *McAunich v. Railroad Co.*, 20 Iowa, 342; *Cooley*, Const. Lim. 146. The title of the act in question here is as follows: "An act to encourage and provide for a general vaccination in the state of California." Now, what is the subject expressed in it? Clearly vaccination, and that only. This is also the subject of the act itself. It is true that the term "vaccination" in the title is qualified by the adjective "general," which makes it broad enough to include all the people of the state; while the body of the act relate to only a certain general class in the state, viz., scholars of the public schools, and those who desire to become such. But we think that under the rules of construction above stated, that the term "general" in the title applies to that general class specified in the act; and that neither the legislators nor the public could be misled by the manner in which the subject of the act is expressed in the title. It seems to be well settled that it is not necessary that the title of an act should embrace an abstract or catalogue of its contents. See *Montclair v. Ramsdell*, 107 U. S. 155, 2 Sup. Ct. Rep. 391; *People v. Hazelwood*, 116 Ill. 327, 6 N. E. Rep. 450; *Hope v. Gainesville*, 72 Ga. 250; *Allegheny Co. Home's Case*, 77 Pa. St. 80; *Lockhart v. Troy*, 48 Ala. 584; *State v. Barrett*, 27 Kan. 218; *Brewster v. Syracuse*, 19 N. Y. 117.

2. The legislature shall not pass local or special laws in certain enumerated cases, among which the act in question does not come, nor in other cases where a general law can apply. Const. art. 4, § 25. The act here is not obnoxious to this provision. It embraces, and is designed to act uniformly upon, all who do or may attend the public schools of the state. Such schools are, by article 9, § 6, of the constitution, defined as follows: "The public school system shall include primary and grammar schools, and such high schools, evening schools, normal schools, and tech-



nical schools as may be established by the legislature, or by municipal or district authority." The class that does or may attend such schools is certainly a large and general one, and we cannot conceive how it could be more general in its nature. An act, to be general in its scope, need not include all classes of individuals in the state. It answers the constitutional requirement if it relates to and operates uniformly upon the whole of any single class, as we are satisfied the act before us does.

It is suggested that the subject of the vaccination act is not within the scope of a police regulation. The legislature has power to enact such laws as it may deem necessary, not repugnant to the constitution, to secure and maintain the health and prosperity of the state, by subjecting both persons and property to such reasonable restraints and burdens as will effectuate such objects. See article 19, § 1. The act referred to is designed to prevent the dissemination of what, notwithstanding all that medical science has done to reduce its severity, still remains a highly contagious and much-dreaded disease. While vaccination may not be the best and safest preventive possible, experience and observation, the test of the value of such discoveries, dating from the year 1796, when Jenner disclosed it to the world, have proved it to be the best method known to medical science to lessen the liability to infection with the disease. This being so, it seems highly proper that the spread of small-pox through the public schools should be prevented or lessened by vaccination, thus affording protection both to the scholars and the community. Vaccination, then, being the most effective method known of preventing the spread of the disease referred to, it was for the legislature to determine whether the scholars of the public schools should be subjected to it, and we think it was justified in deeming it a necessary and salutary burden to impose upon that general class. The remarks of Judge Cooley in his work on Constitutional Limitations, page 155, are applicable here, where he says: "What is for the public good, and what are public purposes, and what does properly constitute a public burden, are questions which the legislature must decide upon its own judgment, and in respect to which it is vested with a large discretion which cannot be controlled by the courts, except, perhaps, where its action is clearly evasive, and where, under pretense of a lawful authority, it has assumed to exercise one that is unlawful." We therefore advise that the judgment be affirmed.

We concur: BELCHER, C. C., and FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

(84 Cal. 598)

PEOPLE v. THOMPSON. (No. 20,633.)

Supreme Court of California. June 23, 1890.)

CRIMINAL LAW—PRELIMINARY HEARING—DEFECTIVE COMMITMENT—CONFESSION.

1. Where a magistrate before whom defendant, charged with robbery, had his preliminary exam-

ination, does not indorse a proper order of commitment on the complaint, the superior court acquires no jurisdiction over defendant, and the papers sent up by the magistrate have no place in that court. The complaint may therefore be sent back to the magistrate to be indorsed as required by Pen. Code Cal. § 873, which provides that the order shall recite that the preliminary examination showed a public offense to have been committed, and that there is probable cause to believe defendant guilty thereof; the magistrate's docket showing that these were the facts.

2. Where an information is filed in the superior court, based on a defective order of commitment, there is no action pending before that court; and a deposition of the complaining witness, taken by a judge of that court before the order of commitment was corrected, is not admissible on the trial under a second valid information; Pen. Code Cal. §§ 879, 882, providing that a judge of the court in which an "action is pending" may take the deposition of a material witness for the people where there is ground to believe that he will not be present at the trial, and that he is unable to procure sureties for his appearance.

3. Neglect by the magistrate to comply with Pen. Code Cal. § 873, which provides that in bailable offenses the order of commitment shall recite the amount of defendant's bail, will not defeat the jurisdiction of the superior court over an information based on such order, which shows that the magistrate has properly conducted the preliminary examination, and has adjudged that defendant should be tried for the offense and be committed to the proper officer for that purpose.

4. Advice by the sheriff to defendant, an 18-year-old boy, that it would be better for him to confess, will exclude a confession made in reliance thereon.

Commissioners' decision. Department

1. Appeal from superior court, Tehama county; CHARLES P. BRAYNARD, Judge.

Information against John Thompson for robbery. He was convicted of grand larceny, and appeals. Pen. Code Cal. § 872, provides: "If \* \* \* it appears from the examination that a public offense has been committed, and there is sufficient cause to believe the defendant guilty thereof, the magistrate must make or indorse on the deposition an order, signed by him, to the following effect: 'It appearing to me that the offense in the within deposition mentioned \* \* \* has been committed, and that there is sufficient cause to believe the within-named A. B. guilty thereof, I order that he be held to answer to the same, and committed to the sheriff of ———.' " Section 875 provides: "If the offense is bailable, and the defendant is admitted to bail, the following words must be added to the order: 'And that he be admitted to bail in the sum of ——— dollars, and is committed to the sheriff of the county of ———, until he gives such bail.' " Section 879 provides: "When the magistrate or a judge of the court in which the action is pending is satisfied, by proof on oath, that there is reason to believe that any [material] witness [for the people] will not appear and testify, unless security is required, he may order the witness to enter into a written undertaking, with sureties, in such sum as he may deem proper, for his appearance." Section 882 provides: "When, however, it satisfactorily appears by examination, on oath of the witness, or any other person, that the witness is unable to procure sureties, he may be forthwith conditionally examined on behalf of the people."

*S. V. Hitchcock* and *R. E. Ragland*, for appellant. *A. M. McCoy*, Dist. Atty., and *Geo. A. Johnson*, Atty. Gen., for the People.

FOOTE, C. The defendant was convicted of grand larceny upon an information charging him with robbery. He appeals from the judgment therein rendered, and from an order denying a new trial. His first point is that the court erred in refusing to set aside an information filed on the 23d of October, 1889. An information for the same offense had been filed on the 7th of September, 1889, and was set aside, on motion, on the 31st of October, 1889, after the second information had been filed. The reasons assigned why the court should have set aside the last information are that the magistrate who examined the defendant made a defective commitment, and that, therefore, the information had no proper basis on which to rest, and the district attorney no authority to file it. It is true that the indorsement upon the deposition or complaint, as first made on the 13th of August, 1889, and returned to the superior court, was not in accordance with the statute, and that the information based on it was properly set aside. There being no proper commitment nor information before the superior court, that tribunal could not try the defendant, and the papers thus sent up by the magistrate had no place in such court. We see no reason why they could not be sent back to the magistrate, as they were by order of the superior court of the 29th of October, 1889, and indorsed under section 872, Pen. Code, if the docket of such magistrate showed, as it did, that he had conducted the examination of the defendant, and had determined upon the evidence adduced that it was sufficient, and that the defendant ought to be tried in the superior court, which had jurisdiction of the offense with which he was charged. The matter stood just as if the magistrate, after an examination which had satisfied him of the defendant's probable guilt, had decided and entered such determination on his docket, that the defendant should be tried, and had sent up the deposition, complaint, and other papers without any indorsement whatever. In such an event the matter would be in the same condition as if he had retained the papers in his own office, and had there, after a time, discovered his own laches in not indorsing and sending them up to the proper court, indorsed a proper order of commitment on the complaint, no evidence having been reduced to writing, and then sent it up to the trial court. If the papers from the magistrate's court were not legally filed, and had no place in the superior court, they were still in the magistrate's court, and he could make a proper commitment, being guided by his docket, to show what he had actually done at the preliminary examination. If the commitment as last made by the magistrate is good under sections 872 and 875, Pen. Code, then there is no merit in the point raised by the defendant. So far as section 872 is concerned, the commitment of 29th of October, 1889, is sufficient to satisfy its terms; and it is

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shown by such commitment that the magistrate examined into the merits of the charge against the defendant, was satisfied that he was guilty, and committed him for trial in the proper court. There is no doubt, therefore, that as to the preliminary examination and determination of the magistrate that the defendant should be held for trial before the superior court, and committed to the hands of the sheriff for that purpose, the commitment plainly shows these necessary facts.

But the defendant argues that, conceding such to be the facts, yet the magistrate neglected to add to the commitment, as the offense was bailable, the words, "and that he be admitted to bail in the sum of — dollars, and is committed to the sheriff of the county until he gives such bail." It does not appear to us that the magistrate's neglect to state that the defendant is admitted to bail in a certain sum, in default of giving which he is committed to the hands of the sheriff, goes to defeat the jurisdiction of the trial court to entertain an information filed by the district attorney, based upon a commitment which shows that the magistrate has properly conducted a defendant's preliminary examination, adjudged that he should be tried for his alleged offense in the proper court, and committed to the proper officer for that purpose. It is true that the magistrate, in order properly to perform his whole duty in the premises, ought, under section 875, to have advised the defendant, the superior court, the sheriff, and all others concerned, of the fact that the defendant's bail-bond had been fixed, and that, on giving it, he might be discharged from custody; but the neglect to do this does not vitiate the commitment to the extent that we can say it does not show that, as an examining magistrate, he has heard the evidence for and against the defendant charged with a certain offense, adjudged that there is probable cause to believe him guilty as charged, ordered that he be tried before the proper court, and committed him to the hands of the sheriff that he may be thus tried. If the commitment, as it does, shows the performance by the magistrate of all his duties, up to the end of the preliminary examination into the defendant's case, the judgment of the officer that the evidence warrants that he, defendant, should be put on trial for the offense charged, before the proper tribunal, and that he is ordered into the custody of the sheriff for that purpose, the omission to indorse that he is admitted to bail in a certain sum, otherwise to remain in custody, is not such an omission of duty as vitiates the other jurisdictional performances of duty. We therefore conclude that the court did not err in refusing to set aside the information of the 23d of October, 1889, based on the commitment of that date, on which the defendant was tried.

But the further point is made that the defendant's rights were prejudiced by the admission of the conditional deposition of one Floyd, the prosecuting witness, taken on the 10th of October, 1889, over the defendant's objection. This deposition was taken in the presence of the judge of

the superior court, before the filing of the second information. In other words, it was taken at a time when there was nothing before the superior court which gave it jurisdiction to try the defendant. For, as we have seen, the first information of the 7th of September, 1889, was set aside for the reason that it appeared the defendant had never been legally committed for trial. Was there, then, any case pending against the defendant in the superior court at the time the deposition of Floyd, of October 10, 1889, was taken? When the defendant was tried it was by virtue of a commitment made after the first information was filed, but before the second one was filed. The deposition was, therefore, not taken at a time when the case in which the defendant was tried was pending. If the first information had been demurred to, the demurrer sustained, and the information dismissed, there would be no case pending against the defendant until another proper information was filed against him. So, in this case, the first information being set aside, there was no case pending against the defendant until the second information, based upon a proper order of commitment, was filed. If there was no case against the defendant pending in the superior court at the time the deposition was taken, could a deposition, taken under section 882 of the Penal Code, be read against him on the trial, upon the second information? It appears that when a magistrate or a judge of the court in which an action is pending is satisfied by proof on oath that there is reason to believe that a material witness (whether an undertaking for his appearance has been taken by the committing magistrate or not, under section 878 of the Penal Code) will not appear and testify at the trial court, to which the depositions and statements taken in the committing court are sent, the committing magistrate, or the judge of the court in which the action is pending, may order such witness to enter into a written undertaking, with sureties in any sum that such officer requiring the bond may deem proper, for his appearance, as specified in section 878, *supra*. By section 882, *Pen. Code*, it is provided that where such action has been taken by either of the officials mentioned in section 879, that in the event "it satisfactorily appears by examination on oath of the witness or any other person that the witness is unable to procure sureties, he may be forthwith conditionally examined on behalf of the people," etc. In the present instance it appears that no undertaking had been taken from Floyd, a material witness, according to the provisions of section 878, *Id*. He was subject then to the provisions of section 879, *supra*. Under them the judge of the superior court, where it was supposed the action against the defendant was pending, proceeded to require an undertaking of the material witness with sureties. The witness having satisfied the judge of that tribunal that he was "unable to procure sureties," that official proceeded to have the deposition taken before himself. It is clear, as we have seen, that when the deposition was taken the action

in which the defendant was tried was not pending before the court over which that judge presided. The committing magistrate had not acted in the matter of ordering a bond with sureties to be given by the witness under section 879, *supra*. The witness was under no obligation to enter into the undertaking and give sureties, because neither the committing magistrate nor a judge of the court where the action in which he was a material witness was pending had required him to give such a bond. The conditions, then, under which the deposition could be taken were not met, and the deposition of Floyd, not taken while the case in which it was read was pending, was not admissible against the defendant on his trial.

The defendant further assigns for error that the court erred in admitting his alleged confessions made to the sheriff, Vestal. It is clear, from all the evidence as to the inducement which occasioned this confession, that it was brought about by the defendant believing what the sheriff told him would come to pass,—that is, that it would be better for him to confess. The effort is made to have it appear that such was not the case; that the defendant did it of his own accord, and not influenced by what the sheriff said. The defendant was about 18 years of age, and had evidently heard of some persons accused of crime who had gotten off by confessing, and, imbued with this notion, he sought an interview with the officer, and after ascertaining that his impression, to a certain extent, was true, inquired of the sheriff whether it would be better for him to make a statement of the facts, and the sheriff replied: "I told him that I didn't think the truth would hurt anybody. It would be better for him to come out and tell all he knew about it if he felt that way." Again, the sheriff was asked this question, concerning the defendant and his proposed confession: "Well, now, his purpose evidently in sending for you, from what was said, and what he said to you, was to find out whether it would be better for him to tell what he knew, or keep it to himself? Answer. I think that was it, probably. Q. But you left with him the impression that if the statement was made that it would be better for him than to keep it to himself,—left him with that impression on his mind? A. Well, I think I did. Q. And you, in that conversation, in a general way, rather encouraged the idea that it would be better to tell the truth than to keep it, didn't you? A. Yes, sir." It is evident that the defendant sought to find out if a confession would be better for him, and that the sheriff induced him to think it would be better, and that thus induced he made it. Such a confession comes clearly within the rule laid down in *People v. Barric*, 49 Cal. 345, and was not voluntary, but induced by the advice of the sheriff to the effect, "It will be better for you to make a full disclosure;" concerning which the rule is without exception "that such a promise made by one in authority will exclude a confession. Public policy absolutely requires the rejection of confessions obtained by means of inducements held out by such persons.

It may be true, even in such cases—owing to the variety in character and circumstances—that the promise may not, in fact, induce the confession. But as it is thought to succeed in a large majority of instances, it is wisely adopted as a rule of law applicable to them all. We cannot too strongly urge on the district attorneys never to offer evidence of confessions, except it has first been made to appear that they were made voluntarily.”

It further appears that the court did not admonish the jury under section 1122 of the Penal Code on their separations, occurring at adjournments and recess during the course of the trial. In the present case no injury appears to have resulted, and there may have been no prejudicial error, yet the section should have been and always ought to be strictly complied with. For the reasons stated we advise that the judgment and order be reversed.

We concur: BELCHER, C. C.; GIBSON, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed.

84 Cal. 617

DAVIS *et al.* v. CALIFORNIA POWDER WORKS.  
(No. 12,295.)

(Supreme Court of California. June 24, 1890.)

MEXICAN LAND GRANTS—CROSS-EXAMINATION—  
IMPEACHING WITNESSES.

1. Defendant claimed title to lands under a grant made by the Mexican governor of California in 1838. Plaintiff alleged that such pretended grant was really made in 1848, after California had become subject to the United States. The only written evidence of the grant was the original petition therefor, having upon its margin a grant of the lands asked for, signed by the governor. The Mexican ex-governor himself testified to a positive recollection that he wrote the grant on the day of its date, and another Mexican swore that he wrote the petition on the same date. But there was no record of the grant in the archives of California for the time it was part of Mexico, and it was not recorded until 1848. The ex-governor was unable to recollect the dates of the most important events of his life, and the dates of many other grants. *Held*, a finding that such pretended grant was not made until 1848 was supported by some evidence, and will not be disturbed.

2. It was proper on cross-examination to ask the ex-governor as to another grant, to show that he had no special recollection of it, when no effort was made to contradict him, or to show that the making of such grant was a wrongful act.

3. It appearing that a change had taken place in his signature, it was proper to prove the date of another grant purporting to have been made shortly after the date of the grant in question, in order to determine by a comparison of the signatures whether the latter was made at the time of its date, or many years later as claimed by plaintiff.

4. For the purpose of testing his recollection the witness was asked as to a number of other grants made by him. There are decisions of the United States supreme court tending to show that he was guilty of turpitude in making these grants. *Held*, the fact that the court is presumed to have knowledge of such decisions will raise no presumption that it was influenced thereby in considering the evidence.

5. A witness for defendant having said that he had received a certain grant, and stated some particulars in regard to it, it was proper, for the purpose of impeachment, although this was a col-

lateral matter, to cross-examine him as to such grant, and then to show by another witness that there was no trace of it in the proper archives.

6. One who was formerly a Mexican alcalde's assistant stated that in 1841 or 1842 he had seen in the archives the title-papers of the grantee under whom defendant claims, and to give probability to the statement testified as to several matters tending to show his knowledge of the archives. On cross-examination as to the extent of his familiarity, he mentioned that he had seen a certain grant therein in 1836 or 1837. *Held* proper to show that such grant was not made until 1841.

7. The scribe who testified as to a positive recollection that he wrote the petition for the grant in question on the day of its date, February 8, 1838, said on cross-examination that, while on his way to his brother's Rancho El Refugio, he had met the grantee, and that this was before he wrote the petition. *Held* proper to show by another witness that El Refugio was not granted to witness' brother until 1846.

Commissioners' decision. In bank. Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

*McAllister & Bergin and Garber, Bishop & Boalt*, for appellant. *Wilson & Wilson*, (*Samuel M. Wilson*, of counsel,) for respondents.

FOOTE, C. This action was brought by the plaintiffs, Davis and Cowell, the first of whom is now dead, and the cause revived in the name of his administrator, against the defendant, the California Powder Works, with the object in view to quiet title to a certain tract of land lying on the east side of the San Lorenzo river, in Santa Cruz county. The plaintiffs had judgment as prayed for. From that no appeal is prosecuted, but the one in hand is taken from an order denying the defendant a new trial. Both parties claim under patents issued by the government of the United States upon confirmed Mexican grants. The patent under which the defendant claims was issued after the commencement of the action, and was pleaded by supplemental answer. The plaintiffs claim title under their patent, and also by estoppel and adverse possession for the statutory length of time. The court below found for the plaintiffs upon the issues presented for decision, and judgment was thereupon entered on the findings.

From the view which we take of the case, as presented in a most voluminous transcript, and as argued at great length and with great ability by counsel on both sides, it seems only necessary to determine whether the trial court was justified by the evidence presented in finding that the grant purporting to have been made by Juan B. Alvarado, the governor of California, then a part of the Mexican republic, and to one William Bocle, was never in fact made, as its face imports, during the term of such governor as a Mexican official, but was made long after his functions as such official had ceased. In other words, that the pretended grant to William Bocle on the 8d day of February, 1838, under which the defendant claims, was not made at that time, but in the year 1848, after California had ceased to be under Mexican authority, and had become a part of the territory of the United States of America. *Second*. Whether the evidence in support of such findings was, any of it,

improperly admitted by the trial court. The grant to Bocle, if made as its date imports, was earlier in date than that of Sainsevain, under which the plaintiffs claim, and the land in dispute is included in both patents. If the evidence sustains the court in its view that the Bocle grant was not made by Alvarado on the 3d of February, 1838, but was made by him in 1848, after his functions as a Mexican official had ceased, then, of course, the Bocle grant was fraudulently antedated, and a patent based upon it should never have been granted by the authorities of the United States. Both sides to this controversy concede that they are, as to the patents adverse to their interests, "third parties," within the meaning of that language as used in section 15 of the act of congress of March 3, 1851. *Rodriguez v. U. S.*, 1 Wall. 588. And that the question of the genuineness of each original grant from the Mexican officials is a legitimate subject of inquiry in this action, provided such inquiry is admissible under the pleadings; the counsel for the plaintiffs claiming that this inquiry is, under the pleadings, admissible as to the Bocle grant, but not as to the Sainsevain grant, and counsel for the defendant claiming that both grants are, under the pleadings, equally subject to be attacked as not being sufficient to carry the land in controversy.

We entertain no doubt but that the grant made to Sainsevain, and under which the plaintiffs claim, is valid and genuine, and that the patent to the same issued by the United States government includes the land in dispute. The evidence as to the Bocle grant, under which the defendant claims, is, in the main, to the effect that there is no official paper appertaining to this grant which appears anywhere in the archives of California, when a part of Mexican territory; that there is no trace of any petition, map, or any other of the necessary title papers for such a grant, to be found anywhere in those archives; that so far as the paper title, or any record of it, is concerned, it depends solely upon a petition prepared by Bocle in 1838 to Bolcoff, the alcalde of the town of Branciforte, where Bocle then lived, for such a grant as that official could make, itself of no value as a muniment of title, and a petition to Alvarado, as the governor of California, to grant the land in dispute, that petition having a marginal writing by Alvarado granting the land as asked for. But no record appears ever to have been made of these papers until the year 1848, when they were recorded in an alcalde book at Santa Cruz, after California had ceased to be Mexican territory. This grant is striven to be upheld by parol testimony going to show that the petition was written by a then youth named Joaquin Escamilla, the marginal grant by Alvarado himself, each of whom swears that they wrote what defendant claims they wrote, and that it was done at the time which the paper expresses, viz., the 3d of February, 1838. The question, then, is whether the evidence of Alvarado and Escamilla, supplemented as it is by certain other witnesses, to the effect that they saw this petition and grant in the hands of

Bocle some years before 1848, is uncontradicted in any way, so that the court below had no legal right to disregard it.

If it be true that, as a legal proposition, the trial court was authorized to disbelieve Alvarado and Escamilla, and to believe that the grant was not made, as they declare, in 1838, but was made in 1848, then the finding that the grant was a fraud, and antedated to deceive the United States authorities, is to be sustained. The force to be attached to evidence of this kind, that in the case of an alleged grant, where the Mexican archives for California show no existence of any of the papers on which the grant is based, and parol evidence is introduced to prove the genuineness of a grant which has always been in the possession of the grantee, without any record of it until the time has passed when the Mexican officials had any power to make a grant, has been frequently discussed, and rules applied, by the supreme court of the United States for the guidance of its courts in their action determining the validity of such grants. The authority of a Mexican official, such as Alvarado claimed to be, in making grants of land such as are here involved, was derived from the colonization act of Mexico of 1824, and the regulations made thereunder in 1828.

They are to be found in Rockwell's *Spanish & Mexican Law*, 452, 453; *Wheeler's Land Titles*, 7, 8. "They are, and were also considered to be, directions to petitioners for land before they could get titles. Where [as here] the petition, and the other requirements following it, have not been registered in the proper office with the grant itself, a presumption arises against its genuineness, making it a proper subject of inquiry before that fact can be admitted. It is not to be taken as a matter of course, nor should slight testimony be allowed to remove the presumption. Both the kind and quantum of evidence must be regarded." *Fuentes v. U. S.*, 22 How. 454. "The governor could not dispense with them with official propriety; nor shall it be presumed that he has done so, because there may be, in a paper said to be a grant, a declaration that they had been observed, particularly in a case where the archives do not show any record of such a grant." *Id.* 453. "The Mexicans of the Spanish race, like their progenitors, were a formal people, and their officials were usually formal and careful in the administration of their public affairs." *White v. U. S.*, 1 Wall. 680. And where it was attempted to be shown that the book which might probably have contained a grant, had it existed, was lost, the supreme appellate tribunal said: "Evidence was also introduced by the claimant tending to prove that a book of records appertaining to land titles in California for the year 1846 was lost, but no attempt was made to show that the grant in question was ever recorded in that book. All we think it necessary to say upon that subject at the present time is that proof of such a loss cannot avail a party in a case like the present unless it also be shown, at least by circumstances which will justify the court in finding the fact, that the grant was duly and proper-

ly entered in the lost record." U. S. v. Knight's Adm'r, 1 Black, 252.

But it could hardly be true, from the evidence of Alvarado in this case, that any of the steps necessary to have a record made of the grant were taken; for, as he says, the whole affair occupied but about 20 minutes, when he had no organized official staff, and was just about to set out on a military expedition against his rival, his uncle Carrillo, and that he made no record or memorandum of the grant, and no report of it to the departmental assembly, as it was his official duty to do, and had no organized office or secretary at that time. The transaction of the presentation of this petition by an obscure Englishman, as Bole was, to Alvarado, the then political and military chieftain, and his writing the grant on its margin, as related by that gentleman, causes us to be reminded much of a hasty dispatch or order written by a general just on the eve of a march to a battle,—an affair apparently so trivial that he did not report it to the departmental assembly, or appear to take any steps at all to perpetuate it as an official act. In speaking as to the memory of those, like Alvarado, former officials of the Mexican government, it is said in *Luco v. U. S.*, 23 How. 543: "Owing to the weakness of memory with regard to the dates of grants signed by them, the testimony of the late officers of that government cannot be received to supply or contradict the public records, or establish a title of which there is no trace to be found in the public archives."

In addition to these elements casting suspicion and doubt upon the validity of Bole's grant, it appears by the evidence of Alvarado that to his knowledge there never was any paper in existence which had any connection with such grant other than the one adverted to. It stands, therefore, based upon the petition and marginal indorsement alone,—a paper which never left the possession of the grantee during Mexican ownership of California, and never was recorded at all, in any way so that it could be inspected by those desiring to do so, until 1848, when Mexican authority had ceased to exist. Thus condemned, as evidence entitled to weight, by the highest tribunal in the land, it is supplemented before the trial court by the evidence of persons, assuming that they ever saw such a paper, who had not seen it for about 40 years until shortly before the trial of the cause. Yet Alvarado could remember, and swear most pertinaciously and positively, as a matter about which there could be no mistake, that he made the marginal grant on the day it purports to have been written, and that, without ever having seen the paper shown him for about 30 years, he could, 10 years before his examination, have told one asking him the date of it. Nevertheless, this same witness, when questioned as to the most stirring and remarkable events of his life as a soldier and politician, could remember no date as to when any of them occurred. He seemed to remember nothing except that the date of the Bole grant was the 3d of February, 1838.

Said Mr. Justice FIELD, in *Pico v. U. S.*, 2 Wall. 282: "When, therefore, a claim to land in California is asserted under an alleged grant from the Mexican government, reference must, in the first instance, be had to the archives of the country embracing the period when the grant purports to have been made. If they furnish no information on the subject, a strong presumption naturally arises against the validity of the instrument produced, which can only be overcome, if at all, by the clearest proof of its genuineness, accompanied by open and continued possession of the premises." Again, it is said in *U. S. v. Teschmaker*, 22 How. 406: "At least, satisfactory evidence should be required, under the circumstances in which most of these Mexican grants were made, as to make the antedating of any given grant irreconcilable with the proof; otherwise, there can be no protection against imposition and fraud in these cases." With reference to the tests of the truth of parol testimony of witnesses such as are relied on here to supply the want of record evidence, the same distinguished court says: "There are many more satisfactory tests of the truth of parol testimony than that of character of the witnesses. Where the facts sworn to are capable of contradiction, they may be proved by others not to be true; and, when they are not, the internal evidence is often more convincing than any other. A shrewd witness, who is swearing falsely to something which cannot be disproved by direct testimony, will confine his recollection wholly to that single fact, professing a want of recollection of all the facts and circumstances attending it. An inexperienced witness, whose willingness to oblige his friend exceeds his judgment, will endeavor to give verisimilitude to his tale by a recital of imaginary circumstances. A stringent cross-examination will generally involve the latter in a web of contradictions, which will be in a measure evaded by the other with the answer that he 'does not recollect.'" *Luco v. U. S.* 23 How. 535, 536.

The insignificant marginal order or grant, where there are no papers except a petition on which such order is written, made at a time when Alvarado was doubtless absorbed in reflection over one of the most daring and dangerous acts of his eventful life,—his expedition against Carrillo, his rival,—and made, too, for a small and almost valueless piece of land, to a man in no way prominent or related to him, in whose behalf there appears no reason for such informal action, is remembered by Alvarado after many years, during which time he has never seen the grant, or had his interest or attention attracted to it in any way, with so much particularity that he cannot be mistaken, he says, as to its date, when, to all other inquiries as to the date of the most eventful occurrences of his somewhat remarkable career, he answers he "does not recollect." The evidence of Escamillo is also far from convincing that he wrote the grant in 1838. We think the trial court cannot be said to have made findings unsupported by evidence upon the question as to the antedating of this grant, and its fraudulent

effect upon the board of land commissioners, and the procurement of the dismissal of the appeal therefrom to the United States district court. It then becomes necessary to determine whether or not any evidence was allowed to be introduced erroneously, which tends to support such findings.

There are a large number of exceptions taken to the introduction of evidence on cross-examination, upon which it is claimed the findings in question are necessarily, in part at least, based. The main grounds upon which it is urged that the action of the trial court in the premises was without legal sanction are that some of the evidence thus introduced was as to collateral facts, and was intended and in the direction of the impeachment of certain witnesses introduced by the defendant, and that some of it was as to particular wrongful acts committed by Alvarado in making other grants, which evidence was to show him as a man unworthy of belief. The general rule with reference to this method of impeaching or weakening the evidence of a witness on cross-examination is thus stated by the appellate court of this state: "As we have said above, a witness cannot be impeached, on cross-examination or otherwise, by proof of specific wrongful acts. The matter about which she was questioned was entirely foreign to the case, and was wholly immaterial, except to discredit the witness, and thereby break the force of her testimony." *Sharon v. Sharon*, 79 Cal. 674, 22 Pac. Rep. 26, 131. In *People v. Dye*, 75 Cal. 108, 16 Pac. Rep. 537, it was said: "A party cannot cross-examine his adversary's witness upon irrelevant matters for the purpose of eliciting something to be contradicted; and if such matters are drawn out, the court should stop the inquiry there. It is well settled that a witness cannot be impeached by contradicting him upon collateral matters." If this collateral matter showed the witness to be guilty of particular wrongful acts, it would certainly go very far to discredit his evidence, as being "a low specimen of humanity," and to permit it would be to proceed in a manner contrary to the first principles of justice. "Any other rule would destroy the law of evidence, and make trials interminable." *Id.*

The first exception to which our attention is directed by the appellant is to be found at folio 2953 of the transcript. The question put to the witness Alvarado was: "Will you look at the document, which I have before referred you to, concerning the Milpitas grant, and state whether that document does not purport to be executed by you as constitutional governor of the department of the Californias?" The question was objected to on the ground that it sought to introduce a collateral matter with a view to impeach the witness. Counsel for the plaintiffs insisted at folio 2953 that he had the right to introduce the evidence to show that, as to important events of his life, Alvarado had no recollection at all, and that the Bocle grant was antedated. It had been brought out in the examination in chief that Alvarado was acting govern-

or and political chief in 1838, and that in 1839, about July, he became constitutional governor. He had shown great positiveness of recollection that he had actually signed the Bocle grant at the time in 1838 it purported on its face to have been signed. Thus the accuracy of his recollection as to the material point in issue, viz., the date of the actual signing of the Bocle grant, became a matter of importance; and to test that it was shown that, as to the Milpitas grant, a larger and more important grant, which was made in May, 1839, before he became constitutional governor, he had no specially accurate remembrance. This was proper, especially in view of the fact that his signing it, as constitutional governor, a short time before he actually became such, was no proof that he acted wrongfully in so signing it, inasmuch as he had a right to make the grant as acting governor and political chief; and no effort was afterwards made to contradict his statement as to when he made it. So that it came under neither of the alleged exceptions to the latitude of a proper cross-examination, either as proof of the commission of a special wrongful act, or as collateral matter brought out on cross-examination, and then contradicted. And it was also competent to show the date of that signature, with a view to its comparison with the signature to the Bocle grant, and thus, perhaps, to show the likeness or unlikeness of the two, made within about a year of each other.

Regarding the evidence objected to with reference to the Feliz grant, Alvarado's signature thereto was already in evidence, and unobjected to. It then became important to show, if possible, there appearing to have been some change in his signature, what difference existed between the signature to that, made some years after the Bocle grant, and the one of Alvarado affixed to this grant, in order to determine by comparison whether the Bocle grant was actually signed in 1838 or later, in 1848. The evidence, we think, was competent, too, in another point of view, and that was to test the accuracy of the memory of the witness, and to show, if possible, that he was mistaken as to the true date of the Bocle grant; and further, the explanation which Alvarado made as to the probable time when he made it as being in 1842, rather than in 1843, as it purports to be, tended to divest the transaction of any appearance of wrongfulness and no effort was afterwards made to contradict his statements on that point.

The witness was further asked with reference to his making other grants, and answered that he made them, and that they were not antedated, but made at the time they were purported to have been made. This evidence was objected to as being collateral matter. In the language of the objection, it was "perfectly foreign to the case." The court overruled the objection, and the witness stated that he had made certain grants to "the Sobrante" and to "Yerba Buena Island," in the bay in front of San Francisco; the Ortega grant being withdrawn. There was no effort made to show that, at the time these grants pur-



port to have been made, Alvarado, if he made them at that time, was not authorized to do so, so that no particular wrongful act is shown. Nor was there any effort made to discredit him by showing that he did not make them at that date. So far as the record shows, as to these particular matters, there is nothing brought out which tends to impeach Alvarado. But it is argued that there are certain decisions of the United States supreme court, of which the trial court had knowledge, which tended to show that Alvarado, in making these grants, was guilty of turpitude. Be this as it may, it is not to be supposed that the trial court would have been influenced to disbelieve Alvarado through its knowledge of matters not in evidence in the particular case it was then trying. Since nothing was shown which tended to impeach the witness, the defendant was not prejudiced.

The fourteenth assignment of error, upon which the defendant seems to rely, is that the court, against its objection, permitted R. C. Hopkins, a witness for the plaintiffs, "to testify in rebuttal of the case made by the defendant, and for the purpose of impeaching the testimony of James Weeks, a witness for the defendant, that he (Hopkins) had examined the records and papers and Spanish archives in the office of the United States surveyor general, whether he could find any grant of land ever made to James Weeks, and that upon such examination he found no grant of land to James Weeks." The ground of the objection, is, as stated, that "the whole question of a grant of land to James Weeks was a collateral matter brought out by plaintiffs' counsel on his cross-examination of James Weeks, and Weeks' answers as to such collateral matter were not contradicted by plaintiffs in their rebutting evidence." The record shows that Weeks was asked on his examination in chief if he had ever had any land granted to him. He stated that he had, in Santa Clara and Santa Cruz counties. He was then asked the name of his grant. His answer was: "I lived on the Potrero in Santa Cruz." Afterwards, he was asked: "Did you get your grant of the Potrero previous to your building the mill on the Zayante creek, or subsequently?" He answered, "Afterwards." Again he was asked "Whom did you sell that Potrero land of yours to? Answer. To Don Pedro Richards." It does not appear that it was inquired of him what sort of a grant this was; but, as it seems to us, since he declared that he had a grant of this land, and sold it, that it was permissible to cross-examine him as to the matter, and then to show by another witness, as a circumstance tending at least to contradict him, that there was no trace of any such grant in the Mexican archives. And, further, Weeks was put upon the stand by defendant to show, among other things, his familiarity with Mexican land grants, so as to strengthen the testimony he gave as to having seen, and being capable of recognizing, the title papers of the Bocle grant in 1841 or 1842, thus tending to negative the idea that it was made in 1848. Therefore, any circumstances in rebuttal

or cross-examination which went to show the improbability of such knowledge on his part was competent; and the evidence of Hopkins that no such grant as Weeks claimed to have had appeared in the Mexican archives tended to throw light upon the matter, and was material and competent.

By the fifteenth assignment of error, it is claimed that it was improper to allow the evidence given by Mr. Hopkins in rebuttal of the testimony of Weeks, and for the purpose of impeaching him, to the effect that the grant made to one Coppinger of a ranch called the "Canada del Raymondo" was in the year 1841, and that Coppinger's petition for said grant was really dated in 1839. The ground of error relied on is that the matter of the grant of land to Coppinger was collateral in its nature, and brought out on the cross-examination of Weeks, and that what he then stated was not subject to be contradicted by Hopkins. The examination in chief of Weeks was evidently for the purpose of showing that he, as a Mexican alcalde's assistant, sometimes acting as constable, and at others as clerk and interpreter, and himself the beneficiary of several grants of land, had special knowledge of such matters, and was likely to know and recognize the proper title papers appertaining thereto. Upon his cross-examination, this matter was gone into extensively, in rebuttal of the claim of his special knowledge of such matters, as above stated, set up in the examination in chief; and the witness finally remembered that before he came to Santa Cruz to live, and consequently before he could have seen the Bocle grant, he had seen one given to Coppinger by Alvarado, and that it was in 1836 or 1837. Afterwards, as we have seen, Mr. Hopkins was called by the plaintiffs, and stated that the Coppinger grant was not made in 1836 or 1837, but in 1841. It was competent, as it seems to us, on cross-examination, to determine, if possible, how much, if any, of such knowledge Weeks did actually possess, as a circumstance tending to throw light upon the question as to whether or not he knew what Bocle's title papers amounted to, which papers he claims to have seen in 1841 or 1842; for, if he had seen them signed by Alvarado in 1841 or 1842, then they could not have been antedated in 1848. But, if he had no such special knowledge as was attempted to be shown on his examination in chief, then he probably was mistaken as to what Bocle's title papers were, if he saw them at all in 1841 or 1842. They may have been the alcalde grant, which is admitted to have been made in 1838. Thus the cross-examination was in rebuttal of that in chief, and the whole of the testimony was that of the defendants, and the plaintiffs could contradict it.

The sixteenth assignment of error is to the effect that it was improper for the court to allow Mr. Hopkins, as a witness in rebuttal, and to impeach the testimony of Joaquin Escamillo, the scribe who testified that he wrote the Bocle petition at Monterey on the 3d of February, 1838, to testify as to the date of a certain grant made to his brother, Blas Escamillo, on

the 6th of June, 1846; and the same ground of objection was made as that just discussed. The witness, when examined in chief, had stated very positively the date of the Bocle grant to have been in 1838, and to show that his recollection of other matters occurring at about or after this was not so accurate would tend to determine whether his memory of the true date of the Bocle grant was reliable or not; and therefore it was competent to show on cross-examination that he had seen Bocle at Santa Cruz at a time when he (the witness) was on his way to visit his brother, Blas Escamillo, at the Rancho El Refugio, concerning the date of the grant to which Hopkins testified, as also the fact that such a grant had been made to his brother, and that the witness had gone there to see him. It was also proper, in this same view, to bring out the fact on cross-examination that the witness remembered he had gone there before he had written the Bocle petition. And then, if the plaintiffs could contradict these matters of recollection by showing that the grant to Blas Escamillo was not made until 1846, it would tend to show the inaccuracy of the recollection of the witness as to the true date of the Bocle grant; for, if it was probable that the witness would not visit his brother until after the making of the grant, in 1846, then the witness would be mistaken in his recollection that he met Bocle before 1838, and hence that evidence would tend to show that this meeting could not have been before 1838, but after 1846, and about 1848, when the plaintiffs claimed the true date to be. So that, the cross-examination being proper, the whole evidence was that of the defendant; and the plaintiffs had a right to contradict it if it could be done.

It follows that the evidence objected to was proper; that it tends to support the finding that the Bocle grant was antedated; and we advise that the judgment and order denying a new trial be affirmed.

We concur: GIBSON, .; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order denying a new trial are affirmed.

#### CASTAGNO V. CARPENTER.

(Supreme Court of Colorado. June 13, 1890.)

##### ASSIGNMENT OF NOTE—INSOLVENCY OF MAKER.

1. On trial of an issue between the holder and the assignor of a promissory note, as to the solvency of the maker, there is no material error in an instruction that, if he was insolvent in the county of his residence, it was not necessary to show his insolvency throughout the country; the evidence tending to show that he was insolvent in that county, and without property anywhere, and the only testimony to the contrary relating to property within the county.

2. Where the testimony clearly showed that the maker was insolvent when the note matured, and from that time to the trial, there is no prejudicial error in a charge that, when a fact is found to exist approximately, the law presumes it to continue until the contrary is shown.

Commissioners' decision. Appeal from district court, Ouray county.

J. P. Cassidy and J. W. Mills, for appellant. S. L. Carpenter, for appellee.

PATTISON, C. This action was brought by Luther Harris in his life-time, against John Castagno, appellant, as assignor of a certain promissory note bearing date June 1, 1882, made by Nellie G. Bragaw and R. S. Bragaw, her husband, for the sum of \$275, payable to the order of George P. Costigan one year after date, with interest at the rate of 2 per cent. per month.

The original complaint was in the usual form, and alleged, among other things, that the note was assigned or indorsed to appellant on or about June 15, 1882, and that it was thereafter indorsed by him to one W. M. Stewart and by Stewart to Harris. To this complaint a demurrer was interposed. Subsequently, by amendment, the following allegation was added: "That at the time said note became due the makers thereof, and each of them, were insolvent, and each of them ever since have been and now are insolvent." An answer was filed which put in issue the material allegations of the complaint, and set up affirmative defenses, which need not be considered by this court.

The only question presented to this court (that being the sole issue tried by the court below) arises upon the allegation of the complaint to the effect that at the time the note in question matured the makers of the note were wholly insolvent. As no action has ever been instituted against the makers, the purpose of this allegation, and the proof introduced to sustain it, was to show that such an action would have been entirely unavailing within the meaning of the statute. The nature and extent of the liability of the assignor of a negotiable instrument is expressly defined by section 7, c. 9, Gen. St. That section provides that "every assignor \* \* \* of every such note \* \* \* shall be liable to the action of the assignee thereof, or his executors or administrators, if such assignee shall have used due diligence, by the institution and prosecution of a suit against the maker of such assigned note, \* \* \* for the recovery of the money or property due thereon, or damages in lieu thereof: provided that, if the institution of such suit would have been unavailing, \* \* \* such assignee \* \* \* may recover against the assignor \* \* \* as if due diligence by suit had been used."

It is conceded that if, at the maturity of the note in question, the makers thereof were insolvent, then a suit against them would have been unavailing within the meaning of the statute, and that to fix the liability of the assignor an action against them was unnecessary. The execution and the assignment of the note being admitted, the only issue presented to the court below was that of the insolvency of the makers, and all the evidence introduced at the trial bore directly upon this issue. A review of the evidence in behalf of plaintiff is entirely unnecessary. It is sufficient to say that such evidence tended to show that the makers of the note were insolvent, not only in the county of Ouray, where they resided at the time the note was made and at its maturity, but that they were without property anywhere within the state of Colorado or elsewhere. No evidence on the part of the de-

fendant was offered which showed, or tended to show, that the makers, or either of them, were solvent, or that they had property anywhere within the state which was subject to execution, except that hereinafter recited. Mr. Cassidy, attorney for the appellant, was sworn as a witness, and stated in substance that he had examined the records of the county of Ouray, and found that on the 4th day of June, 1883, Mr. Bragaw was the owner of an undivided one-quarter interest in a lot 50x142 in the town of Ouray, and three mining claims; that this tract of land and these mining claims were incumbered with a \$300 trust-deed, upon which a balance of \$25, with interest thereon for about two years, remained unpaid; that the value of the lot was \$150. There is no evidence whatever as to the value of the three mining claims. The records were not produced, and Mr. Cassidy did not state whether this property was actually owned by Mr. Bragaw when the note matured.

It further appears that the property mentioned had been sold for taxes in June, 1883. No other evidence was introduced on behalf of the defendant. The jury were instructed to the effect that, if they found that the makers of the note were insolvent in the county in which they lived at the time of making the note, and had lived for several months before, that it was not necessary to show their insolvency throughout the country; that, when a fact or state of facts is found to exist approximately, the law presumes such fact or state of facts to continue till the contrary is shown; that if the jury should find by the preponderance of proof that the makers of the note were insolvent or had absconded when the note became due, or that the institution of the suit against the makers of the note would have been unavailing, then the verdict should be for the plaintiff. The other instructions given by the court need not be recited. The argument of appellant is predicated upon this instruction, and upon the further proposition that the testimony of Cassidy shows that R. S. Bragaw had property subject to execution which might have been reached and applied in part payment of the note had suit been begun against the makers in the first instance.

It is first insisted that the court erred in instructing the jury that, if they should find the makers of the note insolvent in the county in which they lived, plaintiff need not show their insolvency throughout the country. It is unnecessary to determine whether this part of the charge was erroneous or not. The evidence introduced by plaintiff tended to show that the makers of the note were without property anywhere in the state of Colorado, and there was no testimony introduced by defendant which showed, or tended to show, that they had property anywhere, except that of Cassidy, which related solely to the property situated in the town and county of Ouray. As there was no testimony to which the instruction could apply, it is manifest that defendant was not prejudiced, and the error, if it was one, was harmless.

It is further contended that the proposi-

tion embraced in that part of the instruction in which the court said that, when a fact or state of facts is found to exist approximately, the law presumes such fact or state of facts to continue until the contrary is shown, is erroneous. It may be assumed that this portion of the instruction was suggested to the court by the fact that the evidence of some of the witnesses as to the financial condition of the makers of the note was not confined to the precise point of time at which the note matured. But as the testimony, taken as a whole, clearly showed that these parties were insolvent when the note matured, and from that time until the trial was had, it is clear that the defendant could not have been prejudiced. The remainder of the instruction states the law clearly and correctly, and no complaint is made by appellant concerning it.

Again, it is contended that the testimony of Cassidy was sufficient in itself to show that an action against the makers of the notes would not have been unavailing, within the meaning of the statute. This position is untenable. The evidence of Cassidy was not contradicted. Two or three of plaintiff's witnesses stated that they had claims against these parties; that they sought for property out of which to make their claims, but could find none: that the little property which they had was so incumbered that no equity of any appreciable value remained to them; that, in their opinion, they were wholly insolvent. The question of insolvency, therefore, was one for the jury and not for the court. That question was correctly submitted to the jury by the following instruction: "The court instructs the jury that an indorser on a note is not liable for the payment of said note in default of payment by the makers, unless the holders first procure judgment against the makers thereof, and have return of execution that said judgment cannot be satisfied out of the property of the makers of said note, or prove to the satisfaction of the jury that, if suit had been brought on the note against the makers thereof, and judgment recovered thereon, the said judgment could not have been satisfied, either in whole or in part, out of the property of the makers of said note." That this is a correct statement of the law cannot be doubted. In *Dunn v. Ghost*, 5 Colo. 184, it is held that "the statute fixes the liability of an assignor by indorsement of negotiable instruments after diligence against the maker by suit, unless such suit would have been unavailing." The same principle is enunciated in *Martin v. Cole*, 104 U. S. 30. In *Wickersham v. Altom*, 77 Ill. 620, it is said that, "where the evidence shows that the maker of an indorsed promissory note was insolvent at its maturity, and so continued, and therefore a suit against him would have been unavailing, the assignor will be liable to the assignee upon his assignment." As the provision of our statute under consideration was borrowed from Illinois, the decisions of the supreme court of that state are good authority here.

The record fails to disclose any error of which appellant can justly complain. It

is unnecessary to consider in this connection the effect of section 13 of the Code of Civil Procedure, permitting the joinder in the same action of parties and sureties to promissory notes. See *Hamill v. Ward*, 23 Pac. Rep. 330, (decided by this court at the last term.) The judgment should be affirmed.

REED and RICHMOND, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is affirmed.

#### STATE V. OLDS.

(Supreme Court of Oregon. July 1, 1890.)

#### CHANGE OF VENUE—MURDER—EVIDENCE—INSTRUCTIONS.

1. It is the duty of a court of justice empowered to try a party for a criminal offense, in all cases, to see that the party has a fair trial by an impartial jury; and where the party charged with a criminal offense applies to the court to change the place of trial upon the ground that the inhabitants of the county where the offense is alleged to have been committed are so prejudiced against him that he cannot expect a fair and impartial trial, and the facts and circumstances of the case show that the party is not likely to obtain an impartial jury in such county, it is the duty of the court to change the place of trial to another county.

2. Where O. was indicted in the circuit court for the county of M. for murder in the first degree, he having killed W. in said county, and after two trials O. was convicted of the crime as charged, which conviction having been set aside by the supreme court, the case was again set for trial, whereupon O. applied to the circuit court for a change of venue, upon the grounds that the inhabitants of the county of M. were so prejudiced against him that he could not expect to obtain a fair trial, and showed in his application that the leading newspapers at said county of M. had published full accounts of the former trial, and represented O. as guilty of the offense charged; and one of them contained an article animadverting upon the majority of the members of the appellate court for having set aside the conviction, and it appeared upon the third trial that a jury was only obtained from 800 names drawn, two of them having been taken after O. had exhausted his peremptory challenges, seven of them stated upon their examination for cause that they had formed and expressed an opinion as to the guilt or innocence of O. and one of them was allowed to sit in the case,—*held*, that the court should have ordered a change of the place of trial.

3. To justify one person in taking the life of another, it must appear that it was done to prevent the commission of a felony by the latter upon the former. The killing, however, if not justifiable, is not murder in the first degree, unless done purposely, and of deliberate and premeditated malice, or in the commission or attempt to commit rape, arson, robbery, or burglary; and there must be some other evidence than the mere proof of killing to constitute murder in the first degree, unless effected in the commission or attempt to commit a felony; and the deliberation and premeditation necessary in such a case must be evidenced by poisoning, lying in wait, or some other proof that the design was formed and matured in cool blood, and not hastily upon the occasion.

4. As in the opinion of a majority of the members of the court there was no proof in the case of the character above mentioned, *held*, that the evidence was not sufficient to warrant a conviction of murder in the first degree.

5. *Held, further*, that where the evidence in a case of murder is not sufficient to establish the highest grade of the offense charged, it is the duty of the trial court, of its own motion, to in-

struct the jury to that effect; and where it affirmatively appears upon the appeal to this court, from a judgment of conviction of murder in the first degree, that the evidence was not sufficient to justify it, that it is its duty to reverse the judgment.

6. The admission of incompetent testimony in a criminal trial prejudicial to the accused, and which is admitted against his objection, is such an error as will require the appellate court to reverse the conviction obtained therein.

7. Where, in a trial for murder in the first degree, charged to have been committed by the accused shooting the deceased at a certain place, the state, in order to show that the accused was waiting at the place immediately before the shooting was done, introduced a witness who testified that as he passed the place he saw a heavy-set man standing there, but did not recognize him as the accused, nor was he able to describe the man so that he could be identified as the accused, *held*, that the statement of a witness to a friend of his a short time thereafter, upon his hearing that the accused had shot deceased, to the effect that he believed that the accused was standing at the place when he passed by, was not competent evidence. *Held, further*, that the admission of such statement as evidence, under the particular circumstances of the case, against the objection of the accused, was error, and highly prejudicial to him.

LORD, J., dissenting.

(Syllabus by the Court.)

Appeal from a judgment of conviction of the appellant, Charles Olds, for the murder of Emil Weber, rendered by the circuit court of the county of Multnomah.

This is an appeal from a second conviction of the appellant for the crime of murder in the first degree, the first conviction having been reversed by this court at the October term, 1889. The opinion there delivered will be found in 22 Pac. Rep. 940. The cause being remanded to the circuit court, the district attorney moved to again set it for trial, whereupon it was so set for February 12, 1890. The order setting it for trial at this time recites that it was done by consent of the parties; but on the 7th day of February preceding the date at which the cause was set the appellant filed a motion to change the place of trial of the action, upon the grounds that the judge of the circuit court presiding in department No. 2, and the inhabitants of Multnomah county, respectively, were so prejudiced against him that he could not expect an impartial trial either by said judge or in the county. The motion was based on the affidavit of the appellant, which stated in substance that on the 15th day of May, 1889, the indictment was returned by the grand jury charging him with having on the 10th of the same month deliberately, and with premeditated malice, killed Emil Weber; that he was arrested on the day of the homicide, and had ever since been kept in close confinement, with no opportunity to prepare for trial; but that the court, notwithstanding his objections, set his case for trial for the 20th day of June, 1889, on which day he was tried, and the trial resulted in a disagreement of the jury; that the court immediately thereupon, against the objection of appellant, again set the case to be tried July 9, 1889; but it was subsequently continued until the 16th day of that month, at which time the trial was had; that on the 31st day of July, 1889, appellant made and filed an affidavit, with several extracts

from the Daily Oregonian and Evening Telegram attached thereto as exhibits in support of it, a motion to postpone the trial until the next term of court; that from said affidavits and exhibits the court was fully advised that the public mind was greatly influenced and prejudiced against him, and could not fail to have known that he could not have a fair and impartial trial at that term of court; that, notwithstanding said facts, the court overruled the motion, and forced him to trial, in consequence of which a verdict of guilty was found against him. He further said that he believed that the said judge was so influenced by the course pursued by said newspapers, and so prejudiced against him, that he could not expect an impartial trial in a court over which he presided; that he believed that the judge was in great fear and dread of attacks from said newspapers, if he failed to pursue a course which would meet with their approval; and that such dread and fear would prevent him from pursuing an independent course and giving appellant a fair trial. A further ground for his belief that the judge was prejudiced was that when he was called into court to have his case set for trial the last time one of the counsel on his former trial notified the court that the senior counsel who had conducted his former defense was confined to his room by sickness at Tacoma. That another of his counsel, who had assisted at the argument of the case in the supreme court, had gone to San Francisco, and that the day of his return was uncertain. That another lawyer who had been negotiated with to assist in the defense was confined at home by sickness, and it was impossible to know when he would be able to attend court. The court, however, fixed said 12th day of February for the trial, although the district attorney expressed his willingness that it should be fixed for a week later; the judge saying that in view of the business on the docket he would not change the time. That, as appellant was informed and believed, there was business on the docket which would have occupied the whole time of the court during the week asked for, and he believed that the only reason why the court refused to allow another week for his counsel to prepare his case was that he was influenced by his prejudice against appellant, and his fear of attack by the newspapers. That he believed that the inhabitants of the county were so prejudiced against him that he could not expect a fair trial therein. That, in addition to the causes stated in his affidavit, and the exhibits thereto attached, were the following: After his second trial, and the judgment was entered upon the verdict of the jury, that he caused the case to be appealed to the supreme court, where the judgment was reversed, and after it was known to the Daily Oregonian that newspaper attacked the decision with great bitterness, and the majority of the court which rendered it; which attack was published therein on the 17th day of December, 1889, a copy of which is attached to the affidavit, and made a part of it. That the effect of the publication was, as he verily believed, to still further prejudice

the inhabitants of the county against him; to increase the fear of the judge of the court that he would be likewise attacked if he should not please the said newspapers with his action. That the Evening Telegram, under date of February 4, 1890, caused to be published in its columns an article relating to his possible application for a change of place of trial for the purpose, as he verily believed, of forestalling, as far as possible, any action he might think necessary to take in the matter, and, if possible, prevent the court from granting such application if made, and also for still further influencing and prejudicing the inhabitants of the county against him. A copy of this article was also attached to and made a part of said affidavit. The attorney for the state endeavored to controvert the said affidavit by the affidavits of a number of persons, stating that they were citizens of Multnomah county, and were acquainted with many other citizens thereof, and believed that the accused could have a fair and impartial trial therein; that a jury could be selected from the body of the county who would not in any manner be prejudiced against him. The said motion, at the request of the said judge of department No. 2, was heard before the judge of said court, who presides in Department No. 1 thereof, and the same was denied. When the case came on for trial, a jury was selected from 300 names drawn, two of them having been taken after the accused had exhausted all his peremptory challenges. Seven of the jurors drawn stated upon their examination for cause that they had formed and expressed an opinion as to the guilt or innocence of the accused, and one of those was allowed to sit in the case. Upon the trial the following testimony was given regarding the circumstances of the alleged crime:

John Bose testified, in substance, that he was in the employ of Weber. That on the day of the homicide, the 10th day of May, 1889, he started with the deceased to go to their boarding-house on Alder street, in the city of Portland. That they left the barber shop about 1 o'clock P. M., went west on Alder street, and at the corner of Second and Alder met Mrs. Weber and Miss Walters with a gentleman friend. That they stopped and talked with them 5 or 10 minutes. That they then went on the north-east corner of Third and Alder streets, where they met Mr. Gullixson, and Weber ordered a mat from him to be put in front of the boot-black stand in the barber shop. Then they started across Third street, and when they got within 15 or 20 feet of the edge of the sidewalk, on the west side of Third street, they looked up and noticed the accused standing at the water-plug at the north-west corner of Third and Alder streets. That as soon as they noticed him, he said: "Mr. Weber, I hear you have been round town looking for me." In reply to which Mr. Weber said: "You son of a bitch, what do you want of me?" And he hardly had the words out of his mouth when Mr. Olds commenced shooting. The first shot missed Weber; the second one struck him in the back of the neck. As he was falling another bullet struck him, and after he

was down Olds walked up and shot him at another place, and then stooped over and shot him in the back of the head. Five shots were fired. At the time Olds accosted Weber he was standing up against the water-plug, and had his right hand in his front pants pocket, in which he had the pistol. That when the first shot was fired, Weber threw up his right arm and started to go round the corner of the sidewalk. There was an interval between the first and second shots fired. Witness supposed that a cartridge missed fire, or something similar to that. After Olds fired the last shot, he walked around Weber's body. He looked at witness, and then said, "Now, you son of a bitch, I suppose you will go round looking for me," and then walked down Third street. The witness further stated that Olds was about two feet from Weber when he shot him in the neck, and upon his cross-examination stated that when Olds spoke to Weber the latter reached his left hand up to his pants pocket; that he was probably five, six, or seven feet from him at the time he answered Olds; that he was putting his hand in his pocket while he was addressing Olds.

H. F. Gullixson testified, in substance, that he saw Weber at the time referred to by witness Bose; that he had got down a short distance from the lower crossing of Third and Alder streets, and turned around and looked towards the upper corner of said streets, and saw a man fall headlong on his face, with his hands out; fell in a line with the curb. As he fell witness saw another man standing over him, with a pistol, shooting. Between the first and second shots there was probably a little more time elapsed than between the other three shots. Witness only saw when the man fell. Did not see the first shot fired. Being on the wagon, and driving away, his attention was called from hearing the report of the first shot. He indicated the manner of the shooting by snapping his fingers for the period of time of about five seconds. He identified the accused as being the man who did the shooting, and Weber the man who was shot. Stated that after accused shot Weber he turned around and walked upon the sidewalk, with his pistol in his hand, and put it in his pocket, and then took his handkerchief out; took his hat off, wiped the lining and his brow, put the hat on, and his handkerchief in his pocket, and started to walk down the upper side of Third street, between Alder and Washington. Witness did not notice that he was excited, "except you might say so from perspiring." The witness further testified that he saw the accused as he was walking to the jail with Mr. Hacheney; that he walked past witness' store on the opposite side of the street; that he did not appear to be excited; that he walked along very quietly with Mr. Hacheney.

M. C. Griffin testified, in substance, that he resided in Portland, and was a real-estate investment agent; that about 1 o'clock in the afternoon of the 10th day of May, 1889, he was on the east side of Third street, about 80 feet from the corner of Alder, and from 90 to 100 feet from the water-

plug in question; that he heard a shot which attracted his attention. Before he could locate it two or three shots were fired. He then saw the accused, when the fourth shot was fired, stoop over a prostrate form, and very deliberately shoot into the body. The back was towards him. He shot again. Then the accused looked at the body very calmly, walked a step or two, threw back a part of his coat, put in his revolver, then put his hand behind his back, took out a handkerchief, and, as calmly as I am doing it now, took off his hat, wiped his brow, wiped his hat, and at the same time he walked around the body and looked at it a couple of times, put on his hat, and walked north on Third street, very slowly, then he commenced to quicken his step. And several spectators gathered, and said this man ought not to be allowed to go. That witness ran across the street, and put his hand on the shoulder of the accused, and told him "he thought he ought to go to the city jail." Then Mr. Hacheney said he would take him down, and the accused said he would go with him.

Milton Weidler testified, in substance, that he was secretary of the Portland fire department, and that was his business and occupation in May last; that he was not acquainted with the defendant, Charles Olds, or Sandy Olds; that he had seen him; that he saw him about four or five days before the shooting of Weber, in front of the Magnolia restaurant; that as witness was going into a restaurant there were four or five persons standing just outside of the entrance, and as witness came up one party mentioned Olds' name; that he did not know whether it was an introduction or not, and in looking around he saw the accused; that that was all. The witness was then asked if, about 1 o'clock, on May 10th last, he saw the accused, and where it was he saw him. To which the witness answered: "No, sir. I won't swear that I saw him." Witness was then asked the following question: "State if you saw any one upon that day at the corner of Alder and Third." The question was objected to by defendant's counsel, unless there was testimony tending to show and identify the defendant. Whereupon the counsel for the state said: "We will bring it directly home by this very witness." The court thereupon overruled this objection, and the defendant excepted to the ruling. The witness then answered: "I left the Magnolia Restaurant about 1 o'clock, \* \* \* and passed down Alder street, and there was a man standing in close proximity to that fire-plug there. I paid no particular attention to him, and passed on, and I noticed that he was a heavy-set man, and his back was towards me as I passed on down, and I went on down Third street to Washington." Witness further said that he did not particularly observe the color of the person's hair and his clothing. Merely noticed that there was a heavy-set man standing there. That was all he noticed. That he passed on down Washington street, on the north side of it and about half way between Third and Second, when a boy came running along, and the shoot-

ing was spoken of; and the boy said Olds shot Weber. The defendant objected to what the boy said. The witness then went on to say what occurred to him, and an objection was interposed on the part of the defendant. The counsel for the state then asked the following question: "Just state that as to what party was standing there," which was objected to by defendant. Whereupon the court said: "I think he may state it." To which the defendant excepted. Counsel for defendant then objected to the witness stating what occurred to him at the time. To which the court said: "Very well. Answer." Defendant excepted. The witness then said: "Shall I answer what I said?" To which the court replied: "Yes; answer the question." The witness then proceeded to say: "The boy said Olds shot,— when an objection was interposed on the part of the defendant as to what the boy said. Whereupon the court remarked as follows: "What occurred to you is what you were to state. What you said at that time?" Counsel for the defendant objected to what the witness said at that time for the reason that it was incompetent, immaterial, and hearsay. The court overruled the objection, the defendant excepted, and the witness answered as follows: "I said to this friend of mine: 'I believe that Olds was standing on the corner when I passed by.'" The witness further stated that he did not know anything that caused him to believe it. He was then asked by the counsel for the state what was his impression as to the person that was standing there at the time, which question was objected to by defendant's counsel as incompetent. The court overruled the objection, and the defendant excepted to the ruling. The witness then answered "that he merely coupled the fact of a man standing there and the tragedy occurring a few minutes afterwards; that he coupled the two as any one would, and merely said that he believed that Olds was standing there as he came down." Did not pay any particular attention to the man as he stood there; that witness was merely passing by and saw the figure was there. "He was a heavy-set man, but I would not be willing to swear that I noticed his complexion."

Blanche Martin testified, in substance, that she had been residing in the city since 1881. That she remembered the circumstances of the shooting on the 10th of May, 1889. That she was at the time on Third street, between Washington and Alder. Was coming up Third street and heard a shot, but did not know it was a pistol shot, nor pay any attention to it. Then saw the confusion around, looked up and saw a man just fall, and then saw another stoop over him and fire three shots when he was already down lying on his face. That there were three shots fired into his body. After he had done that he stepped on to the sidewalk, took his hat off, wiped his brow and his hat, and then walked down Third street. Would not swear that the accused was the man she saw at the time.

C. E. Hoxie testified, in substance, that he was a police officer of the city on the 10th day of May, 1889, and was acquainted

with the accused. That he had a conversation with him on the way from the police station to the county jail. That he said: "When we got nearly up to the corner of Third and Alder, 'this is the place' he said. 'I was walking up Third street with my hands in my pocket, and my head down, and when I got near to the corner I looked and saw Weber on the crossing of Third street.' That when he saw him he said: 'Mr. Weber, I understand you have been looking for me.' And Weber said: 'What do you want of me?' And he said 'that Weber went down with his hand towards his pocket, and I never waited. I pulled my gun, and began shooting. The first shot I missed him. Weber put up his arm, and I reached over and shot him in the neck, and he fell, and I shot him again.'"

J. F. Clark, a book-keeper, residing in Portland, testified, in substance, that on the 10th day of May, 1889, about 1 o'clock P. M., on his way from his house to the store, after he got past Third street about 50 feet, he heard the quick crack of pistol shots. That he turned around, and just as he turned saw the accused step off the sidewalk and fire two shots into the body of another man. The body was lying close to the curb, the feet towards the curb, and the face lying in the dust towards Alder street. The accused, after he fired those shots, walked right around the head of the body, took his handkerchief out, and wiped his brow; also wiped his hat, and then placed it on his head, and walked off down Third street. That it looked to the witness, the distance he was away, as though he did it pretty cool.

Mrs. Weber, wife of the deceased, testified that she and her husband boarded at the Magnolia Restaurant on Alder street; that they had been boarding there about six months; that she knew the accused by sight, and that he knew they were boarding there; that he had seen them going in and out of there frequently. Witness also testified that her husband's right hand was crippled, and that when walking in the street he "most always carried it in his pocket." Witness had been married to deceased about two years. He had had a former wife, but she had obtained a divorce from him.

M. C. Sullivan testified, in substance, that he was a detective by occupation, and resided in Portland; that, having business at Freeborn's store, between Washington and Alder streets, on the west side of Third, he was leaving the store when he saw Olds, just before the homicide; that he (Olds) was moving towards the corner very slowly, perhaps about 50 feet from the corner, perhaps further; that he had his face turned like as though he was looking towards Second street, going along in a very slow gait; that witness walked down on Washington street, when he heard the shot; that the distance he walked from the time he saw Olds until he heard the shot was about 200 feet; that he has walked it since in a minute and a half; that he (witness) was in a hurry after leaving Freeborn's, and walked pretty fast.

Charles Sliter was called as a witness



on the part of the state, and testified, in substance, that he was one of the proprietors of the Crystal Palace Saloon; that Olds' business was that of running the Olympic club-rooms, up-stairs over the Palace Saloon; that the business belonged to an association, of which Olds was the principal party; that witness was the lessee of the building, and leased the club-rooms to the association, the managers of which were Olds and Frank Lynch; that witness' saloon furnished the liquor for the association's rooms; that on the morning of the shooting, somewhere in the neighborhood of 11 o'clock, Weber and a Mr. Drugan came to the Palace Saloon, and had a drink. "Mr. Weber says to me, 'I suppose you heard about the trouble I had the other day?' I says, 'Yes.' 'Well,' he says, 'I broke some glass-ware, and done other damage here. Whatever it is, I will pay for it.' I told him there was no pay. So far as that was concerned it was all right. It was the trouble in the house I cared more about than anything else. 'Well,' he says, 'I came up to-day; this morning,' he says: 'I want to talk to you about this red-headed son of a bitch upstairs.' He says, 'I know he is running a game up there, and he shall not do business in the town while I am in it.' And with that I was busy, and stopped talking, and our conversation went on at intervals, broken like, because people were coming in and out all the time, and I was behind the bar, and had to do the work. And finally Mr. Weber says to me he would come over again when I was at leisure. 'Anyway,' he says, 'I am going to have him vagged today, and I will see what I can do with him.' So somebody else came in, and he stepped over there, and there was a writing-desk in the corner of the room, and he stepped over there, and Mr. Drugan was with him, and they carried on a conversation, and I was quite busy at that time, and Mr. Weber called out to me and he says, 'I see you are busy. I will see you again after a while.' And he went out." The witness then said that just about noon he went out of the saloon to go to his up-town place; and he continued his testimony as follows: "I went out, and was looking for a street-car; and just as I stepped out of the front door Mr. Olds came up, and I said, 'Good morning,' and he said 'Good morning;' and he says to me, 'I understand Weber has been around again.' I says, 'Yes; he was here, and he is pretty hot, and he talks pretty bad.' And I told him about the conversation we had, and told him also about having him vagged. I then told Mr. Olds that I thought the best thing he could do was to keep quiet, or to go away awhile; go away somewhere until the thing quieted down, and it probably could be settled satisfactorily in some way. Mr. Olds says, 'Well, I will tell you, if you think I am any detriment to the house, I would rather go away.' 'Well,' I says, 'that is my judgment. I think you better go away for a while.' And at that the car came along, and I jumped on the car, and that was our last conversation." The witness also testified that Weber had been at the

Crystal Palace Saloon several times before this inquiring for Olds, and "looking" for him, and that this was what Olds referred to when he said he understood that Weber had been there again. That Weber threatened to inform on the house. Said that he (Olds) should not do any business while he (Weber) was in town. That he would inform against the house and against Olds for carrying on a gambling game. And witness thought to that extent Olds was a detriment to the house. That he did not want any trouble there. That the business was carried on by the Olympic Association. It was an incorporated institution. The witness also testified, against the objection of counsel for the accused, that he (witness,) was the responsible man in the association. The state thereupon rested. The accused did not deny the killing, but claimed and attempted to prove that it was done in self-defense.

E. A. Post, a witness for the defense, testified, in substance, that he resided in Portland. That he had no occupation at present; had just left the hotel business; was one of the proprietors of the Gilman House; was acquainted with Weber. That the latter had a place of business 50 feet from the Gilman House, in 1883 or 1884. That he always considered him a person disposed to be quarrelsome, vicious, irritable, and dangerous. That witness used to drive a soda wagon, and was in his place every morning; knew there was a disturbance there several times, and they all seemed to blame Mr. Weber for it. His reputation was that of a person who would shoot; has seen him carry a pistol; seen him take a pistol out of his drawer and put in his pocket when he went off watch, (meaning when Weber left his saloon for any length of time;) would not swear that it was the pistol shown to him in court, but stated that it was one like that.

C. W. Holyapple testified, in substance, that he was a police officer of the city, and acquainted with Weber in his life-time. That he had the reputation of being very quarrelsome and disagreeable to get along with, and that he would shoot. Counsel for the state, upon the cross-examination of the witness, showed that the latter had arrested Weber several times for gambling, and attempted to show that the persons whom he had heard speaking concerning Weber's character had done so from the fact that Weber claimed that the police officers should not interfere with him in carrying on a gambling business, while they permitted others to do so; and did show that upon one occasion when he arrested Weber for gambling, that Weber told him that if he would go with him to a certain place he would show him where there was gambling, and that witness told Weber that one at a time was all he could handle. That after he took him down to the station that he should see if there was gambling going on at other places, but did not arrest any one then; not at that particular time.

William Summers testified, in substance, that he was acquainted with Weber; knew him in the winter of 1881; first be-

came acquainted with him in Laramie city, Wyo. Ter.; used to be very intimate with him; was in his employ both in Wyoming territory and Portland, in the latter place about nine months, and in the former place about three months. That Weber was engaged in the saloon and gambling business. His reputation was bad. He was believed among those whom he associated with, and understood generally, to be one who would shoot. He and Olds were not on friendly terms; heard him say at the corner of First and Alder streets, Portland, more than a year ago, something about a big son of a bitch, but that some people were bigger sons of bitches than others; back cappers. That witness turned around and said, "What do you mean?" and Weber said, "I mean that big red-headed son of a bitch standing there," referring to Olds. Olds turned and walked round the corner of the side walk out of the way. That Weber was in the habit of carrying a pistol in front of him inside his pants. That the pistol in court is the same kind of a pistol he used to carry. That he had seen him handle it with both his right and left hand. That his right hand was drawn up, and he could not open it to the full extent. That he had seen him take a gun in this hand, (referring to a pistol.) That Weber told him that he had braked on the Union Pacific Railroad between Laramie city and Green river and between Laramie and Rawlins, Wyo. Ter. That his reputation there was bad. Witness said, on his cross-examination, that he came to this country with Weber, and that the latter paid his way out here. That he was a pretty good man when he came here. That, as a man to work for, he so regarded him. That he never had any trouble with him but once, and that settled it between us two. That he could not say that he testified on the former trial that Weber's bad reputation arose out of an order that gambling should not be allowed on the first floor, and his declaration that if gambling was not allowed on the first floor it should not be allowed on any floor. That his reputation became worse after that time than it was before, but that was not the first that started it. That Weber was interested with Jacob Weber, Paul Furray, Isaac Gratton, and, he thought, James Furray, in the Brunswick Billiard Hall, a gambling-house and saloon. That witness was working there at that time; could not say that his reputation among those people was good. That he had been closed up in his gambling-house previous to that time. That his gambling-house on the corner of First and Alder had been closed by the authorities, and after that he went into business with Jacob Weber, Gratton, Furray, and Vernon. That he had heard men in his profession say that his reputation was bad, but could not say that it was any worse after he left the Brunswick Billiard Hall than it was previous to that time. That he was considered by men in his profession a dangerous man. That he would use a gun, pistol, knife, poker, or anything else. That everybody at the Brunswick Billiard Hall, who was interested in the

house, had no love for him. That there was more or less rivalry between him and them. They were engaged in the same kind of business. That witness was now a saloon man at Aberdeen, Wyo. Ter.

Joseph Day testified substantially that he was a police officer in Portland, and had been such since the 1st of August, 1888, and had been such officer at a time previous to that. That he knew Weber's general reputation for being a violent, vicious, and dangerous person. That it was bad; a quarrelsome man. That he knew Olds. That he had a conversation with Weber about two days before the shooting occurred. "I saw him as I was going down Third street. He was walking up the street. I looked at him and says, 'You look from the looks of your eyes as if you had been having a scrape.' He says, 'Yes; the son of a — that did I will make him jump off the wharf' or the 'dock,' I don't remember which words. I says, 'Weber, if I were you I would not have any trouble about anything like that. It won't do any good to make any talk like that.' He says, 'I will kill the son of a b — on sight.' I says, 'Weber, you hadn't ought to talk that way. You know I am a police officer, and that is not very good talk for you to make, because if this man should hear it, he might not give you any opportunity to do that.' 'Well,' he said, 'it don't make any difference to me whether he does or not,' and I walked away, and went down to the station."

J. F. Watson testified, in substance, that he was a captain in the police force, and had been a police officer for 12 or 14 years; that Weber's reputation was bad, and that Olds' reputation in the community as a peaceable, quiet citizen, was good.

J. M. Gilman testified, in substance, that he lived in Portland; was a steam-boat man, and owned the Gilman House; that he knew Weber, and that his reputation was bad.

John Minto testified, in substance, that he resided in Portland, and that he saw the fight which occurred between Weber and Olds a few days before the homicide; that he was standing on the sidewalk in front of the Crystal Palace Saloon. Olds was standing on the edge of the platform in front of the saloon, with his face towards the street, leaning on a small cane. Weber passed directly behind Olds, and looked into the saloon, and turned around and came to Olds from behind, ran against him, and pushed him off the platform onto the sidewalk. Olds dropped the cane, and hit Weber in the face; hit him two or three times. After the first lick Weber threw up his hands to his face, and hit him three or four times about that time. They scuffled a short time. Weber seemed to stoop down and got both hands up to his face, and started for the saloon door. Olds was on the back of his neck, and hit him once or twice in the neck and back of the head, but both went against the door, pushed it open, and went inside. As soon as the doors were open Weber started to the bar, evidently to get hold of tumblers, Olds still having hold of him; but he got to the counter, and got hold of two or three tumblers,

and stepped back. Olds let go of him, turned, almost facing him, and said: "Throw it, you son of a bitch. You don't dare to throw it." This was the first word spoken from the time they commenced. Weber threw one of the tumblers at Olds and missed him, and Olds hit him again; and as Weber stooped to pick up one of the tumblers he had dropped, after he threw the first one, Olds again hit him. By this time they had clinched, were scuffling, and went over the left side against the wall. The bar-tender then interfered, and said, "Don't knock those pictures off the wall." They both seemed to be pretty well out of breath, and separated. No one interfered to any great extent before they were separated. Neither of them was knocked down. Weber threw the glass with his left hand. Witness called his attention to it in talking to him afterwards; told him that he did not know that he was left-handed before. Witness further testified that he was a real-estate man; that he had formerly been sheriff of Marion county.

Frank Summers, bar-tender at the Gilman House, testified, in substance, that about a year before he heard Weber in front of the Brunswick Billiard Hall, about the time he was arrested, say to Olds, "You dirty son of a bitch, I have got it in for you. You are the cause of this." Olds said to him, "Keep away from me. I do not want anything at all to do with you." And he started to walk away from Weber, and the latter followed him up, and kept talking to him in that way. Witness also testified that Weber's reputation was not very good; that he had heard that he would use a gun; that Olds' reputation was good.

Paul Furray testified that he resided in Portland; that he had been bar-tender for Weber; that he was acquainted with his general reputation as a vicious, quarrelsome, dangerous person, and that it was bad; that after the fight they had at the Crystal Palace Saloon he told witness up at his room that it was not over yet; that he would be fixed for him the next time he saw him; and identified the pistol in court as the same one Weber used to carry.

Albert Richster testified that he was a bar-keeper; had been living in Portland 10 years; knew Weber in his life-time, and was acquainted with Olds. That on and just prior to the 10th day of May, 1889, he was at the Crystal Palace Saloon. That he recollected the fight which occurred between Olds and Weber in the early part of May at the saloon, but was not present at the time. That Weber was there about half past 5 o'clock of that day; and he came in and asked how many glasses were broken, and witness referred him to Mr. Watson. He then inquired where Olds was, referring to him in his usual style of designating him. Said: "If he's up stairs, call him down. I will make him leave town. I will do him up. I will make him jump in the river." That was the day before the shooting. That he came back that evening about 11 o'clock, and asked witness the same question again; said he could not work in this town. That wit-

ness communicated to Olds that Weber had been looking for him, and told him what Weber had said. That he had never spoken six words to Weber, but had always heard that his general reputation was bad; and Olds' reputation, as a quiet, peaceable person, was good. That evening when Olds came down from up-stairs he waited until I closed up the saloon. It was 1 o'clock. That Frank Lynch and witness walked home, and Olds was on the inside, and walked up Washington street to East park, and there they left him, and he went up East park. That Lynch told Olds that he had better get in the center; that Weber might be around one of "these corners;" and that Olds stepped between Lynch and witness, and walked up Washington street.

Edward Holman, the undertaker, who took charge of Weber's body, testified that he saw a pistol after they had raised the body from the sidewalk. It was lying down on the sidewalk. That in raising the body up he thought that the pistol was laying right underneath him. That he put a tag on it, and gave it to Sheriff Kelly. Could not tell whether the pistol was laying there or dropped there when the body was picked up; thought the pistol was very similar to the one in court. That it was loaded. Witness also stated that there was a brass weight found there at the place, about the size of an iron weight for scales, marked "200 lbs."

Penumbra Kelly, sheriff of the county, testified that the pistol in court was the same one got from Edward Holman. That it was loaded at the time he received it.

David Campbell testified that he resided in Portland, and on the 10th day of May, 1889, was there. That he was driver in the fire department, and acquainted with Olds. That at the time the shooting took place he was on Fourth and Alder, exercising the horses, riding horseback. That just previous to that had been right where the shooting was done. That he was well acquainted with Olds, but did not see him there; would have known him if he had seen him. That it was just long enough for him to go from there to Washington, up Washington to Fourth, up Fourth to Alder, before the shooting occurred. That the horses trotted all the way.

Frank E. Richardson testified, among other things, that he saw Olds coming up Third street just before the shooting, and also saw Weber and Bose crossing the street; did not pay much attention to them until he heard a shot fired. That Weber and Bose had not got off the curb on Alder street when witness first saw them. That when he first looked up after the shot was fired, he saw Weber standing on the crossing west side of Third, where it intersects Alder. That he went over and helped pick him up after he was shot. That he saw a brass stopper or plug in the street under him when he lifted him up. That he saw a pistol. Mr. Holman picked it up. That he was put in jail as a witness for the state, and was held until the trial of Olds began. That he was not called on either trial as a witness for the state.

M. J. Kochman testified that he saw Weber and Olds standing together, and saw Weber make a motion for his hind pocket. Question. By defendant's counsel. "What pocket?" Answer. "For his hind pocket, or for his pocket, and immediately after that heard a shot fired, and almost immediately another one, and then saw Weber fall; and in a very few seconds after that Olds fired three more shots in his back over him."

S. B. Parrish, chief of police of the city of Portland, testified that soon after Weber was killed he was at the place of the killing. That he saw the pistol picked up from the ground. That when they turned Weber over it was under him, and was picked up then. And he recognized the pistol in court as the one picked up.

Several other witnesses, including the accused himself, gave evidence on the part of the defense, but in the main it was only cumulative of that which was already given. The accused, however, in his testimony, made a full statement of his antecedents, of his relations with Weber, and of the circumstances relating to the killing. The state also called three or four witnesses to rebut the evidence of the defense, regarding Weber's reputation as to his being vicious and quarrelsome; also sought to impeach some of the witnesses for the accused by attempting to show that they had testified differently from what they did on the former trial. Several of the witnesses for the defendant were gamblers, and the counsel for the state proved by them, upon their cross-examination, that the gambling fraternity at Portland and other places had raised a fund to assist the accused in his defense to the charge against him, and the district attorney, in his closing address to the jury, made statements concerning the testimony so elicited, and drew inferences therefrom which the counsel for the defendant claimed, were unwarranted, and which operated prejudicially to the defendant. After the testimony was closed, the trial court charged the jury generally as to the law of the case, to which no exceptions were taken that are relied upon by defendant's counsel. Said counsel, however, saved exceptions to the refusal of the court to give instructions requested by them, and upon which they do rely. The instructions so requested and refused are as follows: "*First*. It is your duty to reconcile the evidence in this case with the defendant's innocence, if you can consistently do so. *Second*. You cannot find a verdict against the defendant unless you find that his guilt is in all things consistent with the evidence in the case, and wholly inconsistent with any reasonable hypothesis of his innocence." The jury returned the following verdict: "We, the jury, find the defendant, Charles Olds, guilty of murder in the first degree, as charged in the indictment." The counsel for the defendant thereupon moved the court to set aside the said verdict upon several grounds specified in the motion filed. The court overruled the said motion, and adjudged that the defendant be hanged, which is the judgment appealed from.

C. B. Bellinger, for appellant. Henry E. McGinn, Dist. Atty., for the State.

THAYER, C. J., (*after stating the facts as above.*) This is the second time this case has been here, (see 22 Pac. Rep. 940.) and the circumstances attending the second trial, and the whole affair, indeed, has been of such a character as to greatly embarrass the court in its determination of the questions involved. This court has no authority to review the determination of trial courts upon questions of fact where the evidence is conflicting; but it has authority to look into a case where there has been a criminal conviction, in order to ascertain whether there is evidence to support the conviction, and to ascertain whether or not the accused has had a fair trial. *State v. Hunsaker*, 16 Or. 497, 19 Pac. Rep. 605; *State v. Cody*, 23 Pac. Rep. 891. Every person charged with a public offense, whether guilty or not, is entitled to a fair trial. "Because," as said Mr. Bishop, in section 40 of volume 1, of his work on Criminal Procedure, "a guilty man has by the law itself a right to be acquitted, unless he can be convicted by virtue of the rules and methods which the law has itself provided." In order to insure such a trial, the constitution of this state (section 11, art. 1) has provided: "In all criminal prosecutions the accused shall have the right to public trial, by an impartial jury, in the county in which the offense shall have been committed," etc. The securing to parties accused of crime a fair trial, by an impartial jury, especially in capital cases, has ever been the solicitude of the common law. Blackstone says: "It was necessary for preserving the admirable balance of our constitution to vest the executive power of the laws in the prince, and yet this power might be dangerous and destructive of that very constitution if exerted without check or control, by justices of oyer and terminer, occasionally named by the crown, who might then, as in France or Turkey, imprison, dispatch, or exile any man that was obnoxious to the government, by an instant declaration that such is their will and pleasure. But the founders of the English law have with excellent forecast contrived that no man should be called to answer to the king for any capital crime, unless upon the preparatory accusation of twelve or more of his fellow-subjects, the grand jury, and that the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbors, indifferently chosen and superior to all suspicion; so that the liberties of England cannot but subsist so long as this *palladium* remains sacred and inviolate, not only from all open attacks, (which none will be so hardy as to make,) but also from all secret machinations which may sap and undermine it, by introducing new and arbitrary methods of trial by justices of the peace, commissioners of the revenue, and courts of conscience. And however convenient these may appear at first, (as doubtless all arbitrary powers well executed are the most convenient,) yet let

It be again remembered that delays and little inconveniences in the forms of justice are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon the sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution; and that, though begun in trifles, the precedent may gradually increase and spread to the utter disuse of juries in questions of the most momentous concern." Cooley, Bl. Comm. bk. 4, pp. 350, 351. The importance of any immunity, however, does not depend so much upon constitutional guaranties as it does upon their observance and enforcement. The violation of the spirit of the law is as pernicious in its consequences as the violation of its letter. The right of the accused in a criminal case to a trial by jury would be of little advantage if the jury had to come from a community biased and prejudiced against him by influences which he was unable to counteract. Such a condition of public sentiment in a community renders it impossible, many times, to enforce a due administration of the law; and it is often produced by the publication of intemperate newspaper articles. It is extremely unfortunate to the cause of justice that many of the newspapers of the country pursue the course they do with reference to cases of homicide. They seldom fail to designate the transaction as a murder, which of itself is a judgment, to the extent of newspaper jurisdiction in such matters, that the slayer is guilty of that crime, without regard to the circumstances connected with it. And they usually publish not only a detailed hearsay statement of the affair, but decidedly indicate their own views regarding it. The result is that by the time the accused is arraigned for trial the reading portion of the community have generally formed and expressed an opinion concerning his guilt or innocence, which renders it very difficult to secure an intelligent and unbiased jury to try him by.

In the case under consideration, the newspapers referred to in the appellant's petition to postpone the trial, and for a change of venue, assume, I should judge from the tenor of the articles made exhibits, to decide how the case should be disposed of. The publishers of these sheets appear to have established a tribunal of their own in which to try the accused; and in view of the extensive circulation of those papers, and their high standing as public journals, it is difficult to conceive how an impartial jury could be secured from the county where they are published, by which he could be tried, especially after two trials had already been had. Under these circumstances, I cannot see why the trial court should have refused a change of venue. It was apparent, then, that a great proportion of those who would be likely to be summoned as jurors would be found to have formed and expressed an opinion as to the guilt or innocence of the accused; an opinion superinduced by the reading of the published statements of the witnesses examined on the former trial and positive comments made by the publisher. There were two questions in the case to

be tried: *First*. Was the accused justified in killing Emil Weber? *Second*. Was there sufficient evidence in the case to show that the killing was done with such deliberate and premeditated malice as to constitute murder in the first degree? That Weber had been abusive and overbearing towards Olds, had made it a point to insult him whenever an opportunity presented itself, and that the latter submitted to it meekly except when assaulted by force, is clearly shown by the testimony. What the cause of Weber's animosity was does not appear, except from the statements of Olds himself. He testified that he was born at Coldwater, Mich. That he lived there until he was 20 years of age. That he went from there to Chicago, where he traveled two years for a wholesale house. That he then went to Colorado, and from there to New Mexico. That, in the first place, he was in the contract business. That he built or was subcontractor of five miles of the Atchison & Topeka Railroad,—the New Mexico branch. That he then went into the livery business at Las Vegas, N. M. That from there he went to Leadville, where he had his first experience in gambling, and after various perambulations, in May of 1883, arrived in Portland, where he had since resided. That he got acquainted with Weber when he first came to Portland, the latter having come there about the same time, and kept a saloon and gambling-house. That the first trouble accused had with Weber was in 1885. That it was over the city election. They had been on opposite sides. That the next day after the election accused called at Weber's place of business, and was refused admission into the gambling department, and that Weber used abusive language towards him, and threatened to have him vagged. That accused said to him: "Mr. Weber, you have a big gambling-house here, are worth plenty of money, and I am a poor man. Of course, you have that privilege." That Weber told him not to come near his house any more, and that he did not go there again while he kept it. That it was closed about a year and a half after that, and he sold or leased it to other parties. That in 1887 or 1888 Weber undertook to indict the police, and accused was subpoenaed to appear before the grand jury. That Weber found it out, and came and wanted to dictate to him what he should testify to. This he refused to submit to. The accused then proceeded to describe minutely Weber's course of conduct towards him thereafter, which was bitter and malicious in the extreme, and which, no doubt, led to the commission of this homicide. It is evident from the testimony in the case that Weber aspired to be a sort of leader among the class with whom he associated. He may not have been a bad man at heart, and probably was respectful and courteous to his superiors; but he had accumulated property; and, like many others, became insolent and arrogant towards those whom he regarded as his inferiors in position, when they opposed his views and wishes. His vocation was calculated to make him morose and irritable. He was engaged in an irrepressible conflict with

the police force, was at variance with his own fraternity, and seems to have concentrated all his spite and wrath upon Olds; and after the latter had beaten him in the fist-fight, in which he himself was clearly the aggressor, he indulged in the numerous threats of violence against him shown in the testimony. These threats may have amounted to nothing more than bravado and swagger; but with such a man as Olds, who was of a taciturn and impressive temperament, and probably remorseful on account of the false and ruinous step he had taken in life, they appeared portentous. But whether or not he was justified in taking his life, under the proofs in the case, was purely a question for the jury.

The right, either of the state or of an individual, to take human life, must be sanctioned by law. In the latter case it must appear that it was done to prevent the commission of a felony upon the individual, etc., as provided in section 1730, Ann. Code. The killing, however, if not justifiable, is not murder in the first degree, unless done purposely, and of deliberate and premeditated malice, or in the commission or attempt to commit rape, arson, robbery, or burglary; and there must be some other evidence of malice than the mere proof of killing to constitute murder in the first degree, unless effected in the commission or attempt to commit a felony; and the deliberation and premeditation necessary in such a case must be evidenced by poisoning, lying in wait, or some other proof that the design was formed and matured in cool blood, and not hastily upon the occasion. This is the effect of the provisions of the statute of this state upon the subject. Section 1727, Id. It therefore devolved upon the prosecution in this case, before the jury could be warranted in finding the accused guilty of murder in the first degree,—there being no pretense that the killing was done in the commission or attempt to commit felony,—to prove facts aside from the fact of the killing, the direct and legal tendency of which was to establish that Olds in cool blood formed a design to kill Weber, and that the killing was done in pursuance thereof. It is not enough, in such a case, to prove circumstances from which inferences might be drawn that the design was so formed, as the statute requires that either the mode of the killing be of a character that it of itself proves deliberation and premeditation, such as poisoning, or that some special proof of a distinct fact be made, such as lying in wait.

It is claimed by the learned district attorney that, from the evidence that Olds gave Weber the beating referred to; that Weber called upon Sliter, and informed him that Olds could no longer continue to run the game he was then running over the Crystal Palace Saloon; that Sliter informed Olds of this, and requested him to leave the city for a while; that Olds walked up Third street to the corner of Alder, where he met Weber, and the killing was done as described in the testimony for the state, and the various circumstances transpired as therein mentioned,—it clearly appeared that Olds killed Weber for the

reason that the latter had been hunting around town for him, and for what he had said to Sliter. These several points in the testimony which the district attorney urged at the hearing, with great force, as evidence that Olds had in cool blood formed the design to kill Weber, were important matter of proof in the case; but that they were sufficient to establish that Olds was lying in wait to commit the homicide cannot be maintained. "Lying in wait," according to Bouvier, is being in ambush for the purpose of murdering another. It implies a hiding or secreting of one's self. It could hardly be claimed that a person walking on a public street in broad daylight, in a populous town, was lying in wait. I do not think, however, that the statute requires proof that the slayer in such case was secreted; but it requires proof of some fact, aside from the killing, showing that it was done in pursuance of a previous design. Olds having gone to the place of the homicide in the manner he did, and under the circumstances existing between himself and Weber, was no stronger proof that he went there to slay Weber than it would have been that Weber went there to kill him, if he had been the slayer. It was not pretended that Olds had ever made threats against Weber, or evinced any intention whatever, before the time of the fatal meeting, to commit violence upon him. He seemed to acquiesce in Sliter's suggestion to leave town; and never, so far as appears from the testimony, did he breathe a breath of vengeance, or even utter a word of complaint. Nor does it appear that Olds had any expectation of meeting Weber on that day. He had, in fact, been trying to avoid such meeting. Upon the night previous, according to his own testimony and that of Richter, he remained up-stairs until a late hour to keep clear of him, and, apprehensive that the latter might be lying in wait to do him bodily injury, went a long distance towards his stopping place between Richter and Lynch. Again, if Olds had intended to murder Weber,—had planned to take his life,—he would not have been likely to have chosen the time and place where the killing was done to execute his purpose.

It was vehemently contended by the district attorney, in his address to the jury, that the gamblers in Portland were at the bottom of the affair; that they had compassed the death of Weber, had employed Olds to carry out their design, and raised money to clear him, and defeat the ends of justice. And he strongly intimated that the police force of the city had lent its aid and influence to further the scheme. The following extracts from the remarkable address will show the position which the district attorney occupied at the trial respecting that feature of the case.

"Men of Multnomah county, will you stand forth and say that, because these men have sent forth the ukase that Weber should die, and that the man who killed him should be defended by their money and influence, and by their power and by their perjury, do you mean to say that, because they have decreed the sacrifice, you will execute their behest?"

"But Weber had made an effort to quit that business, and get into a business lawful and legitimate; and because he did so he was murdered,—because he attempted to stop the wheels of the chariot of King Faro and King Poker, driven by Gratton and Sliter and Olds. I don't know what his motives were. They may have been selfish. But grant it. He was undertaking to suppress something that was against the law, and, because he told them he would do it, they killed him, and shot him down; and they are now rallying around the standard of their twin brothers, King Faro and King Poker."

"Is it not a shame and a disgrace that men who are on the police force of the city of Portland are able, day after day, to patrol their beats, knowing the existence of gambling in this community, knowing where it is, knowing its devotees, conversing with its devotees, walk calmly and placidly into a court of justice, raise their hands to the tribunal of God, when that same hand had formerly been raised to support and sustain the law, and take an oath that these men with whom they associated—gamblers, all of them—that Weber's character was bad, and Olds' character was good. Gentlemen of the jury, I submit these facts to you. I state the facts. You draw your own conclusions."

"Was this case to be prosecuted, or was it a case for the public executor to come into court and say: 'Most grave, reverend, and worthy senior Olds, my most approved good master, led by Vernon and led by Gratton, and the balance of your kind, I apologize most humbly to you. I crave your humble pardon. It is true that you were armed with a deadly weapon. It is true that you stopped a man on the streets. It is true you sat on the fire-plug, and waited for him. It is true that you were waiting there, with your hat over your eyes,—with your eyes turned toward Second street,—waiting for him to come. It is true that Sullivan and Col. Weidler saw you there. But, my dear, good fellow, the police say you are a good man; and I know you must be a good man, or they would not say so.'"

"Go thou and enjoy the peace of the land, King Faro and King Poker, and the balance of the kings. They go to rob manhood and womanhood of its honor and integrity."

"I repeat again that Emil Weber dead is a grander character in my judgment, is a grander character in the judgment of every law abiding citizen of this county, is a grander character to-day with the hand of every one of these scoundrels against him in court, than he would be living with every one of them for him. O! for a new Christ that would enter this temple of justice to-day, saying, as of old, 'My house is a house of prayer, but you make it a den of thieves.' That is what they would do with this court-house. They have commenced to undermine the foundation of justice. They have raised a sack. The cry has gone forth. Seattle has been rallied, Tacoma has been rallied, Spokane has been rallied, and with Portland gamblers have joined hands to defeat the ends

of justice, and to let this gambler go unwhipped of justice, in order that King Faro may rule, and that every man may be deterred from undertaking to stop him in his course."

"Gentlemen, this case is now with you. The people will not be deceived. They cannot be deceived. They know where the right is, and you know where the right is too. You know the elements that are to-day contesting in this court for supremacy. You know that on the one hand is law and order, and on the other hand is riot and bloodshed and disorder. You know that those two things are trying to gain the supremacy in this county. You know that one or the other will rule. If Charles Olds is allowed to go forth with your verdict registered one iota less than charged in this indictment, if it is said of him that he did not commit deliberate and premeditated murder, the shout will go forth to Spokane, the shout will go forth to these various places, that Multnomah county juries will not convict gamblers when they are clearly proven to be guilty; that Multnomah county juries will not do their duty in this regard, but that they will shirk it."

"Can anybody dispute it? Has it not come to be, as I said, a by-word and a reproach that, in the administration of the criminal law in these United States of America, the murderer frequently goes free?"

"Unfortunately, is it not found that there are jurors who do not do their full duty? Because you know the tactics of the gambler, the state needs twelve jurors to convict, and he only needs one. That is the test. That is what has brought jurisprudence in this country into disrepute. That is what has caused the legislatures of various states to pass laws to try, if possible, to execute laws, and to prevent money and power and wealth from impeding and stopping the goddess in dealing out her even-handed justice to all."

These are only a few excerpts from the address, and were not all taken in the order in which it was delivered, but they are a faithful index to its tenor and spirit. It was a remarkable diatribe. It was a powerful invective against the gambling class, a severe criticism upon the police of the city, and also, indirectly, a damaging reflection upon the officers charged with the administration of the criminal law of the county. The eloquent attorney seems to have occupied the position of Samson when he pulled down the temple of Dagon on the heads of the Philistines, and it fell upon him also. If the assumption that the attorney indulged in, that the gamblers of Portland had conspired to take Weber's life, and Olds' shooting him was a part of the conspiracy, could have been sustained, it would have established the latter's guilt of the crime charged in the indictment beyond any question. But when he appeared in this court, and attempted, under the evidence, to justify the verdict of murder in the first degree, he was unable to point out wherein it supported the assumption to any extent whatever; and there seemed no other excuse for his engaging in such extraordi-



nary hyperbole than an excess of zeal bordering on frenzy.

The proof, however, showed that some of the witnesses on the part of the defense were gamblers, and that they had assisted to raise a sum of money to aid Olds in his defense, which, of course, tended to impeach their testimony. The claim of the district attorney that the gamblers had conspired to take Weber's life, and raise a fund to secure Olds' acquittal and corrupt the fountain of justice, seems to have been predicated, in the main, upon the testimony elicited from Thomas Williams on his cross-examination. The witness had testified as to the threats made by Weber against Olds, and in regard to Weber's bad character and Olds' good character. It appeared that the witness, among other occupations, had been engaged in the gambling business. He also testified that he had taken a good deal of interest in the case; had raised money for the defense amounting to about \$3,000, about half of which he contributed himself; that he visited Seattle and Tacoma, and had written to Spokane Falls, in the interest of the accused. Upon his redirect examination, he was asked to state the reason why he took this interest, and he answered: "Simply because he asked me to." "He sent for me after this man was killed. I guess I was the first man that saw him, and I think I was about the only gambling man in the town at the time. He sent for me, and I went to the city jail to see him, and he told me what had happened; and he says: 'I haven't got a quarter. Will you do what you can for me?' I told him I would, and I made my word good, as near as I could." The witness further testified that he had been feeding Olds while he was down-stairs,—sending his meals to him.

The harangue of the district attorney to the jury was highly sensational, and served, no doubt, to incite their passions and prejudices against the accused, but, unless justified by the evidence, was quite out of place. The trial of a fellow-being for murder, where the penalty is death, devolves a grave responsibility upon the attorney for the state, as well as upon the court and jury; and a conviction should never be urged unless justified by the proof, fairly weighed and considered. It is to ascertain the truth, and apply the law; and a resort to imagination or fancy in order to incite the passions and prejudices of the triers is a deviation from the true and proper course. To convict and put to death a human being through the influence of prejudice and caprice is, morally, murder, and more pernicious in its consequences by far than the escape of a guilty person; and the forms of law should never be prostituted to such a purpose.

It is claimed by the counsel for the state that the manner of the accused when he did the shooting, and the language made use of by him, showed deliberation and premeditation. But I do not think what he did or said on that occasion proves that he had previously designed to take the life of Weber. His having the appearance of being cool, his firing the number of shots he did, and the remark he made after Weber was killed, were acts as lia-

ble, or even more so, perhaps, to attend upon a hastily formed design to kill, as upon one formed in cool blood.

Said counsel also claims that, as the trial court was not called upon to make any ruling regarding the sufficiency of the evidence to warrant the conviction of murder in the first degree, no question can therefore be made upon that point in this court, and the question must be raised there before it can be considered here. It has been held repeatedly by this court that it had no authority to review the decision upon a motion for a new trial, and has been indicated very strongly a number of times that the question as to the sufficiency of the evidence to support the judgment or conviction must have been first passed upon in the trial court. But whether that rule should be adhered to in a capital case has never before, that I am aware of, been pressed upon the attention of the court. I have always been of the opinion, since my attention was called to the matter, that, where the evidence in a capital case is shown to be clearly insufficient to warrant a conviction, it would be the duty of this court, under its supervisory power over the circuit courts, to reverse the conviction, and order a new trial. If, for instance, a case were brought here where the accused had been convicted of murder in the first degree, and the evidence showed affirmatively that the *corpus delicti* had not been proven, we could not, it seems to me, affirm the conviction. The counsel for the appellant cites in his brief a number of decisions from the courts of other states to the effect that the appellate court will not apply in capital cases the rules which govern superior courts in other cases with the same strictness, and I am of the opinion that such a rule should obtain here. I think it the duty of a trial court, at all events in a case of murder, where the evidence is not sufficient to warrant a conviction of the highest grade of the offense charged, to instruct the jury, of its own motion, to that effect. "It is," says Blackstone, "the noble declaration of the law \* \* \* that the judge shall be counsel for the prisoner; that is, shall see that the proceedings against him are legal, and strictly regular." Cooley, Bl. Comm. bk. 4, \*355.

I have thus far omitted any reference to the testimony of the witness Milton Welder, contained in the statement herein. The district attorney seemed to rely upon this testimony, in his argument to the jury, as proof that Olds was lying in wait to kill Weber, as it appears in one of the extracts from his speech above set out. That testimony, however, was clearly incompetent, as the witness would swear that the man he saw standing by the fire-plug was Olds, and could not describe the man further than that he was a heavy-set man; and the court committed palpable error when it allowed the witness to testify to what he said to his friend as to his belief that Olds was standing on the corner when he passed. If the witness had seen Olds standing at the place at the time referred to, his testimony to that effect would necessarily have been damaging to the accused; but he could not so swear,

nor describe the man he saw so that he could be identified as Olds. He should not, therefore, have been permitted to eke out his evidence upon that point by testifying to the expression he made use of, when he heard the announcement that Olds had shot Weber, regarding his mental impression that the man he saw standing on the corner was Olds. It was a mere surmise on the part of the witness; yet, admitting it in evidence, under the particular circumstances, was highly prejudicial to the accused.

There are other questions in the case which have been discussed, but it is not necessary to especially consider them. The counsel for the accused had the right to have the two instructions requested by them given in some form to the jury. Whether they were included in the instructions given may be questioned, but the solution of that question is not necessary to the decision of the case, and probably will be obviated in the future.

After a thorough examination of the facts in the case, I am constrained to believe that the accused has not had such a trial as the law accords to parties charged in capital cases. That he is a gambler, and worthless member of the community, may be true; but he is on trial for his life, is within the pale of the law, and the courts can do no less than to require that the law be administered in his case, as in all others, in accordance with its letter and spirit. I am of the opinion that the judgment of conviction should be reversed, and the case remanded for a new trial.

LORD, J., (*dissenting*.) Upon the points discussed, my views, briefly, are these:

1. That an opinion formed from newspaper reports does not disqualify a juror when it is such as will yield to the evidence which may be adduced, and it appears that he can give the defendant a fair and impartial trial; that "all men," as BUTLER, C. J., said, "take newspapers statements as current news, liable to qualification, explanation, or contradiction, and when qualified, explained, or contradicted, they change their opinions or belief accordingly, as a matter of course." So that the opinion which should exclude a juror must be of a fixed and settled character, showing that his mind is not open to the reception of testimony, and partaking, in fact, of the nature of a prejudgment. And finally, that the trial court has a better opportunity to judge of the juror's fitness and competency upon the whole examination, conducted in its presence and hearing, than can the appellate court from a bare inspection of the record alone.

2. That the motion for a change of venue on account of prejudice alleged to have been produced in the public mind by exaggerated newspaper reports that would prevent the defendant from having a fair and impartial trial, controverted by counter-affidavits on behalf of the state to the effect that the accused could have a fair and impartial trial, and that a jury could be selected from the body of the county, was addressed to the discretion of the trial court, and is not reversible error, ex-

cept from manifest abuse and injustice; that the books abound in cases which show, upon applications of this kind, that where, soon after the killing, false and exaggerated statements are alleged to have been published concerning the transaction, in newspapers of general circulation in the county, and that these publications reflected severely upon the defendant's character, and greatly inflamed the public mind and prejudiced the people against him, controverted by affidavits on behalf of the state to the effect that the affiants were acquainted with the feelings and sentiments of the people, and that no excitement or prejudice existed against the defendant which would prevent him having a fair and impartial trial, that such applications are addressed to the discretion of the trial court, and refused to interfere; and that, except in special cases, an interference of the appellate court is more likely to result in a failure of justice than in depriving the accused of a fair and impartial trial.

3. That this court cannot review, as has been done in this case, the determination of the trial court upon a motion to set aside the verdict on the ground of the insufficiency of the evidence—

Because (1) such motion is not reviewable in the appellate court, and that it has been its constant practice, from *State v. Fitzhugh*, 2 Or. 230, to *State v. Clements*, 15 Or. 243, 14 Pac. Rep. 410, in which THAYER, C. J., said, as to the identical point now raised: "This court long ago held that a matter [motion to set aside the verdict] of that character is not reviewable. Counsel, however, continue from time to time to persist in urging such questions upon the consideration of this court, and seem to think that, unless they are able to raise them, judgments are liable to be given without sufficient evidence in law to sustain them. But such results are not liable to follow if counsel will properly present them. This court will not uphold a judgment where the evidence is not sufficient in law to justify its rendition, if the question is properly made, which can be done by a motion at the trial to discharge the defendant upon that particular ground, and including all the evidence in the bill of exceptions tending to establish his guilt. So, also, a question regarding the sufficiency of the proof of a particular fact in the case may be reviewed here, but it must be raised by an exception at the trial. Should the trial court say to the jury that if they found such and such facts, and there was no sufficient evidence in law to authorize such finding of all or any one of the facts thus submitted, an exception in either case could be saved, and made available. All the evidence, however, would have to be certified to this court, bearing upon the same, in the statement of the exception; and the statement, in such case, must purport to contain all the evidence upon the point. This court has nothing to do with the rulings of the lower court upon a motion for a new trial, or to set aside the verdict of the jury. It deals only with questions of law, and they must be squarely presented as such."

Because (2) the rule as thus declared and steadily maintained is better adapted to protect all the legal rights of the accused, and to meet the ends of justice, by presenting the particular matter or point, as here, the fact of premeditation, and the evidence in respect to it, alone, so that the appellate court can examine and pass directly upon it without wading through a voluminous mass of other matter, about which there is no controversy.

Because (3) the determination of the trial court cannot be reviewed, for the reason, as STORY, J., said, that "it is not a matter of absolute right in the party, but rests in the judgment of the trial court, and is to be granted only when it is in furtherance of substantial justice, but that the case is far different upon a writ of error bringing the proceedings at the trial, by a bill of exceptions, to the cognizance of the appellate court. The directions of the trial court must then stand or fall upon their own intrinsic propriety as matters of law." As such rule is operative to prevent a judgment without sufficient evidence in law to sustain it, it ought to stand; and its reversal will be apt to needlessly multiply new trials, and perhaps to cause a failure of justice.

Because (4) that the cases referred to (State v. Cody, 23 Pac. Rep. 892, and State v. Hunsaker, 16 Or. 497, 19 Pac. Rep. 605) are not authorities to look into the case, and pass upon the sufficiency of the evidence, upon the determination of a motion of this character, but that the first (State v. Cody) was brought to the cognizance of the appellate court upon an exception to the trial court's refusal to direct a verdict for the defendant, and that he be discharged, or that the court instruct the jury that the defendant could not be convicted of the crime of mayhem for that the evidence was insufficient to satisfy the same, and not for the refusal of the trial court to set aside the verdict; and in the other, (State v. Hunsaker,) while STRAHAN, J., expressed his personal opinion to that effect, the court did not decide, and he expressly added: "But we do not consider or decide that matter now." So that there is not only no authority in our practice to justify it, but the rulings, as already shown, have been constantly the other way.

But, if these precedents are to be disregarded and overturned to meet the exigency of the case at bar, and the evidence examined upon a motion for a new trial after verdict, then (5) my contention is that there is evidence disclosed by the record of facts and circumstances tending to show premeditation; that the evidence shows that the parties had had a previous quarrel and fight; that afterwards, and upon the day of his death, Weber called upon one Sliter, and told him that the defendant, Olds, could no longer continue to run the game over the Crystal Palace Saloon; and that Sliter communicated this information to the defendant, Olds, and requested him to leave the city; that Olds walked up Third street to the corner of Alder, and that at the time he was armed, with his pistol in his right front pants' pocket, and that he had his hand on it,

and there met Weber, and said to him, "I hear you have been about town looking for me?" and before Weber could make full reply commenced firing, and after shooting four bullets into him,—some of which after his victim lay dead or dying at his feet,—threw back his coat, put in his revolver, then took out his handkerchief, and calmly took off his hat, wiped his brow, wiped his hat, walked around the body, and, before leaving it, saying, "Now, you s— of a b—, you have got me," tending to show that his mind was made up to answer his own inquiry in the way it was done before Weber could reply. One witness, when asked, "What time would you say elapsed between the time Olds addressed the remark, 'Mr. Weber, I understand you have been looking for me,' until he fired the shot," answered that "it was almost instantaneous, and that Weber had hardly completed his reply, 'You s— of a b—, what do you want with me?' when the first shot was fired, tending to show that the question was not asked to elicit an answer, but that it was asked and followed so instantly by pistol shots as tended to indicate that the purpose to take Weber's life was already formed when it was done. When all the facts are taken together,—the fight which had preceded Weber's conversation with Sliter, which he had imparted to the defendant, Olds, and which indicated a purpose to break up his gambling game; Olds going armed to the corner of Alder street, his stopping there, and, when Weber came along, addressing to him an inquiry that tended to show that what Sliter had told him was then in his mind, but followed so quickly by pistol shots as tended to indicate that no reply was expected, but that he was executing a purpose already formed; and his manner after the killing, so comparatively free from excitement or passion, deliberately putting back his revolver into his pocket, calmly wiping his brow, his hat, and walking about his victim, leaves him with the remark, "Now, you son of a b—, you have got me," or, as the facts would seem to tie together, "You have been looking for me, and now you have got me,"—they tend to indicate a state of mind that was not acting on the impulse of the moment, but executing a purpose already formed with deliberation to insure certainty in its results. It may be that there is testimony of other witnesses which would contradict this, or from which different inferences may be drawn, or which would tend to support some other theory, or from facts admitted, and even undisputed, as to what is the proper deduction, where different men, equally sensible and impartial, would make different inferences. But that only serves to show that the law commits the case to the decision of the jury, and not the court; for, in passing upon the sufficiency of the evidence by a court, "it must be assumed," said Judge DILLON, "that all the evidence in the case is true, and that the witnesses are all credible, for, if there are questions relating to the credibility of witnesses, or if what the evidence proves depends upon the credibility of witnesses, or upon the proper

deduction to be drawn from the evidence, these are questions, not for the court, but for the jury under the direction of the court." *U. S. v. Babcock*, 3 *Dill*. 578. That rule, applied to the evidence disclosed by this record, makes this a case for the decision of the jury, and not for the court, as it is their province to decide questions of fact, as it is of the court to decide questions of law.

4. That the testimony of Weldler is merely cumulative, and that there is sufficient evidence to support the verdict without it, and therefore its admission, conceding it to be incompetent, was without prejudice, and is not reversible error.

5. That the remarks attributed to the district attorney as improper, and inserted in the record were not excepted to, and brought to the attention of the trial court for its decision, and cannot now be raised for the first time in this court, within the ruling and decision in *State v. Abrams*, 11 Or. 172, 8 *Pac. Rep.* 327, in which *Watson, J.*, said: "Some of the remarks attributed to Mr. Dorris were undoubtedly improper, and can hardly be condemned with too much severity. But however reprehensible, there is one insuperable obstacle to their being considered here as ground for reversal: They involve no error of the court below. We have announced this principle before, (*State v. Anderson*, 10 Or. 448,) and we now lay it down as a rule to which there can be no exception, that no objection to proceedings in the court below can be heard in this court which is not based on alleged error in judicial action on the part of the lower court."

In view of these considerations, much as I regret to differ with my associates, as I understand the law and the practice, so long and steadily adhered to by this court, I cannot consent to disregard and overturn them, and have therefore no other alternative than to dissent.

#### SULLIVAN V. OREGON RY. & NAV. CO.

(*Supreme Court of Oregon.* June 10, 1890.)

#### RAILROAD COMPANIES—FENCES—KILLING STOCK.

1. A statute which prescribes, as a precautionary measure, what shall be deemed a sufficient fence to protect a railroad track from the entrance of live-stock, and declares an absolute liability for the killing of stock for the failure to fence, or for killing stock on an unfenced track, except for contributory negligence or misconduct, imposes, by implication, the duty to fence as much as if such duty was expressly declared.

2. Section 4044 makes a railroad company liable for the value of stock killed upon or near any unfenced track by a moving train, and section 4045 prescribes what shall be deemed a sufficient fence to guard the railway track from the entrance thereon of live-stock, and section 4048 provides that in every action for the value of any stock mentioned in section 4044 so killed that proof of such killing shall be deemed and held conclusive evidence of negligence, except when the owner is guilty of negligence, or misconduct. *Held*, that the statute, in prescribing the fence, and declaring that stock killed "on or near any unfenced track" shall be conclusive evidence of negligence by implication, makes it the duty of a railway to fence its track.

3. A statute often speaks as plainly by inference, and by means of the purpose which underlies the enactment, as in any other manner.

4. Such a statute is intended as a precaution-

ary measure to protect the track from stock, where allowed to roam at large, so as to insure safety in the running of the trains as well as to prevent the destruction of live-stock, and is a police regulation, which finds its authority in the same power as regulates the storage of gunpowder, or other dangerous instrumentalities, and is not obnoxious to the constitutional objection of depriving the company of its property without due process of law, or of denying it the equal protection of the laws.

5. Under the statute, in view of the construction given in *Hindman v. Navigation Co.*, 17 Or. 619, 22 *Pac. Rep.* 116, when it is alleged and proven that stock is killed or injured at a place where the company has failed to fence, but the duty existed, (an unfenced track,) a case of negligence is made out unless the defendant can show contributory negligence or misconduct.

6. Proof of the place of entry of the stock only becomes material and devolves on the plaintiff when stock is killed or injured at a place where the railroad company is not bound to fence, as a public highway, which has entered where its track was unfenced, and the duty to fence existed, and such killing or injury is the direct consequence of omission to fence.

(*Syllabus by the Court.*)

Appeal from circuit court, Umatilla county; *JAMES A. FEE*, Judge.

The action was to recover damages for the killing of a stallion by the defendant railroad, belonging to the plaintiff, based upon the act of 1887, and found in *Hill's Compilation*, §§ 4044-4049, inclusive. Upon issue being joined, a trial was had, and the plaintiff recovered judgment, from which this appeal is brought.

*W. W. Cotton and Gilbert & Snow*, for appellant. *Ramsey & Wager*, for respondent.

**LORD, J.** There are two questions suggested by the defendant upon this record for our determination. These will be examined in the order discussed. The first is that the act of 1887, in relation to killing stock upon or near any unfenced track of any railroad, and found in *Hill's Compilation* of 1887, as sections 4044 to 4049, inclusive, is unconstitutional. Section 4044 provides as follows: "Any person \* \* \* or corporation \* \* \* owning or operating any railroad within the state of Oregon shall be liable for the value of any horses \* \* \* killed \* \* \* upon or near any unfenced track of any railroad in this state, whenever such killing or injury is caused by any moving train or engine or cars upon such track." Section 4045 is as follows: "No railroad track shall be deemed to be fenced within the meaning of this act unless such track is guarded by such fence against the entrance thereon of any such live-stock on either side of said track, and not more than one hundred feet distant therefrom: provided, that whatever is a lawful fence under the laws of this state in the county where such killing or injury shall occur, and no other, under the laws of this state, shall be deemed and held a lawful fence under this act; and provided, further, that complete, natural defenses against the entrance of such stock upon said track, such as natural walls or deep ditches, shall be deemed and held to be a fence under this act, when the same, in connection with other and ordinary lawful fences, form a continuous guard and defense against the entrance of

such live-stock upon the track." It is claimed by counsel for the defendant that these sections are unconstitutional, for the reason that they are in conflict with the fourteenth amendment of the constitution of the United States, (1) in that they deprive the defendant of its property without due process of law; and (2) in that they deny to the defendant the equal protection of the laws. As corporations are persons within the meaning of the clause in question, they are entitled to invoke the benefit of its provisions. *Santa Clara Co. v. Railroad Co.*, 118 U. S. 394, 396, 6 Sup. Ct. Rep. 1132. The defendant, then, is within its protection. The alleged conflict of these sections, or the act of 1887, to the fourteenth amendment, ordaining that no state shall deprive any person of its property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws, is supposed to lie in discriminating against the defendant by imposing a liability where no duty is required by law, or without any act of negligence on its part. The contention is that the act of 1887 imposes no duty upon the defendant to fence its track. Yet it declares that the company shall make reparation for the killing of stock in the prosecution of its lawful business, without any fault or negligence on its part, or the violation of any duty imposed by law. As the defendant has the lawful right, in a lawful way, to run its trains, in order to hold it liable for the value of stock killed, caused by the running of its trains, there must be some violation of a duty imposed by law, or some act of negligence on its part. And it would follow, unless the act imposes some duty, the violation of which renders the defendant liable, it would be open to the objection that it subjects the defendant and its business to a liability where no wrong has been committed or duty unperformed, thereby depriving it of its property and the equal protection of the law afforded to others. That the legislature, in the exercise of the police power of the state, may require all railroads to fence their track, and for neglect or failure to perform this duty render them liable for whatever injury is done, or for double the value of the stock killed, and that such legislation is not obnoxious to the clause of the constitution in question, has been frequently decided, and cannot be questioned. The danger attending the running of steam railway cars, and liability to serious injury or loss of life of its passengers by collision with animals straying upon its track where allowed to roam at large, makes it a requirement of duty to exercise the utmost care, and to take every precaution to keep its track clear, so as to prevent accidents from such collisions. How can this be better done, and the track kept comparatively secure from stock going upon it, than by requiring the railroad company to fence its track, and, in default thereof, to hold it liable for the value of the stock killed by such collision, when the plaintiff is not contributorily negligent? Such a precaution, where stock is allowed to run at large, is a police regulation, and, as a security against the loss of life and prop-

erty in the operation of dangerous machinery, is based upon the same principle, and finds its authority in the same power, which regulates the storage of gunpowder or other dangerous explosives. This being so, the legislature may require railroad companies to inclose their tracks with fences, and provide that they may be held liable for all stock killed, caused by their neglect to maintain such fences; and, if the act in question has imposed this duty on the defendant, and attached a liability for its neglect, it is a valid exercise of the police power, and not subject to the constitutional objection urged. The real inquiry, then, is, does the act of 1887, as found in the sections, supra, inclusive, undertake to impose any duty upon railroad companies to fence the line of their track, and for failure to discharge this obligation render them liable for the value of the stock killed? While the act does not declare the duty of the defendant railroad company to fence its track in express terms, it is sufficient, and forms part of the statute, if it makes it the duty of the defendant to do so by implication. "An implication," said FOLGER, J., "is an inference of something not directly declared, but arising from what is admitted or expressed. Thus, when a statute, looking beyond the question of revenue, inflicts a penalty for doing an act, though that act be not in terms prohibited, yet it is unlawful, for the penalty implies a prohibition. *Griffith v. Wells*, 3 Denio, 226. And the principle is that as the law will not punish an act which it is lawful to do, when it does punish it the act must of necessary implication be unlawful. In *re City of Buffalo*, 68 N. Y. 173. So a statute which prescribes, as a precautionary measure, what shall be deemed a sufficient fence to protect a railroad track from the entrance of live-stock, and declares an absolute liability for the killing of stock for the failure to fence, or for killing stock on an unfenced track, except for misconduct or contributory negligence, imposes, by implication, the duty to fence as much as if such duty was expressly declared. A duty which is implied from what is expressed in a statute forms a part of it, and is as obligatory as if directly enjoined and declared. Section 4044 makes the defendant, as a railway corporation, liable for the value of stock killed on or near any "unfenced track," and section 4045 prescribes what shall be deemed a sufficient fence to protect the railway track from the entrance thereon of live-stock, and section 4048 provides, in substance, that in every action for the value of any stock mentioned in section 4044, and killed on an unfenced track, proof of such killing shall be deemed and held conclusive evidence of negligence on the part of the company except when the owner is guilty of contributory negligence or misconduct contributing to the injury. The fence defined in section 4045 was intended to guard the railroad track "against the entrance thereon" of live-stock, as a precautionary measure to avoid liability to accidents, and, when erected and maintained as prescribed, obviates the liability created by section 4044 by converting the "unfenced" into a fenced

track. There is no liability for the killing of stock except where there is a failure to fence, or on an "unfenced track," and it is for the omission of an "unfenced track," or the failure to fence it, that creates the liability, except for misconduct or contributory negligence. As, then, it is only "unfenced tracks" to which the liability attaches when the owner is not guilty of contributory negligence or misconduct contributing to his injury, it is the failure of the defendant to fence its track, or the negligence in allowing it to be exposed as "an unfenced track" for the entrance of live-stock, that renders it liable for the value of such stock when killed by a collision with its trains. The statute declares what kind of fence will be deemed sufficient to guard the track from stock going upon it, and, by implication, if fenced as prescribed, will avoid the liability declared as to "unfenced tracks;" that is, if the defendant railroad company will erect and maintain the fence prescribed by the statute along the line of its track, it ceases to be liable under the preceding section. It does not make the company absolutely liable for the stock killed on its track, but the liability attaches only when the road is unfenced, when the precautionary measure prescribed by the statute to avoid accidents and collision with such stock is neglected and unperformed, and the owner is not contributorily negligent or guilty of misconduct. The duty, then, to fence is plainly implied, and the liability is imposed for the failure to do it. Negligence is the failure to perform some act required by law, or the doing of an act in an improper manner. When the statute prescribes the fence, and declares stock killed on "an unfenced track" shall be conclusive evidence of negligence by implication, it makes it the duty of the company to fence its track, because one cannot be deemed guilty of negligence unless a duty has gone unperformed or neglected. "A statute," it is said, "often speaks as plainly by inference and by means of the purpose which underlies the enactment as in any other manner." *U. S. v. O'Connor*, 31 Fed. Rep. 451. And so here the duty to fence is as plainly inferred as if it had been declared in express language, and the liability only attaches for disregarding it, and leaving the track unfenced.

In Iowa the statute is as follows: "Any corporation operating a railway that fails to fence the same against live-stock running at large, at all points where such right to fence exists, shall be liable to the owner of such stock injured or killed by reason of the want of such fence for the value of the property or damage caused, unless the same was occasioned by the willful act of the owner or his agent, and in order to recover it shall only be necessary for the owner to prove \* \* \* ; and, if such corporation neglects to pay, \* \* \* such owner shall be entitled to recover double the value of the stock killed or damages caused thereto." Code Iowa, § 1289. In *Welsh v. Railroad Co.*, 53 Iowa, 634, 6 N. W. Rep. 13, the action was to recover double the value of a horse alleged to have been killed by one of the defendant's engines at a point where it had the

right to fence its road, and the court below instructed the jury that it was the duty of a railroad company to fence its road against live-stock running at large at all points where such right to fence exists, and it was objected to this instruction that no such duty exists, and the court say: "While, it is true, the statute does not impose an abstract duty or obligation upon railway companies to fence their roads, yet, as to live-stock running at large, a failure to fence fixes an absolute liability for injuries occurring in the operation of the road by reason of the want of such fence. The corporation owes a duty to the owners of live-stock running at large, either to fence its road or pay for injuries resulting from the neglect to fence." And in *Bennett v. Railway Co.*, 61 Iowa, 356, 16 N. W. Rep. 210, the court say: "We think the only proper construction of the statute is that, in order to escape liability, the company must not only fence, but keep the road sufficiently fenced; and this has been more than once ruled." This statute does not in express terms declare the duty of the railway companies to fence their tracks, but it is implied as a reasonable means to keep its track clear, and insure safety in the movement of its trains. In *Railway Co. v. Beckwith*, 129 U. S. 26, 9 Sup. Ct. Rep. 207, the validity of the statute was assailed, as here, as being in conflict with the first section of the fourteenth amendment of the constitution of the United States, and it was held not subject to that objection, but a valid and reasonable exercise of the police power of the state for the protection of its citizens. Mr. Justice FIELD, in delivering the opinion of the court, among other things, said: "The tremendous force brought into action in running railway cars renders it absolutely essential that every precaution should be taken against accident by collision, not only with other trains, but with animals. A collision with animals may be attended with more serious injury than their destruction. It may derail the car, and cause the death or serious injury of passengers. Where these companies have the right to fence their tracks, and thus secure their roads from cattle going upon them, it would seem to be a wise precaution on their part to put up such guards against accidents at places where cattle are allowed to roam at large. The statute of Iowa, in fixing an absolute liability upon them for injuries to cattle committed in the operation of their roads by reason of the want of such guards, would seem to treat this precaution as a duty. \* \* \* But the obligation of the defendant railway company to use reasonable means to keep its track clear, so as to insure safety in the movements of its trains, is plainly implied in the statute of Iowa, which also indicates that the putting up of such fences would be such reasonable means of safety." And again: "As it is thus the duty of the railway company to keep its track free from animals, its neglect to do so, by adopting the most reasonable means for that purpose,—the fencing of its road-way, as indicated by the statute of Iowa,—justly subject it, as already stated, to punitive damages, where inju-

ries are committed by reason of such neglect." And so here, the duty of the defendant railway company to use reasonable means to keep its track clear by fencing it as indicated by the statute, and thereby avoid the liability to accidents from stock running at large and straying upon its track, is plainly implied as the proper means to secure safety, and its neglect to do so by leaving its track unfenced justly subjects it to the liability fixed for the injury committed. Nor is the case of *Bielenberg v. Railway Co.*, 8 Mont. 276, 20 Pac. Rep. 314, relied upon by appellant's counsel, in conflict with the view suggested. There the statute was different, and in effect declared that any railroad corporation shall make reparation to the owner of any stock for any injury inflicted in the prosecution of its lawful business without any fault or negligence on its part. It was as follows: "Every railroad corporation or company operating any line of railroad or railway, or any branch thereof, within the limits of this territory, which shall damage or kill any horse \* \* \* by running any engine or engines, car or cars, over or against any such animal, shall be liable to the owner of such animal for the damages sustained by such owner by reason thereof." As there was "no law," as the court say, "in the territory which compels railroads to fence their lands," and as the statute in question did not make it their duty, either expressly or impliedly, to fence its track, it required the court, to sustain such statute, "to lay down the doctrine that the legislature can inflict a penalty upon one who is doing a lawful act in a lawful manner," which the court refused to do. The liability of railway corporations, under this statute, did not attach for the violation of any law, or the neglect to perform any duty, or for the want of proper care in running its trains, but they were mulct in damages without any wrong or fault, when engaged in the lawful prosecution of their business, and when no one else was so liable under such circumstances. The same may be said of *Railway Co. v. Lackey*, 78 Ill. 55; and *Zeigler v. Railroad Co.*, 58 Ala. 595; *Jensen v. Railway Co.*, (Utah,) 21 Pac. Rep. 994,—which were under like statutes. Nor is *Hindman v. Navigation Co.*, 17 Or. 619, 22 Pac. Rep. 116, in conflict with the construction which we have given to our statute. It is true that *THAYER, C. J.*, in the course of his opinion, said that "fencing the railroad track is not imposed upon the company as a duty," that is, not directly or expressly imposed as a duty, "but," he observes, "it is a fact;" that is, the killing of stock on an unfenced track by a moving train, "which of itself establishes conclusively that the company is guilty of negligence." This could not be so unless some duty was neglected, and it must therefore be implied. The theory of the argument is only consonant with this hypothesis. Its meaning, plainly, is that when stock is killed at a place where the duty to fence has been neglected by the company, an absolute liability attaches. "It is a fact which of itself establishes conclusively that the company is guilty of negligence." The result is that

we think that the statute in question is not obnoxious to the constitutional objection suggested, but that in devolving a liability for the violation of the duty to fence it is a valid and reasonable exercise of the police power of the state, intended to guard the track against live-stock, so as to insure the safety of the lives of passengers and property involved in the running of its trains, as well as to prevent the destruction or loss of such property by collision with moving trains or cars.

The next objection embraces exceptions to instructions given and instructions asked and refused. These instructions are as follows: "Under the laws of this state, in an action like this, proof of the killing of the horse by the defendant's moving engine or cars, and that the place where the horse entered on the track was not fenced, is conclusive proof of negligence on the part of the defendant corporation, unless the point where the horse entered and was killed was a county road or public highway. (3) In this case, if you find from the testimony that the horse entered upon the track of the defendant at a point some distance from where he was struck and killed, and some distance from any county road or public crossing, and that soon after he entered thereon the defendant's train came along, and that the horse ran along upon said track where it was unfenced, in front of said train, until he was struck and killed by it, and that he entered upon said track from a common, unfenced range, then you should find a verdict for the plaintiff for the full value of said horse at the time he was killed. (4) I charge you that if the horse entered upon the defendant's unfenced track from a common, unfenced range, at a point where there was no public road or public crossing, and, being on said track at said point, ran from there along and upon said unfenced track in front of the defendant's train to a point at or near a public road, and was there struck by the defendant's engine or cars, and was killed, then the defendant is liable for the value of said horse. And the fact that he may have been struck in the edge of the public road affords no defense, provided he got on the track and ran along it, and was struck as aforesaid." The court also charged to the effect that the section of the Code referred to did not apply to public crossings, etc., and that the owners or operators of railroads were not liable for killing stock on public highways unless guilty of negligence, or a want of ordinary care, and that if they found from the evidence that the plaintiff's stallion was upon the track at a point where a public highway crosses the same, and was there struck and killed by a moving train, the fact that the track was unfenced at that point is no evidence of negligence. The defendant claims error in the refusal of the court to give the following instruction: "The mere fact that plaintiff's stallion was struck by a moving train or engine on the railroad track of the defendant, at a point where the defendant had no legal right to fence the same, is not sufficient evidence of negligence to warrant you in finding a verdict for the plaintiff. If, therefore, you find



from the evidence that the plaintiff's stallion was struck and killed by a moving engine or train on the track of defendant's railroad, at a point where the same was unfenced, and that such point was a public highway, then the defendant had no legal right to fence, and your verdict must be for the defendant. To entitle to plaintiff to recover in this action, he must show that the stallion was struck by a moving train on defendant's railroad track, at a place other than upon a country road or public highway. The *onus* of proof is upon the plaintiff, and unless he shows by a preponderance of the evidence that the stallion received the injury which caused his death at a point other than on a public highway, your verdict must be for the defendant." Upon the facts as exhibited by this record, the position of the trial court was that if the stallion entered upon the track at a point where there was no fence, but where the duty to fence existed, although it might be killed at a place afterwards where the statute made no requirements to fence as a public highway, the defendant company would be liable. While the counsel for the defendant was contending for a literal construction of the statute, namely, that the statute specified that it was the killing of the stock upon or near an unfenced track, and as a track crossing an unfenced highway was an unfenced track, it was within the letter of the law, that the plaintiff, to bring himself within the statute, must show that his stock was killed on an unfenced track, and that by reason of the instructions as given and refused the defendant was prejudiced under the evidence as to whether the animal was killed on a public highway. The statute is: " \* \* \* shall be liable \* \* \* for any horse \* \* \* killed upon or near any unfenced track," etc.; and is broad enough, construed liberally, to include highways or depot grounds. But, as the court charged, such a construction is inconsistent with the reason of the statute and the purpose underlying its enactment. It was therefore held in *Moses v. Railroad Co.*, 18 Or. —, 23 Pac. Rep. 498, that the statute did not apply to such places; that railroad companies were not required to fence their depot grounds or public road crossings, and, as a consequence, were not liable to pay for live-stock which may wander upon their track at such places and be killed without negligence on their part. Such places, then, must be considered without the operation of the law, or the requirement to fence to guard the track from the entrance of stock thereon. To give the statute the construction contended for it would make it apply to places where the duty to fence is not required, as a public highway, where the track is necessarily unfenced to accommodate the public convenience. Proof that stock wandered on the track at such place, and were killed, would not render the railroad company liable, and the court so instructed the jury. It is at such places as the company is bound to fence, and fails to observe that requirement of the law, whereby stock enter upon the track and are killed, which constitute the liability. As highways are ex-

cepted from its operation, there could be no liability for stock which may enter upon the track at a public highway and be killed. That result, if it occurred on a public highway, could only arise where the stock entered upon the track at some place where the duty to fence was neglected, and the animal running down the track was struck by the engine and killed at some place where the duty to fence did not exist as a public highway or depot grounds. In such case the killing of the stock is the natural and proximate result of the duty neglected in failing to fence where the law required it. It is the want of a fence that has caused the injury. Hence the theory of the court, that if the horse strayed upon the track at a point where the company was bound to fence, but had neglected to do so, it was liable, irrespective of the place at which the horse may have been killed. But it by no means follows, nor did the court so rule, that if stock was killed at a place where the duty to fence existed, but had been neglected, that a case of negligence was not made out. While, under the statute, the duty to fence is not declared in mandatory terms, it is implied from the omission to fence or leaving the track unfenced whereby stock may enter thereon and be killed. It is therefore the failure to fence when stock are "killed upon or near any unfenced track," where the duty to fence existed, that constitutes the negligence and fixes the liability, the implication being the stock entered upon the track at the place where they were killed and the requirement to fence was neglected. The action is prosecuted upon the omission to fence, so that when it is proven that the stock were killed at a place where the company is obliged to fence, but where it is not fenced, ("an unfenced track,") the statute says that "such proof shall be deemed and held to be conclusive evidence of negligence." This is upon the assumption that the company have failed to fence and keep the stock off of the track at a point where it was the duty of the company to fence, and where the cattle entered, and by reason thereof were killed. It is true that in some jurisdictions under their statutes it is held that the point of entry must be alleged, and that the evidence must distinctly show that the stock got upon the track at a point where there should have been a fence, but there was none; otherwise the plaintiff cannot recover. But under our statute, and in view of the construction already given to it in *Hindman v. Navigation Co.*, where the facts to be alleged and proved are stated, when stock is killed or injured at a place where the company has failed to fence, but the duty to fence existed, a case of negligence is made out, unless the defendant can show contributory negligence or misconduct. If, then, the proof showed that the horse was killed by a moving train at a place where the track was unfenced, or where there was a failure to fence, and the law required it to be fenced, the defendant is liable, or, if the horse got on the track, and was killed at a public crossing, as the court charged, the defendant is not liable. But if the horse got on

the track where the duty to fence was neglected, and the horse was run down and struck by a moving engine and killed, at a public highway, the injury originating in the failure to fence is the proximate cause of the injury, and, as the court charged, the defendant is liable. Under our statute proof of the place where the horse got on the track only becomes material when the horse is killed at a public place or crossing, and the claim of the plaintiff is that he got on the track at a place where the law required a fence, and that his killing at a public crossing was the direct and natural result of an omission to fence. Such place being without the statute, the plaintiff, to bring the injury within its operation, would be required to show that it was caused by an omission to fence where the duty existed. In effect the court charged this, but it did not charge, as there was evidence tending to show, that if the horse was killed where the duty to fence was neglected, that a case of negligence was made out, and that the defendant was liable. The truth is that there is no pretense that the railroad is fenced anywhere in this region, and upon the facts as disclosed by this record, how the defendant was prejudiced, it is difficult to understand. Under our view of the law, the court, by its instructions, required stricter proof of the plaintiff than the statute would require in case the horse was killed where the duty to fence was neglected. As to the first instruction asked by the defendant, and refused, in the first part it assumes a fact disputed, and in the last is covered by instructions given. As to the other two, the court does charge that the injury must have occurred from the omission to fence, which excludes injuries originating on highways, to which the statute does not apply. Injuries originating from a failure to fence, although occurring on a highway, are tied to the causes away from it, and held within the operation of the law, so that the plaintiff, to recover, must show that the inception of the injury, or its cause, was at a place where the duty to fence was neglected, which shows that it did not originate on a highway, but owes its occurrence and existence to causes away from it. Some of the authorities indicate that when the want of a fence is shown, and the injury is proven as the direct consequence of it, if the defendant thinks it occurred where no fencing is required, as on a public highway, that to avoid the liability thereby established the defendant ought to be required to show it. Referring to cases of this character, Mr. Rorer says: "When the absence of a fence is shown, and the injury is proven, then, if defendant will avoid liability by showing the occurrence to have originated at a place where fencing was not required, or was not allowable, as at a public crossing \* \* \* or other public place of business, then the burden of proof is on the defendant to prove these facts; and, if not absolutely necessary, yet it were the better practice to plead them." 2 Ror. R. R. 1396. But, however this may be, we are unable to see that there was error, and the judgment must be affirmed.

## EATON v. OREGON RY. &amp; NAV. CO.

(Supreme Court of Oregon. June 10, 1890.)

## RAILROAD COMPANIES—KILLING STOCK—FENCES—PLEADING—EVIDENCE.

1. Under the statute for killing or injuring live-stock on an unfenced track, it is not necessary to allege the point at which the animals entered upon the track of the railroad.

2. Nor is proof of entry material except where stock is killed at a place where the company is not bound to fence, as a public highway which has entered where its track was unfenced, and the duty to fence existed, and such killing is the direct consequence of the neglect to fence.

3. When it is alleged and proved that the company failed to fence, and that the plaintiff's stock was killed or injured upon or near such unfenced track by a moving train, the negligence is established, and can only be defeated by proof of contributory negligence or misconduct.

(Syllabus by the Court.)

Appeal from circuit court, Union county; JAMES A. FEE, Judge.

This is an action composed of six causes, five of which are brought to recover damages for killing and injuring stock belonging to the plaintiff by moving trains of the defendant railroad company, and the last for the destruction by fire of grass, etc., and to which further reference will not be made, as no argument for error is suggested. The trial resulted in a verdict and judgment for the plaintiff, from which the defendant has brought this appeal.

W. W. Cotton and Gilbert & Snow, for appellant. R. Eakin and T. H. Crawford, for respondent.

LORD, J., (after stating the facts as above.) The first objection is directed to the refusal of the court to give certain instructions asked by the defendant, and designed to raise the question as to the liability of the company for live-stock killed by its moving trains where such stock stray upon the track at some point where the company is not required to fence by the statute; but as to which instructions it is certified to us in the bill of exceptions that they were refused by the court for the reason that there was no evidence tending to show where the animals entered upon the track. The object of the first of such instructions refused was to question the sufficiency of the following allegation: "That the track and grounds of the defendant at the point where said animals were so killed and destroyed were not fenced by the defendant as required by law." This objection is made on the hypothesis that the point of entry on the track must be distinctly alleged, otherwise the allegation is defective. Without conceding it, but for the purposes of the argument only, it may be admitted that the allegation is defective in the particular claimed, and that, if subjected to the test of a demurrer, it would be held to be insufficient; and yet we think, if the defect claimed be a defect, it was cured by the verdict. The allegation is that the stock was killed at a point on the defendant's road where it was required by law to fence its track, but it does not allege that the track was not fenced at the point where the stock entered upon the track. If the stock was killed at a place along the line of the railroad track where it was not

fenced, but where the company was required to fence, as alleged, it is plain that the stock were not killed by an injury originating on a public highway, or other place where the company was not required to fence by law. As the averment is that the track was not fenced where the stock was killed, and the duty to fence was imposed by law, this language may mean there was no fence anywhere along the track, or that the track was fenced except where the stock was killed; and in either case the implication is that the track was not fenced where the stock entered upon the track. In such cases it is fair to assume after verdict, and in support of the judgment, that the omitted fact was proven. But in actions of this character, predicated upon an omission to fence, if the stock is killed at a place where the company was obliged to fence, but has failed to do it, the jury is justified in presuming that such stock entered upon the track at that place. Mr. Wood says: "When cattle are injured or killed at a place where the company has failed to fence, or to maintain a sufficient fence, the jury is justified in presuming that they entered upon the track at that place." 3 Wood Ry. Law, § 422, p. 1566. So that, if the evidence is that the road was not fenced at the place where the stock was killed, but where the law imposed the duty to fence, the presumption is that the stock got upon the track at the place where it was killed. In *Railroad Co. v. Casner*, 72 Ill. 384, it was held that in an action against a railroad company, where the evidence is that the road was not fenced at the place where the stock was killed, it is but a fair inference that the stock got upon the road at the place where it was killed.

When, therefore, the want of a fence where the duty to fence is shown, and the killing of the stock is proven, the presumption is, and the jury are authorized to find, that the stock entered upon the track at that place. So that after verdict, and in support of the judgment, especially when the court certifies there was no evidence showing where the stock entered upon the track, the defect in the allegation is cured by the inference that they entered upon the track where they were killed, and that the jury so inferred by their verdict. In the case of *Railroad Co. v. Casner*, supra, the claim was that the evidence did not show the place where the stock got upon the track, but the court said: "But the evidence was that the road was not fenced where the stock was killed; and, in the absence of any other proof, it would be but a fair inference that the stock got upon the road at the place where it was killed." It does not seem to me the objection is tenable in any view. But I do not understand the statute requires that the point of entry shall be alleged. Section 4048, Hill's Code, provides that in every action to recover the value of live-stock mentioned in section 4044—that is, killed on an unfenced track—"so killed, \* \* \* proof of such killing or injury shall of itself be deemed and held to be conclusive evidence, in any court of this state, of negligence." So that when it is alleged and proved that the defendant company failed to

fence, or its track was unfenced, and that the plaintiff's stock was killed or injured upon or near the track by a moving train, the negligence is established, and can only be defeated by proof of contributory negligence or misconduct on the part of the plaintiff. In *Hindman v. Navigation Co.*, 17 Or. 619, 22 Pac. Rep. 116, THAYER, C. J., in construing these identical provisions, said: "Under these provisions, it would seem that a plaintiff is entitled to recover against a railroad company for the killing or injury of his stock by alleging and proving that the company owned or operated the railroad, that its track was unfenced, and that the plaintiff's cattle or horses were killed or injured, as the case might be, on or near the track, by a moving train, engine, or cars upon such track; that the company will be allowed to defeat the recovery by proof of contributory negligence," etc. It would seem to be plain from the statute, and the construction given to it in *Hindman v. Navigation Co.*, supra, that it is not necessary to allege or prove the point of entry, or that proof of entry is material, except when the stock is killed where the company is not bound to fence, as a public highway which has entered where its track is unfenced, and the duty to fence was imposed, and such is the direct consequence of the neglect to fence. In such case the killing or injury, although it took place on a highway, owes its inception to the neglect or omission of the company to fence its track, and is the direct and proximate result of it; and in legal contemplation the place of the injury is inseparably connected with the cause of the injury, which is the ground of the action, and within the statute. In cases of this sort, in order to show that the killing of the stock was within the operation of the statute, although it occurred at a place outside of it, the plaintiff would be required to show that the stock entered the track where the law required the company to fence, but where it had omitted to do it, and that the killing was the direct and proximate result of it. While, therefore, the allegation might be better stated, it is not subject to the objection urged.

The other instruction refused and excepted to was intended, as the argument indicates, to throw upon the plaintiff the burden of showing the point at which the stock entered upon the track; the claim being that the evidence showed that some of the animals killed were killed upon the track at a point where the public highway crosses the railroad track. The view already expressed will relieve us of the duty to say more in respect to the point of entry, except to add that in our judgment the evidence does not show that the cattle were killed, or strayed upon the track, at a public crossing. It shows that the animals were killed at points where the law required the company, but where it had failed, to fence, although some of them were killed near the crossing; and in such case it is not necessary for the plaintiff to prove where the entry on the track occurred, for these facts, under the statute, constitute negligence. Nor, as disclosed by the facts upon the record, do we think

the court erred in refusing the other instruction, upon the ground indicated.

As to the constitutional objection raised to the act, it is sufficient to refer to *Sullivan v. Navigation Co.*, ante, 408, which is adverse to the contention set up. It follows that the judgment must be affirmed.

EATON V. OREGON RY. & NAV. CO.  
(Supreme Court of Oregon. June 21, 1890.)  
RAILROAD COMPANIES—FIRES—KILLING STOCK  
—PLEADING.

1. While, under the Code, each cause of action must be separately stated, with the relief sought, so as to be intelligently distinguished, yet, where the corporate existence of the defendant, and the ownership of its road, is not only made certain by reference, but the answer supplies the defect in each count, *held* that, in the absence of a demurrer specifying the objection, after the evidence was submitted the objection comes too late.

2. The purpose of our statute is to make the railroad company owning the road, or the company operating the road, liable, so that either may be sued, as the plaintiff may elect, who has sustained injury to his live-stock by a moving train upon its unfenced track.

3. If the plaintiff was in a position to have prevented any damage from fire to his property without incurring unusual danger, and made no effort to do so, it was negligence on his part, and precludes his right of recovery.

(Syllabus by the Court.)

Appeal from circuit court, Union county;  
JAMES A. FEE, Judge.

The complaint set forth ten causes of action, eight of which grew out of the alleged injury or killing of stock belonging to the plaintiff, and the other two by reason of fires alleged to have been set out by engines belonging to the defendant. Issue was joined on each cause of action; and, after the plaintiff had submitted his evidence at the trial, the defendant moved for a nonsuit on the ground that there was no allegation of the corporate existence of the defendant, and its ownership of the road, except in the first count of the complaint. The court granted the motion as to the last nine causes of action, but refused it as to the first cause of action, upon which there was a trial, verdict, and judgment for the plaintiff, from which the defendant appealed; and the plaintiff appealed from the judgment of nonsuit, which is now to be considered.

*R. Eakin and T. H. Crawford*, for appellant. *W. W. Cotton and Gilbert & Snow*, for respondent.

LORD, J., (after stating the facts as above.) Under the Code, it is required that each cause of action must be separately stated, with the relief sought, so as to be intelligently distinguished. In the first count the averment is distinctly made of the incorporation and ownership of the road by the defendant. In the succeeding counts, such averment is not repeated, but it is made certain by reference to the first count; and in the answer the incorporation, corporate existence, and ownership of the railroad is directly admitted and averred. It is no doubt true that the complaint must state all the facts which constitute the cause of action embraced in it, and its defects cannot be supplied from other statements. But here the fact of the

corporate existence of the defendant, and its ownership of the road, is not only distinctly made certain by reference, but the answer supplies the defect in the allegation. So that, in the absence of a demurrer specifying the defect, after the evidence is submitted, the objection comes too late, and ought not to prevail. Defects of this character should be pointed out before answering and going to trial; otherwise, when the defects complained of are supplied by the answer, and the defendant is content to go to trial, he will be precluded from raising them.

The next objection is that the defendant company was not operating the road alleged to be owned by it, which caused the alleged injuries to the plaintiff. This objection is based on the assumption that our statute delaring a railroad company liable for the value of live-stock killed upon or near its unfenced track does not apply to the owner of the road unless such owner was actually operating the road which caused the injury. That statute provides: "Any \* \* \* company or corporation, or lessee or agent thereof, owning or operating any railroad within the state of Oregon, shall be liable for the value of any horses \* \* \* killed, and for reasonable damages for any injury to any such live-stock, upon or near any unfenced track of any railroad in this state, whenever such killing or injury is caused by any moving train or engine or cars upon such track."

Hill's Compilation, § 4044. We think it is plainly the purpose of this statute to make the company owning the road, and the company operating the road, liable, and that either may be sued, as the plaintiff may elect, for the injury which he may have sustained to his live-stock by a moving train upon any unfenced railroad track. Its language is that "any company owning or operating" shall be liable, etc., which means either the one or the other shall be liable, and not that the one operating the road at the time of the accident must be the owner in order to render it liable, within the terms of the statute. This is the view taken in *Hindman v. Navigation Co.*, 17 Or. 619, 22 Pac. Rep. 116, in which *THAYER, C. J.*, said: "Under these provisions it would seem that a plaintiff is entitled to recover against a railroad company for the killing or injury of his stock by alleging and proving that the company owned or operated the railroad, that its track was unfenced," etc., which plainly means that it would be sufficient, under the statute, to allege and prove the facts of killing or injury of such animals, either against the company which owned or the company which operated the railroad, upon its unfenced track, to entitle the plaintiff to recover. As this disposes of all the objections which we deem it necessary to consider under the motion for nonsuit, it results that the judgment must be reversed as to the 2d, 3d, 4th, 5th, 6th, and 7th causes of action; and as to the 8th, 9th, and 10th, we shall proceed briefly to consider them separately.

The eighth cause of action, as set forth in the complaint, is based on the common-law liability for negligence in killing a steer upon the track of the defendant at a

point where it crosses the county road. The evidence in respect to the point where the killing occurred is that "the stock were struck on the railroad track in the lane. The lane is a county road." The only question, then, to be considered, is whether any negligence is shown on the part of the company. While it does not appear directly that the train which the witness saw, when it passed, killed the animals that were found dead and crippled at the crossing, yet, assuming that such was the case, it does not appear that the company or its agents omitted to exercise any precaution necessary under the circumstances. The witness does not know whether the bell was rung or the whistle was sounded, or that every precaution was not observed consistent with a due regard for the safety of the train. In such case, in the absence of any proof of negligence, the defendant's motion for nonsuit was properly granted as to this cause of action.

The ninth cause of action as set forth in the complaint is based on the negligence of the defendant in allowing fire to escape from its engine, whereby a growth of dry grass which had been left uncut by the plaintiff for fall and winter feed was burned and destroyed. The ground upon which the motion for non-suit now to be considered is based, is whether, from the plaintiff's evidence, he was guilty of contributory negligence. It appears from the testimony that the fire was burning close to the railroad track on the right of way of the defendant when the plaintiff first saw it. The plaintiff testifies: "I was on my way down to my pasture. Near the field, I saw a smoke start up, and get larger until we got near it. We saw that the grass in my field north of the Stafford lane was on fire. I was within one-quarter mile of the fire, going to the Union depot, when I saw it. Just before we saw the first smoke, we had noticed a train pass towards the Union depot, going east. We went on and watered my horses that were in the pasture. There was a large band, and it took some time, and then I went up to the depot to notify the section boss and station agent. When we got down to where the fire was, it had spread out, and was burning fast. There was one hundred acres burned at that time, and it was worth \$7 an acre for fall and winter feed. I left it uncut for that purpose. I made no effort to put the fire out. It was none of my business. It was the business of the railroad company. I had two men with me at the time. The fire was burning close to the railroad track when we first saw it. It was on the right of way of the defendant." From this testimony it clearly appears that, when the plaintiff first saw the fire, it was burning close to the railroad track, and on the right of way of the defendant, and, as the train had just passed, had been set out only a short time, and had not reached the field of uncut grass which was subsequently destroyed; that at that time he had two men with him, and was within a quarter mile of the fire, and that, in-

stead of taking some measure, or making some effort, to put out the fire, he went on and watered his horses that were in the pasture; and, as the band was large, he says, it took some time. But when he was done he then went to the depot, more than a mile away, to notify the section boss or the station agent. When all this was done, and finally "we got down to where the fire was, it had spread out, and was burning very fast. There was a hundred acres burned at that time." Considering that the fire, when first seen by the plaintiff, had just started, and was then only burning on the railroad track, and that the plaintiff, with two men, was within a short distance of it, but that, before he went to water his horses, it was in his field, it is clear that, if he had made reasonable efforts, his property could have been preserved. There is nothing in the circumstances, as detailed by himself, necessary to prevent the fire spreading, and save his uncut grass, which required any unusual effort, or involved any great danger. His indifference is explained by his own testimony when he states: "It was none of my business. It was the business of the railroad company to put the fire out." This is the reason he "made no effort to put the fire out." But, if he was in a position to have prevented any damage from fire, it was his business; and, if he made no effort to do so, it was an act of negligence on his part which precludes a recovery. Said BREKSE, J.: "He saw the fire in time to arrest its progress, or at any rate to make some effort to that end, but did not choose so to do. He left the scene, and was absent nearly one hour, and on his return the fire had reached the meadow. Common prudence required he should have made some effort to prevent this, and it was negligence on his part \* \* \* that he did not." *Railroad Co. v. McClelland*, 42 Ill. 359. "Even if the appellants were guilty of negligence," said WALKER, J., "the appellees were bound to use reasonable efforts to preserve their property. When the fire escaped, they had no right to fold their hands, and permit their property to be consumed, without effort for its preservation, and then claim the right to recover the loss from the company." *Railroad Co. v. Pindar*, 53 Ill. 451. Other cases might be cited of like import, but these are sufficient to illustrate the principles involved. His neglect to try and stop the fire when he first saw it burning, and when, with reasonable exertion, all damage from it to his property could have been avoided with slight effort, and without danger, precludes his right of recovery. The motion for nonsuit was rightly sustained to this cause of action, as well as the tenth and last cause of action embraced in the complaint, to which we do not deem it necessary to make further reference than to say the proof submitted by the plaintiff is insufficient to sustain it. It follows that the judgment must be reversed as to the 2d, 3d, 4th, 5th, 6th, and 7th causes of action, but affirmed as to the 8th, 9th, and 10th causes of action; and it is so ordered.

(19 Or. 397)

EATON v. OREGON RY. &amp; NAV. CO.

(Supreme Court of Oregon. June 21, 1890.)

Appeal from circuit court, Union county; JAMES A. FEE, Judge.

W. W. Ootton and Gilbert &amp; Snow, for appellant. B. Eakin and T. H. Crawford, for respondent.

**PER CURIAM.** The points raised and decided in the preceding cases (Eaton v. Navigation Co., ante, 413, 415; Sullivan v. Same, ante, 408) render it unnecessary to consider the main questions suggested by this record. In the views there expressed, the instructions were not prejudicial, and the judgment must be affirmed.

(44 Kan. 330)

WEATHERBEE v. COCKRELL.

(Supreme Court of Kansas. July 3, 1890.)

FRAUDULENT CONVEYANCES—EFFECT AS TO PARTIES.

Where the purchaser of a tract of land, who is in debt as a surety for others, has the grantor, when paid the consideration, execute a deed of general warranty for the land to his sons, and the purchaser has the conveyance so made to deceive and defraud his creditors, the deed is binding between the parties, and is also binding between the purchaser and a grantee of his sons, who stands in their shoes.

(Syllabus by the Court.)

Error from district court, Greenwood county; A. L. REDDEN, Judge.

On the 14th day of May, 1886, James Weatherbee commenced his action against Elias Cockrell, and alleged in his petition that "on or about the 23th day of January, 1879, plaintiff purchased the following described lands, situate in Greenwood county, Kansas, to-wit: The east half ( $\frac{1}{2}$ ) of section twenty-three, (23,) in township twenty-three (23) south, of range twelve (12) east; that at the time of said purchase said plaintiff caused and procured the conveyance of said land to Paul Weatherbee and Ben Weatherbee, sons of plaintiff; that said conveyance was so made in trust for the benefit and use of the plaintiff; that the entire consideration paid for said land was paid by plaintiff, and no part thereof was paid by said Paul and Ben Weatherbee; that afterwards, to-wit, on the — day of —, 1885, said Paul and Ben Weatherbee, without any right or authority, and in fraud of plaintiff's rights, conveyed said land to defendant; that, at the time and before said conveyance of said land by said Paul and Ben Weatherbee to defendant, the said defendant was informed and well knew of the equitable title to said lands, and that the same was in the plaintiff; that the bare legal title was in said Paul and Ben Weatherbee in trust for plaintiff; that with said knowledge said defendant received the legal title from said Paul and Ben Weatherbee. *Second.* For a second and further cause of action plaintiff says that he is the equitable and legal owner of the lands described in plaintiff's first cause of action; that he is entitled to the immediate possession of the same; and that said defendant wrongfully and unlawfully detains the possession thereof against plaintiff. Wherefore, plaintiff prays judgment against said defendant, that said defendant be compelled to convey the legal title to said land to plaintiff, and that plaintiff have the immediate possession

thereof, and for costs." On the 3d day of December, 1886, the defendant filed a general denial to the petition. Trial had on the 20th of September, 1887. After the plaintiff had introduced all of his evidence, the defendant demurred thereto, upon the ground that the evidence did not prove, or tend to prove, a cause of action in favor of the plaintiff and against the defendant. This demurrer was sustained by the court, and judgment rendered thereon. To the ruling and judgment of the court the plaintiff excepted, and brings the case here.

Clogston, Hamilton, Fuller & Cubbison, for plaintiff in error. Ira P. Nye, for defendant in error.

**HOBTON, C. J.,** (after stating the facts as above.) This was an action in the court below by James Weatherbee, to compel Elias Cockrell to convey to him one-half of a section of land. The evidence upon the trial was substantially as follows: In January, 1879, James Weatherbee resided in Ohio. He purchased the land in controversy from John Burry, and paid \$3,000 for it. He directed Burry to execute a conveyance of the land to his two sons, Paul and Ben Weatherbee. This was done. Paul was then 17 years of age, and Ben 10 years of age. Shortly after this conveyance, the plaintiff and his sons removed to Kansas, and lived near the land. Paul and Ben Weatherbee sold the land for \$3 an acre to William Cockrell. Soon after, at the instance of William Cockrell, the deed was made from Paul and Ben Weatherbee directly to Elias Cockrell. At the time that Paul and Ben Weatherbee sold the land to William Cockrell for \$3 an acre, it was worth \$10 an acre. William Cockrell claims he sold the land to his brother at \$4 an acre. Before William Cockrell purchased the land he was informed by plaintiff "that the land belonged to him, and that he had better not buy it; if he did, he would probably buy a lawsuit." Plaintiff also testified that William Cockrell was the agent or partner, or both, of Elias Cockrell; that they did business together, under the firm name of Cockrell Bros. The trial court sustained a demurrer to the evidence of the plaintiff, and rendered judgment in favor of the defendant for his costs. The ruling and judgment of the trial court are complained of. This complaint is not well founded. Upon the facts as disclosed upon the trial the demurrer to the evidence was properly sustained.

It clearly appears from the evidence that when the plaintiff purchased the land in dispute he had the deed executed to his sons, then minors, for the purpose of defrauding his creditors. He had signed two notes as surety. These notes amounted to \$1,500, and he had the land conveyed to his sons, so that it would not be subject to the payment of these notes; at least, the conveyance was so made with the hope, on the part of the plaintiff, that it would deceive, delay, and defraud his creditors. Of course, as to the creditors of the plaintiff, the conveyance of the land to the sons was fraudulent, and, if the creditors of the plaintiff were making any claim to the land, the conveyance would be so re-

garded. Paragraph 7165, Gen. St. 1889. A fraudulent contract, voluntarily made, binds the parties, although void as to creditors. There is no obligation upon a court of equity to extricate a fraudulent grantor from the effect of his voluntary act. "As between the parties themselves, and all persons claiming under them in privity of estate, voluntary conveyances are binding; but in so far as they have the effect of delaying, defrauding, or deceiving creditors, voluntary conveyances are not *bona fide*, and are void as against creditors, to the extent to which it may be necessary to deal with the property to their satisfaction. To this extent, and to this extent only, they will be treated as if they had not been made. To every other purpose they are good." Kerr, Fraud & M. 199. "A conspiracy to defraud creditors is an offense against good morals, common honesty, and sound public policy, for it is a let and hindrance to the due course and execution of law and justice, and tends to overthrow all true and plain dealing, bargaining, and *chevisance* between man and man, without which no commonwealth or civil society can be maintained or continued. It is therefore a proper case for the application of the maxim, *in pari delicto, melior est conditio defendantis*. [In equal fault, the defendant's case is the better.]" Bump, Fraud, Conv. 443; Dunning v. Bathrick, 41 Ill. 425; Railroad Co. v. Mathers, 71 Ill. 592. The conveyance made to the sons, at the instance of their father, is binding between the parties, and therefore is binding between the plaintiff and the grantees of the sons, who stands in their shoes. Further, under paragraph 7164, Gen. St. 1889, the plaintiff has no resulting trust by the conveyance to his sons. That paragraph reads: "When a conveyance for a valuable consideration is made to one person, and the consideration therefor paid by another, no use or trust shall result in favor of the latter; but the title shall vest in the former, subject to the provisions of the next two sections." He does not bring himself within the terms of paragraph 7165 or 7166, Gen. St. 1889. Mitchell v. Skinner, 17 Kan. 563. The sons did not agree to hold the land in trust, or otherwise, for their father. They never agreed, by parol or otherwise, to reconvey the land to their father, or to any one for his benefit. Plaintiff claims, however, that the money paid by him for the land was exempt under the statute of the United States, and therefore that no fraud was intended, or could have been intended, in having the land conveyed to the sons. The record does not show, or tend to show, that the money was exempt. The only evidence upon this point is that of the plaintiff, and reads as follows: "Question. Was it your money that paid for the land? Answer. It was my individual money that paid for it; \$3,000 was money that I earned as a United States soldier during the late war." This evidence does not show, or tend to show, that the \$3,000 was pension money, or exempt within the terms of the United States statute. Cranz v. White, 27 Kan. 319.

It is also claimed that, as the deed or conveyance to the sons was not offered in

evidence, and is not contained in the record, it will be presumed, as the plaintiff referred to it as a deed of trust, that it declared upon its face that the sons held the land in trust for their father, the plaintiff. The record does not support this claim. It was admitted by the parties upon the trial that the conveyance to the two sons was in the form of a warranty deed from John Burry to them. Again, John Burry testified that the deed which he executed "was the ordinary form of a warranty deed." The ruling and judgment of the district court must be affirmed. All the justices concurring.

(44 Kan. 295)

**MARTIN et al. v. MARTIN.**

(Supreme Court of Kansas. July 2, 1890.)

**EQUITY—JURISDICTION—CONDITIONS—FORFEITURE.**

In an action to forfeit an estate in certain land, where the court has acquired jurisdiction to hear the case, it may adjudicate and pass upon all of the real and substantial rights of the parties connected with the subject-matter of the litigation, in order to avoid a multiplicity of suits.

(Syllabus by Green, C.)

Commissioners' decision. Error from district court, Franklin county; A. W. BENSON, Judge.

John W. Deford, for plaintiff in error. Mechem & Smart and H. P. Welsh, for defendants in error.

GREEN, C. The facts material to this case are: Jacob Martin and his wife deeded their homestead, in Franklin county, to their son Henry, on the 5th day of July, 1880, on the condition that the father should have his support and a home as long as he should live. Henry occupied the farm with his father and mother until 1884, when he left the place, and moved to Iowa. In July, 1885, Henry deeded the farm to his brother, Frank, in consideration of \$1,375 cash. This conveyance was made without the express consent of the father, but it was understood by Frank that his father was to have his support. Frank moved onto the farm, but he and his father did not get along very agreeably. Complaint was made that the son did not furnish proper support. The wife died in 1886, and after a time the father went to live with a married daughter. This suit was commenced in August, 1887, to forfeit the estate which Henry and Frank Martin, or either of them, had in the land conveyed by the father to Henry, and for such other, further, and different relief as might be decreed equitable. The court below found that the defendants were in default of the performance of the conditions and fulfillment of the covenants contained in the conveyance of title to the real estate described in the plaintiff's petition, and by reason of the default the plaintiff had sustained damages in the sum of \$150, and that Frank Martin, since the commencement of the suit, had leased said farm, for \$100, for the term of one year from March 1, 1888, to March 1, 1889, and had received said \$100, and gave judgment to the plaintiff against Henry and Frank Martin for \$150 and costs, and judgment against Frank Martin for \$100, and made each



judgment a lien on the place, and also decreed that the plaintiff should recover possession of the real estate on March 1, 1889, and have peaceable possession, and enjoy the same, during the term of his natural life, upon the sole condition that the taxes should be paid on or before December 20th of each year after December, 1888, and in case of failure to pay the taxes the premises should revert to the defendant Frank Martin. A motion for a new trial was made—*First*, because the decision of the court was not sustained by sufficient evidence, and is contrary to law; *second*, that the amount of plaintiff's recovery was too large; and, *third*, error of law occurring at the trial, which motion was denied.

The first complaint made by the plaintiff in error is that the defendant Henry Martin was discharged; that the second deed bound the son Frank to furnish a home and support, not defining where that should be. We do not agree with counsel for plaintiff in error upon this proposition. We think when Henry Martin accepted the deed from his father, it was with the idea that he was to support his father during his natural life; and he could not be released from such obligation without the express consent of the father. The court must have found that this was not given, and therefore the son was not released. Again, we think that the condition expressed was a covenant running with the land, and was upon a condition subsequent. The language at the close of the body of the deed is: "But said Jacob Martin to have his support and home as long as he lives." While the question is not free from difficulty, we think it better and safer to hold this construction. The consideration moving the father to deed his home to the son was that he should be supported. It is a well-settled equitable rule that a court of equity will fully rescind a conveyance by parents to a son, in consideration of the covenant of the son to support and maintain them, in case of a breach of such covenant. *Bogle v. Bogle*, 41 Wis. 209; *Bresnahan v. Bresnahan*, 46 Wis. 385, 1 N. W. Rep. 39; *Blake v. Blake*, 14 N. W. Rep. 173; *Delong v. Delong*, Id. 591; *Drew v. Baldwin*, 4 N. W. Rep. 576.

The plaintiff in error contends that the defendants did not waive a jury in the court below, and therefore the court could only grant strictly equitable relief, and had no right to assume the functions of a jury, and give a judgment for damages and the possession of realty. The case was one for equitable relief. A jury was not requested to pass upon any question of fact in the case. It is a well-settled principle of equity jurisprudence that, where the court has all the parties before it, it will adjudicate upon all the rights of the parties connected with the suit, so far as it can, so as to avoid a multiplicity of suits. *Selbert v. Thompson*, 8 Kan. 65. Courts of equity may adjust their decrees so as to meet most, if not all, the exigencies which may arise; and they may vary, qualify, restrain, and model the remedy so as to suit it to the mutual and adverse claims controlling equities, and the real

and substantial rights of the parties. 1 Story, Eq. Jur. § 28. The court below, having acquired jurisdiction of the parties and the subject-matter of the suit, had the inherent power to make all necessary orders, decrees, and judgments so as to settle the matters in controversy, and thus prevent litigation. Where a court of equity obtains jurisdiction of a suit for the purpose of granting some distinctively equitable relief, and the special relief prayed for is not practical, the court may retain the cause, decide all the issues involved, and may decree the payment of mere compensatory damages. 1 Pom. Eq. Jur. § 237, and authorities there cited. We think the judgment and decree of the court below should not be disturbed, and recommend that it be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

#### FARRY v. DAVIDSON *et al.*

(Supreme Court of Kansas. July 3, 1890.)

FALSE IMPRISONMENT—ATTORNEY'S LIEN—ENFORCEMENT.

An action for false imprisonment in which the attorneys for the plaintiff had filed an attorney's lien, and given notice thereof to the defendant in the action, was thereafter settled between the plaintiff and the defendant, and the plaintiff dropped out of the case; whereupon, without any motion for substitution, the case proceeded, over the objection of the defendant, as upon an issue between the plaintiff's attorneys and the defendant for the recovery of the attorneys' fees under their lien and notice. *Held*, error, and that the attorneys must proceed in an independent action to establish their lien, and collect their fees. *Railway Co. v. Thacher*, 17 Kan. 92.

(Syllabus by *Strang, C.*)

Commissioners' decision. Error from district court, Chautauqua county; M. G. TROUP, Judge.

*John W. Shartel*, for plaintiff in error. *Whitney & Donaldson* and *J. D. McBrian*, for defendants in error.

STRANG, C. January 13, 1887, John M. Davidson brought an action in the district court of Chautauqua county against John Farry, for false imprisonment. Pending the trial of the case, and before the issues were fully made up, the plaintiff and defendant settled their differences, and the plaintiff gave the defendant a receipt in full except the claim of his attorney. When the case was begun the attorneys for the plaintiff filed a lien in the case for attorneys' fees, claiming \$500, and served a copy of this lien upon the defendant, Farry. Notice of this lien was served upon Farry before his settlement with Davidson. After the settlement between Davidson and Farry, Farry asked and obtained leave to file a supplemental answer in the case, and set up his settlement with Davidson. Whitney and Donaldson, Davidson's attorneys, then asked leave to reply, which was granted. They filed a reply alleging that they were the attorneys of Davidson, and, as such, commenced this suit against Farry, at which time they filed an attorney's lien for their fees, claiming \$500, and served a copy of such lien upon Farry; that their services were worth

\$500; and thereafter, without any notice for substitution, or any leave of court in any manner obtained, making Whitney and Donaldson parties to the action, the case proceeded as upon an issue between Whitney and Donaldson, the attorneys for Davidson, the plaintiff, and Farry, Davidson dropping entirely out of the case. Upon this issue, over the objection of Farry all the time, the case was tried by a jury, resulting in a verdict for Whitney and Donaldson for \$280. A motion for a new trial was filed and overruled, and judgment entered on the verdict.

There are numerous errors alleged in the case, and argued at length in the brief of plaintiff in error, most of which we do not care to consider, as it seems to us that the whole proceeding subsequent to the supplemental answer was erroneous. We do not think there was anything for the court to settle except the question of costs, after the supplemental answer was filed. Whitney and Donaldson could not litigate their rights under their employment with Davidson, and their notice of lien, in the case between Davidson and Farry. They had settled, and Davidson had gone out of court, and Farry had a right to go when the court had settled the question of costs between him and Davidson, and he had complied with the order of the court with respect thereto. Whatever rights Whitney and Donaldson had under their lien and notice thereof they must litigate in an action brought for that purpose. In this case they were simply intruders. They stepped in without any leave from any one, and without asking leave, and, over the objection of the defendant, Farry, at once proceeded to try an issue not involved in the case; in other words, at once instituted a case of their own against Farry, giving it the place in court of the case that had just dropped out by settlement and satisfaction between the parties thereto. We know of no such easy road into court. They could not form an issue with Farry to try their rights under the notice of their lien in that summary way. If this case as between Whitney and Donaldson and the defendant, Farry, had any standing in court, it would have to be reversed because of errors in the instructions of the court, which seem to be very faulty. The court not only assumed that a judgment would have been found against the defendant if the case between Davidson and Farry had been tried through, but assumed the amount of such judgment, and then gave that amount to the jury as a basis for finding the value of the services of Whitney and Donaldson. The court also practically instructed the jury what evidence they should believe and take as the basis for their finding as to the value of the services of the attorneys Whitney and Donaldson. In jury trials the court should leave something open for the jury to pass upon. In this case the court assumed everything against the defendant except the value of the services of the attorneys, and told them what witnesses they should believe upon that subject.

Counsel for the defendants ask us to reverse the case because of error on the part of the court in refusing to give an instruc-

tion which they asked in relation to the champertous character of the contract between Whitney and Donaldson and their client, whereby they agreed to take and try the case. There was evidence in the case upon that question, and, as the court gave nothing in its general instructions upon that subject, it was the court's duty to give an instruction, if asked so to do, upon that subject. Such instruction, however, should be so drawn as to properly present that question to the jury. As we think the instruction asked in this case upon that subject somewhat incomplete, and as this case must be reversed upon other grounds, we will not pass upon this question now. We recommend that the judgment of the district court be reversed.

PER CURIAM. It is so ordered; all the justices concurring.

#### MILLER *et al.* v. TOPEKA LAND CO.

(Supreme Court of Kansas July 3, 1890.)

#### DEEDS—DESCRIPTION—PATENTS—BOUNDARIES.

1. The reference in a deed of conveyance of real estate to the government patent, in the description of the property conveyed, makes the description and reference to the United States survey a part of the deed.

2. On a line of the same survey, and between remote corners, the whole length of which is found to be variant from the length called for, it is not to be presumed that the variance was caused from a defective survey in any part, but it must be presumed, in the absence of circumstances showing the contrary, that it arose from imperfect measurement of the whole line; and such variance must be distributed between the several subdivisions of the line, in proportion to their respective length.

(Syllabus by the Court.)

Error from district court, Shawnee county; Z. T. HAZEN, Judge *pro tem.*

J. T. Ward, for plaintiffs in error. A. Bergen, for defendant in error.

HORTON, C. J. The Topeka Land Company brought its action against F. O. and G. F. Miller, to quiet its title to a strip or tract of land in the N. E.  $\frac{1}{4}$  of section 2, township 12, range 15, in Shawnee county, described as follows: "Commencing 1,323.08 feet north of south-east corner of said quarter section; thence running west 40 chains, or thereabouts, to the west line of said quarter section, at a point 1,325.33 north of the south-west corner of said quarter section; thence south 33 feet; thence east 40 chains, or thereabouts, to the east line of said quarter section; thence north 33 feet to place of beginning." Trial had by the court, Hon. Z. T. HAZEN acting as judge *pro tem.* The court, after hearing the evidence and arguments of counsel, found the allegations in the plaintiff's petition to be true, and made a general finding in favor of the plaintiff. The court subsequently, upon its general finding, rendered judgment in favor of the plaintiff and against the defendants, forever quieting the title in the plaintiff to the land in controversy as against the defendants, and all persons claiming under or through them, or either of them. The de-

endants bring the case here. The principal complaint is that the judgment of the trial court is not sustained by sufficient evidence. The record does not show any exception to the evidence given, nor does it show any evidence was excluded. The case made does not state expressly, or by implication, that it contains all of the evidence introduced upon the trial. The certificate of the judge clearly implies that all of the evidence is not embraced in the record. As the judgment follows the petition, the only matter for our consideration is whether the allegations of the petition are sufficient to entitle the land company to the judgment rendered.

The petition alleges, among other things, that, on the 2d day of April, 1860, the United States conveyed by its patent, to Lewis C. Wilmarth, "the north-east quarter of the north-east quarter of section two, (2,) in township twelve, (12,) of range fifteen, (15,) in the district of lands subject to sale at Lecompton, Kan., containing thirty-eight acres and twenty-seven hundredths of an acre, according to the official plat of the survey of said lands returned to the general land-office by the surveyor general;" that on the 1st day of June, 1860, the United States also conveyed by its patent, to Lewis C. Wilmarth, "the south half of the north-east quarter, and the north-west quarter of the north-east quarter, of section two, (2,) in township twelve, (12,) range fifteen, (15,) in the district of lands subject to sale at Lecompton, Kan., containing one hundred and eighteen acres and fifty-two hundredths of an acre, according to the official plat of the survey of the said land returned to the general land-office by the surveyor general," which patent is duly recorded in the office of the register of deeds of Shawnee county, at page 289, vol. 13; that according to the official plat of the survey of said land, returned to the general land-office of the United States by the surveyor general, the width of the south half of said quarter section was 20 chains on its east and west lines; that the east line of said north-east quarter of said quarter section was 19.07 chains; that the length of the west line of the said north-east quarter of said quarter section was 19.13 chains; that the length of the west line of the said north-west quarter of said quarter section was 19.19 chains; that the real length of the entire east line of the said quarter section is 39.20 chains, and not merely the total of the official measurements, which are 39.07 chains; that the actual and real length of the entire west line of the said quarter section is 39.43 chains, and not merely the total of said official measurements, which are 39.19 chains; and that there are no monuments upon the land of the government survey of the line between the north half of said quarter section and the south half thereof; that on the 24th of May, 1880, Lewis C. Wilmarth and wife executed and delivered to the Topeka Land Company a conveyance of a certain portion of said land, described as follows: "The south-half of the north-east quarter of section two, (2,) in township twelve, (12,) range fifteen, (15,) in the district of lands subject to sale at

Lecompton, Kan., as described in government patents issued to the parties of the first part April 2d and June 1st, 1860, and duly recorded in volume 13, pp. 289, 290, Shawnee county records;" that on the same day, the 24th of May, 1880, Lewis C. Wilmarth and wife executed and delivered to F. O. Miller a conveyance of a certain portion of said land, described as follows: The north half of the north-east quarter of section two, (2,) in township twelve, (12,) range fifteen, (15,) in the district of lands subject to sale at Lecompton, Kan., as described in government patents issued to the parties of the first part April 2d and June 1st, 1860, and duly recorded in volume 13, pp. 289, 290, in Shawnee county records;" that said defendants have not, nor has either of them, any right, title, or interest in or to any of said lands hereinbefore described, save and except under and by virtue of said deed of said Lewis C. Wilmarth and wife; that the plaintiff is the owner and in the actual possession of the strip or tract of land heretofore described as 83 feet wide from north to south, and 40 chains long from east to west.

Upon the allegations in the petition, the judgment of the district court must be sustained. In the deeds of Wilmarth to the parties to this action, the reference to the government patents made the description and the United States survey a part of the deeds. Tied. Real Prop. § 841, and cases cited; Davidson v. Arledge, 88 N. C. 326; Powers v. Jackson, 50 Cal. 429; Tarpinning v. Cannon, 28 Kan. 665. According to the government survey the entire length of the east line of the whole quarter section was 39.07 chains, of which the east line of the south half of the quarter section, as measured by the government survey, was 20 chains long, and the north half 19.07 chains. The length by accurate measurement of the entire east line of the quarter section is 39.20 chains, being .13 chains more than the survey as made by the government surveyors. The plaintiff below, under its petition, is entitled to its proportionate share of the .13 of a chain. "Where, on a line of the same survey, between remote corners, the whole length of which line is found to be variant from the length called for, \* \* \* we are not permitted to presume merely that a variance arose from defective survey in any part, but we must conclude, in the absence of circumstances showing the contrary, that it arose from the imperfect measurement of the whole line, and distribute such variance between the several subdivisions of such line in proportion to their respective lengths." Moreland v. Page, 2 Iowa, 139; McAlpine v. Reicheneker, 27 Kan. 257; Newcomb v. Lewis, 81 Iowa, 488-490; O'Brien v. McGrane, 27 Wis. 446; Jones v. Kimble, 19 Wis. 430-432. Again, the petition alleges that the plaintiff is the owner of and in the actual possession of the strip or tract of land in dispute. In the absence of evidence, we must assume that the trial court had evidence before it to justify its finding, and therefore properly rendered judgment accordingly. The judgment of the district court will be affirmed. All the justices concurring.

## COOPER V. CLARK.

(Supreme Court of Kansas. July 8, 1890.)

## ASSIGNMENT FOR BENEFIT OF CREDITORS—ATTACHMENT.

Where a deed of assignment for the benefit of creditors is executed in good faith, and without any wrongful intent, but is so defectively executed as to render it void, *held*, that the execution of such instrument in such manner is not sufficient of itself to authorize an attachment against property.

(Syllabus by the Court.)

Error from district court, Washington county; E. HUTCHINSON, Judge.

A. S. Wilson, for plaintiff in error. Charles Smith, for defendant in error.

VALENTINE, J. This was an action brought in the district court of Washington county on June 13, 1888, by O. A. Cooper against N. L. Clark, to recover the sum of \$367.50 on an account for goods alleged to have been sold and delivered by the plaintiff to the defendant. On the same day an order of attachment was issued and levied upon certain property as the property of the defendant. The affidavit upon which the attachment was founded sets forth the grounds therefor as follows: "That said defendant is about to remove his property, or a part thereof, out of the jurisdiction of this court, with the intent to defraud his creditors, and is about to convert his property, or a part thereof, into money, for the purpose of placing it beyond the reach of his creditors, and has property and rights in action which he conceals, and is about to assign, remove, and dispose of his property, or a part thereof, with the intent to defraud, hinder, and delay his creditors, and has assigned, removed, and disposed of his property, or a part thereof, with the intent to defraud, hinder, and delay his creditors, and fraudulently contracted the debt, and incurred the obligation, for which the above-named suit has been brought." On June 20, 1888, the defendant filed a motion to dissolve the attachment upon the ground "that the grounds, statements, and affidavits in and upon which said attachment, and the order therefor, were made and issued, are not, nor are any of them, true." On the next day this motion was heard by the court upon evidence, and was sustained, and the attachment dissolved; and, to reverse this order of the district court dissolving the attachment, the plaintiff, as plaintiff in error, brings the case to this court.

The principal evidence relied on by the plaintiff to sustain his attachment was a deed of assignment executed by the defendant on June 11, 1888, to R. Vincent, for the benefit of the defendant's creditors, which assignment the plaintiff claims was and is defective in two particulars, to-wit: (1) The deed of assignment attempted to make John Sanders a preferred creditor; (2) no schedule of liabilities was filed." On June 14, 1888, the defendant executed another deed of assignment, precisely like the first, except that the alleged defects in the first deed of assignment were rectified and cured. In the second deed of assignment, no creditor was preferred, and with it a full schedule of liabilities was filed. This

second deed of assignment, however, has but little materiality in this case. The first deed of assignment purports to convey all the property of the defendant, real and personal, except such as was exempt from judicial process; and it then contains the following provisions, to-wit: "The said second party shall take immediate possession of all said property, both real and personal, hereby assigned, and sell and dispose of the same as shall best promote the purposes hereof, and in such manner as shall be to the best interests of the creditors of the said assignor, and do and perform all things necessary and proper to be done and performed to execute fully the trust hereby created, giving and granting to said assignee full power and authority to make, execute, and deliver any and all papers, receipts, bills, mortgages, and conveyances necessary or proper to be made, executed, or delivered for the full, perfect, and final execution and settlement of said trust, and by and with the proceeds, sales, and collections to pay the just and proper costs of the execution of said trust, and pay and discharge—*First*, the debt and demand of John Sanders against the said first party in full; *second*, all the other debts of said first party in full, together with interest due and accruing, whether due or hereafter to become due, provided the remainder, after paying said costs and expenses and the said debt of the said John Sanders, shall be sufficient therefor. If not, then to pay each and every of said debts, demands, and liabilities due or to become due against said first party, otherwise than that of said John Sanders, *pro rata* said remainder shall be sufficient; it being the purpose and intent to prefer said John Sanders." From anything appearing in the case, the defendant may have acted in the utmost good faith in all that he did; and as the court below sustained the defendant's motion, and dissolved the attachment, it must have found that the defendant did so act. Upon the evidence, we cannot reverse this finding.

The only question, then, to be considered, is whether, as a matter of law, the facts that the defendant in the deed of assignment preferred a creditor, and did not file any schedule of liabilities, proves the truth of the grounds set forth in the plaintiff's affidavit for the attachment. The question is not whether these facts render the deed of assignment void. That question is not in this case. But, as before stated, the question is whether these two facts, with the other evidence, necessarily proves the truth of the plaintiff's grounds for his attachment. We think they do not. *Harris v. Capell*, 28 Kan. 117; *Tootle v. Coldwell*, 30 Kan. 125, 135, 1 Pac. Rep. 329 et seq.; *McPike v. Atwell*, 34 Kan. 142, 148, 8 Pac. Rep. 118. There is some uncertainty with reference to Sanders' claim; but upon the evidence, and as against the decision of the court below, we cannot say that it was in any respect fraudulent, or that there was any fraud or intended wrong, in any manner, connected therewith. Nor does it make any difference with reference to whom the property attached belonged. The attachment was against the defend-

ant, and the grounds for the attachment, as set forth in the plaintiff's affidavit, were that he was guilty of fraud, or of intended fraud. If he was not guilty of any fraud or intended fraud, then the attachment was rightfully dissolved, whether the order of attachment was levied upon his property or upon some one else's property; and this for the reason that there was no sufficient ground, in fact, for the attachment to rest upon. Upon the evidence, it is to some extent doubtful whether the defendant and Sanders were partners or not, whether the preferred debt to Sanders was a partnership debt or an individual debt, and whether the property levied upon under the attachment belonged to the defendant or to Sanders or to the partnership. Whether the defendant and Sanders were partners or not is wholly immaterial so far as this case is concerned, provided the preferred debt was not a partnership debt; and there was evidence sufficient to authorize the court below to find that the preferred debt was not a partnership debt, but was the individual debt of the defendant to Sanders. There was also sufficient evidence to authorize the court to find that the property upon which the attachment was levied was the individual property of the defendant; but the question is immaterial, so far as this case is concerned. The order of the court below dissolving the attachment will be affirmed. All the justices concurring.

#### BLACKWOOD V. SHAFFER.

(*Supreme Court of Kansas. July 3, 1890.*)

##### APPEAL—TIME OF TAKING.

Where a demurrer by the plaintiff is sustained as to the third paragraph of the defendant's answer, and afterwards the case is tried upon the issues presented by the petition and the remainder of the answer, and within less than one year after the rendering of the judgment, but not within one year after the sustaining of the demurrer, the defendant, as plaintiff in error, brings the case to the supreme court. *Held*, that the supreme court cannot consider the question whether the court below erred or not in sustaining the demurrer, as it is brought to the supreme court too late.

##### (*Syllabus by the Court.*)

Error from district court, Clay county; E. HUTCHINSON, Judge.

C. M. Anthony, for plaintiff in error. Harkness & Godard, for defendant in error.

VALENTINE, J. This was an action brought in the district court of Clay county, in March, 1886, by J. W. Shaffer, against Thomas Blackwood and S. M. Hollis, to recover for alleged breaches of certain injunction bonds. On April 14, 1886, the defendants filed their answer, which, omitting title and signature, reads as follows: "(1) The defendants deny each and every allegation contained in plaintiff's petition. (2) For further answer defendants say that the defendant Hollis is neither jointly nor severally liable on the several undertakings sued upon, as the same were not, nor was either of them, executed by him. (3) The defendants aver that there never has been a final judgment

or adjudication that said temporary injunction ought not to have been granted, said cause still being undecided, and now pending in the supreme court of the state of Kansas." On May 3, 1886, the plaintiff demurred to the third paragraph of the foregoing answer, upon the ground that it did not state facts sufficient to constitute any defense to the plaintiff's action. On May 8, 1886, this demurrer was heard by the court and sustained. The plaintiff then dismissed his action as to Hollis. The case was then continued from time to time as against Blackwood, until May 10, 1888, when he moved the court to dismiss the same upon the ground that the action had been brought prematurely. This motion was overruled. On May 11, 1888, the case was tried before the court and a jury, and the jury rendered a verdict in favor of the plaintiff and against the defendant Blackwood, and assessed the damages at \$611.33. On May 14, 1888, the defendant filed his motion for a new trial upon the following grounds, to-wit: "(1) Misconduct of the jury. (2) Excessive damages appearing to have been given under the influence of passion or prejudice. (3) Error in the assessment of damages and amount of recovery, the same being too large. (4) That the verdict is not sustained by sufficient evidence, and is contrary to law. (5) Error of law occurring at the trial, and excepted to by the defendant at the time. Affidavits and other evidence will be used at the hearing of this motion." On May 21, 1888, this motion for a new trial was heard and overruled, and on the same day judgment was rendered in favor of the plaintiff and against the defendant, Blackwood, in accordance with the verdict of the jury. On July 6, 1888, the defendant, Blackwood, as plaintiff in error, brought the case to this court for review. The errors alleged in the petition in error are as follows: "(1) The court erred in sustaining the plaintiff's demurrer to the third paragraph of defendant's answer. (2) The court erred in refusing to sustain said demurrer to plaintiff's petition at the request of defendant. (3) The court erred in rendering judgment for the aggregate amounts of the bonds sued on. (4) The court erred in refusing to grant a new trial. (5) The judgment was given for the plaintiff, J. W. Shaffer, when it should have been for the said defendant, Thomas Blackwood, said suit having been instituted by the said J. W. Shaffer before any right of action had accrued to him."

The plaintiff in error, however, in his brief seems to abandon all the alleged errors, except the ones relating to the ruling of the court below on the demurrer, and certainly the other alleged errors are not tenable. But are the ones relating to the demurrer tenable? It is alleged, in effect, in the third paragraph of the defendant's answer, that the action in which the injunction bonds were given was still pending in the supreme court when the answer was filed in this case; but there is no allegation anywhere that the action in which the injunction bonds were given was pending in the supreme court or elsewhere when this present action was commenced,

or that any bond or undertaking was ever given in the action in which the injunction bonds were given for the purpose of staying the proceedings in that action in the district court while the action was pending in the supreme court. Nor is there any allegation anywhere showing what was sought to be reviewed in the supreme court in that action. Probably because of a want of such allegations the district court sustained the demurrer. But a preliminary question is presented in this court by the defendant in error. The defendant in error claims that this court cannot consider the question as to whether the ruling of the court below upon the demurrer was right or not, for the reason that the demurrer was sustained on May 8, 1888, and this proceeding in error was not brought to this court until July 6, 1888, more than one year—indeed, more than two years—after the ruling of the court below upon the demurrer. When the court below sustained the demurrer the defendant below might have immediately brought that order to the supreme court for review, (Civil Code, § 542;) but he could not wait two years, nor more than one year, and then bring it to the supreme court, (Id. § 556.) As the ruling of the court below upon the third paragraph of the defendant's answer virtually swept such third paragraph out of existence, and as no amendment was ever made to such third paragraph, nor any leave asked for or given to so amend it, the ruling on the demurrer was a final order, and such ruling was not subsequently involved in any other ruling of the court below. When a case is brought to the supreme court for the purpose of having any judgment or order of the court below reviewed, everything necessarily involved in such judgment or order is reviewable in the supreme court; but the order of the court below in this case, sustaining the demurrer to the third paragraph of the defendant's answer, is not involved in any other order, or in any judgment of the court below, and hence it is not reviewable upon this principle. If the demurrer had been overruled a different rule would apply. Also, if the trial of the case upon its merits had been had in a short time after the ruling on the demurrer, so that the entire case, the ruling on the demurrer, and all, could have been brought to this court within less than one year after the sustaining of the demurrer, and if the entire case had been so brought to this court within less than one year after the sustaining of the demurrer, then we could determine whether the order sustaining the demurrer was erroneous or not; but such is not this case. As every alleged error except the ruling of the court below upon the demurrer is now abandoned by the plaintiff in error, and as no error is shown to have been committed by the court below, unless such court committed error in sustaining the aforesaid demurrer, the order of the court below sustaining the demurrer is virtually the only action of the court below brought to this court for review; and it was brought here too late.

The judgment of the court below will be affirmed. All the justices concurring.

### McGEE v. KROH.

(Supreme Court of Kansas. July 2, 1890.)

#### SPECIFIC PERFORMANCE—EVIDENCE—LETTERS.

When an action for specific performance is sought to be sustained upon the writing of an alleged agent, it is error to introduce the writing in testimony before the authority of the agent is satisfactorily shown.

(Syllabus by Strang, C.)

Commissioners' decision. Error from district court, Wyandotte county; O. L. MILLER, Judge.

*Sherry & Hughes and Hale & Fife*, for plaintiff in error. *Hutchings & Keplinger*, for defendant in error.

STRANG, C. Robert McGee was the owner of three lots situate in Armourdale, Kan. He authorized Major Anderson, of Armourdale, to sell the lots for \$2,200. Anderson got Williams and Chadwick to assist him in selling the lots to a customer of theirs, and they succeeded in making the sale for \$2,200, half cash and half on a year's time. Anderson then went over to Kansas City, Mo., to see McGee, and report the sale, but found McGee away from home. He notified McGee's son, whom he found in McGee's place of business, of the sale. The son said he would notify his father. A few days afterwards, on returning to his office, Anderson found a note which read: "Major: Will take \$2,200. \$1,100 cash. McGEE." He took the note and called on McGee. McGee denied any knowledge of the note, but upon calling his son, he (the son) said he had written it after hearing from him. Anderson informed McGee that he had sold the lots for \$2,200, \$1,100 cash and \$1,100 in a year. McGee replied that he would not sell that way. That if he sold he must have all cash. He claimed that he had not authorized a sale part cash and part on time; that he had not authorized his son to do or say anything in connection with the lots. The lots were sold to the defendant, Kroh. Kroh went to see McGee, and demanded a deed, which was refused, and on the 23d day of September, 1887, he commenced this action for specific performance. April 16, 1888, it was tried by the court without a jury, resulting in a judgment for the plaintiff for specific performance and for costs. Defendant below filed a motion for a new trial, which was overruled. The plaintiff assigned numerous errors, and has discussed them at considerable length in his brief, while the defendant has filed no brief in this court.

There are one or two rulings upon the admission of evidence that seem so plainly erroneous that it will probably not be necessary for us to notice many of the errors assigned. The plaintiff complains of the admission in evidence of the note mentioned above, which was written by McGee's son. This note was identified as having been written by the boy, but there is no evidence that the boy had any authority to write it, or to do or say anything else in connection with the lots. This was clearly error. After the plaintiff rested, McGee was put upon the stand

and asked if he had ever authorized his son to write the note received in evidence, which question was objected to, and the objection was by the court sustained upon the ground that the witness had said he wrote his son about these lots and other matters, and therefore to answer would be giving the contents of letters. An examination of McGee's evidence shows that the conclusion of the court was unwarranted. Any fair construction of McGee's evidence shows that he did not intend to say that he wrote his son giving him any authority in connection with the lots, and that he did not so say. His answer was broken by an interruption, and was never completed, and does not justify the conclusion that the court reached, and therefore the ruling of the court, sustaining the objection to the question, was erroneous. The court made the following as a finding of fact: "About the 28th of June, the day upon which the sale was made to the plaintiff as before found, the son of the defendant, by and with the authority of the defendant, left with the defendant's agent, Anderson, the little scrap of paper introduced in evidence, which contained the following words relating to said lots: 'Major: Will take \$2,200. \$1,100 cash. McGEE.'" This finding is erroneous. It is not supported by any evidence, there being no evidence that McGee's son, who wrote the note, had any authority to write it. For these several errors we recommend that the judgment of the district court be reversed.

PER CURIAM. It is so ordered; all the justices concurring.

#### STROWGER V. SAMPLE.

(Supreme Court of Kansas. July 3, 1890.)

TRIAL—RECEPTION OF VERDICT—REMARKS OF COUNSEL.

1. In a civil action, it is not error for a trial court to receive the verdict of the jury in the voluntary absence of the parties and their attorneys, while the court is in regular session.

2. In a civil action, where counsel, in his argument to the jury, says of an affidavit for continuance: "This is not the evidence of the absent witness. It is only what the affiant swears the absent witness would testify to if here,"—and he is immediately called to order by the court, and the jury are immediately instructed that counsel is wrong,—that the affidavit must be treated as the deposition of the absent witness,—and it also appears from the record that other witnesses testified on both sides of the case upon the same subject-matter to which the affidavit to be treated as the deposition of the absent witness related, held not error sufficient to reverse.

(Syllabus by Strang, C.)

Commissioners' decision. Error from district court, Butler county; A. L. L. HAMILTON, Judge.

E. N. Smith and T. A. Kramer, for plaintiff in error. G. P. Aikman and Harris, Harris & Vermillion, for defendant in error.

STRANG, C. Action on contract, begun August 12, 1887, before a justice of the peace of Butler county, Kan. Plaintiff below claimed a balance due him from the defendant upon a contract for work, drill-

ing wells, at a stipulated share of the proceeds received for drilling the wells. Plaintiff alleged he was to work for the defendant himself, furnish a man and two teams to operate the well drills, and to receive as compensation for such services one-third the net proceeds from the wells drilled, and claims a balance due him of \$161.79. August 25, 1887, the case was tried before the justice, who rendered a judgment for the plaintiff for the amount of his claim and costs. The defendant appealed to the district court, where, on the 23d day of April, 1888, after all the motions and pleadings known to the practice were exhausted, the case came to trial on a bill of particulars making a claim on part of the plaintiff, in substance, as above stated, and an answer by the defendant, setting up that the plaintiff and he were partners in the business of drilling wells; that the partnership had never been settled, and there were outstanding partnership accounts, uncollected, which would render it impossible in the present action to ascertain how much was due either the plaintiff or defendant, as between themselves. The jury found for the plaintiff, returning as their verdict the same amount as the judgment of the justice,—\$161.79. The jury made special findings of fact against the partnership theory of the defendant, and in favor of the claim of the plaintiff below that he was at work for the defendant below for one-third of the net proceeds of the wells drilled; and they also made other findings necessary to support their general verdict.

There are many errors discussed in the brief of the plaintiff in this case, most of which, we think, are eliminated by the findings of the jury. We have examined the instructions of the court, and fail to find any error therein that would justify a reversal of this case. That being true, we think all the errors assigned growing out of the questions relating to the jurisdiction of the court, and all others depending upon the question of partnership, are taken out of the case by the findings of the jury that no partnership existed between the plaintiff and the defendant, but that, on the other hand, the plaintiff worked for the defendant by himself, and with his teams and son, and was to have one-third of the net proceeds from the wells drilled as compensation for the labor so performed. We think this question of partnership was fairly submitted by the court to the jury, and that the findings of the jury thereon are supported by the evidence. Indeed, it seems to be supported by a preponderance of the evidence.

The plaintiff argues that the failure of the jury to answer all the questions submitted by the defendant below to them is error. The defendant made no application to the court to require the jury to make any other or further answers to their questions, and no objection to the reception of either the general verdict or the special findings of the jury, but relied upon his subsequent motions for judgment upon the findings, notwithstanding the general verdict, and for a new trial. We do not think the defendant is in a position, on the record here, to urge this ob-



jection; and, besides, an examination of all the findings satisfies us that, if the failure to answer should be treated as counsel treats it—that is, as a negative answer—there would not exist anything, so far as this question is concerned, that would reverse this case.

It is claimed that the case should be reversed because of misconduct of the attorney of the plaintiff in connection with the deposition of Burnham. For his remark in relation to Burnham's deposition, the attorney was at once called to order, and reprimanded by the court; and the court instructed the jury not to consider the statement of counsel in relation to the deposition, but to treat the affidavit as the deposition of Mr. Burnham. Under the circumstances, we do not think the matter could have prejudiced the jury. The counsel was immediately called to order, and the jury was immediately instructed by the court that counsel was wrong,—that the affidavit was to be considered as the deposition of Burnham. Besides, there was evidence from other witnesses, on both sides of the case, on the question to which Burnham's evidence related. Several witnesses, including the defendant, testified thereon. The jury may have considered the affidavit of Mr. Burnham as his deposition, untainted or unimpeached in any degree by the remark of counsel, and yet have found as they did upon the question to which Burnham's evidence related.

It is argued that a new trial should be granted because at the time the verdict was received the defendant below and his attorneys were absent from the courtroom. But it appears the court was in session, the judge and clerk thereof were present, and there is no showing that defendant was in any way prejudiced by reason of not being present. We do not think it necessary, in a civil case, that the judge should send for the defendant or his counsel before receiving a verdict; nor do we think the court should delay or embarrass the business of the court by waiting until a party in a civil case comes into court before receiving a verdict. If they want to be present, they must attend the sessions of the court. We fail to find any reversible error in the record in this case, and therefore recommend that the judgment of the district court be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

ABBEY *et al.* v. W. B. GRIMES DRY GOODS CO.

(Supreme Court of Kansas. July 3, 1890.)

SUMMONS—INDORSEMENT—CORPORATION—STOCKHOLDERS' LIABILITY.

1. The indorsement of a summons, in accordance with section 59 of the Code of Civil Procedure, need not necessarily be signed by the clerk, and attested with the seal of the court.

2. Under section 44 of chapter 23 of the law concerning private corporations, (paragraph 1204, Gen. St. 1889,) the liability of stockholders to the creditors of a corporation is several, and not joint, and each must be sued separately.

(Syllabus by Green, C.)

Commissioners' decision. Error to district court, Republic county; E. HUTCHINSON, Judge.

W. T. Dillon, for plaintiffs in error. Caldwell, Ellis & Cook and E. C. Ellis, for defendant in error.

GREEN, C. This action was commenced against the stockholders of the Republic County Co-operative Association, to fix the liability of said stockholders, under section 44 of the general incorporation act, (Gen. St. 1889, par. 1204.) The corporation was organized in 1882, to engage in buying and selling general merchandise in Belleville, Republic county, and continued in business until the 19th of April, 1886, when the association made a general assignment of all its property for the benefit of its creditors; and in pursuance of the assignment the entire property of every kind owned by it was devoted to the payment of the creditors of the association *pro rata*. Certain sums being still unpaid, plaintiff below commenced this action on the 10th of February, 1888, to recover the sum of \$165.94, with interest at the rate of 7 per cent. from the 6th of June, 1887, making 32 stockholders of the corporation defendants, seeking to make them liable for an amount equal to the stock held by each in said association. The co-operative association was not sued, and no judgment had been previously obtained against it.

1. The first alleged error is the overruling of the motion made by the defendants below to set aside the summons for the reason that there was no proper indorsement thereon. The indorsement reads as follows: "Suit brought for the recovery of money. Amount claimed, \$164.94, with interest from the 6th day of June, 1887, at the rate of 7 per cent. per annum till paid, and the liability of the several within defendants for the payment of said sum of \$164.94, and interest, be fixed as follows: Della Abbey, \$20.00; D. C. Bowersox, \$5.00; Gertrude Bowersox, \$20.00," etc., naming each one of the defendants for the amount of stock which it was claimed each had at the dissolution of said corporation. It is claimed upon the part of the plaintiff in error that this is not a compliance with the statute; that the clerk should make this indorsement and sign it, and, being an official act, he should attest it with the seal of the court. We do not think this position tenable. We think the decisions of this court in the case of *George v. Hatton*, 2 Kan. 333, and *Weaver v. Gardner*, 14 Kan. 347, settle this objection, and that there was no error in the court's overruling the motion to set aside the summons. Upon the overruling of the motion of the defendants to set aside the summons, the defendants interposed a demurrer to the plaintiff's petition, on the ground—*First*, that the petition did not state facts sufficient to constitute a cause of action; and, *second*, that several causes of action were improperly joined; which demurrer was overruled by the court and excepted to. Judgment was thereupon entered against the defendants for \$189.68, and costs taxed at \$56.30; and ordered that execution issue against each one of the defendants, respectively, in accordance with the amount of stock

owned by each of them, and the costs of the action.

2. The controlling question in this case is the one raised by the second ground of demurrer, and the only one discussed by counsel which we will proceed to consider. The suit, as stated, was to fix the liability of certain stockholders in a corporation. The language of the statute is: "If any corporation, created under this or any general statute of this state, except railway or charitable or religious corporations, be dissolved, leaving debts unpaid, suits may be brought against any person or persons who were stockholders at the time of such dissolution, without joining the corporation in such suit; and if judgment be rendered, and execution satisfied, the defendant or defendants may sue all who were stockholders at the time of dissolution for the recovery of the portion of such debt for which they were liable, and the execution upon the judgment shall direct the collection to be made from property of each stockholder, respectively; and if any number of stockholders [defendants in the case] shall not have property enough to satisfy his or their portion of the execution, then the amount of deficiency shall be divided equally among all the remaining stockholders, and collections made accordingly, deducting from the amount a sum in proportion to the amount of stock owned by the plaintiff at the time the company dissolved." Gen. St. 1889, par. 1204.

The contention of counsel is that the liability of stockholders, in actions of this kind, is several and not joint; that the action is purely legal in its nature, being the action of one creditor of a corporation to enforce the statutory liability of each defendant; and that said liability of the joint defendants is unequal in amount. The nature of this liability is peculiar. It seems to have been created for the exclusive benefit of corporate creditors. The liability rests upon the stockholders of a corporation to respond to the creditors for an amount equal to the stock held by each, and it has been held that the action to enforce this liability can only be maintained by the creditors themselves, in their own right, and for their own benefit. Cook, Stocks, § 216. Can a suit be maintained under this liability, created by statute, by one creditor against more than one stockholder, where the liability is necessarily for different sums, as in this case 12 of the 32 defendants are liable for \$5 each; 5 for \$10 each; 3 for \$15 each; and others for \$20 each? Reason alone answers the question in the negative, from the very nature of the difficulties we would encounter, to hold otherwise in an action for a money judgment alone. The rule, however, is well settled by the great weight of authorities that such an action must be maintained against each stockholder alone. The supreme court of Missouri has had occasion to consider a statute similar to our own, and says that suits of the above description, whether brought in law or equity, will not lie against defendants jointly, but must be begun against each one severally, and, under the law, the

stockholder thus compelled to pay must resort to his remedy for contribution. Perry v. Turner, 55 Mo. 418. The law is stated in the case of Paine v. Stewart, 33 Conn. 516: "Where a general statute under which a corporation is organized imposes a liability upon the stockholders in their individual capacity, in general terms, and in proportion to the amount of their stock, such liability is distinct from the corporate liability, and is of the same character as that incurred by an association of individuals where there is no corporate existence; and, although upon principle they should be subject to suit as in other cases of associate liability, yet, as such liability is peculiar, because unequal and limited, and a joint judgment against all is impossible, their liability must be treated as several, *ex necessitate rei*, and they must be sued severally."

The rule that stockholders of a corporation cannot be joined as defendants necessarily rests upon the ground that the liability is for different sums, and each stockholder might have a distinct and separate defense. Where the liability of stockholders is confined to the extent or amount of their stock, or is in proportion to their stock, the liability, being unequal and limited, is several. Shafer v. Moriarty, 46 Ind. 9; Bank v. Ibbotson, 24 Wend. 473; Ohio Life Ins. & Trust Co. v. Merchants' Ins. & Trust Co., 11 Humph. 1, 33; Crease v. Babcock, 10 Metc. 525, 557, 568; Pettibone v. McGraw, 6 Mich. 441; Lane v. Harris, 16 Ga. 217; Adkins v. Thornton, 19 Ga. 325, 328; 2 Mor. Priv. Corp. § 901; Pom. Rem. § 317.

Counsel for defendant in error contend that section 44 of chapter 23 of the corporation act authorizes a suit against all of the stockholders. We are of the opinion, however, that suits can only be maintained by stockholders who have been sued, and judgment has been satisfied against other stockholders for contribution. It may be urged that the view we take of this question will lead to a great many suits against individual stockholders; but this is not necessarily true. Section 32 of chapter 23, (par. 1192, Gen. St. 1889,) prescribes a very simple remedy, where a judgment has been obtained against a corporation, and an execution issued against the property of the corporation, and returned "No property found." An execution can then issue, upon proper order, against any of the stockholders, to an extent equal in amount to the amount of stock held by each. In this case no judgment was rendered against the corporation, and there may be a question whether suit can be entertained against the stockholders individually until the corporation has been dissolved by judicial declaration, or the expiration of its charter. But this question was not discussed by counsel in their briefs, and is not now decided.

We think the court erred in overruling the demurrer of the defendants in the court below, and we recommend that the judgment be reversed.

PER CURIAM. It is so ordered; all the justices concurring.

**MCBRIDE et ux. v. LOMBARD MORTG. CO.**  
(*Supreme Court of Kansas. July 3, 1890.*)

**NOTE AND MORTGAGE—ACTION ON—LIMITATION.**

Where a note and mortgage are executed and delivered to the mortgagee, the law implies, in the absence of any agreement to the contrary, that the money for the note and mortgage is at once due and payable to the mortgagor from the mortgagee. If no agreement is made in writing by the mortgagee for the payment of the money for the note and mortgage when delivered and accepted, an action for the recovery of the money therefor by the mortgagor against the mortgagee must be brought within three years after the note and mortgage are accepted.

(*Syllabus by the Court.*)

Error from district court, Sedgwick county; T. B. WALL, Judge.

*E. N. Smith*, for plaintiff in error. *Harris, Harris & Vermillion*, for defendant in error.

**HORTON, C. J.** This was an action brought in the court below on the 27th of December, 1884, by William A. McBride and wife against the Lombard Mortgage Company, to recover \$311.45. The petition alleged that on the 27th of June, 1881, the plaintiffs executed and delivered to the defendant a note secured by a mortgage upon real estate in Butler county, in this state, for \$750, with interest coupon notes attached, at the rate of 7 per cent., payable semi-annually; that the defendant, in consideration of the execution of the notes and mortgage, agreed to loan and pay to the plaintiffs, in a reasonable time after the delivery of the notes and mortgage to the defendant, the sum of \$750; that the defendant paid the plaintiffs upon the notes and mortgage \$438.55, leaving a balance of \$311.45 due and unpaid; that in April, 1882, plaintiffs demanded of the defendant this money, which it refused to pay, and has never paid. The defendant answered, and among other defenses pleaded the three-years statute of limitations. Before the action was tried, William A. McBride died; and upon the motion of Mrs. Margaret M. McBride, the administratrix of the estate of her husband, the action was revived in her name. Upon the trial, Mrs. McBride testified, among other things, that in his life-time she was the wife of William A. McBride; that, with her husband, she executed in 1881 the note and mortgage for \$750 to the company; that the company paid them the amount thereof, excepting about \$300; that payment was made by the company on the day they executed the note and mortgage; that they borrowed the money for general purposes, and were to receive the amount of the note and mortgage at the time they delivered them to the company, but the company kept back \$300. The defendant interposed a demurrer to the evidence, which was sustained by the court. The plaintiff excepted and brings the case here.

The mortgage company did not sign or execute any written agreement for the payment of the money on the notes and mortgage for \$750 when they were received from McBride and wife. Therefore, as soon as the notes and mortgage were delivered and accepted by the company, the

money became at once due and payable. As McBride and wife were entitled to the money upon the notes and mortgage when they delivered them to the company, their right of action for the money retained or not paid accrued at that time, and, not being in writing, was barred within three years. The notes and mortgage were executed and delivered on the 27th of June, 1881. This action was not brought until the 27th of December, 1884,—more than three years thereafter. Therefore, it was not commenced within time, and the ruling of the trial court must be sustained.

There is in the record evidence tending to show that the mortgage company kept back or retained, out of the proceeds of the \$750 loan, \$300, to pay a mortgage to the Corbin Banking Company. There is no allegation, however, in the petition, of any contract or arrangement to that effect, or that the mortgage company had the right to keep back or retain any money for any such purpose. The allegations in the petition as to the payment of the \$750 are as follows: "That the defendant, in consideration of the execution of said notes and mortgage, agreed to loan and pay to the plaintiffs, in a reasonable time after the delivery of said notes and mortgage as aforesaid to said defendant, on the terms of the aforementioned agreement and note and mortgage, the sum of \$750." The evidence introduced upon the trial does not sustain these allegations, because it appears from the evidence that the money was to be paid upon the delivery of the notes and mortgage, and not within a reasonable time. Again, the evidence shows that, even if the \$300 was kept or retained to pay a prior mortgage, plaintiffs received notice in August or September, 1881, that the mortgage was due and had not been paid, and this action was not commenced until more than three years after such notice. If the mortgage company agreed with plaintiffs to pay or take up any prior mortgage, these facts should have been alleged in the petition; and then, if the company had deceived or defrauded the parties by failing or refusing to carry out the contract, an action could have been instituted for damages for the breach. There are no such allegations in the petition. The contention is that the money for the notes and mortgage was not due until a demand therefor, and that, as a demand was made in April, 1882, the action was commenced within three years thereafter, and therefore in time; but the evidence in the record does not sustain this view. The judgment of the trial court will be affirmed. All the justices concurring.

**SMITH V. DAVIS et ux.**

(*Supreme Court of Kansas. July 3, 1890.*)

**'COVENANT AGAINST INCUMBRANCES—BREACH—DAMAGES.**

In an action by a grantee against a grantor upon a covenant by the grantor that the land conveyed was free and clear from all incumbrances, where it is alleged that another than the grantor had the right, under a lease which would not expire for some years, to procure ice from the premises, and a right of way across the premises for such pur-

pose, the plaintiff may, upon proper and sufficient proof, recover substantial damages, although he has paid nothing to extinguish the incumbrance, nor been disturbed in his possession.

(*Syllabus by the Court.*)

Error from district court, Bourbon county; C. O. FRENCH, Judge.

*West & Humphrey*, for plaintiff in error.  
*Dillard & Padgett*, for defendants in error.

VALENTINE, J. This was an action brought in the district court of Bourbon county on November 4, 1887, by H. D. Smith against John Davis and Margaret L. Davis, husband and wife, to recover for an alleged breach of covenants contained in a deed of conveyance of real estate executed by the defendants to the plaintiff. The plaintiff's petition alleges and sets forth, among other things, that the deed contained the following covenants, to-wit: "And the said parties of the first part do hereby covenant and agree that, at the delivery hereof, they are the lawful owners of the premises above granted, and seised of a good and indefeasible estate of inheritance therein, free and clear of all incumbrances, and that they will warrant and defend the same in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, forever, against all persons lawfully claiming the same." A copy of the deed is also given as a part of the petition. The alleged breach of the covenants, and the prayer for relief, as set forth in plaintiff's petition, read as follows: "Plaintiff alleges that at the delivery and execution of said deed, to-wit, on May 18, 1887, defendants were not the lawful owners of said real estate, and seised of a good and indefeasible estate of inheritance therein, free and clear of all incumbrances, but that at that time, and ever since, there was and has been a lease on said premises from defendant J. E. Davis to M. D. Hartman & Co., for the purpose of cutting, hauling, and removing ice, which said lease was by its terms to run and continue till September 17, 1884, a copy of which is hereto attached, marked 'B,' and made a part hereof; said lease being in fact an incumbrance on said real estate to the extent of one thousand dollars. Plaintiff alleges that said lease could not be purchased in for less than \$1,000, and is a valid subsisting lease from defendant J. E. Davis to said M. D. Hartman & Co., and is to plaintiff a damage of \$1,000. Wherefore plaintiff demands judgment against defendants J. E. Davis and Margaret L. Davis for one thousand dollars and costs of suit." A copy of the lease is also given as a part of the petition. The lease was dated September 17, 1884. The defendant J. E. Davis was the party of the first part, and M. D. Hartman & Co. constituted the party or parties of the second part. The ice was to be cut and obtained from the Marmaton river, where it runs across the land conveyed by the defendants to the plaintiff. The lease contained the following, among other things, to-wit: "To have and to hold the same, unto the said party of the second part, from the 17th day of September, 1884, to the 17th day of September, 1884, being for a period of ten (10) years;

and the said party of the second part, in consideration of the leasing of the premises as above set forth, and the said sale of the ice thereon, covenants and agrees with the said party of the first part to pay the said party of the first part, his heirs and assigns, as rent for the same, the sum of one hundred dollars per year, as follows: First year, rent to be paid in advance,—the receipt thereof is hereby acknowledged,—and thereafter on the first day of June in each and every year during this lease. And the said party of the first part, in consideration of the leasing of said premises, further agrees that said party of the second part shall have the right of way across said land, to and from said river, during the ice season, for the purpose of cutting, hauling, and removing said ice as aforesaid. The covenants and agreements herein shall extend to, and be binding upon, the heirs, executors, administrators, or assigns of the parties to this lease." The defendants demurred to the plaintiff's petition, which demurrer was overruled; and they then answered, and the plaintiff replied. Afterwards the case was regularly called for trial, and the record, with reference to this subject and subsequent proceedings, reads as follows: "And afterwards, to-wit, on May 23, 1888, said cause came on to be tried, and a jury was impaneled, whereupon defendants, in open court, offered to confess judgment for one dollar, which offer was by plaintiff refused. Thereupon the plaintiff, to maintain the issue on his part, was sworn, and took the witness stand, and was asked to state if he was the plaintiff in this case. Whereupon defendants objected to any evidence under plaintiff's petition, for the reason that it states grounds for nominal damages only, which objection was argued by counsel; and the court, having heard all the arguments, and being fully advised, sustained said objections, to which the plaintiff then and there excepted. Whereupon the court ordered the jury to return a verdict in the following words: 'We, the jury, find for the plaintiff, and assess his damages at one dollar. ROBERT McCORD, Foreman,'—which said verdict said jury thereupon signed by its foreman, and returned it into court. \* \* \* Thereupon, it is considered, ordered, and adjudged by the court that plaintiff have and recover of and from defendants, and each of them, the sum of one dollar and his costs herein, taxed at \$——; and execution is awarded. To all of which the plaintiff excepted and excepts." The plaintiff then moved the court to set aside the foregoing verdict, and to grant a new trial, upon various grounds, but the court overruled the motion; and the plaintiff excepted, and afterwards, as plaintiff in error, brought the case to this court for review.

It will be seen that the only question involved in this case is whether the plaintiff's petition states facts sufficient to constitute a cause of action for anything more than nominal damages. The court below held that it did not; and the plaintiff in error (plaintiff below) claims that this was error. A solution of this question depends upon the nature and character of the covenants contained in the deed

of conveyance from the defendants to the plaintiff, and also upon the nature and character of the breaches of such covenants. We shall treat this case, however, principally, as though the breach of the covenant against incumbrances was the only breach of covenant to be considered, although it may be that there are other covenants which were broken at the time of the execution of the deed of conveyance, to-wit, a covenant that the defendants were the lawful owners of the property, a covenant that the grantors were lawfully seised of the premises, and a covenant that they had a good and indefeasible estate of inheritance therein; for, while these things were principally true, yet they were not absolutely and entirely true. The defendants' interest in the property was diminished to the extent of the rights transferred by the lease to M. D. Hartman & Co. The incumbrance consisted of the right of M. D. Hartman & Co. to cut, haul, and remove ice from the premises, and the right of way of M. D. Hartman & Co. across the premises for the purpose of cutting, hauling, and removing ice therefrom. These things constituted an absolute, unqualified, and unconditional incumbrance upon the premises. In this respect they are unlike a contingent dower interest, such as could exist at common law, which might never come into actual existence. Neither the plaintiff nor the defendants had any power to remove or to extinguish this incumbrance except with the consent of M. D. Hartman & Co., the lessee; and the value of this incumbrance to M. D. Hartman & Co., or the injury it occasioned to the premises conveyed, no one could tell by any certain or definite rule. In this respect it is wholly different from a mortgage lien, or any other kind of ascertainable money lien, upon real estate; for such a lien is fixed and definite in the amount which it would take to remove it. But suppose that the plaintiff in this particular case could have had the incumbrance removed, with the consent of M. D. Hartman & Co., by paying to them the sum of \$1,000; and suppose that he had paid that amount, and that they had then, in consideration of that amount, relinquished all their claims to the property. Still that amount would not be the measure of damages in this case, or any other case brought by the plaintiff against the defendants because of a breach of their covenants. The real measure of damages would be the amount of the actual injury to the premises by reason of the incumbrances, which might not be one-tenth the amount paid; and, if not, then the plaintiff could not recover in this or in any other action, as damages, one-tenth of the amount paid. As before stated, this case is unlike a case where the incumbrance is a money lien of fixed amount upon the premises conveyed. In this case the amount of the damages resulting from the incumbrance is not ascertainable by any mere calculation, as it is when the incumbrance consists of a mere money lien; and neither can the incumbrance be removed at the will or pleasure of an interested party, as it can when it consists of a mere money lien. We suppose that the ice mentioned in this

case has actual value, and the right of way to procure such ice also has actual value; and the right to the ice and to the right of way, being in another than the owner of the land, depreciates the market value of the land as to such owner, and these values and this depreciation may be shown by evidence. We think the plaintiff in this case is entitled, upon proper and sufficient proof, to recover substantial damages, and that the court below erred in holding otherwise. Among the authorities which tend to support these views, see the following: Harlow v. Thomas, 15 Pick. 66; Wetherbee v. Bennett, 2 Allen, 428; Bronson v. Coffin, 108 Mass. 175; Williamson v. Hall, 62 Mo. 405; Kellogg v. Malin, Id. 429, 434; Hubbard v. Norton, 10 Conn. 422; Funk v. Voneida, 11 Serg. & R. 109; Fritz v. Pusey, 31 Minn. 368, 18 N. W. Rep. 94; Walker v. Wilson, 13 Wis. 522; Guthrie v. Pugsley, 12 Johns. 126. There are also many similar cases, in which substantial damages were recovered in the lower court, and the judgment sustained by the appellate court, in which no question was raised with regard to the right of the plaintiff to recover substantial damages. These cases we also think are some authority in favor of the rights of parties in cases like this to recover substantial damages. See, also, 2 Suth. Dam. 324, 326-329, and cases there cited. The defendants cite the following cases: Black v. Coan, 48 Ind. 385; Rosenberger v. Keller, 33 Grat. 489; Boon v. McHenry, 55 Iowa, 202, 7 N. W. Rep. 503; Fritz v. Pusey, 31 Minn. 368, 18 N. W. Rep. 94; Ogden v. Ball, 36 N. W. Rep. 344. The judgment of the court below will be reversed, and cause remanded for a new trial. All the justices concurring.

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*Ex parte CURNOW.* (No. 1,323.)

(Supreme Court of Nevada. June 23, 1890.)

HOMICIDE—INDICTMENT—ASSAULT WITH INTENT TO KILL.

Under an indictment for murder defendant may be convicted of assault with intent to kill under Gen. St. Nev. § 4292, providing that the defendant may be found guilty of any offense necessarily included in that charged in the indictment, or of an attempt to commit the offense charged.

On application for writ of *habeas corpus*. *Baker & Wives*, for petitioner. *Peter Breen*, Dist. Atty., for the State.

HAWLEY, C. J. Petitioner was jointly indicted with William Curnow for the crime of murder. The charging portion of the indictment is as follows: "That heretofore, to-wit, on or about the 13th day of September, A. D. 1889, \* \* \* in the county of Eureka, state of Nevada, the said defendants, William Curnow and Nicholas Curnow, did then and there feloniously, unlawfully, premeditatedly, and with malice aforethought, shoot and wound one William Courtney and inflict upon the body of him, the said William Courtney, a mortal wound, of which mortal wound the said William Courtney. \* \* \* on or about the 18th day of October, A. D. 1889, \* \* \* died." They were jointly tried under this indictment and found "guilty of an assault with in-

tent to kill," and upon this conviction the court sentenced this petitioner to six years' imprisonment in the state penitentiary, where he is now confined. Petitioner contends that his imprisonment is illegal, because, as he claims, the verdict is absolutely void, and that the court had no jurisdiction to impose such a sentence.

Is the verdict rendered by the jury responsive to the issues raised by the indictment? Can a defendant under an indictment for murder be convicted of any offense less than manslaughter? The answer to these questions depends to some extent upon the evidence that was submitted at the trial, and it is questionable, to say the least, whether under the writ of *habeas corpus* they can be reviewed where the petition simply sets forth the indictment and verdict. It may be that under the proofs in this case the verdict was contrary to law, wholly unwarranted and unauthorized by the evidence. The only question, however, which we are called upon to determine in this proceeding is whether in any conceivable case, under any possible state of facts, such a verdict can be sustained upon a charge of murder in the form mentioned in the indictment. If it can, then it is admitted that petitioner should be remanded to the custody of the warden of the state-prison. Our statute provides that "in all cases the defendant may be found guilty of any offense the commission of which is necessarily included in that with which he is charged in the indictment, or may be found guilty of an attempt to commit the offense charged." Gen. St. § 4292. It must be admitted that there are many cases where the crime of an assault with intent to kill is not necessarily included in the crime of murder. A defendant may, in certain cases, be convicted of murder in the first degree when the evidence clearly shows that there was no intent whatever upon the part of the defendant to kill the deceased. If a defendant sets fire to a house, without any knowledge that it is inhabited by any human being, with the intent only to commit the crime of arson, and a person therein was killed by the burning of the house, the defendant could be indicted and found guilty of murder. Id. § 4620. So in all the cases enumerated in section 17 of the act concerning crimes and punishment where the killing is committed in the perpetration, or attempt to perpetrate, any arson, rape, robbery, or burglary. Id. § 4581. This is precisely what was meant, and all that was decided, in *State v. Lopez*, 15 Nev. 413, cited by petitioner, wherein it was said that under this statute "there may be murder without any intent to kill."

There are other cases, that need not be here enumerated, where a conviction for murder could be sustained against a defendant without any direct proof of an intent on his part to kill, murder being the natural result and consequence of his unlawful act. But the assault and the intent with which the assault is committed by the defendant are, in a majority of cases, essential links in the chain of evidence necessarily included, as material ingredients constituting the crime of murder. These acts, being included as a part of the

entire transaction, must necessarily be considered in determining the crime, if any, committed by the defendant. If the crime of which the defendant is convicted can be legally carved out of the crime of which he is indicted, the verdict is not void. In all cases of murder, where the injury inflicted by the defendant is the mediate or immediate cause of the death, the jury would only be justified, under an indictment for murder, in finding the defendant guilty of murder in the first degree, murder in the second degree, or manslaughter.

In *People v. Adams*, where the defendant was indicted for murder, and convicted of assault and battery, the supreme court, upon appeal, said: "It is certainly a little singular that an assault which is followed by death as its result should be regarded as anything but homicide. If a crime at all, it must have been murder or manslaughter, and a verdict clearing a party from that guilt is not in accordance with common sense." 52 Mich. 25, 17 N. W. Rep. 226. But let us suppose a case where the deceased is assaulted by the defendant with the intent to kill him, and the deceased dies within a year and a day thereafter, and the defendant is indicted for the murder upon the theory of the prosecution, that the death was the result of the injuries inflicted by the assault; but upon the trial the evidence upon the part of the defendant shows, to the satisfaction of the jury, that the deceased did not die from the effects of the wound, but from other causes entirely independent of the effects of the assault. Would not the jury, in such a case, be authorized to find the defendant guilty of an assault with intent to kill? In such a case, would not the crime of an assault with intent to kill be necessarily included in the higher offense with which he was charged in the indictment? Should the defendant, in such a case, after his conviction of the lesser crime, be discharged, or held in the custody of the sheriff to answer before another grand jury for the crime for which the jury, on his trial for murder, found he was guilty? Could not the defendant, if he was subsequently indicted for the lesser crime, plead that he had been placed in jeopardy for the same offense by his former trial upon the indictment for murder?

The questions involved in this proceeding have never been decided in this state, and it is only in rare and exceptional cases that they are liable to be raised. There are, however, cases in this and other states where analogous principles have been either decided or discussed which have a direct bearing, more or less, upon the subject. The principles involved are not, therefore, entirely new, novel, startling, or monstrous in their character. In *State v. Robey* the defendant was indicted for an assault with intent to murder, and was found guilty of "an assault with a deadly weapon, with intent to inflict bodily injury." The indictment charged that Robey, "without authority of law, and with malice aforethought, did shoot at William Newsom, with a shotgun loaded with leaden bullets, with intent to kill him." It was claimed that the indictment would not sustain the verdict be-

cause it did not charge an intent to do bodily injury. This court, after reviewing several authorities, said: "After a careful consideration of this appeal, we are of the opinion that the judgment is sustained alike by reason and authority. The defendant was fully informed by the indictment of the charge against him and of the means employed in committing it. He is accused of intent to murder by shooting. Murder by shooting cannot be effected without bodily injury. The offense of which he was convicted is therefore necessarily embraced in the one charged. By the indictment he is charged with the particular act of which he was convicted, but in a higher grade of crime." 8 Nev. 321, and authorities cited. In *People v. Prague*, similar in all respects to the *Robey* Case, recently decided by the supreme court of Michigan, the court said: "Where the offense embraces different degrees, and the highest degree is charged, it has been held that the person charged may be convicted of any of the lesser degrees. Thus, if charged with murder in the first degree, he may be convicted of murder in the second degree, or of manslaughter, or of assault and battery. The reasons are that the offense springs from the same transaction, and is supported by the same class of testimony." 40 N. W. Rep. 243. In *State v. Smith* the court declined to pass upon the question whether a defendant could, in any case, under an indictment for murder, be convicted of a simple assault, as it was not involved in the case. It was, however, said that the only theory upon which defendant could have been acquitted of the homicide and convicted of assault "is that the wound inflicted was not the cause, mediate or immediate, of the death, a theory which derives no countenance from the testimony." 10 Nev. 124. In *Wilson v. State*, where it was held that the defendant could not, under the charge of murder, be convicted of "cruel and unusual treatment of a slave," the court said: "If a case shall arise in which a party has made an unlawful, felonious assault on another, inflicting a wound, and death follows the wounding, but from the evidence the jury are unable to say that the wounding caused the death, yet, if the evidence shall clearly satisfy them that the assault was made with the intent of taking life, a case may be presented authorizing the courts to punish for the assault with the intent to commit murder upon an indictment charging the commission of the offense. The record, however, does not present such a case, and its discussion would be premature at this time." 29 Tex. 245. Bishop says that "if the indictment is for murder, the verdict, when the prisoner is found guilty, may be either for murder or manslaughter. If the indictment charges an assault, as most indictments for murder do, the verdict may even be for the simple assault, or for a simple assault and battery, if the allegation includes also a battery, except where the common-law rule prevails, that there can be no conviction of a misdemeanor on an indictment for a felony." 2 Bish. Crim. Proc. § 639. In *Com. v. Roby*, 12 Pick. 504, cited and relied on by

petitioner, Chief Justice SHAW was of opinion that the rule of the common law, as stated in the last clause of the above section from Bishop, did not result from considerations peculiar to the administration of justice in England, "but from the broader consideration, that the offenses are, in legal contemplation, essentially distinct in their nature and character, and that this is manifest from an examination of the authorities." Entertaining this view, he held that "in no case could a party on trial for the one be convicted of the other." There are many cases which declare that the reason upon which the qualification of the rule was founded was that, upon a trial for misdemeanor in England, the defendant had the privilege of making a defense by counsel, to have a copy of the charge against him, and a special jury, which were not allowed in cases of felony. In this country the rights of the defendant to a fair and impartial trial are as full and complete, and in some respects greater, on a trial for felony as in cases of misdemeanor. Hence, in many of the states, the qualification stated by Bishop has been departed from, upon the ground that, the reason for it ceasing, the qualification ceased with it. In other states the qualification has been abolished by statute. It has also been so abolished in England. There are, however, a few states that still adhere to the old common-law rule upon the subject. Whatever the weight of authority may have been at the time the *Roby* Case in Massachusetts was decided, in 1832, we are of opinion that the views expressed by Chief Justice SHAW are not sustained by the weight of the authorities as they exist at the present time. *Hanna v. People*, 19 Mich. 318; *Stapp v. State*, 3 Tex. App. 144; 1 Bish. Crim. Law, § 804 et seq., and authorities there cited. But, in any event, that question is not directly presented in this case, as the crime of which petitioner was convicted is of the same generic class as that charged in the indictment, to-wit, a felony. In *Wright v. State* the court said: "Assault and battery, which is simply a misdemeanor, is not included in any of the degrees of homicide. The misdemeanor is merged in the felony. The assault \* \* \* which results in death must belong either to felonious homicide, embraced in murder or manslaughter, or to justifiable or excusable homicide, as the execution of a felon by due course of law, or in a proper measure of self-defense. In either event, the simple assault and battery no longer remains, as such, to be punished. It is either merged, justified, or excused." 5 Ind. 528. But it must be noticed that this Indiana case—like the case of *People v. Adams*, 52 Mich. 24, 17 N. W. Rep. 226, where it was held that an indictment charging murder, in the abbreviated statutory form, would not sustain a verdict for the offense of assault and battery—relates to that class of cases to which we have heretofore referred, where death resulted from the injuries inflicted by the assault. It will, for this reason, readily be seen, as before stated, that the decisions in this class of cases have no application (certainly no binding force) to



a case like the one we have supposed to exist, where the death of the deceased was not the mediate or immediate result of the assault, etc.

It has frequently been decided that a defendant indicted for rape may be found guilty of an assault with intent to commit rape, or a simple assault, upon the reason that these minor offenses were necessarily included in the crime of rape. The question, however, does not solely depend upon the averments in the indictment, but also upon the character of the evidence at the trial, as cases have arisen where the facts showed that the assault was not a necessary ingredient of the crime of rape, or attempted rape. *State v. Pickett*, 11 Nev. 259. The reason why a defendant indicted in the ordinary form for murder may be convicted of manslaughter is that, if the averment that the killing was with malice aforethought be negatived or stricken from the indictment, there still remains a sufficient charge of manslaughter. To constitute the crime of an assault with intent to murder, every ingredient of murder must be present except the death of the party assaulted. In an indictment for murder it is not necessary that the assault with intent to kill should be expressly charged in formal words. It is sufficient, in the case we have supposed, if the murder charged necessarily includes the assault. In determining the question whether, under such an indictment, a verdict for the lower offense can be sustained, courts should look at the evidence submitted at the trial, as well as to the language of the charge contained in the indictment. It has been decided that a defendant may be found guilty of murder in the first degree upon the finding of the jury that he killed the deceased in the perpetration of robbery, or rape, etc., without any allegation of that fact in the indictment. The indictment in the case of *State v. Gray* simply charged that defendant, "without authority of law, and with malice aforethought, killed R. H. Scott, by shooting him with a shotgun." No question was raised in that case as to the sufficiency of the indictment; but the verdict, as well as certain instructions given by the court, was sustained upon the sole ground that the murder was committed by the defendant while attempting to commit a robbery. 19 Nev. 213, 8 Pac. Rep. 456. In *State v. Johnson* the indictment contained two counts, each alleging premeditation, deliberation, and other necessary ingredients of murder in the first degree. There was no averment in either count that the murder was committed in the perpetration of a robbery. The trial court, as in the *Gray* Case, instructed the jury that, if they found from the evidence that the killing was done in the perpetration of a robbery, it was murder in the first degree. Upon appeal it was argued that, in the absence of an allegation in the indictment that the killing was done in the perpetration of a robbery, the finding of such fact would not authorize a verdict for murder in the first degree. The supreme court said: "We are of a different opinion. The indictment sufficiently alleges that the killing amounted to murder in the first degree. It was

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not necessary to allege the facts and circumstances attending the crime. The indictment sufficiently supported proof of facts which constituted the killing murder in the first degree, and under it proof was competent to show that the crime was committed in the perpetration of robbery." 72 Iowa, 400, 34 N. W. Rep. 177. See also, *Graves v. State*, 45 N. J. Law, 347; *Titus v. State*, 49 N. J. Law, 39, 7 Atl. Rep. 621. Now, it being true that none of the rights or privileges of the defendant, guarantied by the provisions of the constitution, are violated, or any recognized rule of law disregarded, by convicting him of murder in the first degree upon proofs that the crime was committed in an attempt to commit robbery, under an indictment which described the crime in the abbreviated statutory form, how can it consistently be claimed that such rights and privileges are violated when he is convicted of a lesser offense, the ingredients of which are included in the charge of murder? If the indictment need not in formal terms state the attempt to commit robbery in the one case, why should it be necessary to allege the assault with intent to kill in the other? Is not the defendant, in either case, under an indictment in proper statutory form, duly informed of the nature and cause of the accusation against him? In *Graves v. State*, supra, the court said: "When the legislature, commendably simplifying the form of the indictment, provided that in charging the crime it should not be necessary to set forth the manner in which, or the means whereby, the death was caused, but that it should be sufficient to charge that the defendant willfully, feloniously, and of his malice aforethought, killed and murdered the deceased, it merely provided that in a charge of murder, a crime well understood and defined in the law, it should be enough to charge the crime in language sufficient to designate it. It also provided that, if the jury should find the accused guilty of murder, they should, by their verdict, say whether it was murder of the first or second degree. \* \* \* The statute did not make murder of the first degree a separate and distinct crime from murder of the second, but murder of each grade, after the passage of the statute, continued to be, as it had theretofore been, the crime of murder. The indictment in the statutory form is for the crime of murder, without regard to the degree. Under such an indictment, the defendant is not only informed of the nature and cause of the accusation, but is apprised of what it is exactly. It is a charge of murder, and the cause the willful and felonious killing, by him, of the deceased, of his malice aforethought. The offense for which he is called to answer is charged in the indictment. It is murder. According as he shall or shall not be proved to have committed the crime of murder, he will be convicted or acquitted; and, if convicted, according as it shall be proved that he committed it under circumstances which characterize the one degree or the other, so it will be found or adjudged with a view to his punishment, and he will be punished accordingly." 45 N. J. Law, 358.

It was unnecessary, in the indictment for murder against petitioner, to allege an assault with intent to kill, in formal and express terms, but under the averments in the indictment all the facts and circumstances in relation to the shooting of the deceased could be given in evidence at the trial. The real questions, therefore, are, as before stated, (1) whether the proofs upon the trial showed that there was an assault with intent to kill the deceased; and, (2) if there was such an assault, whether that offense is, upon the facts, necessarily included in the charge set out in the indictment.

Supposing, as we have, that the facts of the case tended to show that the death of Courtney was not in any manner to be attributed to the wound inflicted by the shooting, we proceed to consider the cases which are directly in point. In *State v. Scott*, 24 Vt. 127, the evidence was considered insufficient to show that the death of the deceased resulted from the beating and wounding by Scott, but might have resulted from other causes. It was held that the defendant, who was indicted for manslaughter, might properly be convicted of assault and battery, although the indictment did not contain any count specially charging the less offense. In *Stapp v. State* the defendant was indicted for the murder of one Finley, and upon the trial was convicted of an assault with intent to murder. The question whether such a conviction could be sustained was reviewed at considerable length. The court said: "After a careful examination and consideration of the briefs and oral argument of counsel, and the authorities cited, we believe that an indictment for murder includes an indictment for an assault with intent to murder." 3 Tex. App. 146. This conclusion was partly arrived at by reason of the language used in paragraphs 6, 7, art. 3096, Pasch. Dig., which is as follows: "(6) Every offense against the person includes within it assaults with intent to commit said offense, when such assault is a violation of the penal law. (7) Every offense includes within it an attempt to commit the offense when such attempt is made penal by law." These paragraphs do not, in our opinion, furnish any greater support for such a conviction than the provisions of our own statute, and all the reasoning of the court, and facts of the case, are directly applicable to the questions we are considering and the case we are supposing. The question was raised by the evidence at the trial whether Finley died from the wounds inflicted by Stapp, or whether his death was to be attributed "entirely to engorgement of the lungs, produced by intoxication and exposure, and the antecedent predisposition to pneumonia." Upon this state of the testimony, under an indictment for murder by stabbing with a knife, the court charged the jury "that if they acquitted the defendant of the three degrees of homicide,—murder in the first degree, in the second degree, and manslaughter,—that then they could consider whether the defendant was guilty of assault to murder." After a definition of the several degrees of homicide the court further charged the jury as

follows: "Should you not believe beyond a reasonable doubt that the defendant is guilty of either murder in the first or the second degree, or of manslaughter, but should you believe beyond such a reasonable doubt that he is guilty of an assault with intent to murder, you should so find." The court, after declaring that the allegations in the indictment were sufficiently comprehensive to charge an assault with intent to murder, said: "In the case at bar the injury appears to have been inflicted with deliberate design, and in a vital part, with a knife, charged to be a deadly weapon, in a manner and under circumstances [as the jury doubtless concluded] calculated to induce the belief that the accused intended to take life, and without any extenuating circumstances. We think that the charge of the court upon the offense of an assault with intent to murder was sufficiently specific. Taking the charge as a whole, it was a clear and able exposition of the law applicable to the case, and was not calculated to mislead the jury. The verdict of the jury was fully authorized by the evidence. \* \* \* If the defendant was surprised by the charge of the court, we cannot relieve him. He was called upon by the indictment to meet every offense included in it. If the interpretation given to the statute, both by the district court and this court, is 'an interpretation against public policy,' the legislative department of the government is the one to go to to have the evil corrected." The legislature, desiring to place this question beyond all cavil, subsequently amended the statute by providing, in express terms, that murder includes assault with intent to murder, and that assaults with intent to commit any felony include all assaults of an inferior degree. Code Crim. Proc. Tex. art. 714.

In *Bean v. State* the indictment charged the defendant with murder in the second degree, and he was convicted of an "aggravated assault and battery," and, notwithstanding the express provisions of the Code, it was contended by counsel that the conviction could not be sustained because the essential elements of the latter offense were not set out nor embraced in the charge in the indictment. The court, in reviewing this question, said: "Independently of this article 714, we are further of opinion that the indictment in this case is sufficient, even in setting forth the offense of an aggravated assault and battery, under the seventh subdivision of article 488 of the Penal Code, which makes an assault aggravated 'when a serious bodily injury is inflicted upon the person assaulted.' Now, the indictment charges that the appellant killed and murdered the deceased by 'striking, beating, bruising, and wounding him with a stick.' It is clear that he could not have done this without inflicting serious bodily injury upon him. It is true, the exact statutory words which we have quoted are not used in the indictment, but the substituted words are, if not equivalent, certainly of more extensive signification than the statutory words, and this is all that is required." 25 Tex. App. 355, 8 S. W. Rep. 278. In *Davis v. State* the defendant was in-

dicted for murder, charged to have been committed by shooting the deceased with a gun, and was convicted of an assault with intent to kill. The statute of Arkansas is not essentially different in substance from the statute of our state. The court, upon the questions applicable to this case, said: "An assault with intent to kill, though a felony by our law, is not one of the degrees of homicide, but it is an attempt to commit murder, and is virtually included in every murder that is committed by violence. All the elements of murder, except the actual killing, must conspire to constitute the crime. \* \* \*

We therefore conclude that, following the analogies of the previous decisions of this court, reinforced, as they are, by direct provisions of the Criminal Code, if the proof fails to establish all the allegations of the indictment so as to warrant a conviction of the offense presented, but at the same time shows the defendant is guilty of a substantial crime necessarily contained in the terms of the indictment, he may be found guilty of the minor offense. Cases may readily be supposed where any other rule would operate to defeat justice; as, if the proof should show that the person alleged to have been murdered was not in reality dead, or that he died after the lapse of more than a year and a day, or from other causes than the wounds inflicted by the accused. \* \* \* The present indictment is in the abbreviated code form, and does not in terms charge an assault upon the person of Adams, as the common-law form does. Yet, as it sufficiently charges murder in the second degree, and as the offense for which the prisoner was convicted is necessarily included in that charged, it may suffice for the purpose, though there be no words specifically designating the offense so included."

45 Ark. 469. In *Smith v. State* the defendant was indicted, with two other persons, for the murder of S. B. Canthron. The indictment, as in this case, charged that the offense was committed by shooting the deceased with a gun. There was testimony tending to show that Canthron may have died from the effects of pneumonia instead of from the wound. There was also testimony tending to show that the wound inflicted by the defendant was likely to bruise the lung and cause pneumonia. The defendant was convicted of murder in the first degree. Upon appeal he claimed that the court erred in refusing to give the following instruction: "If the jury believe from the evidence, beyond a reasonable doubt, that the defendant participated in the shooting of deceased, but fail to find that death resulted from said wound, they may find defendant guilty of an assault with intent to kill, but not of murder or manslaughter." The court said: "It is most probable from the testimony that Canthron died from pneumonia or congestion of the lung, caused by the wound inflicted by the appellant, or so aggravated by it as to hasten death. In either event, the wound should be regarded as the juridical cause of death, and the prisoner held to the consequences. \* \* \*

But, in determining whether the court

ought or ought not to have instructed the jury on the question of a lower offense included in the greater charge, we look to the record only to see if there is any testimony to base it on. *Fagg v. State*, 50 Ark. 506, 8 S. W. Rep. 829. We do not stop to weigh it, and thus try to ascertain what effect, if any, it might have had with the jury. Where the defendant is shown to have inflicted a malicious wound, and the proof shows that death ensues from it, and he seeks to evade the consequences by showing that his act was not the cause, nor the cause of the cause, of death, the evidence should be very plain to warrant the jury in agreeing to his version. But, if there is any evidence to sustain his theory, it must be submitted to the jury under proper instructions from the court. The court has no discretion to withhold instructions appropriate to any theory of the cause sustained by competent evidence. \* \* \* For the error indicated, the judgment is reversed." 50 Ark. 549, 8 S. W. Rep. 941. In *State v. Parker*, the court said: "It is urged by counsel for defendant that the verdict of guilty of an assault with an intent to commit a great bodily injury, upon the indictment for murder, is unauthorized by law. Code, § 4466, provides that 'the defendant may be found guilty of an offense, the commission of which is necessarily included in that with which he is charged in the indictment.' It cannot be doubted that an assault is included in the crime of murder. Usually an indictment, in express words, charges an assault with felonious intent. Of necessity an assault must have been literally committed in all cases of murder by direct violence. The intent with which the assault is committed relates to its character, and indicates its degree. It is discovered, not in the extent or nature of the violence, but in the *animus* of the perpetrator. It follows that an assault, whether with an intent to murder, to maim, or to inflict a great bodily injury, is included in the crime of murder. It is the settled doctrine of the law in this state that an assault is included in the crime of murder. The intent with which the assault is committed does not exclude it. This case illustrates the reasonableness of the rule we recognize. The indictment alleges assault upon the deceased, who was a child, the failure and refusal of defendant to furnish him with medical treatment and care, and the compelling of the child to work while wounded and bruised. Now, if the jury found that death resulted, not from the assaults and treatment received from defendant, but from disease, and also found that defendant did assault the child with an intent to inflict a great bodily injury, their verdict is authorized by the law, the assault being included in the charge of murder." 66 Iowa, 589, 24 N. W. Rep. 225.

From this review of the authorities it seems to us perfectly clear that petitioner should not be either discharged, or remanded to the custody of the sheriff of Eureka county. Petitioner is remanded to the custody of the warden of the state-prison.

84 Cal. 181

**TAFT v. PRESIDIO & F. R. Co.** (No. 11,988.)  
(*Supreme Court of California.* May 12, 1890.)

**POWER OF ATTORNEY—TRANSFER OF STOCKS—  
CONVERSION.**

A power of attorney conferred authority to invest money in securities, and "to sell, dispose of, transfer, and deliver all or any of my interests in the capital stock of any association, bodies corporate," etc.; also "to bargain and agree for, buy, sell, mortgage, hypothecate, and in any and every way and manner deal in and with, \* \* \* choses in action." Civil Code Cal. § 324, provides that the shares of capital stock of a corporation "may be transferred by indorsement by the signature of the proprietor, or his legal representative, and delivery of the certificate." *Held*, that the attorney in fact had no power to have certain shares of defendant company's capital stock belonging to his principal transferred to himself upon the books of defendant, without indorsement of her name upon the certificate either by her, or by himself as her attorney, and such transfer was a conversion by the company, for which it is liable.

In bank. Appeal from superior court, city and county of San Francisco; T. H. REARDON, Judge.

*Jarboe & Harrison and Lloyd & Wood*, for appellant. *Wilson & Wilson*, for respondent.

**SHARPSTEIN, J.** On the 22d day of October, 1874, the plaintiff executed to Arthur W. Bowman, a power of attorney, authorizing him to transact her business generally and particularly, "to invest all and singular such sums of money as may be in his hands belonging to me in such securities and upon such terms as he may think fit, and for my interest; to sell, dispose of, transfer, and deliver all or any of my interests in the capital stock of any association, bodies corporate or politic, and to represent me and vote for me at any and all meetings of stockholders of any and all corporations in which I now, or may hereafter hold or own shares of capital stock; and represent me and my shares of stock aforesaid in all matters and things touching the said shares, and the acts and doings of the said corporations; also, to bargain and agree for, buy, sell, mortgage, hypothecate, and in any and every way and manner deal in and with, goods, wares, and merchandise, choses in action and other property in possession or in action; and to make, do, and transact all and every kind of business of whatever nature and kind soever; \* \* \* giving and granting unto my said attorney full power and authority to do and perform all and every act and thing, whatsoever, requisite and necessary to be done in and about the premises, as fully, to all intents and purposes, as I might or could do if personally present." This power of attorney continued in force until October 18, 1884, when it was revoked.

On and prior to the 23d day of May, 1882, the plaintiff was the owner of 200 shares of the capital stock of the defendant corporation, which stood in her name on the books of the corporation, and for which a certificate, numbered 31, had been issued to her. The defendant corporation was organized under the laws of this state for profit. Its by-laws, regulating transfers of stock, so far as relevant to this case, are as follows: "Sec. 2. Every transfer of

stock, or of the certificates, above provided to be issued, shall be entered in the transfer books, to be kept by the secretary, by an entry showing to and by whom transferred, the numbers and designations of the shares, and the date of the transfer, and duly attested by the secretary. No transfer shall be valid except as between the parties, unless made as in this section provided. Sec. 3. The stock shall be transferable as in the last preceding section specified, and upon the books of the corporation, upon proper assignment and delivery to the assignee of the certificates above provided for. \* \* \* Sec. 4. The surrendered certificate shall in all cases be canceled by the secretary, before issuing a new one in lieu thereof." On the 19th day of August, 1882, A. W. Bowman presented to the secretary of defendant the certificate of stock No. 31 issued to the plaintiff as aforesaid, but not indorsed by her or by any other person for her; and at the same time presented to the secretary said power of attorney from the plaintiff, and demanded a transfer to himself, in his own name, of the 200 shares of stock represented by certificate No. 31, then standing in her name on the books of the company. The secretary then received from Bowman the certificate No. 31 without indorsement, canceled it, made the transfer on the books as requested, and, in lieu of certificate No. 31, issued to Bowman, in his own name, two certificates of 100 shares each, numbered respectively 211 and 212. At the time of this transfer the plaintiff was absent from this state, and actually knew nothing of it, and had authorized it in no other way than by said power of attorney. On said 19th day of August, 1882, Bowman was largely indebted to divers persons in this state, and was then, and ever since has been, insolvent. Thereafter, for a valuable consideration, Bowman assigned and transferred said certificates numbered 211 and 212 to the California State Deposit & Trust Company, a corporation which took the assignment and transfer thereof in good faith, without notice of the rights of the plaintiff. Plaintiff had no notice of this transfer and assignment of certificates Nos. 211 and 212, until after they were made, and did not authorize the same, otherwise than by said power of attorney. Bowman was a director of the defendant corporation from January, 1882, until October, 1884. The defendant corporation never had any actual or presumptive notice that Bowman procured the transfer of said stock to himself for his own use, or that he intended to convert it to his own use, or to use it in any way prejudicial to the rights of the plaintiff, unless such notice may be presumed from the fact that he was one of the directors of the defendant corporation, as above stated. The action was brought by the plaintiff to recover from the defendant damages for an alleged conversion of said 200 shares of stock, and the court found: "*Eighth.* That said defendant did, prior to the commencement of this action, convert and appropriate said 200 shares of stock of the defendant, so belonging to plaintiff, and has wholly refused to return the same, or

any part thereof, to plaintiff; and that, at the time of such conversion, the same was of the value of \$10,000." Judgment was accordingly rendered in favor of plaintiff for \$10,000 and costs. Defendant moved for a new trial, on the ground, among others, of insufficiency of the evidence to justify the decision. From the order denying the new trial, and also from the judgment, the defendant appeals.

The decision turns upon the construction of the power of attorney held by Bowman. If it conferred on him the power to transfer to himself the stock of his principal, then the court below erred in finding that appellant converted respondent's stock, otherwise not. The authority conferred by the power of attorney is very general, but does not authorize the attorney to do anything except for and in the name of his principal. The exchange of her shares for an equal number of shares to be issued to himself is not directly, nor, in our opinion, indirectly, authorized by anything contained in the power of attorney; and it was not done for and in the name of the principal, nor in accordance with the by-laws of appellant, or the provision of the Code that such shares of stock may be transferred by indorsement, by the signature of the proprietor, or his attorney, or legal representative. Civil Code, § 324. Here the transfer in controversy was made without indorsement by the signature of the proprietor, or her attorney, or her legal representative. In *Stackpole v. Arnold*, 11 Mass. 27, PARKER, C. J., said: "No person, in making a contract, is considered to be the agent of another, unless he stipulates for his principal by name, stating his agency in the instrument which he signs. This principle has been long settled, and has been frequently recognized; nor do I know an instance in the books of an attempt to charge a person as the maker of any written contract, appearing to be signed by another, unless the signer professed to act by procuration or authority, and stated the name of the principal on whose behalf he gave his signature." In this case there was no indorsement by signature such as the law requires to effect a valid transfer, and, if there had been, the agent's signature, without stating the name of the principal on whose behalf he gave his signature, would not have authorized the cancellation of the principal's certificate, and the obliteration of all evidence of her ownership of stock. Appellant is certainly in no better position now than it would be if the agent had indorsed the certificate by his own signature, without stating the name of his principal. Respondent had a right to rely on the observance by appellant of its own by-laws, and the laws of the state, in the transaction of its business. Appellant was under no obligation to permit a transfer until the requirements of its by-laws, and of the laws of the state, were fully complied with. "A purchaser of stock does not receive the certificate of his vendor, but a new one, made out in his own name, and reciting nothing contained in the former. He is therefore protected in the enjoyment of his purchase, even though there was no right to make the transfer to him. For this reason an

unauthorized transfer is a wrong done to the owner of stock, for which, not only the person who makes it, but any one knowingly assisting in the wrong, is responsible. That a bank or other corporation, and also these defendants, are trustees to a certain extent for stockholders—that is, for the protection of individual interests—cannot be denied. They are alike trustees of the property, and of the title of each owner. They have in their keeping the primary evidence of title, and they are justly held to proper diligence and care in its preservation. From this it results that they may rightfully demand evidence of authority to make a transfer before they permit it to be made. Their own safety requires that they be satisfied of the right of the person proposing to make a transfer to do what he proposes. Generally, sufficient evidence of such right is found in the possession of legal title to the stock. Yet it is well settled that it is not in all cases sufficient, notwithstanding that the true equitable ownership may be in some other than the holder of the legal right, and the transfer may be a gross wrong to such an equitable owner. To that wrong the corporation or keepers of the register make themselves parties, if, with knowledge that there is no equitable right to transfer, they permit it to be done." *Bayard v. Bank*, 52 Pa. St. 232. In *Selover v. Commercial Co.*, 7 Cal. 266, it is held that "where a *feme sole* becomes the owner of shares of stock in a company, and afterwards marries, and after marriage the husband and wife execute an indorsement on the certificate of stock, purporting to sell the same to A., without any privy examination of the wife, and there being at the time no inventory of these separate property of the wife on record, such a sale was void as against a subsequent purchaser, under an instrument duly signed and acknowledged." No indorsement is not better than a defective indorsement, which was held in that case to be wholly ineffectual. If an indorsement had not been considered necessary in that case the court would not have written an elaborate opinion to prove that the indorsement was not such as the law required. It would have disposed of the case by holding that, as no indorsement was required, it was immaterial whether the attempt to indorse had been successful or otherwise.

After a careful inspection of the power of attorney we are unable to discover any clause which even constructively authorized Bowman to convert the shares of his principal into shares of his own. And that is precisely what he did by the assistance of the appellant, without which he could not have converted them. Appellant invokes the familiar rule, "that where one of two innocent persons must suffer, the loss shall fall on him who has afforded the opportunity for the same." But it was the appellant, in this case, who afforded the agent an opportunity to inflict loss upon his principal, and also aided him in inflicting it. As was said in *Bayard v. Bank*, supra: "With them [the corporation] was the registry, and transfers could be made only with their consent, by the surrender of the certificates and the issue

of new ones." We think it clear that a transfer not made by the party transferring, or some agent duly authorized, can have no effect. And we think in this case the transfer was not made by the owner of the stock, or by an agent duly authorized to make it as it was made, and, as respondent was divested of her property by the unauthorized act of appellant, it must be held responsible to her for the damage she has suffered in consequence of such wrongful act. Judgment and order affirmed.

We concur: BEATTY, C. J.; FOX, J. WORKS, J.

#### BURCH V. TAYLOR.

(Supreme Court of Washington. May 28, 1890.)

CORPORATIONS—STOCKHOLDER—UNPAID SUBSCRIPTIONS.

1. Under Code Wash. § 2434, making every stockholder "personally liable to the creditors of the company to the amount of what remains unpaid upon his subscription to the capital stock," the unpaid subscriptions constitute a trust fund, which cannot be reached in an action at law by a judgment creditor of the corporation against an individual stockholder. ANDERS, C. J., dissenting.

2. A judgment creditor of a corporation and others cannot sue a stockholder for his unpaid subscription before execution is issued as against the other debtors and returned *nulla bona*, though the corporation is alleged to have no assets.

Appeal from district court, Spokane county.

Turner, Forster & Turner, for appellant. Griffiths, Moore & Feighan and Frank H. Graves, for appellee.

STILES, J. Plaintiff in error was a subscriber to the capital stock of the Spokane Falls & Coeur d'Alene Transportation Company, who had not fully paid his subscription,—the sum of \$25 still being due from him,—though, for aught that appears, the balance had not been called in by the corporation. Being such a stockholder, he sued out and obtained a judgment against the corporation, C. C. McCoy, M. R. Brown, and George McCabe, for something over \$600, which judgment is unpaid. The defendant in error was another subscriber to the stock of the same company, whose unpaid subscription amounted to \$275, and plaintiff brought suit against him in a justice's court for that amount, less the sum of \$25 due from himself to the corporation. There was a judgment for plaintiff in justice's court, as prayed for, from which an appeal was taken to the district court, which district court sustained defendants' demurrer to the complaint as amended therein, and entered judgment for defendants' costs. Error is assigned thereon.

The main question involved in this case is, does section 2434 of the Code of Washington authorize an action at law by a creditor of a corporation against a stock subscriber? This inquiry, if determined in the negative, would oust the justice's court of jurisdiction. The second clause of section 2434 is as follows: "Each and every stockholder shall be personally liable to the creditors of the company to the

amount of what remains unpaid upon his subscription to the capital stock, and not otherwise,"—which is simply a declaration of the American doctrine of the common law of corporations as held, almost without exception, in the decisions of courts. Thomp. Liab. Stockh. §§ 25-37; Cook, Stocks, § 199 and note 1; Sawyer v. Hoag, 17 Wall. 610. In the discussion of this case, both sides seem to have entirely lost sight of this fact, and have cited us to numerous authorities which are in nearly every instance discussions of what is known as the "statutory liability" of stockholders, which is a liability created by statute in addition to unpaid subscriptions, and which, being construed to be a contract liability between the stockholders and the creditor, without any privity with the corporation, is subject to many rules different from those applicable in cases like this; the one great distinction between these two classes of liability being that stock subscriptions are held to be a trust fund for the payment of creditors, while the additional statutory liability produces a fund without any trust features, as has been held in some states. To enforce a right to participate in a trust fund requires proceedings in equity, unless there be peculiar and explicit statutory provisions to the contrary. So in this class of cases the action must be in equity, where the creditor desires himself to be the actor in the proceeding to collect and apply subscriptions. Therefore, in the case at bar, the justice had no jurisdiction of the subject-matter of the action, and the judgment must be affirmed.

There were several other interesting questions suggested by the record in this case, but we shall allude to only one of them, which, it seems to us, would have defeated plaintiff's action upon either theory as to a stockholder's liability. Plaintiff's judgment was against the corporation, McCoy, Brown, and McCabe. The complaint showed that the corporation had no assets but its unpaid stock subscriptions, which, we presume, was intended to be equivalent to an allegation of insolvency, and to excuse the issuance of an execution against it, and a return of *nulla bona*; but it contained no showing whatever that the plaintiff could not have made his judgment out of the property of the other judgment debtors, McCoy, Brown, or McCabe. Where so simple a process as an execution might have satisfied plaintiff's demand, the defendant should not have been attacked until it had been resorted to, and failed; and the failures should have been shown. The judgment of the court below is affirmed, with costs to the defendant in error.

HOYT, J., concurs. SCOTT, J., concurs in result. DUNBAR, J., not sitting.

ANDERS, C. J., (*dissenting*.) I concur in the result, but I cannot agree with the majority of the court in holding that a stockholder who is himself a creditor of the corporation cannot maintain an action at law directly against another stockholder, who has not paid up his subscription. See *Smith v. Londoner*, 5 Colo. 365.

**BURCH v. GLOVER.***(Supreme Court of Washington. May 28, 1890.)*

Appeal from district court, Spokane county.

*Turner, Forster & Turner, for appellant. Griffiths, Moore & Feighan and Frank H. Graves, for appellee.*

STILES, J. This cause presents precisely the same state of facts as that of *Burch v. Taylor*, ante, 438, (just decided;) and for the reasons given in that case the judgment of the court below is affirmed.

HOYT, J., concurs. SCOTT, J., concurs in result. ANDERS, C. J., dissenting.

**BURCH v. MOORE.***(Supreme Court of Washington. May 28, 1890.)*

Appeal from district court, Spokane county.

*Turner, Forster & Turner, for appellant. Griffiths, Moore & Feighan and Frank H. Graves, for appellee.*

STILES, J. This cause presents precisely the same state of facts as that of *Burch v. Taylor*, ante, 438, (just decided;) and for the reasons given in that case the judgment of the court below is affirmed.

HOYT, J., concurs. SCOTT, J., concurs in result. ANDERS, C. J., dissenting.

**MCGLAUFLIN et al. v. HOLMAN et al.***(Supreme Court of Washington. May 19, 1890.)*

LANDLORD AND TENANT—UNACKNOWLEDGED LEASE.

Tenants who enter under a lease sufficient except for lack of acknowledgment, and pay rent and erect improvements, cannot be ejected by a subsequent vendee of the landlord, who takes with knowledge of the facts.

Appeal from district court, Spokane county.

Action by N. F. Holman, Rosamond Holman, and Phoebe B. Green against George McGlauflin and L. B. Handley, to recover possession of land. Defendants appeal.

*Turner, Foster & Turner, for appellants. Houghton, Graves & Jones, for appellees.*

SCOTT, J. It appears in this case, by appellants' answer, that on May 15, 1888, one Henry L. Tilton agreed to execute to appellants a lease of certain lands in the city of Spokane Falls, for the term of three years from said date, and on said day, by a written instrument, purported to lease the same to them accordingly. The instrument was invalid by reason of its having no acknowledgment, although it was otherwise sufficient.

It further appears by the answer that appellants went into, and remained in, possession of the premises, made several payments of rent in pursuance of the terms of said purported lease, and, for the purpose of engaging in business, erected a building thereon at a cost of several hundred dollars. Subsequently, said Tilton sold the premises to appellees, who in July of said year brought this suit to oust appellants. Upon the trial of the cause, appellants offered to prove the payment of rent to said Tilton up to the time of said sale, and subsequently to the appellees, according to the terms of the instrument;

also, that they were put in possession of the premises thereunder by said Tilton, and were in possession thereof at the time appellees purchased; also the making of said improvements; and further, that appellees had actual knowledge of appellants' rights in the premises; all of which matters were pleaded in said answer. Appellees objected to the introduction of such testimony, whereupon the district judge sustained the objections, and directed the jury to find a verdict for appellees. This was error; for, were the facts as pleaded by appellants, and which they thus sought to prove, they were entitled to a specific performance of the terms of the defective agreement for which they had prayed in their answer. See 1 Tayl. Landl. & Ten. §§ 32, 33; Fry, Spec. Perf. §§ 584, 585; Pom. Spec. Perf. §§ 124-126; 3 Pom. Eq. Jur. §§ 1297, 1409. The judgment of the lower court is reversed, and the cause remanded.

ANDERS, C. J., and STILES and HOYT, JJ., concur. DUNBAR, J., not sitting.

**BLANTON v. STATE.***(Supreme Court of Washington. May 31, 1890.)*

HOMICIDE—INDICTMENT—GRAND JURY—VENTRE—EVIDENCE.

1. Under Code Wash. §§ 786, 790, making one who "purposely, and of deliberate and premeditated malice," kills another, guilty of murder in the first degree, and one who kills purposely and maliciously, but without deliberation "and premeditation," guilty in the second degree, an indictment for murder which does not charge a purpose to kill, though it allege that defendant purposely, and of his deliberate and premeditated malice, assaulted deceased, and purposely, etc., fired the shot, is insufficient though not objected to in the court below; and the defect is not cured by the conclusion of the indictment: "And so the grand jury aforesaid do say that defendant \* \* purposely, and of his deliberate and premeditated malice, did kill and murder." HOYT, J., dissenting.

2. But such an indictment will support a judgment and sentence for manslaughter.

3. Under Code Wash. § 1047, providing that no motion to set aside an indictment on the ground that the grand jury was summoned and impaneled without authority of law shall be allowed to a defendant held to answer before indictment, a motion to quash on that ground is properly overruled where, after the grand jury was discharged, defendant committed murder, and was in custody when the jury was re-summoned, and declined to challenge the panel or the individuals.

4. A venire for additional jurors, ordered before the regular panel was exhausted, is a harmless irregularity where the regular panel was exhausted before any of the talesmen were drawn.

5. On an indictment for shooting deceased, it is admissible to show that, almost immediately after the killing, defendant turned and fired at the two persons with whom deceased was walking.

6. It is not error to exclude evidence of defendant's witness who has testified as to how defendant acted and talked, especially on the day of the homicide, as to "whether he talked like a sane or insane man during the night."

Appeal from superior court, Whitman county; W. N. RUBY, Judge.

*Moses Bull and C. M. Kincaid, for appellant. L. H. Plattor, for the State.*

ANDERS, C. J. On the 16th day of December, 1889, the appellant, Benjamin Blanton, killed one Thomas C. Click, in



Whitman county, in this state, by shooting him with a pistol. Upon the plea of not guilty, and the defense of insanity or *delirium tremens* resulting from long-continued use of intoxicating liquors, he was tried, convicted of murder in the first degree, and sentenced to be hanged. The defendant brings the cause to this court for review, and claims a reversal of the judgment of the court below for errors alleged to have been committed on the trial.

Although the indictment was not attacked in the trial court either by motion to quash or by demurrer, or even by motion in arrest of judgment, it was insisted on the argument in this court, by appellant's counsel, that it does not state facts sufficient to constitute murder either in the first or second degree, under our statute, and is insufficient to sustain the judgment of the superior court; and while it is to be regretted that the question was not raised at an earlier stage of the proceedings, and presented in the brief of counsel, still we are of the opinion that it is a matter which the defendant should not be deemed to have waived by his failure to urge it in the court below. The indictment, omitting the venue, is as follows: "Benjamin Blanton is accused by the grand jury of the state of Washington, for the county of Whitman, by this indictment, of the crime of murder in the first degree, committed as follows: That he, the said Benjamin Blanton, on the 16th day of December, 1889, at the county of Whitman, in the state of Washington, in and upon the body of one Thomas C. Click, then and there being, feloniously, purposely, and of his deliberate and premeditated malice, did make an assault; and that he, the said Benjamin Blanton, with a certain revolving pistol, then and there charged with leaden bullets, which said revolving pistol he, the said Benjamin Blanton, then and there had and held, and there, feloniously, purposely, and of his deliberate and premeditated malice, did discharge and shoot off, to, at, against, and upon the said Thomas C. Click, and that the said Benjamin Blanton, with one of the leaden bullets aforesaid, out of the revolving pistol aforesaid, then and there, by force of the gunpowder aforesaid, by the said Benjamin Blanton discharged and shot off as aforesaid, then and there, feloniously, purposely, and of his deliberate and premeditated malice, did strike, penetrate, and wound him, the said Thomas C. Click, giving to him, the said Thomas C. Click, one mortal wound, of which said mortal wound he, the said Thomas C. Click, then and there instantly did die; and so the grand jury aforesaid do say that the said Benjamin Blanton, him, the said Thomas C. Click, in the manner and by the means aforesaid, feloniously, purposely, and of his deliberate and premeditated malice, did kill and murder, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the state of Washington. Dated at Colfax, in said county of Whitman, the 19th day of December, A. D. 1889."

At common law, murder was defined as the unlawful killing of a human being un-

der the king's peace, with malice prepense or aforethought, either express, or implied by law. 1 Russ. Crimes, 482; 4 Bl. Comm. 198. And there was no classification of crime into degrees, but all malicious homicides were of the same grade, and subject to the same penalty. It being manifestly unjust to punish him who kills another with only that degree of malice which is implied by law with the same severity as him who deliberately and premeditatedly takes the life of a fellow being, the legislatures of several of our states have changed the common law relating to murder, not only by dividing it into distinct degrees, but by specifically defining its grades, and prescribing corresponding penalties. Our statute defines murder in the first degree as follows: "Every person who shall, purposely, and of deliberate and premeditated malice, or in the perpetration, or attempt to perpetrate, any rape, arson, robbery, or burglary, or by administering poison, or causing the same to be done, kill another, every such person shall be deemed guilty of murder in the first degree, and upon conviction thereof shall suffer death." Code, § 786. And "every person who shall purposely and maliciously, but without deliberation and premeditation, kill another, every such person shall be deemed guilty of murder in the second degree." Id. § 790. Murder, therefore, with us, is now a purely statutory, and not a common-law, crime, and must be so considered by the courts, and, in order to constitute murder in either degree, it is necessary that there must have been a specific intent or purpose to kill. Under our statute, this is evident; but the difficulty in given cases is to determine whether or not this intent has been sufficiently expressed in the indictment. And the question now before us is, has this been done in the indictment now under consideration? It is insisted that the indictment nowhere charges that the defendant purposely, and of his deliberate and premeditated malice, killed the deceased, and that without such a direct and positive allegation it is fatally defective. The objection is well taken, and must be sustained.

The indictment does allege that the defendant did purposely, and of his deliberate and premeditated malice, assault the deceased, and that he purposely, and of his deliberate and premeditated malice, fired the fatal shot; but it does not allege that it was thus fired with the intent to kill, or that the killing was thus done. All of the averments of this indictment may be true, and yet the defendant not guilty of murder. But it has been suggested that the concluding part of the indictment, beginning with the words "and so," does contain all the averments necessary to make it conform to the requirements of the statute. But is this a concise statement of an act descriptive of the crime, or is it a mere conclusion of law drawn from antecedent averments of facts? The adverb "so" is defined by Webster as meaning "in the same manner; as has been stated; in this or that condition or state; under these circumstances; in this way with reflex reference to something just asserted."

This is the ordinary way the word is understood, and it must be taken to mean the same thing when used in an indictment. Under our statute an indictment must be direct and certain as to the party charged, the crime charged, and the circumstances of the crime, when necessary to constitute a complete crime; and the act or omission charged as the crime must be clearly and distinctly stated, in plain and concise language, so that a person of ordinary understanding may know what is intended; and conclusions of law need not be stated. At common law the indictment would be good, as it was not necessary to allege a purpose or design to kill in an indictment for murder; and the concluding part was deemed only a conclusion of law, without which an indictment, as such, would be sufficient. *Rex v. Nicholas*, 32 E. C. L. 747; *Fouts v. State*, 8 Ohio St. 98, and authorities cited.

If this were a new question, and presented for the first time; if pleaders and courts were not familiar with the form in which this indictment is drawn, and accustomed to look upon it as the established and long-sanctioned precedent of an indictment,—would we hesitate to say that it does not consist with the essential requirements of our statutes? We think not. And, as we have no common-law crime of murder in this state, we are constrained to look solely to our statute for the definition of the crime; and it will not do for the grand jury to charge an assault or a shooting in the language of the statute, and then conclude that "so" the deceased was killed. The following cases are in point: See *Fouts v. State*, 8 Ohio St. 98; *Kain v. State*, Id. 307; *State v. McCormick*, 27 Iowa, 402; *Shaffer v. State*, 35 N. W. Rep. 384; *Leonard v. Territory*, 2 Wash. T. 381, 7 Pac. Rep. 872. In the case of *Leonard v. Territory*, supra, the indictment was identical in its language with the one now before us; and our late territorial supreme court held it insufficient to charge murder in the first degree, for the reason that it failed to allege that the killing therein described was done purposely, and of deliberate and premeditated malice. And the majority of the court are satisfied both with the reasoning and the conclusion reached in the opinion of the learned judge in that case.

But, while we are constrained to hold that the indictment in this case is insufficient to sustain a conviction of murder in either the first or second degree, we are clearly of the opinion that it sufficiently charges manslaughter, and is therefore valid to that extent.

Turning from the indictment, we will now direct our attention to the errors alleged to have been committed on the trial of the cause in the court below. The first assignment is that the court erred in overruling defendant's motion to set aside the indictment for the alleged reason that the grand jury which found the indictment was ordered, summoned, impaneled, and sworn without authority of law. A grand jury had been summoned for the regular term of the district court of the territory, had been discharged by the court on the sixth day of the session. Afterwards the

defendant, while the court was in session and without a grand jury, committed the crime with which he is charged. The court ordered the grand jury to be summoned to inquire into the matter. The defendant was then in the custody of an officer upon complaint duly made, was present when the grand jury was impaneled, and, though given an opportunity to challenge either the entire panel or the individual jurors, declined so to do, but afterwards interposed a motion to set aside the indictment for the reasons above stated. The court very properly overruled the motion. After waiving his right to object to the jury, the defendant had no right to raise the objection by motion to quash the indictment. Besides the statute provides that no motion to set aside the indictment on the ground specified shall be allowed to a defendant held to answer before indictment. Code, § 1047. The defendant was in substantially the position contemplated by that section of the Code, and he cannot be heard to urge any objections to the grand jury.

It is next urged that the court erred in ordering a *venire* for 36 additional trial jurors before the regular panel of 23 jurors was exhausted. But the record shows that none of the additional jurors or talesmen were drawn as trial jurors until the original panel was entirely exhausted. This, at most, was but an irregularity, and we fail to see any error therein that could have been prejudicial to the defendant.

On the third day of the trial, defendant moved for a continuance on the ground of newly-discovered evidence. The motion was overruled, and exception taken and error assigned. The affidavit was insufficient, and we cannot say the court abused its discretion in denying the motion.

Objection is also made to the refusal of the court to exclude from the jury the evidence of one Mattock as to the shooting of Bennett and Doble, on the ground of irrelevancy. The facts disclosed by the record are these: At the time of the commission of the homicide, Click, the deceased, and Bennett and Doble were walking together on the sidewalk in Colfax. As they were passing by the defendant, he suddenly drew a revolver from his pocket, and shot Click, and almost immediately turned and fired at the other two persons, Bennett and Doble. Mattock testified to these facts, and his evidence was objected to as irrelevant, and as tending to show the commission by defendant of other distinct crimes. The testimony was properly admitted. It was a part of what the defendant did at the time,—a part of his acts. All the *res gestæ* may be shown, though the transaction is a continuing one. 1 Bish. Crim. Proc. (3d Ed.) § 1125.

During the trial, one John Tobin was called as a witness for defendant. After stating to the court and jury how the defendant acted and talked, especially on the day of the homicide, he was asked by defendant's counsel to "state whether or not he talked like a sane or insane man during the night." The question was objected to by the prosecution, and the objection sustained, and the ruling of the

court duly excepted to, and assigned for error. The question might have been permitted without prejudice to the state; and, on the other hand, we fail to perceive wherein the defendant could have been in any degree injured or prejudiced by its exclusion. It is true, that non-expert witnesses may give their opinions as to the insanity of an individual after having first testified to his actions, declarations, general demeanor, and peculiarities; but we fail to see that this rule was violated in this particular instance.

It is further claimed that the court unduly abridged the right of the defendant to testify in his own behalf, but we think the objection is not well taken.

The defendant also assigns several errors which he alleges were committed by the court in charging the jury, as well as in refusing to charge as requested by his counsel. We have carefully examined the instructions, and have come to the conclusion that the law, as applicable to the facts of the case, was fully and fairly given to the jury, and that the defendant could not have been prejudiced by the refusal of the court to instruct as requested.

Holding, as we do, that the indictment sufficiently charges manslaughter, the cause must be remanded to the court below with instructions to set aside the judgment heretofore entered, and to pass sentence upon the defendant for manslaughter, upon the verdict of guilty; and it is so ordered.

SCOTT and STILES, JJ., concur. DUNBAR, J., not sitting in the case.

HOYT, J., (*dissenting*.) I concede that the weight of authority is with the majority of the court, but I cannot bring my judgment to a concurrence therewith, and hence I am compelled to dissent. The reasoning of the cases relied upon to sustain the position of the majority as to the sufficiency of the indictment seems to me to be over technical, and unsatisfactory to the common understanding. I agree with the majority that the specific intent to kill must appear; but, unlike them, I am of the opinion that it does appear in the indictment in question. I think that the reasoning of the minority of the court in the two Ohio cases cited by Chief Justice ANDERS is more satisfactory than that of the majority, and should be inclined to follow the same, and hold this indictment good, without the aid of our statute as to the sufficiency of indictments, and, when aided by such statute, it seems to me clear that the position taken by the majority of the court is untenable. It is true that one section of our statute requires that the allegations of the indictment must be direct and certain; but this section must be interpreted in the light of the subsequent sections, which provide, in substance, that an indictment shall be sufficient if a man of common understanding can determine therefrom with what he is charged. Interpreting these sections together, and I can give them all force only by holding that the legislature meant to state in said first section what a perfect indictment should contain, and how it should be

stated, and that the subsequent sections were enacted for the purpose of preventing a person charged with crime from availing himself of a want of a technical compliance with said first section by the prosecution. In other words, the legislature has said every indictment ought to be direct and positive as to all its allegations, but if it is not the defendant can take no advantage of such fact, provided certain things can be gathered therefrom by a man of common understanding. If this construction of those sections of the statute is correct, the material inquiry in this case is this: Can a man of common understanding see from the indictment in question what crime is intended to be charged, together with certain other necessary allegations, as to which no question is made? In my opinion, there can be but one answer to this question, and that an affirmative one. Let any man of common understanding read the said indictment, and he cannot possibly fail to see that the prosecution intended to charge the defendant with murder in the first degree; and, if this is so, I think that under our statute the indictment is good as against the objections urged against it.

Not only do I think the indictment good, but, even if it were bad, I do not think the defendant was in a position to avail himself of its insufficiency as a cause for reversal by this court; for, while it is doubtless true that the objection that the indictment does not state facts constituting the crime of which the defendant was convicted can be raised for the first time in this court, yet in my opinion it must be regularly raised by the assignment of errors in the case, or at least by the briefs of one or both of the parties to the appeal. In this case the sufficiency of the indictment is not attacked in the least degree, either in the assignment of errors or in the briefs, and was first suggested by the oral argument on the part of the plaintiff in error. To hold that such a question can thus be raised and made available by a defendant is to practically nullify the requirement of an assignment of errors, either in the brief or elsewhere, and throw open the doors to such a course of practice as will practically deprive this court of the benefit of an argument by the defendant in error as to the vital question upon which the case may turn in this court, and also, in many cases, as to the final determination of the cause.

I think that the judgment and sentence of the court below should be affirmed—*First*, because the indictment is sufficient; and, *second*, because the error upon which the majority of the court founds the reversal was not properly before the court for determination.

#### STATE V. SO HO GE.

(*Supreme Court of Washington*. May 31, 1890.)

Appeal from superior court, Walla Walla county. *Wellington M. Clark*, for appellant. *L. H. Plattor*, for the State.

SCOTT, J. Defendant was convicted of murder in the second degree upon an indictment failing to charge a purpose to kill. A motion by defend-

ant in arrest of judgment was sustained. The state appeals.

In *Leonard v. Territory*, 2 Wash. T. 381, 7 Pac. Rep. 872, the court decided that it was necessary to allege a purpose to kill in order to sustain a conviction for murder under our statutes. We have followed that case in *Blanton v. State*, ante, 499, (just decided.) The indictment in this case is sufficient to charge manslaughter. These matters having been discussed in the last case cited, it is unnecessary to review here. Allowance of the motion in arrest of judgment was therefore error, and the same is reversed. The cause is remanded, with instructions to the court below to sentence the defendant for manslaughter upon the conviction already had.

STILES, J., concurs.

HORT, J., (*dissenting*.) I concur in the result in this case, but not in the reasoning, in the two cases above referred to.

#### STATE v. So Ho Me.

(*Supreme Court of Washington*. May 31, 1890.)

Appeal from superior court, Walla Walla county. *Wellington M. Clark*, for appellant. *L. H. Plattor*, for the State.

SCOTT, J. This case is in the same condition as *State v. So Ho Ge*, ante, 442, (just decided.) The order sustaining the motion in arrest of judgment is reversed, and the court below is directed to sentence the defendant for manslaughter.

STILES, J., concurs. HORT, J., concurs in the result.

#### LANGERT v. ROSS et al.

(*Supreme Court of Washington*. May 28, 1890.)

##### VENDOR AND VENDEE—CONSTRUCTION OF CONTRACT.

1. A memorandum reading: "Received of A. \$5 as part payment for lots 1 and 2 in block No. 1806, conditions as follows: \$2,495 to be paid on or about the 20th day of March, 1888, and balance, of \$1,500, to run on time, to suit said A.'s convenience,"—with an agreement to furnish a warranty deed on payment of the \$2,495, is not an option, merely, but an agreement of sale which may be enforced by the buyer until his rights have been terminated by tender of performance by the seller, as time will not be regarded as of its essence.

2. It may be shown by parol that the block referred to was in the city where the receipt was dated, and that the \$1,500 was to be kept back to pay a mortgage on the lots.

Appeal from superior court, Pierce county.

Suit by Charles Langert against Frank C. Ross and James M. Ashton for specific performance, or, in case that cannot be decreed, for damages. The defendant Ashton purchased the property in question after the expiration of the time referred to in the memorandum between Langert and Ross. Judgment was given for defendants, and plaintiff appeals.

*Judson, Sharpstein & Sullivan*, for appellant. *F. Campbell and Mitchell, Ashton & Chapman*, for appellees.

HORT, J. The rights of the parties to this action must be determined by the construction to be given to the memorandum in writing made by the defendant to the plaintiff in words and figures as follows, to-wit: "Tacoma, W. T., March 16, 1888. Received of Chas. Langert, \$5.00 as part

payment for lots No. 1 and 2, in block No. 1806, conditions as follows: \$2,495.00 to be paid on or about the 20th day of March, 1888, and balance, of \$1,500.00, to run on time, to suit said C. Langert's convenience. I also agree to furnish said C. Langert a warranty deed upon the payment of the \$2,495.00, and a clear title. FRANK C. ROSS. Witness: J. W. SUMMERS." Was it simply an option giving the right to the plaintiff to purchase the property in question, which terminated, by the terms of the memorandum itself, on the 20th day of March, named therein? or was it a contract for the sale of said property, with dependent conditions making it the duty of either party to tender performance on his part before he could declare the contract forfeited by the other party? The court below evidently found the legal effect of said memorandum was as first stated, as with this construction the evidence might warrant the conclusions of fact and law as found by said court, while the giving to the said contract the other construction would have made the findings of facts by the lower court impossible, upon any fair and reasonable construction of the evidence introduced upon the trial of the cause.

The material question, then, is as to the construction of said contract. Plaintiff contends that it is a full contract for the sale of the real estate in question, with all the elements of such contracts, and that, as it does not appear therefrom that time was of the essence thereof, it entitled the plaintiff to tender performance on his part, and demand his deed, at any time before he was put in default by a proper tender of performance by defendant. If the first part of plaintiff's contention is true, we think the latter is also, as we deem the doctrine of equity, that time will not be held to be of the essence of contracts of this nature, unless the intent of the parties thereto that it should be clearly appears therefrom, is too well established by authority to be open to question, or to make it proper to cite authorities in support thereof. Defendant, however, argues that the first part of said contention is not true, for the reason that said memorandum is too indefinite and uncertain to be capable of enforcement in a court of equity. We agree with the contention of the defendant that the memorandum in question cannot be construed as contended for by plaintiff unless all the terms of the sale reasonably appear therefrom, or may, under the rules applicable to the introduction of oral evidence in aid of such contracts, be made to appear. Investigating the contract in question by the rule thus invoked by the defendant, we see but two provisions thereof that are at all open to criticism. The first is as to the description of the property. But as the property is described with definiteness, so far as the particular lots and block are concerned, and is only faulty in not showing that the block named is in Tacoma, we think the omission is one that could be supplied by oral proof. The other is as to the time of payment of the \$1,500 that was not to be paid on the delivery of the deed; and as to this, we think, oral

proof to explain the situation of the contracting parties was admissible, not for the purpose of changing the contract, but to show that there was a mortgage of \$1,500 on the property in question, and that the keeping back of the \$1,500 was for the purpose of paying off the said mortgage when it became due; and, this having been made to appear, the time of payment of said \$1,500 becomes certain, as that is certain which may be made certain, as this could have been by referring to said mortgage, or the record thereof. The contract relied upon by plaintiff entitled him to relief as against the maker of said contract, but the proof showed that it was not in the power of said maker to specifically perform; and therefore it was the duty of the court to have given the plaintiff damages for the violation of the contract.

The proof of damages was not satisfactory, and it is doubtful whether, thereon, a judgment of more than nominal damages should have been rendered; and, in view of the unsatisfactory state of the proof upon this question, we think equity demands that there should be a rehearing in the court below. The cause will therefore be remanded, with instructions to set aside the judgment in favor of defendant, and proceed to a rehearing of the cause against defendant Ross in accordance with this opinion.

ANDERS, C. J., and SCOTT and STILES, JJ., concur. DUNBAR, J., not sitting.

#### MARTIN V. WHITMAN COUNTY.

(Supreme Court of Washington. May 28, 1890.)

##### CONTRACT—CONSTRUCTION—DELINQUENT TAXES.

A contract with a county to list delinquent taxes therein for 5 per cent. on the total amount of the list, "to be paid out of the tax due the county on said tax-list, as it is collected," entitles the maker of the list to a sum equal to 5 per cent. of the total amount out of the first money collected, and not merely to 5 per cent. of the amount collected. HORT, J., dissenting.

Appeal from district court, Whitman county.

D. J. Crowley, Frank H. Brown, and P. C. Sullivan, for appellant.

STILES, J. Plaintiff in error brought suit against Whitman county upon a contract made with him by the board of county commissioners, by an order spread upon its minutes in the following words: "It is hereby ordered that C. Q. Martin make a tax-list of all taxes delinquent in Whitman county, and that he receive therefor 5 per cent. on the total amount of said tax-list. That said 5 per cent. is to be paid out of the tax due Whitman county on said tax-list, as it is collected." The supreme court of the territory, in *Martin v. Whitman Co.*, 20 Pac. Rep. 599, held the making of this contract to have been within the power of the board of commissioners. This, therefore, is the law of the case. See *Navigation Co. v. Dacres*, 23 Pac. Rep. 415, (January session of this court.) The cause was tried upon its merits, in accordance with that opinion, upon a complaint alleging the list to have been made

by plaintiff, showing \$68,576.25 delinquent taxes due the county, and the sum of \$2,000 thereof actually collected. The truth of these allegations, and others showing the refusal of the board to allow more than 5 per cent. of the money collected, was admitted. The answer of the defendant alleged that the list prepared by the plaintiff was so carelessly and negligently prepared that it was useless for the purpose for which it was designed, viz., the collection of the taxes delinquent, but no proof seems to have been offered to sustain these averments; and the case was submitted to the jury after a refusal of the court to direct a verdict for the plaintiff for \$2,000, and upon the court's direction to find for plaintiff for \$100, and costs.

The request to charge necessarily involved a construction of the terms of the contract by the court, on the question whether the services of the plaintiff were to be compensated by the payment of an amount equal to 5 per cent. of the total amount of delinquent taxes discovered and listed by him, out of the first money derived from that source, or 5 per cent. of the money collected, without regard to the gross delinquency. The court, as has been observed, instructed that only 5 per cent. of the amount collected had been stipulated for, and plaintiff appealed. We are well satisfied that the construction given to the contract was wrong. Indeed, as we view it, it was not subject to construction at all, but was plainly such an agreement as the plaintiff contends it to be. Upon a retrial of the case, therefore, unless the defendant can show the truth of the matters alleged in its answer, judgment must be entered for plaintiff for the amount collected up to 5 per cent. of \$68,576.25. Upon so plain a case it would be within the power, and it would ordinarily be the inclination, of this court, without ordering a new trial, to amend the judgment of the court below; but in the case at bar the contract made, in view of the short time occupied by the plaintiff in the performance of the work, (barely three months,) seems to have been so recklessly improvident and unbusiness-like a transaction on the part of the commissioners, that we think justice requires that the county have an opportunity to avail itself of the alleged worthlessness of plaintiff's work, as shown in its answer.

The judgment is reversed, and a new trial ordered, in accordance herewith.

ANDERS, C. J., and SCOTT, J., concur; DUNBAR, J., not sitting.

HORT, J., (dissenting.) I am unable to agree with the majority of the court in their conclusions as to this case. The order relied upon as a contract was made by a body representing the county, which is a necessary part of the government of the state, and therefore, in the strictest sense, a public body. The rule is well settled that any and all acts of such a public body, when alleged as the foundation of a claim by a private person against such body, must be construed in favor of the public, and against such private person. It follows that if the order in ques-

tion is capable of two constructions that one must be given it that will best protect the rights of the public. I think the order in question might well be construed as it has been by the majority of the court, but I also think it capable of the construction contended for by the defendant,—that the compensation of 5 per cent. attached to the entire amount of the tax-list, but became due and payable only upon such portion of said amount as was from time to time collected; and this construction being in the interest of the public, and being also reasonable and just as between the parties, while the other construction makes it unreasonable and oppressive to the public, I think it ought to be adopted by the court. In my opinion the judgment appealed from should be affirmed.

#### HICKMAN V. HICKMAN.

(Supreme Court of Washington. May 28, 1890.)

##### DIVORCE—INSANITY—CONSTITUTIONAL LAW.

Act Wash. T. Dec. 22, 1885, authorizing divorce on the ground of incurable chronic mania existing for more than 10 years, is valid, and within the power of the territorial legislature.

Appeal from superior court, Jefferson county; MERRIS B. SACHS, Judge.  
Hays & Plumley, for appellant.

SCOTT, J. Appellant brought this suit in the superior court of Jefferson county, to obtain a divorce upon the ground of incurable chronic mania or *dementia* of the defendant, existing for more than 10 years prior to the commencement of the action. The defendant, by her guardian *ad litem*, interposed a general demurrer to the complaint.

The sole question presented to us in the case is as to the validity of the act of the territorial legislature approved December 22, 1885, making such incurable chronic mania or *dementia* one of the grounds upon which divorces might be granted, where the affliction had existed for 10 years or more. The judge of the superior court by whom the cause was tried held that the act was contrary to public policy, and was therefore unconstitutional. No other objection was urged here, nor is there any apparent defect in the act. However it may be regarded as a measure of public policy, the power of our territorial legislature under the organic act extended to all rightful subjects of legislation. The reasons for which divorces might be granted have always been recognized as one of them, under our system of government. In fact our territorial supreme court held that the legislature could itself grant a divorce by a special act (Maynard v. Valentine, 2 Wash. T. 3, 3 Pac. Rep. 195,) and this was subsequently affirmed by the supreme court of the United States, (Maynard v. Hill, 125 U. S. 190, 8 Sup. Ct. Rep. 723.) It follows that the legislature could authorize the granting of divorces by the courts, for any causes that the legislature deemed sufficient, and whether the same should be due to misfortune or misbehavior could not affect the validity of such

laws. The judgment of the lower court is reversed.

ANDERS, C. J., and HOYT, DUNBAR, and STILES, JJ., concur.

#### KERRON V. NORTH PAC. LUMBERING & MANUF'G CO.

(Supreme Court of Washington. May 28, 1890.)

##### REFLEVIN—PLEADING—AMENDMENT.

1. In an action to recover personal property, it is a good defense that plaintiffs, who allege ownership generally, claim only under a mortgage from third persons, and such case does not come within Code Wash. § 108, providing that plaintiffs, in such action, failing to establish ownership, may prove a right of possession by virtue of a special property, and amend.

2. Where plaintiffs allege ownership generally, defendant need not set up in his answer that a bill of sale, under which plaintiffs claim, is a mortgage, in order to introduce evidence to that effect.

Appeal from superior court, Wahkiakum county; FRANK ALLEN, Judge.

Seneca Smith and Stott, Boise & Stott, for appellants. Thos. N. Strong and Doolittle, Pritchard & Stevens, for appellee.

HOYT, J. This action was brought to secure the possession of certain saw-logs, alleged to have been unlawfully detained by the defendants. In its complaint the plaintiff alleged that it was the owner of the logs in question. Defendants denied the ownership, and set up that they were in possession by authority of one J. F. Kimball, who cut and put into the water the logs. Plaintiff, to prove its ownership, put in evidence a bill of sale, made by said Kimball, in words and figures as follows, to-wit: "Know all men by these presents that I, James F. Kimball, of Cathlamet, Washington Territory, the party of the first part, for and in consideration of the sum of one dollar and other good considerations to me in hand paid by the North Pacific Lumbering & Manufacturing Company, a corporation, the party of the second part, the receipt whereof is hereby acknowledged, do, by these presents, grant, bargain, sell, and convey unto the said party of the second part, its successors and assigns, all of the following described personal property, to-wit: All of the saw-logs manufactured or purchased by me, and now in or near the waters of the Columbia and Elokomon rivers, in Wahkiakum county, territory of Washington, being all the saw-logs now on hand and owned by me in said county of Wahkiakum; and I do also sell to said corporation all the logs now in the process of manufacture, or that I may cut into saw-logs during the year 1887, all marked as follows: A stump mark or brand in the end, a 'T,' and a wap mark, a crow's foot,—to have and to hold the same to the said party of the second part, its successors and assigns, forever; and I do for myself, my heirs, executors, and administrators covenant and agree to and with the said party, its successors and assigns, to warrant and defend the sale of said property, goods, and chattels hereby made with the said party of the second part, its successors and assigns, against all and every per-

son or persons, whomsoever, lawfully claiming or to claim the same. In witness whereof I have hereunto set my hand and seal the 17th day of October, in the year of our Lord, 1887. Signed, sealed, and delivered, in presence of THO. N. STRONG, F. R. STRONG. J. F. KIMBALL. [Seal.] Defendants offered to prove certain facts tending to show that said bill of sale was given simply as a security, and was therefore, in fact, only a mortgage. The court excluded this proof. Defendants excepted, and have assigned error thereon, and this ruling we will proceed to examine.

The plaintiff concedes, in its brief, that the said ruling was erroneous if the fact that it was only a mortgagee, and not the owner, would, under the pleadings in the cause, have been of any avail to the defendants, but argues upon two grounds that proof of such a fact would not have aided them: *First*, for the reason that as mortgagee it would have had a special property in the logs, and have been entitled to maintain its action by virtue of the provisions of section 108 of the Code; and, *second*, that before the defendants could avail themselves of such a defense they must have pleaded it in their answer. As to the first proposition above stated, it is only necessary to say that this court, at its last term, held in a case like this, where the plaintiff claimed as owner and proved only that he was a mortgagee, that he could not recover; and as we are satisfied with that decision, and the reasoning therein, it is conclusive of this question. See *Silsby v. Aldridge*, 23 Pac. Rep. 836, (decided at last term.) If the plaintiff in its complaint had set out the bill of sale in question, and alleged ownership thereunder, it would undoubtedly have been necessary for the defendants to have pleaded that it was only a mortgage to have entitled them to introduce proof to show such fact; but as it contented itself with the allegation of ownership without showing how it was acquired, and thus entitled itself to establish such ownership by any competent proof, it must follow that, when such proof was introduced, the defendants were entitled to meet the case made by plaintiff's evidence by any competent proof that tended to show that such evidence was untrue; and that the bill of sale introduced was not, in fact, a conveyance of the property, but was only a mortgage thereon, as fully and completely as though the matters in defense had been fully set out in their answer. The proof offered by the defendants was wrongfully excluded, and the error thereon assigned was well taken.

Error was also assigned upon various rulings growing out of the instructions to the jury, but the record seems to be imperfect, and, as it is impossible to determine therefrom just what the judge did instruct the jury, we shall not discuss these errors further than to say that, excepting as to the instruction that the intent of the parties must be gathered solely from the bill of sale which, for the reason hereinbefore stated, we hold to be error, we are of the opinion that the instructions fairly interpreted the law of the case. The judgment of the lower court must be re-

versed, and the cause remanded for a new trial.

ANDERS, C. J., and STILES and SCOTT, JJ., concur; DUNBAR, J., not sitting.

#### CHAMBERLAIN v. WINN.

(Supreme Court of Washington. May 28, 1890.)

#### REPLEVIN—PLEADING—INSTRUCTIONS.

1. In an action to recover possession of specific personal property, the defendant may, under the general denial, prove ownership or the right of possession of the property in controversy in a third person.

2. In such action a charge to the effect that "the plaintiff claims that the defendant detains her property," and that the defendant denies such detention, is misleading, as tending to exclude from the consideration of the jury the question of ownership.

3. Where there was evidence to show that a bill of sale under which defendant claimed had been given as a compromise of a disputed claim, it is error to instruct the jury that such bill of sale conveys no right to the property in question.

On rehearing. For former opinion, see 20 Pac. Rep. 780.

*Sullivan, Woolford & Sullivan* and *C. S. Voorhees*, for appellant. *Allen & Crowley* and *Anders, Benton & Clark*, for appellee.

SCOTT, J. Upon the reargument of this cause which was allowed by the territorial supreme court, a constitutional majority of this court have not become satisfied that the judgment heretofore last rendered, reversing the lower court, is wrong. It is therefore allowed to stand, and a *re-mittitur* is directed.

STILES and HOYT, JJ., concur. ANDERS, C. J., not sitting in the case, having been of counsel below. DUNBAR, J., not sitting.

#### JOHNSTON et al. v. EISENBEIS.

(Supreme Court of Washington. May 28, 1890.)

#### APPEAL—FINAL ORDER—INJUNCTION.

An order denying a motion, based on defendant's answer and other papers, to dissolve a temporary injunction, and grant an injunction against plaintiff without disposing of plaintiff's prayer for a permanent injunction, is not a final disposition of the cause from which an appeal will lie.

Appeal from district court, Jefferson county; C. H. HANFORD, Judge.

Bill in equity by Charles Eisenbeis, against Charles G. Johnston, William Olsen, and Herman Metzger. Defendants appeal.

Wm. T. Muir, for appellants. Calhoun & Coleman, for appellee.

HOYT, J. The plaintiff herein filed his complaint in the lower court, asking that defendants be perpetually enjoined from doing certain acts therein complained of, and obtained from the court a temporary restraining order pending the hearing of the cause. Defendants filed their answer, in which they set forth certain affirmative allegations, and, based thereon, asked an injunction against the plaintiff. Upon the record thus made up, and upon other papers and affidavits filed in the cause, de-



defendants served notice upon the other party that they would move the court to dissolve the restraining order that had been granted to plaintiff, and to grant unto said defendants an injunction restraining the plaintiff from doing certain acts set out therein. Upon the hearing of the motions the court made an order simply denying both branches of said motion, and making no other adjudication as to the rights of the parties. Was this order such that an appeal therefrom would lie to this court? If it was not a final judgment or order, then, under numerous decisions of this court, an appeal therefrom would not lie; and we think it was not. There was no final disposition of the cause. The plaintiff is still in court, asking for the permanent injunction, and his right thereto has never been adjudicated. There was no judgment that finally foreclosed the rights of either party, nor was there any order as to costs. The order, we think, was interlocutory, and not final. The appeal must be dismissed, and it is so ordered.

ANDERS, C. J., and DUNBAR, SCOTT, and STILES, JJ., concur.

#### TERRY V. STATE.

(Supreme Court of Washington. May 28, 1890.)

##### INDICTMENT—EMBEZZLEMENT.

Code Wash. § 835, provides that "if any officer, agent, clerk, or servant, or person to whom any money or other property shall be intrusted for any specific purpose, for hire, shall embezzle, \* \* \* [he] shall be deemed guilty of larceny." Held, the words "for hire" qualify each of the enumerated classes; and therefore, in an indictment for embezzlement by an agent, an omission to charge that he was an agent for hire was fatal.

Error from district court, King county.

Code Wash. § 835, provides that "if any officer, agent, clerk, or servant, or person to whom any money or other property shall be intrusted for any specific purpose, for hire, shall embezzle, \* \* \* [he] shall be deemed guilty of larceny," etc. And section 836 provides, among other things, that, "if any agent, clerk, officer, servant, or person to whom any money or other property, shall be intrusted, with or without hire, shall fraudulently convert to his own use, \* \* \* he shall be deemed guilty of larceny," etc.

Ronald, Piles & Relfe, for plaintiff in error.

DUNBAR, J. The indictment under which the appellant was convicted of larceny was under section 835 of the Code, and, omitting the formal parts, was as follows: "The said J. E. Terry, on the 25th day of May, A. D. 1889, in the county of King, in the district aforesaid, then and there being the agent of one W. H. Gleason for sale of a certain horse, then and there the personal property of said W. H. Gleason, did then and there sell the said horse to one F. E. Scott for the sum and price of one hundred and ninety dollars, and did then and there, by virtue of said employment, receive from said F. E. Scott as the purchase price of said horse, and as the personal property of said Gleason, the sum

of one hundred and fifty dollars, lawful money of the United States, and the promissory note of said Scott for forty dollars, and did then and there, willfully, fraudulently, and feloniously, take and secrete the whole of said money, with the intent thereby to embezzle and fraudulently convert the same to his own use, contrary to the form of the statute," etc.

Several points are raised by the appellant; but the one to which the court will address itself, as being decisive of the case, is "that the omission to charge in the indictment that the defendant was an agent for hire" is fatal. The court below held that the words "for hire" did not apply to "any officer, agent, clerk, or servant," but only to any one included in the word "person," and that the word "person," as used in that statute, meant any person other than an officer, agent, clerk, or servant, and that the words "for hire" only applied to such other persons. This construction of section 835 as an independent section is not in harmony with the rule of *ejusdem generis*, that in the construction of statutes, contracts, and other instruments, where an enumeration of specific things is followed by a general word or phrase, the latter is held to refer to things of the same kind as those specified. But, outside of this rule of construction, the enactment of section 836, which must be construed in connection with section 835, by its terms, included in the proviso, expressly covers cases of embezzlement by the same classes of persons mentioned in section 835, "without hire," showing conclusively that in the legislative mind the words "for hire" were intended to apply to all persons mentioned in section 835. On any other theory the proviso would be meaningless. We are, therefore, of the opinion that the omission to charge in the indictment that the defendant was an agent for hire is fatal. The legislature not having provided any punishment for crimes specified in the proviso in section 835, that portion of the law is inoperative. The cause will be remanded to the court below, with instructions to discharge the defendant, appellant.

ANDERS, C. J., and HOYT, SCOTT, and STILES, JJ., concur.

#### WHITE V. TERRITORY.

(Supreme Court of Washington. June 2, 1890.)

##### FORGERY—INDICTMENT—EVIDENCE.

1. In an indictment for forgery of a draft it is not necessary to set out the figures cut therein.

2. As under the statutes of Washington forgery may consist in the uttering of a forged instrument, an indictment charging that defendant uttered and published as true a certain false and forged writing, set out in the indictment, is sufficient to cover the case of a raised draft.

3. A juror, having stated that he has impressions as to the merits in a criminal action, cannot be asked whether such impressions are favorable to defendant.

4. The prosecution may show, by either party to it, an entire conversation, a part of which has been called out by defendant.

5. That the judge intimated his opinion as to the value of some portions of the evidence will not require a reversal, where he clearly and fully

gave the jury to understand that the facts were exclusively for them.

6. An instruction that "the mere uttering of a forged instrument is of itself a circumstance from which knowledge of its falsity may be presumed, \* \* \* but that presumption is not conclusive; \* \* \* it is open to the defendant to contradict or explain the fact of his having guilty knowledge,"—is not erroneous where it is shown by the other instructions to have meant that the utterance of a draft, found to be forged, would be a circumstance from which the jury would be warranted in finding a guilty knowledge if they were convinced by it beyond a reasonable doubt, when examined in the light of the other evidence.

Appeal from district court, King county.  
*James Hamilton Lewis and W. Lair Hill*,  
for appellant. *Stratton & Fenton*, for respondent.

Hoyt, J. Defendant was convicted of the crime of forgery, in the district court for the third judicial district holding terms at Seattle. Numerous exceptions were taken to the ruling of the court during the progress of the cause, and errors thereon have been duly assigned, and the case brought here for review. Nearly all of the errors assigned have been relied upon here as cause for reversal, and have been argued by counsel with great diligence and ability. We do not, however, feel called upon to discuss the questions arising upon each of said alleged errors separately, and shall content ourselves with the examination of four principal questions, as we think that the mind of the court as to the other errors assigned will be sufficiently indicated by such discussion. The questions which we shall notice are as follows: (1) As to the sufficiency of the indictment; (2) as to the challenge of the juror McRedmond; (3) as to the testimony of the witness Morrisett; (4) as to the instructions to the jury.

The following is a copy of the indictment: "Wm. M. White is accused by the grand jury of the territory of Washington for the county of King, in the third judicial district of said territory, by this indictment, of the crime of forgery, committed as follows: The said Wm. M. White, on the 25th day of May, A. D. 1889, in the county of King, in the district aforesaid, then and there being, did then and there willfully, knowingly, falsely, fraudulently, unlawfully, and feloniously utter and publish as true, to the Puget Sound National Bank of Seattle, the same being a body corporate under the banking laws of the United States, a certain false and forged writing on paper, of the tenor following: 'The Commercial National Bank, No. 16,743, Portland, Oregon, May 13, 1889. At sight of this first exchange, second and third unpaid, pay to the order of J. C. Smith (\$2,500.00) twenty-five hundred dollars, value received, and charge the same to the account of R. L. Durham, cashier. To the National Bank of the Republic, New York City;' with the words, 'J. C. Smith,' and 'Wm. M. White,' written on the back of said paper, he, the said Wm. M. White, then and there well knowing the said instrument of writing to be false and forged, with intent then and there to injure and defraud the Puget Sound National Bank, and other persons to the jurors unknown,

contrary to the form of the statute in such case made and provided, and against the peace and dignity of the territory of Washington." The act allowed to be proved under said indictment was the uttering by the defendant of a draft, originally genuine, for \$25, which had been altered to \$2,500. The indictment correctly sets out the altered draft, with the exception that in the draft itself there appeared the figures "\$2,500" cut therein, which did not appear in the copy in the indictment; and it was claimed that such omission made the draft inadmissible in evidence. We think, however, that such figures so cut in the draft were no part of the contract contained therein. Such figures were no more a part of the instrument, in a legal sense, than are the marginal figures on a bank note, or the lathe work, or any other device thereon, to prevent counterfeiting; and as it has never been held necessary to set these out in the indictment, we think the same rule should apply to the figures in question. See Whart. Crim. Pl. & Pr. § 167; *State v. Flye*, 26 Me. 312; 1 Whart. Crim. Law, § 731. It is further claimed that the draft introduced, having been originally a genuine one, and the forgery consisting of an alteration, and not of an original false making, the indictment did not sufficiently state the facts to warrant proof of such alteration. We cannot agree with this contention. The offense of forgery under our statute may consist in the uttering of a forged instrument. The draft set out, if altered from \$25 to \$2,500, was as much a forged instrument as though the signature of the maker had been falsely written thereto; and we see no more reason for alleging that the draft was made a forged one by a material alteration thereof, than there would be in a proper case in stating that the forged writing was made such by the false signing of the same. In either case we think the facts are sufficiently stated when, in addition to the other averments contained in this indictment, the instrument alleged to have been forged is set out in full, and that under such indictment the forgery of the instrument may be shown, as well by proof of a material alteration, as by proof of an original false making. 2 Archb. Crim. Pl. & Pr. 1569, (*Pomeroy's Notes*;) 1 Whart. Crim. Law, § 735; 2 Bish. Crim. Law, § 535; *State v. Flye*, above cited.

The juror McRedmond, having stated that he had impressions as to the merits of the cause, was asked by counsel for defendant whether or not such impressions were favorable to defendant. The answer of the juror was excluded, and we think such exclusion was correct. That such a question would have been improper under the old rule as to the examination of jurors is conceded. It is claimed, however, that the statute, which provides that opinions shall not disqualify if the court finds certain facts, has changed the rule, and several authorities are cited which sustain this proposition. We, however, are not well enough satisfied with the reasoning of these cases to justify us in reversing the long-standing practice of the courts of this territory and state; and

we think that it is not necessary to add another to the numerous side issues that have to be examined in the trial of a cause.

The testimony elicited from the witness Morrisett was called for by the course of the defense in calling out the conversation as to which he testified, and, a part of the conversation being in, the jury were entitled to the whole of it; and, on principle, it is immaterial which one of the parties to the conversation is called to prove it.

The instructions were voluminous, and defendant alleges error as to several parts of the same. That part of the instruction most relied upon by defendant as ground for reversal, and which we think most likely to have been prejudicial to defendant, is as follows: "You are to consider the testimony in regard to all these different writings that have been offered here as simply a circumstance which you are to judge of in the light of your own experience as business men, and as men of affairs, for whatever weight you consider it entitled to as being decisive or otherwise in this case. The mere uttering of a forged instrument is of itself a circumstance from which knowledge of its falsity may be presumed. I mean by that, if you find from the testimony that this particular draft described in the indictment was forged, that is, falsified, and that it was uttered, that is, passed, by the defendant, you have got a right to presume from these facts that he knew that it was forged at the time of passing it; but that presumption is not conclusive; it is not binding as against other testimony in the case. If these facts stand alone, without being met by other testimony in the case, you could rest upon that presumption; but, as I have said, it is not conclusive. It is open to the defendant to contradict or explain the fact of his having guilty knowledge;" and we shall examine only this one, as our reasoning as to this will apply with greater force as to the other instructions given. If the above-quoted instruction stood alone it might be open to objection, as thus construed it is possible that the jury would have been justified in believing that a *prima facie* case having been made out by the prosecution, they could only look to the defendant's testimony to rebut the case so made by the prosecution; but when this instruction is examined in the light of all the others given, we are not satisfied that the jury could have been misled by it. The instruction, taken as a whole, we think, fairly states the law applicable to the evidence introduced at the trial. It is doubtless true that there are isolated sentences in several parts of the charge which in themselves are objectionable, and it is probable that the instructions taken as a whole intimated to the jury the opinion of the trial judge as to the value of some portions of the evidence; yet, as it clearly and fully gave the jury to understand that the facts were exclusively for them, we do not think that such intimation alone would justify a reversal of the judgment. The instruction above quoted, when interpreted in the light of all, as above stated, could mean nothing more than that, if the

jury were satisfied that defendant had uttered the draft in question, and that it was forged as claimed, such utterance would be a circumstance in the case from which the jury would be warranted in finding a guilty knowledge; if, in fact, their minds were convinced beyond a reasonable doubt by such circumstance, and that, being so convinced, they would be warranted in convicting the defendant, provided that, when they examined such circumstance in the light of all the proofs, such conviction beyond a reasonable doubt still existed in their minds; and thus construed we think it correctly stated the law, for while it is true that the cases are not numerous where the bare possession of a single forged instrument has been held to warrant a presumption of guilty knowledge, yet the cases are numerous where the possession of three or four bank bills has been held sufficient to justify such presumption, and it is clear to any person of common understanding that it would be more reasonable to require an explanation of the possession of a single draft like the one in question than it would of three or four or even ten bank bills of ordinary size; for while even a prudent man who handles large sums of money might be utterly unable to show where any one of ten, or even a hundred, five-dollar bills came from, there are very few men whose transactions are such that a \$2,500-draft passes through their hands without their being able to show conclusively from whom they received it.

The instructions as to what constitutes a reasonable doubt were more favorable to defendant than the law required, and from the whole case, as presented by the record, we are of the opinion that the defendant had a fair trial, and that no substantial error to his prejudice has been made to appear. The judgment and sentence of the lower court must be affirmed, and the cause remanded for further proceedings. All concur.

#### KELLY v. DALLES CITY.

(Supreme Court of Oregon. May 23, 1890.)

#### PUBLIC LANDS—DONATION CLAIMS—MILITARY RESERVATIONS.

1. The right to take a donation land claim under the act of congress of September 27, 1850, creating the office of surveyor general of the public lands in Oregon, and to provide for the survey thereof, and to make donation to settlers, did not attach to any tract or parcel of land selected for a military post, or within one mile thereof, unless the residence and cultivation of the claim were commenced previous to the selection. The settlement of the donation claimant upon the land will not, however, be adjudged to have been in violation of the said act where it appears that he duly filed a notification of his claim with the surveyor general, made proof of residence and cultivation in accordance with the provisions of the said act, and that the same were duly received and acted upon by the land department, unless it is shown by competent proof that the selection was duly made prior to the settlement, although the land adjoining the claim was occupied at the time by United States troops as a military post.

2. Where a qualified claimant under said act of congress duly made a settlement upon the public domain, and filed a notification with the sur-

veyor general claiming a parcel of land described therein as a donation claim under the act, *held*, that neither the secretary of war nor the president had authority to select the land as a military reservation without his relinquishment thereof, or making him due compensation therefor.

(*Syllabus by the Court.*)

Appeal from circuit court, Wasco county; J. H. Bird, Judge.

The appellant commenced a suit in said court to have the respondent decreed to be the holder of the legal title to certain land in trust for appellant, and to execute a deed of conveyance of all its rights, title, and interest therein to appellant, with such other and further relief as he might be entitled to in equity. He alleged in his complaint that on the 22d day of November, 1853, one Winson D. Bigelow, being then a resident and settler upon a certain tract of land in Oregon, and duly qualified to enter the same as a donation claim under the act of congress approved September 27, 1850, commonly known as the "Donation Law," filed with the surveyor general of Oregon a notice, in writing, setting forth his claim to the benefits of the fourth section of said act of congress, and wherein he notified said surveyor general of the tract of land claimed by him, described as accurately as the same could be done in advance of the public surveys thereof; that said Bigelow personally resided upon and cultivated the said tract of land continuously from the 1st day of November, 1853, the time of said settlement thereon, to the 16th day of February, 1860, and within three months after the survey was made by the United States thereof, as a part of the public lands, he notified the register and receiver of the proper land-office of the precise tract of land claimed by him, and made his final proof of his said residence and cultivation, and of his having in all respects complied with the provisions of said act of congress, and the amendments thereto, so as to entitle him to a donation of said tract of land; that afterwards, on the 5th day of May, 1861, the United States issued to said Bigelow a patent for all of said land, except a portion thereof embraced in a patent which was wrongfully issued by the United States to the Missionary Society of the Methodist Episcopal Church on the 9th day of July, 1875, also except a portion thereof which is embraced in what is known as the "Harney Military Reservation;" that appellant, by direct and mesne conveyance from the said Bigelow, succeeded to his title to that portion of the donation claim which lies between the western boundary thereof and what is known as the "U. S. Military Reservation" and "Fort Dalles," as established by Brig. Gen. Harney in the year 1859, which last-described land is the parcel of land in controversy; that said military reservation, established in 1859, adjoined what was then the southern boundary line of Dalles City, the respondent herein; that the eastern boundary line of said Harney Military Reservation, commencing at the northeastern corner thereof, runs thence S., 13 deg. 30 min. W., 19.16 chains, where it intersects and crosses the western boundary of the Bigelow claim, and, continuing on in

the same course,—S., 13 deg. 30 min. W., runs 53 chains from said point of intersection upon the said donation claim, and running thence N., 66 deg. 34 min. W., 17 chains, where it recrosses the said western boundary of the donation claim, and thereby includes in said military reservation about 44½ acres of land belonging to appellant; that appellant is the equitable owner of said 44½ acres of land, and that the legal title thereof is in the respondent by virtue of a grant made under an act of congress entitled "An act to provide for the disposition of useless military reservations," approved February 24, 1871, and entitled to a conveyance of the legal title from the respondent. The respondent filed an answer to the said complaint, denying all the allegations therein contained, and for a further answer averred that no part of said land was subject to be taken as a donation claim, for the reason that, at the time of the alleged settlement and filing thereof, it was a part of a duly authorized and established military reservation known as "Fort Dalles," which included 10 miles square, was established by the president of the United States in 1848, and remained unchanged until some time after the alleged settlement of the said Bigelow, and at the time thereof was actually occupied as such building, parade, and other grounds, a part of which was inclosed, and said inclosure included said grounds and the lands in controversy; that the east line of the part inclosed was commonly known as, and called, the eastern boundary line of the reservation; that in 1853 the said 10-mile reservation was reduced by the proper authorities to one mile square, the eastern boundary line of which reduced reservation conformed in all respects with the eastern boundary line of the part of the 10-mile reservation, which was used for the particular purposes mentioned, and which was the most valuable and desirable part thereof. The respondent also charges in his said answer that the patent issued to said Bigelow was obtained by fraud and misrepresentation in certain particulars therein specified. Respondent further alleged that whatever interest it may have in said tract of land was obtained in the year 1871, since which time it has had the sole, exclusive, and notorious possession of every part thereof, and that neither the appellant, nor any of his grantors, have ever been seised or possessed of any part of it for a period of more than 10 years prior to the commencement of this suit. The appellant filed a reply to the new matter contained in the answer, denying the same. The case was heard upon depositions, proofs, and exhibits, upon which the circuit court found that the appellant had failed to sustain the allegations of his complaint, and thereupon decreed that it be dismissed, which is the decree appealed from.

J. K. Kelly, appellant, *pro se.* F. P. Mays, for respondent.

THAYER, C. J., (*after stating the facts as above.*) The decision of this case turns mainly upon the question as to whether the land claimed by the said Winson D.

Bigelow as a donation claim was subject to be taken as such under said act of congress of September 27, 1850. Said Bigelow was doubtless a qualified person to take a claim under said act, and, so far as I am able to discover, performed all the conditions and requirements necessary under it to entitle him to the benefit of its provisions. But it is earnestly contended on the part of respondent's counsel that the claim would not attach to the parcel of land included in his notification for the reason that it was a part of a tract selected for a military post, or at least was within one mile of land reserved for the governmental purposes, and therefore invalid.

The history of the case shows that on January 29, 1848, the then secretary of war, the Hon. W. L. Marcy, made and published an order that the commanding officer of the military stations established in the route to Oregon make a reserve of 10 miles square around the same, and cause it to be surveyed and divided off into suitable portions, the boundaries of which to be clearly marked by natural or other objects, and indicated by numbers on a map to be prepared for the convenience of future reference. A copy of this order was inclosed by the adjutant general of the United States, on February 2, 1848, to Lieut. Col. C. Wharton, first dragoons, commanding at Fort Leavenworth, directing him to furnish every commander of a post that might be established with a copy of the said order, and to enjoin upon him a strict compliance with its requirements. That on June 22, 1850, Col. Loring, commanding the eleventh military department, at Fort Vancouver, O. T., made a special order to the effect that Brevet Maj. S. S. Tucker, mounted riflemen, should, in establishing the military post at the Dalles of the Columbia river, make a military reservation of 10 miles square; that he cause it to be surveyed by an officer of his command, and designate its limits by prominent natural objects, if any, and strong posts; that a plat of the reservation be sent to head-quarters, at Vancouver. A survey and map were introduced in evidence at the hearing, purporting to be a survey and map of a 10-mile military reservation at the Dalles, and to have been made by George C. Bomford, surveyor, in 1852. Upon this map was indorsed the following certificate: "This survey of the military reservation at this post was made by Mr. Geo. C. Bomford under a contract made with him on the 10th of September, 1852, by 1st Lieut. John B. Gibson, 1st artillery, then in command of this post, acting under the order of Br'v't Brig. Gen. E. A. Hitchcock, commanding the Pacific Division, Hd. Qrs. Dalles of the Columbia river, Oregon Ter'y, 31st October, 1852. [Signed] B. ALVORN, Capt., Br'v't Major U. S. A., Com'd'g." It further appears that on the 18th day of May, 1854, the then secretary of war, Hon. Jefferson Davis, made and published an order as follows: "War Department, Washington, May 18th, 1854. Gen. John E. Wool, Com'g Dept. of the Pacific—Sir: It is represented to this department that a reservation of ten miles square has been

made for military purposes at the Dalles of the Columbia, and that possession of this tract is claimed by the military authorities to the exclusion of persons claiming parts thereof. You will please cause a tract of not exceeding six hundred and forty acres to be selected for the use of the post, avoiding, as far as consistent with the public interest, all interference with private claims, and cause the limits thereof to be properly marked. You will also please have a plat thereof made and forwarded to this department, with such a description of the tract that it can be platted in its proper position on the maps of the public lands. The selection of this tract being made carefully, and after full examination by competent officers, you will cause the commanding officer to relinquish possession of any other lands held at that place. Should the reservation include the improvements of any settler made previous to the reservation, you will cause the value thereof to be ascertained, if possible, in a manner satisfactory to the owner, and report the amount, in detail, to this department. Very respectfully, your obedient servant, JEFF'N DAVIS, Sec'y of War." The appellant concedes that, in pursuance of this last order of the war department, a military reservation was duly established at the Dalles of the Columbia, but contends that no such reservation was established there prior to that time.

It appears that said Bigelow, on the 22d day of November, 1853, filed with the then surveyor general of Oregon a notification of his claim to a donation of 320 acres of land under said act of congress of September 27, 1850, in which the boundaries of said claim were as follows: "Beginning at a point on the south bank of the Columbia river, at a point where William C. Laughlin's west line intersects the Columbia river, running thence south, 32° 30' west, 105 chains; thence east 72 chains; thence north 52 chains; thence west 15 chains; thence north, 36 degrees 50 minutes east, to the place of beginning; containing 320 acres, as appears by the annexed diagram." Appended to said notification were filed notes purporting to be of a survey of said claim made September 4, 1853, by Justin Chaneworth. These notes were recorded in the land-office at Oregon City, October 6, 1853, and described the said claim as follows: "Beginning at the south-western corner of W. C. Laughlin's claim; thence south, 32 degrees 30 minutes, adjoining the military reservation, including Fort Dalles, two hundred and ten two pole chains; witness oak 18 inches in dia. 6; thence 144 chains to the southern boundary of John A. Simms' claim, 13 chains north from the south-western corner; witness oak 12 inches in dia.; thence along said boundary 107 to the north-western corner of said claim; thence west along the south boundary of Laughlin's claim 30 ch. to the south-western corner; thence along the western boundary of said claim 73 ch. to the place of beginning." A plat was drawn in the margin of said field-notes, indicating the shape of the claim; and accompanying the said notification and field-notes was the affidavit of the said Bigelow to the effect

that he was a white settler on the public lands, in that he arrived in said territory on the — day of October, 184—, and was a resident thereof on and before the 1st day of December, 1850; that he was a native-born citizen of the United States; that he was born in Massachusetts in 1823; and that he personally resided upon, and cultivated, that part of the public lands particularly described in his notification continuously from the 2d day of November, 1853, to the 16th day of February, 1860, and that he was not a married man. It further appears that, at the time of filing the said notification, the lands upon which it was filed were unsurveyed lands of the United States, and that the same were not surveyed until February 4, 1860. That on the 16th day of February, 1860, said Bigelow filed with the surveyor general of Oregon a notification of his claim to a donation of 820 acres of land, in which he described the same as "beginning at the north-west corner of the claim in section 3, 48.92 chains, west 4.83 chains, south of the corner of fractional sections 2 and 3; thence south 36.50 chains; thence east 16.25 chains; thence south 49.47 chains; thence west 71.02 chains; thence N., 32 degrees 30 minutes east, 101.82 chains, to the place of beginning." That said notification was accompanied by the affidavit of the said Bigelow, in the form of settler's oath, upon final proof and cultivation of the claim. Also the affidavits of two witnesses as to such settlement and cultivation thereof as required by said act of congress.

There is testimony in the case tending to prove that, at about the time said Bigelow filed his original notification, Lieut. Montgomery, of the fourth infantry, was then stationed at the Dalles Military Post by order of Brevet Maj. Alvord, who was in command of the post, surveyed a line from the north-west corner of the McLaughlin donation claim one mile south, which was recognized as the eastern line of said reservation, and that it coincided with the west line of Bigelow's donation claim; that subsequently, in the year 1854 or 1855, Maj. Rains, then in command at the post, caused a new survey of the reservation to be made, changing the line established by Montgomery, and threw off a portion of it on the north for a town-site. It further appears that on the 1st day of January, 1859, certain parties petitioned the honorable secretary of war to relinquish to Dalles City that part of the said reservation lying between the first bluff and the Columbia river, and the bluff of rocks on the west bank of Mill creek and the line of the reservation, together with that portion lying east of a line extending Second street south to a point parallel with the southern boundary of said city, and that on the 2d day of September, 1859, Acting Secretary of War Drinkard made an order authorizing the commanding officer of the department of Oregon, at his discretion, to reduce the limits of the said reservation so as to leave the land referred to by the petitioners unoccupied; that the reserve, not exceeding one mile square, and including all the public buildings, should then be accurately surveyed, and the necessary plat and notes forwarded to the adjutant

general's office, in order that it might be formally set apart for military purposes. The matter was referred to the commanding general by the assistant adjutant general, September 17, 1859. In pursuance of which order, Gen. Harney ordered said reservation to be so surveyed, plats and notes to be transmitted to his office to be forwarded to the adjutant general, that the reservation might be formally set apart for military purposes; that the northern limits of the reserve should not extend beyond the first bluff from the Columbia river, and, should no inconvenience be found to arise to the military service when running the lines, the prolongation of Second street of the town of Dalles should mark the eastern boundary; and Brevet Second Lieut. Joseph Dixon, corps of topographical engineers, was assigned to the execution of the duty. On the 20th day of December, 1859, said Joseph Dixon reported that he had completed the survey, and also the triplicate maps of the reservation. Under this proceeding the limits of the said reservation seem to have been definitely established. It will be seen from an inspection of the maps and reports of the surveys that the east line of the reservation, as established by Lieut. Dixon, is the same as that attempted to be established by Maj. Rains. They differ, however, in their extent north. The former one "does not extend beyond the upper edge of the first bluff from the Columbia river," while the latter, traced from south to north, continues to the "most eastern extremity of the rock at the mouth of Mill creek." They also differ in their extent south; the Rains line stopping "at a rock on the brow of the bluff marked with a cross," and the Dixon line extending several chains further south. Whether the said east line of said reservation was changed by the Rains and Dixon survey in its termini and course from the line thereof as surveyed and located by Lieut. Montgomery is a material question in the question between the parties.

It is claimed by appellant, and the evidence tends to show, that Lieut. Montgomery established the initial point of the line at the north-west corner of the Laughlin donation claim, and ran from thence S., 32 deg. 30 min. W., one mile, while it is shown that Maj. Rains established the initial point of the eastern boundary of the reservation at the most eastern extremity of the rock at the mouth of Mill creek, and ran from thence south, 14 deg. 23 min. W., 64 pole chains and 30 links to a certain point indicated upon the map prepared by him. The starting-point of the Rains and Dixon east boundary line of the reservation, regarded as a continuous line, is some distance west from that of the Montgomery line, but its bearing west is 18 degrees 7 minutes less than that of the latter, in consequence of which it cuts across the same, and its southern terminus is some distance further east than that of the Montgomery line at its southern extremity. This resulted in extending the eastern boundary of the southerly portion of the reservation onto Bigelow's donation claim as described in his notification; and the territory between said two lines,

south from the point where the Rains and Dixon line cuts across the Montgomery line, constitutes the premises in controversy.

It further appears that at the time Bigelow filed his notification, and made his final proof, the Missionary Society of the M. E. Church made a claim to about 90 acres off the northern and part of the western portion thereof. The claim of the said society was based upon an alleged occupancy of the land as a missionary station at the time of the establishment of the territorial government of Oregon under the act of congress of August 14, 1848, by virtue of a clause in the first section thereof which provides "that the title to the land, not exceeding 640 acres, now occupied as missionary stations among the Indian tribes in said territory, etc., be confirmed and established in the religious \* \* \* societies to which said missionary stations, respectively, belong;" that the matter was contested in the land-office, and was finally decided by the secretary of the interior in favor of the latter, and a patent to the said 90 acres was thereafter, and on the 9th day of July, 1875, issued to it, and afterwards, and on the 5th day of May, 1881, a patent was issued to the said Bigelow for the said claim, except the portion thereof patented to the said missionary society, and the portion included between the said lines, as before mentioned. It further appears that in September, 1877, two suits were commenced against the said missionary society—one of them by James K. Kelly, Aaron E. Wait, and Orlando Humason, and the other by said Kelly and Wait—to test its rights under the said patent as against the claim of the said Bigelow to the land included in his said donation claim; the plaintiffs in the respective suits claiming under him, the said Bigelow. These suits were removed to the United States circuit court for the district of Oregon, where they were tried, and a decree rendered to the effect that the said missionary society was the trustee for the plaintiffs therein of the legal title to the said land, and that it convey the land to them; that an appeal was taken from the said decree to the supreme court of the United States, and was there duly affirmed; the said last-mentioned court holding that the record clearly showed a full compliance by Bigelow with the law, and established his right to the land in controversy, which he afterwards conveyed to the appellees in the cases. The evidence herein shows that in November, 1862, said Bigelow conveyed to appellant and said Wait the undivided one-third part of his said donation claim, except such portion thereof as he had previously sold, and that in December, 1864, he conveyed to said Humason the undivided two-thirds of the claim, subject to the same exception, and that since said time, and before the commencement of this suit, the appellant had acquired Wait's interest therein, and all the interest conveyed to Humason.

The allegation in the complaint that the land in controversy in this suit was claimed by the respondent, Dalles City, by virtue of an alleged purchase from the United States under the act of congress

approved February 24, 1871, entitled "An act to provide for the disposition of useless military reservations," seems to be sustained by the proofs in the case, although the respondent's counsel strongly contended to the contrary at the hearing. Said counsel insisted that the said act, of itself, was not sufficient to confer the legal title upon the respondent, and that there was no proof in the case that the latter had complied with its terms. I have not the act before me, and my only recollections of its terms are that it granted to the respondent certain lands, including the premises in question, upon the payment of five dollars an acre therefor. Whether the act is sufficient to convey the legal title to the land to the respondent without proof of the payment by the latter of the five dollars an acre therefor may be somewhat questionable; but I find among the exhibits in the case of Kelly v. Pike, which the parties herein stipulated should be used as evidence in this case, the following: "U. S. Land-Office, Oregon, May 12th, 1881. It is hereby certified that the records of this office show that by the act of February 24th, 1871, authorities of Dalles City, Oregon, were allowed to make cash entry No. 1161 at Oregon City land-office on April 8, 1872. Part N. W.  $\frac{1}{4}$  and part of S. W.  $\frac{1}{4}$  sec. 3, and part of N. E.  $\frac{1}{4}$ , and part of S. E.  $\frac{1}{4}$  sec. 4, and part N. E.  $\frac{1}{4}$  sec. 9, and N. W.  $\frac{1}{4}$  sec. 10, all in township 1 N., of R. 18 E., W. M., containing 162.51 acres, at five dollars per acre, \$812.55, and paid therefor, on said April 8, 1872, at the rate of \$5 per acre. [Signed] F. A. McDONALD, Register." Attached to this is a certificate in the usual form by the said register, as register of the United States land-office at the Dalles, Or., to the effect that he had compared the same with the original entries made in the records of that office in said matter, in the purchase of the land by Dalles City, and that it was a true and complete copy thereof, and the whole thereof, together with a map of the same. And to which was appended a small map or plat showing the location of the premises.

The counsel for the respondent has interposed several other objections to the appellant's right of recovery herein; but it seems to me that the question suggested in the outset, as to whether the land claimed by Bigelow could be lawfully taken as a donation claim, is the only one which in any wise is doubtful. If the land claimed by Bigelow was at the time he filed his first notification a part of a military reservation, he had no legal right to settle thereon, and attempt to take it as a donation claim under said act of congress of September 27, 1850, as section 14 of said act reserves such portions of the public lands as may be designated under the authority of the president of the United States for forts, magazines, arsenals, dock-yards, and other needful public uses, from the operation of the act, and section 9 of said act provides that such claim shall not attach to any tract or parcel of land selected for a military post, or within one mile thereof, or to any other land reserved for governmental purposes, unless the residence and cultivation thereof shall have



commenced previous to the selection or reservation of the same for such purposes. The legality of the attempt upon the part of Bigelow to take the said donation claim depends, therefore, upon the fact whether, on the 2d day of November, 1853, the date of his settlement, the land claimed by him had been designated under the authority of the president of the United States for the purposes mentioned, or had been selected for a military post, or was within one mile thereof, or had been reserved for governmental purposes. It cannot be maintained from the proof that a military reserve of 10 miles square was ever established at the point in question. No authority was shown for locating any such reservation at that place. The order of secretary Marcy was only to the effect "that the commanding officer of the military stations established on the route to Oregon should make a reserve of ten miles square around the same," etc. The order was directed to the commanding officer of military stations which had been established, and established on the route to Oregon. It had no reference to stations of that character which were to be established at a particular locality in Oregon. The establishment of such a station required a special order under the authority of the president of the United States; and, before we can conclude that any military station was established at the Dalles, it must appear that such an order was promulgated by his authority. The adjutant general, Mr. R. Jones, in referring the matter to Col. Wharton, used, it is true, the words, "to be established on Oregon route." But that was not the order made by the honorable secretary of war. The order of Col. Loring to Maj. S. S. Tucker, that he would, "in the establishing of the military post at the Dalles of the Columbia river, make a military reservation of ten miles square," does not appear to have been made in accordance with any authority competent to select land for a military post; and the subsequent order of the then secretary of war, Jefferson Davis, dated May 13, 1854, indicated that none had been given, although he recognized the fact that a reservation of 10 miles square had been made for military purposes at the Dalles of the Columbia, and that possession of such tract was claimed by the military authorities to the exclusion of persons claiming parts thereof. The inference to be drawn from the proofs in the case is that the military authorities located a site at the Dalles of the Columbia for a military post; that they entered into occupation of it with the expectation that a tract or parcel of land would ultimately be selected by the president of the United States at that point for such purpose. Until such time, its limits could not be defined and fixed. It was, doubtless, in view of such selection being made that Bomford, in pursuance of a contract with Lieut. Gibson, surveyed the tract of land shown upon the map prepared by him October 31, 1852, and that the surveys and maps before referred to were made. This work was all done without any authority from the president except the survey and map made by Lieut. Dixon. That

work was done by acting secretary of war, Hon. W. R. Drinkard. The order made by the latter dated September 22, 1859, after authorizing the commanding officer of the department, at his discretion, to reduce the limits of the reservation, etc., directed that the reserve, not exceeding one mile square, and including all the public buildings, be accurately surveyed, and the necessary plat and notes forwarded to the adjutant general's office at Washington, in order that it might be formally set apart for military purposes. This order was referred to the commanding general of the department, Gen. Harney, for execution, who assigned Lieut. Dixon to execute the duty, and subsequently forwarded the map of the military reserve at Fort Dalles, as so laid off, to the adjutant general at Washington City, D. C.

It is apparent that until this time the site of the reservation was not regarded as having been authoritatively established. If it had been, Bigelow, Laughlin, and Simms would not have been likely to have taken donation claims in so close proximity to it, nor the surveyor general of Oregon have allowed their notifications thereon to be filed in his office, and proof made of their compliance with the provisions of the donation law. Bigelow certainly knew he could not take a donation claim upon a military reservation, nor within one mile of a military fort duly established as such; and it is not probable that he attempted to do so, and highly improbable that the land department would permit it to be done. The fact that he obtained a patent to the larger part of the claim notified upon, and that his grantees established in the United States courts that, by virtue of his settlement, residence, and cultivation, he was entitled in equity, under the donation act, to the part thereof patented to the Missionary Society of the M. E. Church, are very convincing proofs that his settlement was lawful, which could not have been the case if the site for the post had been formally set apart by the proper department for military purposes; and, if his settlement were lawful under the said act, his claim could not be rightfully encroached upon by the secretary of war or the president, any more than it could be rightfully claimed by the missionary society under the decision of the secretary of the interior, and the patent issued in accordance therewith. The settlement, and compliance with the law authorizing it, secured to Bigelow and his grantees a vested right in the claim notified upon, of which they cannot be deprived by the exercise of any power of the government, for any purpose, without payment of just compensation. Nor did the secretary of war, acting under the authority of the president, have power to include in the said reservation any part of the claim of the said Bigelow after his settlement thereon, and the filing of his notification, if the settlement were legally made, without his relinquishment thereof, or making to him such compensation therefor. The part of the donation claim included in what is known as the "Harney Reservation," as surveyed and platted by Lieut. Dixon, equitably belongs, in

my opinion, to the appellant as grantee directly and indirectly, from said Bigelow; and he is entitled to the relief prayed for in his complaint. I think, however, that as the respondent, Dalles City, has paid the United States, at the rate of five dollars per acre, for the land in controversy, it should not be required to pay costs and disbursements herein, but that the appellant should be required to pay all disbursements in this court and in the circuit court. A decree will be entered herein in accordance with the principles of this opinion.

### MITCHELL v. CAMPBELL.

(Supreme Court of Oregon. May 7, 1890.)

EJECTMENT—PLEADING—ADMINISTRATORS—SALES BY ORDER OF COURT—STATUTES—ENACTMENT.

1. Under the Code of Civil Procedure of this state it is only necessary for the plaintiff, in an action to recover the possession of real property, to set forth in his complaint the nature of his estate in the property, whether in fee, for life, or a term of years; if for life, for whose life; if for a term of years, the duration thereof; and to allege that he is entitled to the possession of the property, and that the defendant wrongfully withholds the same from him, to his damage in the sum claimed by him. It is also necessary to describe the property with sufficient certainty to enable the possession thereof to be delivered, in case a recovery be had.

2. The defendant must deny the allegations of the complaint which he desires to controvert, and if he claims that the property belongs to him or another, or claim any license or right to the possession thereof, he must set forth the nature and duration of such estate or license or right with the certainty and particularity required in the complaint, which really is all the facts that need be pleaded in the complaint and answer.

3. A sale of real property belonging to the estate of a deceased person, made by an executor or administrator thereof, under an order of a county court sitting in probate, and having jurisdiction over the estate, is not necessarily void, although the petition for the order of sale, the citation to the heirs, and the service of the citation are defective.

4. Such defects, under the curative acts of 1874 and 1878, should be disregarded where the property sold at such sale has been purchased for a valuable consideration which has been paid by the purchaser to the executor or administrator or his successor in good faith, and the sale has not been set aside, but has been confirmed or acquiesced in by the court.

5. The legislature has no power to make valid, by a retroactive statute, that which is inherently a nullity, nor render a sale of property efficacious when made in manner which it had no power to authorize; but when the sale is void merely in consequence of a failure to comply with the conditions upon which the power to make it was delegated by the legislature, and which it could have dispensed with in the beginning, and the sale been valid, it can by the adoption of such a statute legalize it.

6. After an act of the legislature has been in force many years, and recognized and acted upon by the courts in numerous instances, without any question having been made as to the manner of its passage, the court will regard it as having been duly adopted, and will not look into the journals of the two houses of the legislature in order to ascertain whether the bill for the act was read the number of times required by the constitution, or whether amendments proposed in one house were adopted by the other.

7. The act of the legislative assembly of the state, entitled "An act to amend sections four and

seventeen of chapter one of the Code of Civil Procedure, relating to the time for the commencement of actions to recover the possession of real property," approved October 17, 1878, limits such time to 10 years only in case the party entitled to commence the action labor under none of the disabilities specified therein, one of which is that the party at the time the cause of action accrued was a married woman.

8. When a plaintiff, a married woman, brought an action against a defendant to recover the possession of certain real property, claiming to be the owner in fee of five-ninths thereof, four of the ninths by purchase from certain heirs to the property, the other ninth by inheritance, and alleged that the other four-ninths belonged to certain other heirs of the estate; and the defendant set up as a defense adverse possession of the property; and it appeared that none of the heirs to the estate were under any legal disability except the plaintiff, who was such married woman at the time her right of action accrued, and during all the time of the adverse possession,—*held*, that the plaintiff was entitled to the full period of 15 years in which to commence the action to recover the ninth interest inherited by her, but that 10 years' adverse possession was a sufficient time to bar the right to recover any of the other interests in the property; and that an instruction of the court upon the trial of the action, that 10 years' adverse possession was sufficient to bar the plaintiff's right of recovery without exception in regard to the ninth interest inherited, was error. *Held, further*, that while the error affected only said ninth interest, yet it could not be corrected on appeal without a reversal of the entire judgment and directing a new trial. *Held, also*, that adverse possession of real property for the period prescribed by the statute of limitations vests a perfect title in the possessor as against the former holders of the title. The decision upon the point in *Parker v. Metzger*, 12 Or. 409, 7 Pac. Rep. 518, approved.

(Syllabus by the Court.)

Appeal from circuit court, Union county; JAMES A. FEE, Judge.

The appellant commenced an action in the said circuit court to recover possession of certain real property, consisting of a tract of land situated in said county of Union, claiming to be the owner in fee of an undivided five-ninths interest therein as tenant in common with four other parties named in the complaint, who were alleged to be the owners of the other four-ninths thereof. The complaint contained two counts, both of which relate to the same subject-matter, and allege but one cause of action. An answer was filed on the part of the respondent which contained a denial of the material allegations alleged in the complaint, and also several defenses of new matter pleaded to the respective counts; the first of which defenses was an alleged ownership on the part of the respondent of the property in controversy. The second one was that the appellant's cause of action did not accrue within the period prescribed by the statute of limitations. The third one was adverse possession of the property by the respondent for more than 16 years. The fourth one was that the property belonged to the estate of one P. M. Curry, who died in said county about the year 1868; that in the course of the administration of his estate it was sold at administrator's sale under an order of the county court of said county, in due course of administration; that one F. T. Dick became the purchaser thereof at the price of \$605, bidden therefor;

that the sale was confirmed by the said county court, and a deed executed to the said Dick, and that the respondent derived title through mesne conveyances from him in good faith; and that more than five years had elapsed since said sale. And the fifth one was that the appellant ought not to be admitted to allege ownership of, and right to possession of, said property, by reason of the facts set forth in the fourth ground of defense. The appellant, after filing a motion and a demurrer to said answer, which were overruled by the court, filed a reply to the several defenses of new matter set forth in the said answer. The first reply filed by the appellant was to the effect that the said defenses were based upon the act of the legislative assembly of the state of Oregon entitled "An act to amend sections four and seventeen of chapter one of the Code of Civil Procedure, relating to the time for the commencement of actions to recover the possession of real property," approved October 17, 1878, (Laws 1878, p. 21,) which act the appellant alleged was void upon the ground that it was not read by sections or otherwise on three several days in the state senate, nor were the rules requiring such reading suspended; that certain proposed amendments to said act, made in the senate, were not constitutionally concurred in by the house of representatives, nor such amendments passed by the house; that the title to the act was not read as required by the constitution, nor passed by the legislature. To this reply the respondent interposed a general demurrer, which was sustained by the court. The appellant thereupon, by leave of the court, filed a reply to the defenses referred to, denying all the material allegations therein set forth, except the one alleging that more than five years had elapsed since said administrator sold the property; and, further replying, alleged that appellant, on and prior to the 2d day of October, 1869, and ever since had been, a married woman; also that the respondent was the administrator of the estate of said P. M. Curry, and as such fraudulently and corruptly caused and procured fictitious claims to be allowed by the said county court in his own favor, for the purpose of involving the same, and of cheating and defrauding the heirs to the estate, including appellant, out of said land, and vesting a colorable title thereto in himself; that he obtained the possession thereof while acting as administrator of the estate, and while in such possession of the land obtained a pretended colorable title to the same by such fraud; also that the proceedings under which the sale by the administrator was made, copies of which were exhibited, were irregular, and insufficient to authorize such sale; and the appellant alleged, also, many other fraudulent acts committed by the respondent in the management of the said estate as administrator thereof. The issues between the parties, after having been made up as mentioned, were tried by a jury, who returned a verdict in favor of the respondent, which was to the effect that the appellant was not the owner of any interest in the lands described in the complaint,

nor entitled to the possession thereof, upon which verdict the judgment appealed from was entered.

T. H. Crawford and J. W. Shelton, for appellant. James D. Slater, for respondent.

THAYER, C. J., (after stating the facts as above.) The issues in this case are too prolix. A large amount of the labor bestowed thereon was unnecessary, and served no purpose, except to obscure the real points of contention between the parties. In an action to recover the possession of real property under the Code of this state, the plaintiff is required to set forth the nature of his estate in the property, whether in fee, for life, or a term of years, and for whose life, and the duration of such term, and that he is entitled to the possession thereof, and that the defendant wrongfully withholds the same from him, to his damage in such sum as may be therein claimed. The complaint must describe the property with sufficient certainty to enable the possession thereof to be delivered in case a recovery be had. The defendant may controvert the allegations of the complaint, and if he claim that the property belongs to him or to another, or claim any license or right to the possession thereof, he must plead it in his answer, and set forth the nature and duration of such estate or license or right to the possession with the certainty and particularity required in the complaint. This, substantially, is all that is required to be pleaded in that character of actions; all other matters being redundant, and not necessary to be spread upon the record.

Counsel for the appellant have urged a number of points herein as error, and have cited a great many authorities to sustain them; but it seems to me that the main question in the case to be tried, and which was tried in the circuit court, was whether or not the appellant's action was barred by the statute of limitations. The respondent's counsel does not, so far as I can discover, contend that the probate proceedings under which the property was sold at administrator's sale were strictly in conformity with the statute, although he insists that the sale was made in good faith, and that the funds realized therefrom were honestly applied in the payment of debts existing against the estate of the intestate, and that the irregularities and defects in said proceedings were of such a character as would require the courts, under the curative statutes of 1874 and 1878, to disregard them. The effect of these statutes upon sales of real property by administrators, under irregular proceedings, has not been determined by any adjudication of this court which has come to my knowledge; but it seems to me that they have an important bearing upon the decision regarding the validity of such sales when they are made in good faith, for the purpose of paying legal claims against the estate administered upon. No one will contend that the legislature has power to make valid that which inherently is a nullity, or render a sale efficacious when made in a manner which it had no power to authorize. Where, however, the

sale is void merely in consequence of a failure of those having the direction of it to observe conditions imposed by the legislature itself, and which it could have dispensed with in the beginning, and the sale have been valid, I do not see why it could not by a retroactive act cure the defect. Section 3 of the act of 1878, entitled "An act to cure defects in deeds heretofore made to real property that are defective in execution or acknowledgment, and to cure defects in judicial sales of real property and sales of lands by executors and administrators," provides as follows. "All sales by executors and administrators of their decedents' real property in this state to purchasers for a valuable consideration, which has been paid by such purchasers to such executors or administrators of their successors in good faith, and such sales shall not have been set aside by the county or probate court, but shall have been confirmed or acquiesced in by such county or probate court, shall be sufficient to sustain an executor's or administrator's deed to such purchaser for such real property; and, in case such deed shall not have been given, shall entitle such purchaser to such deed, and such deed shall be sufficient to such purchaser," to entitle such purchaser to "all the title that such decedent had in said real property; and all irregularities in obtaining the order of the court for such sale, and all irregularities in making or conducting the same by such executor or administrator, shall be disregarded." Laws 1878, p. 82. And section one of the act of 1874, entitled "An act for the relief of purchasers of real estate at sales made by administrators or executors," provides: "When any real estate has been heretofore or shall be hereafter sold by any executor or administrator under or by virtue of any license or order of any county court in this state, and said sale shall have been approved by said county court, and the purchaser shall have paid the purchase money for the same, and said sale shall have been made in good faith in order to provide for payment of the claims against said estate, and the executor or administrator shall have failed or neglected to make or execute any deed conveying such real estate to such purchaser, or if from mistake or omission in said deed, or defect in its execution, the same shall be inoperative, and the period of five years shall have elapsed after the making of such sale, then, in such case, all such sales shall be, and are hereby, confirmed and approved, notwithstanding any irregularities or informalities in the proceedings prior to said sale." Laws 1874, p. 92.

These acts, according to my view, are wholesome regulations of law, and the heirs to the property sold have no grounds for complaint on account of the enforcement of their provisions. The title of the heirs to the property is subject to the paramount right of the government to direct its disposition, if necessary, for the purpose of liquidating existing claims against the estate of the decedent. The heirs' title vests in them by operation of law, but is subject to such right of disposition. If, therefore, the property is sold under an

order of the probate court, by a duly appointed and qualified executor or administrator, for the purposes mentioned, and a valuable consideration has been paid therefor by the purchaser in good faith, the heirs are not deprived of any vested right; although the conditions upon which the general statute authorized the sale to be made were not strictly complied with. Under the general statute, the executor or administrator, in order to obtain a license to sell real property belonging to the estate of the decedent, must file a petition containing certain facts. The probate court must thereupon issue a citation to the heirs to show cause why the property should not be sold to pay claims against the estate, which must be returned with proof that it had been served in the manner prescribed by statute. In proceedings of that character, a defect in the petition, citation, or in the proof of the service of the citation will, under the general statute, render the sale a nullity; and although an order were made in due form to sell the property, and it were sold for its full value by the executor or administrator, and the proceeds were received by him and applied in good faith to the payment of the debts against the estate, which are charged by law upon the property, yet the heirs could reclaim it freed from such charge. For the purposes, therefore, of preventing such flagrant injustice, the said curative acts were passed. And it cannot be maintained that they were adopted in order to obviate the effect of mere informalities. The legislature, for the purpose of preserving to the heirs their inheritance, provided that certain prerequisites should be observed as a condition to the right of the representative to legally sell it. The effect of the said provision was that a sale made without a compliance with such prerequisites was void, and in order to prevent such consequence, in a certain class of cases, the said curative statutes were adopted. Their object evidently was to render valid sales made under the circumstances specified in the sections of said acts above set out, which would otherwise have been void. It was to prevent injustice, which is ample apology for upholding that character of legislation. The view I have endeavored to indicate herein is much better expressed in a note by Mr. Brightley appended to the decision in the case of *Wilkinson v. Leland*, 2 Pet. (3d Ed.) 627, as follows: "The legislature has power to validate a prior acknowledgment of a deed or mortgage, (*Journey v. Gibson*, 56 Pa. St. 57,) or to validate a void contract, (*Watson v. Mercer*, 8 Pet. 88,) such as the prior conveyance of a married woman, (*Joan's Appeal*, 57 Pa. St. 369.) To the objection that such laws violate vested rights of property, it has been forcibly answered that there can be no vested right to do wrong. Claims contrary to justice and equity cannot be regarded as of that character; consent to remedy the wrong is to be presumed. The only right taken away is the right dishonestly to repudiate an honest contract or conveyance to the injury of the other party. Even where no remedy could be had in the courts, the vested right is generally unat-

tended with the slightest equity. *Randall v. Kreiger*, 23 Wall. 149."

If the construction of the two acts suggested, which is obviously in accordance with the intention of the legislature, be correct, and the power to provide that a sale by an executor or administrator of the real property of the decedent shall be regarded valid, which under the existing law would have been deemed a nullity, reside in that body, then all the principal exceptions relied on by the appellant's counsel, aside from those relating to the statute of limitations, may easily be disposed of. That the power to validate a sale in such cases, which in legal effect was void, is within the province of legislative functions, is fully sustained by *Wilkinson v. Leland*, supra. Judge STORY, who delivered the opinion of the court in that case, at page 657 says: "The question then arises whether the act of 1792"—referring to an act of the legislature of Rhode Island—"involves any such exercise of power,"—power to divest the vested rights of property, and transfer them, without the assent of the parties. "It is admitted that the title of an heir by descent in the real estate of his ancestor, and of a devisee in an estate unconditionally devised to him, is, upon the death of the party under whom he claimed, immediately devolved upon him, and he acquires a vested estate. But this, though true in a general sense, still leaves his title incumbered with all the liens which have been created by the party in his life-time, or by the law at his decease. It is not an unqualified, though it be a vested, interest, and it confers no title, except to what remains after every such lien is discharged. In the present case, the devisee under the will of Jonathan Jenckes, without doubt, took a vested estate in fee in the land in Rhode Island. But it was an estate still subject to all the qualifications and liens which the laws of that state annexed to those lands. It is not sufficient to entitle the heirs of the devisee now to recover, to establish the fact that the estate so vested has been divested, but that it has been divested in a manner inconsistent with the principles of law." Again, at pages 660, 661, he says: "What, then, are the objections to the act of 1792? First, it is said that it divests vested rights of property. But it has been already shown that it divests no such rights, except in favor of existing liens of paramount obligation, and that the estate was vested in the devisee expressly subject to such rights. Then, again, it is said to be an act of judicial authority, which the legislature was not competent to exercise at all, or, if it could exercise it, it could be only after due notice to all the parties in interest, and a hearing and decree. We do not think that the act is to be considered as a judicial act, but as an exercise of legislation. It purports to be a legislative resolution, and not a decree. As to notice, if it were necessary, (and it certainly would be wise and convenient to give notice, where extraordinary efforts of legislation are resorted to, which touch private rights,) it might well be presumed, after the lapse of more than 30 years, and the acquiescence of the parties for the same

period, that such notice was actually given. But, by the general laws of Rhode Island upon this subject, no notice is required to be, or is in practice, given to heirs or devisees, in cases of sales of this nature; and it would be strange if the legislature might not do, without notice, the same act which it would delegate authority to another to do without notice. If the legislature had authorized a future sale by the executrix for the payment of debts, it is not easy to perceive any sound objection to it. There is nothing in the nature of the act which requires that it should be performed by a judicial tribunal, or that it should be performed by a delegate instead of the legislature itself. It is remedial in its nature, to give effect to existing rights. But it is said that this is a retrospective act, which gives validity to a void transaction. Admitting that it does so, still it does not follow that it may not be within the scope of the legislative authority in a government like that of Rhode Island, if it does not divest settled rights of property. A sale had already been made by the executrix under a void authority, but in entire good faith, (for it is not attempted to be impeached for fraud,) and the proceeds, constituting a fund for the payment of creditors, were ready to be distributed as soon as the sale was made effectual to pass the title. It is but common justice to presume that the legislature was satisfied that the sale was *bona fide*, and for the full value of the estate. No creditors have ever attempted to disturb it. The sale, then, was ratified by the legislature, not to destroy existing rights, but to effectuate them, and in a manner beneficial to the parties. We cannot say that this is an excess of legislative power, unless we are prepared to say that, in a state not having a written constitution, acts of legislation having a retrospective operation are void as to all persons not assenting thereto, even though they may be for beneficial purposes, and to enforce existing rights. We think that this cannot be assumed, as a general principle, by courts of justice. The present case is not so strong in its circumstances as that of *Calder v. Bull*, 3 Dall. 386, or *Rice v. Parkman*, 16 Mass. 226, in both of which the resolves of the legislature were held to be constitutional."

Whether the sale of the property in controversy by the administrator to the said F. T. Dick was made under circumstances that would bring the transaction within the provisions of said two acts was a question of fact proper to be submitted to the jury, and they may be presumed to have found by their verdict that the sale was made under such circumstances. And the appellant's counsel do not appear to claim that the proofs in the case were not sufficient to warrant the jury in so finding. Said counsel do, however, claim that the petition for the order to sell and the citation to the heirs were defective; but that, in view of the said curative acts, would not necessarily render the sale void. They, however, contend that the acts do not cure jurisdictional defects, and cite, among other authorities, the language of Mr. Cooley upon the subject in his work on

Constitutional Limitations, (page 457, 5th Ed.) where he says: "A retrospective statute curing defects in legal proceedings, where they are in their nature irregularities only, and do not extend to matters of jurisdiction, is not void on constitutional grounds, unless expressly forbidden." But the learned author did not mean by this that defects arising from a failure to set forth the necessary facts prescribed by statute, to confer jurisdiction upon a court in regard to a particular matter, could not be cured by subsequent legislation, where the court had general jurisdiction of the subject. He says, at page 458, same work: "The rule applicable to cases of this description is substantially the following: If the thing wanting, or which failed to be done, and which constitutes the defect in the proceedings, is something the necessity for which the legislature might have dispensed with by prior statute, then it is not beyond the power of the legislature to dispense with it by subsequent statute. And if the irregularity consists in doing some act, or in the mode or manner of doing some act, which the legislature might have made immaterial by prior law, it is equally competent to make the same immaterial by a subsequent law." Also at page 471: "But the healing statute must in all cases be confined to validating acts which the legislature might previously have authorized. It cannot make good retrospectively acts or contracts which it had and could have no power to permit or sanction in advance." This last clause indicates very clearly what the author did mean by "curing defects in legal proceedings, where they do not extend to matters of jurisdiction." He evidently meant matters not within the jurisdiction of the legislature. That body could not cure a defect arising from a failure to serve process in an action or suit in accordance with some prescribed mode, as it has no power to authorize an adjudication against the party to the action or suit without such service being made. A failure to acquire original jurisdiction over the person or property of a defendant in any case would doubtless come under the same rule. But where a court obtains jurisdiction over a special subject-matter given to it by law, as probate courts do over the estates of deceased persons after an executor or administrator of the estate has been duly appointed and qualified, and the court has proceeded to exercise its jurisdiction in regard to a matter connected therewith without having complied with the mode which the legislature had prescribed, but which it could have dispensed with, then the proceeding of the court, although irregular and defective, could be confirmed by subsequent legislation when justice would thereby be promoted.

The appellant's counsel also contend that the circuit court committed error in refusing to give the following instruction: "If you find from the evidence that the defendant entered the premises without title, the fact that defendant has acquired by adverse possession the title of the tenants in common, who were not made parties to this action, does not preclude the

plaintiff from recovering the whole of the premises." Said counsel attempt to sustain their contention that said instruction should have been given upon the authority of *Chipman v. Hastings*, 50 Cal. 310, which seems to be in point. The supreme court of California held in that case that the question as to whether the title of the tenants in common, who were not parties, had been defeated by such an adverse possession on the part of the defendant, could be determined only in an action to which they were parties. The view taken by that court must have been that the legal title to the property was not acquired by adverse possession; that such possession would merely operate as a bar to the right of entry of the owner of the fee. Such, however, is not the rule in this state. This court held in *Parker v. Metzger*, 12 Or. 409, 7 Pac. Rep. 518, that adverse possession of real estate for the period prescribed by the statute of limitations vested a perfect title in the possessor as against the former holder of the title and all the world, and that he was entitled to all the remedies which were incident to possession under a written title. According to that view, the respondent's tenure in the property was as certain under the proof of an adverse holding during the period prescribed by the statute of limitations as it would have been under an absolute deed of conveyance from such tenants in common.

The point claimed by appellant's counsel, that the act of the legislative assembly of the state approved October 17, 1878, purporting to be an amendment to sections 4 and 17 of chapter 1 of the Code of Civil Procedure, was void for the reasons stated in the appellant's reply, cannot, at this late date, be entertained. Said act had stood upon the statute books for nearly 10 years, and been recognized and acted upon by the courts in a number of cases without being questioned. Under such circumstances, it should be presumed to have been adopted in conformity with the requirements of the constitution. If the matter had been brought to the attention of the court soon after the act was passed, it would have been proper to have inquired as to whether the bill was read in the respective houses the number of times, and in the manner, prescribed by that instrument, and as to whether proposed amendments to it in one of the houses had been regularly concurred in by the other; but, after having been acquiesced in for so great a length of time, it would be highly detrimental to public interest to determine it invalid in consequence of an informality in its enactment, when it is evidently the express will of the legislature. The effect of the act was to change the time for the commencement of an action to recover the possession of real property from 20 years to 10 years, which has always been regarded by the community as a wholesome regulation, and I do not think that it would be either just or politic to decide it a nullity at this late date, even if the journals of the two houses of the legislative assembly do fail to show the facts claimed by appellant's counsel. But the act of 1878, in prescribing

the period of 10 years in which an action shall be brought to recover real property, provides, among other things, that if any person entitled to bring the action be, at the time the cause of action accrued, a married woman, the time of such disability shall not be a part of the time limited for the commencement of the action; but the period within which the action shall be brought shall not be extended more than five years by such disability, nor be extended longer than one year after it ceases. The appellant herein, being a married woman at the time her alleged cause of action for the recovery of the ninth interest in the real property in question inherited by her arose, was entitled to the full period of 15 years in which to commence her action to recover such interest, while she was only entitled to the period of 10 years in which to commence her action for the recovery of the other interests conveyed to her, assuming, what seems to be conceded by her counsel, that the statute had begun to run against the respective owners of those interests at the time they were so conveyed. The disability of the appellant was set forth in her reply to the defense of the statute of limitations contained in the answer, to which the respondent filed a demurrer, and the court sustained it, and subsequently instructed the jury to the effect that 10 years' adverse possession by the respondent was sufficient to bar her right of recovery, without making any exception in favor of the interest inherited by her. This was error. The holding should have been that the appellant was entitled to the period of 15 years in which to commence the action to recover that particular interest. I doubt very much whether the error, as a matter of fact, prejudiced the appellant's case, as the jury very probably found that the sale of the property by the administrator, under the curative acts, was valid; but the appellant was entitled to the benefit of the law, and may have been prejudiced by its having been withheld from her.

Another contention of appellant's counsel is that the statute does not begin to run in such a case until the administration of the estate has fully terminated. I have no doubt but that the statute does not begin to run while the property is subject to the possession of the administrator for the purposes of being applied to the satisfaction of claims against the estate, as such possession is not inconsistent with the title of the heir. Where, however, the administrator has sold the property under an order of the probate court, the sale been confirmed, and a deed executed to the purchaser, as was done in this case, the matter stands differently. There the sale, and possession of the purchaser under it, operate as divestment of the heir, and the right claimed by the purchaser under the sale is in hostility to his title; and if such possession be open, notorious, and continuous, under a claim of ownership of the property, during the period prescribed by the statute of limitations applicable in such cases, it will ripen into a valid title, although it were wrongful in the outset. I am unable to discover

any error in the record herein aside from the one suggested. The judgment appealed from should therefore be affirmed, except so far as it affects the ninth interest claimed by the appellant in the property as heir at law of P. M. Curry, deceased; but as to that interest it should be reversed, and the appellant have a new trial concerning her right to recover it, in view of the law that her claim thereto, if she has any, is only barred by an adverse possession for the period of 15 years; and such would be the order of the court if it had the legal right to make it. The court, however, is compelled to reverse the judgment *in toto*, and remand the cause to the circuit court for a new trial in accordance with the principles of this decision. Such will therefore be the order.

WILKIN *et al.* v. ELLENSBURG WATER CO.  
(Supreme Court of Washington. May 19, 1890.)

#### CONSTRUCTION OF CONTRACT.

Under a contract for construction of a ditch at 16 cents "per cubic yard of earth or gravel necessarily moved," except a portion between certain points, which is to be at 18 cents per cubic yard, extra compensation cannot be recovered on the ground that "cement gravel" or hard pan was found between those points, and was not contemplated by the parties in fixing the price.

Error to district court, fourth district.

*Parsons, Cadwell & Bausman*, for plaintiffs in error. *D. Gaby and Turner, Foster & Turner*, for defendant in error.

ANDERS, C. J. At the time of the commencement of this action Frank H. Wilkin and Thomas J. Wilson, plaintiffs below, were copartners, doing business under the firm name of Wilkins & Wilson, and defendant in error was a corporation duly organized under the laws of the then territory of Washington. On the 14th day of October, 1886, plaintiffs and defendant entered into the following agreement in writing: "Know all men by these presents, that the Ellensburg Water Company has this day let unto F. H. Wilkin and T. J. Wilson a contract to construct certain portions of ditch for said company, as follows: Commencing at station forty-three and running to station seventy-seven; again commencing at station ninety-four and running to station ninety-eight; again commencing at station three hundred and ninety-four and running to station four hundred and forty-eight; again commencing at station one hundred and sixty-six and running to station one hundred and eighty-four; again commencing east of the tunnel and constructing one mile between that and the Nannum creek; again commencing east of McCausland's place and constructing the ditch to its termination. All ditch above the tunnel to be twelve feet wide on the bottom and fifteen feet wide at the top, or thirty inches above grade, and thirty inches deep; and all east of the tunnel to be eight feet wide on the bottom and eleven feet wide at the top, and thirty inches deep, all of the ditch to be built according to the regular surveyed grade. All earth or ground excavated to be placed on the lower side of the ditch, not nearer than one foot from edge



of ditch, and all fills on lowerside of ditch to be two feet higher than the usual bank; and in no instance is the bank on the lower side of the ditch to be cut down lower than thirty inches above the bottom of the ditch. Work to be commenced on that portion of the ditch above the tunnel immediately, and be finished by the first day of June, A. D. 1887, and the balance on east to be finished by June 1, 1888. In consideration of the said F. H. Wilkin and T. J. Wilson performing the agreements and constructing said ditch as above specified, the said Ellensburg Water Company agree to pay F. H. Wilkin and T. J. Wilson, or their assigns, sixteen cents per cubic yard of earth or gravel necessarily moved in constructing all that portion of the ditch west or above the tunnel specified in the agreement, except that portion between stations one hundred and sixty-six and one hundred and eighty-four, inclusive, which last amount is to be paid for at the rate of eighteen cents per cubic yard necessarily removed. On that portion of the contract west of the tunnel the company are to make measurements and estimates every thirty days while the work is being done, and make payments in cash as fast as accepted. That portion of the contract east of the tunnel to be paid for in stock of the company at par, at the rate of ten cents per cubic yard of earth, and sixteen cents for gravel and rock, necessarily moved in constructing said portion of the ditch, whenever each contract is completed."

It was conceded upon the argument that plaintiff constructed the ditch according to the terms of the contract, and that defendant had paid them on account thereof an amount equal to the contract price, as specified. But plaintiffs in error contend that in prosecuting the work they encountered a large amount of "cement gravel" or hard pan, between stations 166 and 184, as well as at a place called the "Abbott Ranch," and that "cement gravel" was not contemplated by the parties to the contract, or the price to be paid for removing it specified in the agreement, and that therefore they are entitled to recover what it was reasonably worth to excavate it, regardless of the terms of the contract as to price. We will here state that plaintiffs in error on the argument waived all claim to recover extra compensation for work done at points other than between stations 166 and 184, inclusive. It appears that, at the time plaintiffs entered into the contract with defendant, they knew, or might have known, that the work between the stations last mentioned would be more difficult to perform than elsewhere. They must be presumed to have known it, for they asked, and defendant agreed to pay, a higher price for that particular portion than for the remainder. They also knew that one Parmenter had previously undertaken the work, but had abandoned it. We cannot therefore say that excavating "cement gravel" was not contemplated by the parties to the contract, or that plaintiffs are entitled to recover compensation for removing it beyond the price specified. On the contrary, we are of the opinion that

the contract price must be the measure of plaintiffs' compensation. Plaintiffs may have made a bad bargain, but, if so, it is their misfortune, and they can be afforded no relief in this action. See 1 Redf. R. R. \*417; Canal Co. v. Dubois, 15 Wend. 87; Sherman v. Mayor, 1 N. Y. 316.

Several errors are assigned and relied on by the learned counsel for plaintiffs in error as grounds of reversal of the judgment of the court below, but, as we are clearly of the opinion that the judgment was right, the errors, if any, were without prejudice to plaintiffs. The judgment of the court below is affirmed.

STILES, SCOTT, and HOYT, JJ., concur.  
DUNBAR, J., not sitting.

SEAMAN *et al.* v. HAX *et al.*, (two cases.)  
(Supreme Court of Colorado. May 16, 1890.)

MORTGAGOR AND MORTGAGEE—ESTOPPEL.

A mortgagee who levies on, and sells under execution, the mortgagor's equity of redemption, to satisfy an independent debt, is not estopped from enforcing his mortgage lien also against the mortgagor or his creditors; for, such interest being subject to levy and sale by Gen. St. Colo. 1883, § 1883, the mortgagee may subject it to an independent debt as well as a stranger.

Appeal from district court, Arapahoe county.

In the year 1882, Catherine Caspar, being indebted to appellees in the sum of \$2,000, executed four promissory notes for \$500 each, payable in three, six, nine, and twelve months, respectively. To secure these notes, she also gave a mortgage upon eight lots in the city of Denver, which mortgage was at the time duly filed for record with the clerk and recorder of Arapahoe county. At the time of the foregoing transaction, four of the said lots were already incumbered by a trust-deed. The four lots thus incumbered were afterwards sold to satisfy the indebtedness secured by the said trust-deed. In 1884, appellees obtained a judgment against said Caspar for a separate and distinct indebtedness. In July of said year, under said judgment, execution was duly levied upon the four lots covered by the mortgage. They were sold at sheriff's sale; and Gartner, one of the appellees, became the purchaser thereof. In August, 1884, the mortgage notes being due and unpaid, appellees began suit to obtain judgment thereon, and to foreclose their mortgage against the property. In 1885, while said foreclosure suit was still pending, Bentley, who was impleaded in the present suit, obtained a judgment against Caspar for the sum of \$85.53. After the expiration of six months from the date of the execution sale above mentioned, at which Gartner became the purchaser, Bentley, as an execution creditor, redeemed, under the statute, from that sale. His execution was then levied upon the property. It was sold by the sheriff. He became the purchaser, and ultimately received his sheriff's deed. In September, 1886, a judgment of foreclosure was rendered in the mortgage proceedings, and the real estate ordered sold, in pursuance thereto, to satisfy the debt, then

amounting to \$2,893.75. On the 12th of October, 1886, Bentley sold and conveyed by deed to appellant Seaman the interest acquired by him under his sheriff's deed. On the 25th of October, 1886, the present action was instituted; Caspar, Seaman, and Bentley being made parties thereto. The object was to obtain a decree which should in effect remove the cloud cast upon the title by reason of the Bentley execution sale and the Seaman purchase, so that upon sale under the decree of foreclosure the purchaser's title might be perfect. Defendants Bentley and Caspar disclaimed. Defendant Seaman answered. A demurrer to his second defense was sustained, and from the order thus entered, the first of these appeals was taken, under the act of 1885, no longer in force. Afterwards, Seaman having in the meantime amended his answer, upon motion the court found in favor of appellees on the pleadings, and rendered a decree accordingly. To review the latter proceedings and decree the second appeal was taken. Gen. St. Colo. § 1883, provides that every interest in land, legal and equitable, shall be subject to levy and sale under execution.

*J. A. Bentley*, for appellant. *O. B. Liddell*, for appellees.

HELM, C. J. These appeals are considered together, as the view of the court, hereafter expressed, is decisive of both. It is unnecessary to critically analyze the pleadings. The answer contains many supposed denials, and it also sets up supposed affirmative defenses. But we shall address ourselves to the question whether or not the facts that appear in the pleadings without contradiction warranted the decree rendered by the court below. If we shall discover that the decree was proper under the pleadings as they stood at the time it was rendered, no error was committed by the court in its ruling upon the demurrer to the second defense.

Though the mortgage originally described eight lots, the sale to a third party in satisfaction of a prior trust-deed entirely divested of its value the mortgagees' lien upon the four lots sold; and their security was narrowed to the remaining four lots, which alone are the subject of the present controversy. Appellant relies upon the doctrine of equitable estoppel, *i. e.*, an estoppel created by the conduct of appellees. His position is that appellees, by levying execution upon and selling the mortgaged lots, waived their rights to enforce the mortgage lien as against him or his vendor; but he cites no case that recognizes such waiver or estoppel under circumstances similar to those before us. By statute in this state, the mortgagor's interest in land is expressly made subject to execution sale; and there is no doubt but that a stranger to the mortgage might have levied his execution upon the premises in question, and have sold the same, to satisfy his judgment. The mortgage lien would not, in such case, have been divested, and the purchaser would have taken title subject thereto. To all intents and purposes, after issue of the sheriff's deed he would step into the shoes of the mortgagor. We know of no reason why

the mortgagee has not the same rights in this respect as other creditors. Suppose his mortgage debt is not due. The mere fact that he happens to have a prior lien, given to secure a different debt which has not yet matured, would not, either upon principle or authority, prevent his proceeding in the premises as any other judgment creditor. The mortgagee must not make a fraudulent use of his superior lien, secrete its existence, or otherwise mislead others to their disadvantage; but the mere isolated fact that he, instead of another, subjects his mortgagor's remaining interest to judicial sale in satisfaction of an independent debt, does not of itself work the estoppel contended for. The acts of appellees do not constitute a fraud in law; and we scan the record before us in vain for such *indicia* of fraud in fact as will sustain appellant's contention. Appellees do not appear to have done anything, either by word or act, or by omission to speak or act, tending to mislead or deceive appellant. Their mortgage was regular in form. It correctly described the property, and was duly recorded. Thus all parties were visited with constructive notice of its existence, and the lien created thereby. It was not released of record, and nothing was said or done by appellees to fairly justify an inference that the mortgage notes had been paid. On the contrary, the complaint avers that appellant had notice, when he purchased, that the foreclosure suit was pending. The denial that his vendor, Bentley, had "legal notice" thereof, "so as in any way to affect \* \* \* the title derived," etc., was no denial, even as to Bentley. We fail to discover in these transactions the essential elements of an equitable estoppel. Defining such elements, see Bigelow, *Estop.* (2d Ed.) 437; 2 Pom. Eq. Jur. § 805; *Griffith v. Wright*, 6 Colo. 248. The judgments of the court below in both cases are affirmed.

#### MISSOURI PAC. RY. CO. V. CARPENTER.

(*Supreme Court of Kansas.* July 3, 1890.)

#### AUTHORITY OF AGENT—EVIDENCE—INSTRUCTIONS.

1. In an action against a railroad company for damages growing out of alleged negligence on part of the company in complying with a verbal contract between the plaintiff and the company's agent, where the company denies the authority of the agent to make the contract, and there is evidence tending to prove that the agent had no authority to make the contract, it is error for the court to assume that the agent had authority, and so instruct the jury.

2. The question of authority should be submitted to the jury.

(*Syllabus by Strang, C.*)

Commissioners' decision. Error from district court, Chautauqua county; M. G. TROUP, Judge.

*J. H. Richards* and *C. E. Benton*, for plaintiff in error. *Whitney & Donaldson*, for defendant in error.

STRANG, C. G. M. Carpenter, plaintiff below, on the 4th of July, 1887, placed in the yards of the Missouri Pacific Railroad Company at Sedan, Kan., a lot of hogs, preparatory to shipping them. He alleges he made a verbal contract with one Ray,

agent of said company at Sedan, by which Ray agreed to feed and furnish water to said hogs while they were in the yards, sufficient to keep them in good condition; that Ray did not furnish sufficient water to the hogs, by reason of which 11 of them died; that said contract was made with Ray as the agent of the said railroad company; and therefore the railroad company is liable for the loss of the hogs. The company refused to pay for the hogs; and on the 22d day of December, 1887, Carpenter brought his action to recover from the company the value of the hogs, as damages. The case was tried December 31st, and a judgment rendered against the defendant, the Missouri Pacific Railway Company, for \$250 and costs. An appeal was taken to the district court of Chautauqua county, and was there tried on the 9th of March, 1888, by a jury, resulting in a verdict for the plaintiff below for \$125.50. A motion for a new trial followed, which was overruled; and the company brings the case here, asking this court to reverse the judgment of the district court.

Of the errors assigned, the first relates to the instructions of the court, given as follows: "There is some evidence in this case tending to show that the agent of the railroad company had no authority to make the contract which was made in this case; but the court is of the opinion that, whether the agent had such express authority or not from the railroad company, he had implied authority to make such contract, from his general authority as such agent of the defendant at this place. The court is of the opinion that the contract for the care that was to be bestowed upon this stock was such a reasonable one as the agent of the defendant at this place would have the right to make, in and about, and by virtue of, his general authority as the station agent of the railroad company at this place. So that the court, in this case, does not submit to you, as a question of fact in this case, whether the agent had express authority to make this contract or not in this case. I submit to you only the question of fact, whether the contract was made, and whether it was complied with, by this railroad company; and, if not, how much the plaintiff is entitled to recover for the damages that resulted from such failure." These instructions, we think, are erroneous. The judge says: "There is some evidence tending to show that the agent of the railroad company had no authority to make the contract which was made in this case." This statement is hardly as strong as the facts made the evidence, as there is not only a total want of any evidence tending to show that the agent had any authority to make the contract, but positive evidence that he did not. The contract was an oral one, and there was positive evidence that the agent was instructed not to make any contract touching shipments except in writing; and yet the court instructed the jury that the agent had authority to make the contract. The assumption in this instruction was unwarranted. It was not alone an assumption of authority growing out of the character of the

agent's employment with the company, but it was directly in the face of the evidence that the agent was prohibited from making such contracts. The court should at least have submitted the question of authority in the agent to make the contract to the jury. *Gano v. Railway Co.*, 49 Wis. 59, 5 N. W. Rep. 45; *Chapman v. Railway Co.*, 26 Wis. 296; *Voorhees v. Railway Co.*, 30 N. W. Rep. 29; *Railway Co. v. Stults*, 31 Kan. 752, 3 Pac. Rep. 522.

In the last clause of the instructions above copied, the court assumes that damages accrued to the plaintiff below if the jury should find a contract was made, and the defendant below did not comply with it. This assumption is also unwarranted. The court should have left it to the jury to say whether damages followed at all, as well as how much. *Johnston v. Clements*, 25 Kan. 376; *Helthacker v. Fitzhugh*, 41 Kan. 50, 20 Pac. Rep. 465, 41 Kan. 54, 21 Pac. Rep. 782; *Gano v. Railway Co.*, 49 Wis. 59, 5 N. W. Rep. 45.

Complaint is also made that the court erred in rejecting evidence that should have been received. Among other questions asked, to which objections were sustained, were the following: "Question. I will ask you if you don't know you had read the rules and regulations for the transportation of live-stock by the Missouri Pacific Railway Company, in which the authority of the agent was confined strictly to the written or printed live-stock contract, and in which these rules especially stated that he had no authority or power to make any contract other than that contained in the printed contracts?" "Q. And whether you did not know it was the rule and regulation of this company in the shipment of stock, and which was a part of its contracts that you had heretofore made, and which you knew you would be required to make in this case, that the owner of the stock was required to take care of, feed, water, and attend his stock while the same may be in the stock-yards of the railroad company, and that you knew it was the rule and regulation of the company that while awaiting shipment the stock would only be held at the risk of the owners?" The court should have permitted answers to these questions. They related directly to the issue upon the question of the agent's authority to contract with Carpenter, and tended to prove that the agent had no authority to make the contract, and also that Carpenter knew he had no such authority. It was cross-examination, because Carpenter had just testified fully in regard to the contract he alleged he had made with the agent. The defendant below offered to prove by Carpenter, the plaintiff, that he knew, at the time he made the alleged verbal contract with the agent, that it was the rule of the company that the shipper should take care of, feed, water, and attend his stock while in the stock-yards awaiting shipment, and that he knew the agent had no authority to make a contract to waive that portion of the regular contract of shippers. The court sustained an objection to this offer, which we think is error, for reasons above stated. But

the plaintiff, being a witness on the stand when the offer was made, remarked in relation thereto, to the jury: "I don't know that." This statement the defendant below requested the court to withdraw from the jury, which it refused to do. This we think was error, also. The court, having refused the offer, should not have permitted any evidence to go to the jury in relation to it. The statement having been made by the witness to the jury, it should have been withdrawn. For these errors, we recommend that the judgment of the district court be reversed.

PER CURIAM. It is so ordered; all the justices concurring.

MISSOURI PAC. RY. CO. v. GEDNEY.

(Supreme Court of Kansas. July 3, 1890.)

RAILROAD COMPANIES—KILLING STOCK—VIGILANCE.

It is not enough for the engineer and fireman in charge of a railway locomotive and train to merely use diligence in driving animals away that are discovered upon the track, but they should keep a vigilant lookout, and exercise ordinary diligence to frighten away animals that may be discovered approaching, and in dangerous proximity to, the track, by sounding the whistle, ringing the bell, and using the means provided for that purpose.

(Syllabus by the Court.)

Error from district court, Anderson county; A. W. BENSON, Judge.

W. A. Johnson, for plaintiff in error. Kirk & Schoonover, for defendant in error.

JOHNSTON, J. This was an action brought by Harry Gedney to recover for a cow killed by a train of the Missouri Pacific Railway Company at a crossing of a public highway in Anderson county, and resulted in a verdict of \$30 in favor of the plaintiff. The railway company insist that the findings and verdict of the jury are not sustained by the evidence. The cow killed was one of several that were grazing on the highway, near to the crossing on the railroad, on the morning of the accident. Some of them were upon one side of the track and some upon the other, when a freight train, traveling at the rate of 15 miles an hour, passed along the road and over the crossing. Shortly before the train reached the crossing, the cow stepped upon the track, and was struck and killed. The principal question tried was whether those in charge of the train exercised due care, under the circumstances, to avert the injury. The jury found that they did not. It is found that they failed to keep a vigilant lookout for stock or obstructions on the track, and failed to sound the whistle or ring the bell when approaching the crossing, and failed to do that which was necessary in order to avoid a collision. We think there is sufficient evidence in the record to support the findings and verdict. It is true, the jury found that the engineer did not discover the cow going upon the track until the engine was within 20 feet of her, and that the train was then going at the rate of 15 miles an hour, and could not have been stopped after the cow came upon the track, and

before she was struck. It is also true that the engineer and fireman testify that they were vigilant in looking out along the line of the road to see if there were any objects ahead, or animals dangerously proximate to the track; and, further, that they sounded the whistle as they approached the crossing, and as soon as they saw the cow that they reversed the engine, and endeavored to stop the train. The testimony of Gedney, however, is to the effect that the whistle was not sounded, nor any danger signal given, 80 rods from the crossing, nor at any time afterwards before the cow was struck. There is also testimony that the ground was level near the crossing, and that there were no obstructions to prevent the engineer and fireman from seeing the cattle on the side of the track for a distance of half a mile or more, and that, although the cattle were in plain view, and approaching the track, no alarm was given to drive them away from the track. If the engineer and fireman were at their posts, and kept a lookout for obstructions, and an animal not seen by them came suddenly upon the track when there was not sufficient time or opportunity to frighten her away, or where they could not, by ordinary diligence, avoid a collision, the company would not be liable. It is not enough, however, that they used diligence to avert the injury after they saw the cow upon the track. It was their duty to keep a lookout for objects or animals approaching or in dangerous proximity to the track, and if the circumstances indicated that there was danger that they would get upon the track, to use the means which they possessed for driving them away. The sounding of the whistle or other alarm 80 rods from the crossing might not have served the purpose of driving the cattle away from the track, but certainly the sounding of an alarm, as they approached more closely, would have tended to drive the cattle beyond the reach of danger. There was no direct evidence contradicting the testimony of the engineer and fireman that they kept a vigilant outlook for animals or objects on or near the track, but the testimony that the view was unobstructed along the track for the distance of half a mile or more, and that the animals were in plain view, and could have been seen by them for that distance if they had looked, certainly tends to support the finding of the jury that there was negligence in not keeping an outlook ahead of the train. If by a diligent outlook animals approaching or dangerously proximate to the track could have been discovered by the engineer and fireman, their failure to use the ordinary means provided for frightening animals from the track, and to avoid a collision with them, was such negligence as would make the company liable for the injury occasioned. As is stated in *Railway Co. v. Wilson*, 28 Kan. 641: "If the employees of the railroad company could, by the use of ordinary prudence, see, or, seeing the stock on the road, could without danger stop the train and avoid striking the animal, they were required to do so, because the idea is not tolerable that an injury may be inflicted which by ordinary care and dili-

gence may be avoided." The conflict of testimony as to the care and diligence used by the engineer and fireman in respect to keeping an outlook and in sounding an alarm, the topography of the ground near to the crossing, and the proximity of the animals to the track, has been settled by the jury, and under well-worn precedents their finding and verdict upon such testimony must be held conclusive. We think the case was fairly submitted to the jury by the charge of the court, and that no good reasons for a reversal of the judgment exist. Judgment affirmed. All the justices concurring.

MISSOURI PAC. RY. CO. v. HARRELSON *et al.*

(Supreme Court of Kansas. July 3, 1890.)

CONSTITUTIONAL LAW—TITLES OF LAWS—RAILROADS—FENCES.

1. Chapter 154 of the Session Laws of 1885, "An act to compel railroad companies to fence their roads by and through lands inclosed with a lawful fence," is constitutional and valid.

2. The title to an act is sufficient if it indicates clearly, though in general terms, the subject-matter of the legislation. *State v. Barrett*, 27 Kan. 213.

(Syllabus by Green, C.)

Commissioners' decision. Error from district court, Miami county; J. P. HINDMAN, Judge.

W. A. Johnson, for plaintiff in error.  
John C. Sheridan, for defendant in error.

GREEN, C. This case was tried in the court below upon the following stipulation: "It is hereby agreed by and between the parties to this action that a jury trial shall be waived in this case, and the cause be submitted to the court upon the following agreed facts, which shall be all the evidence in the case: It is hereby stipulated and agreed between the parties hereto that N. E. Harrelson is, and was on September 6, 1886, the owner of the south-west quarter of section six, (6,) and the north-west quarter of section seven, (7,) in township number seventeen, (17,) of range twenty-four, (24,) all in Miami county, Kan.; that J. B. Hawthorne is, and was on September 6, 1886, the tenant and occupant of said lands; that on September 6, 1886, said lands were inclosed with a good, sufficient, and lawful fence; that the line of defendant's railroad runs through said lands; that on the 6th day of September, 1886, the plaintiff notified the defendant, in writing, to inclose its said line of railroad through said lands with a lawful fence within sixty days therefrom, and maintain the same; that the defendant did not inclose its line of railroad through said lands with a lawful fence within sixty days from the service of said notice; that on the 14th day of March, 1887, the plaintiff commenced the construction of a good and lawful barbed wire fence along said line of said railroad, through said described lands, and on June 5, 1887, completed the construction of said fence, which entirely inclosed said line of railroad through said described lands; that there are 149 rods of said fence, and that the reasonable cash value for the construction and material of said fence would be fifty

(50) cents a rod; that said defendant has not paid anything to plaintiff for the construction of said fence. It is further agreed that, in case the plaintiff is entitled to recover an attorney fee on this statement of facts, the sum of twenty-five (25) dollars would be a reasonable attorney fee for the prosecution of said action. The defendant denies that it is liable for the payment of an attorney fee, under the facts and law in this case." Judgment was rendered for the plaintiff below.

The constitutionality of chapter 154 of the Session Laws of 1885 is challenged by the plaintiff in error. The claim is first made that the statute in question is unconstitutional and void for the reason that it simply requires the railroad companies to fence their roads through lands inclosed by a lawful fence; that it is for the benefit of the land-owners alone. This is not the only object of the law. Animals straying upon a railroad track are one of the recognized sources of danger to travel; and, with the increased speed of railroad trains, experience amply demonstrates the necessity of inclosing railroad tracks through inclosed fields, as well as elsewhere, with good and sufficient fences; and, to insure safety and protection to the traveling public, all these necessary precautions are demanded. It is not the land-owner alone who is benefited. The railroad company, in obeying the law, protects its passengers and its property interests as well. The protection is threefold. We place the validity of this law upon the broad ground of protection to the passengers who intrust themselves to the care of the railroads. It is the duty of these corporations to give to those who travel in their cars increased safety of life and limb. II, in the judgment of the law-making power of the state, this can be done by requiring the railroad companies to fence their roads, it is but reasonable, and within the power of the state, and they should comply with the legislation. Incidentally the property of the road is protected, as well as the stock of the adjoining owner. In the exercise of the ordinary police powers of the state, it has been held reasonable to require the railroads to fence their tracks, not alone for the protection of the live-stock of the abutting owners. Indeed, the chief object of the statute is the protection to the traveling public against accidents occurring through collision of trains with cattle, and one exercise of the power to require railroads to fence their tracks does not preclude a second regulation of the same kind, providing for other and different fences; and the railroad company cannot relieve itself from the obligation to erect and maintain fences by a contract with abutting owners. *Tied. Lim.* § 194; *Blair v. Railroad Co.*, 20 Wis. 262; *Schmidt v. Railroad Co.*, 23 Wis. 186. In the case of *Railroad Co. v. McClelland*, 25 Ill. 140, the court declared that, when the safety of person and property both demand the fencing of railroads, it is no more than the exercise of a reasonable police regulation to require it, and to impose adequate penalties to secure a compliance; and the imposition of such a duty does not deprive the com-

pany of any of its corporate rights and franchises, as they still exist, and may be exercised, although it may be in a less commodious manner; but, when the public exigencies demand it, they must submit to the regulation, as if required of individuals. But we are not obliged to go beyond our own jurisdiction to find ample authority to uphold such legislation. Mr. Justice BREWER, in speaking for this court in the case of *Railway Co. v. Mower*, 16 Kan. 573, cited numerous authorities to support a similar measure,—the stock law of 1874. The authorities are fully collated and cited in the opinion of the court in that case, and we need only to call attention to them here. This decision has been upheld and approved since 1876, and we see no good reason why the principle settled then should now be disturbed.

Counsel again contend that that portion of section 3 of the act in question which provides for attorney's fees is unconstitutional and void, for the reason that the subject-matter is not clearly expressed in the title. A reference to chapter 94 of the Session Laws of 1874, relating to the killing or wounding of stock by railroad companies, will show that the same penalty and provisions are in that statute as the one in question; and this court has held that section 2 of said chapter 94, giving a reasonable attorney's fee to the plaintiff, in case of recovery, for the prosecution of his suit against the railroad company for the value of stock killed or injured, was constitutional; that it is in the nature of a penalty, and is not beyond the power of the legislature. The title questioned is, "An act to compel railroad companies to fence their roads by and through lands inclosed with a lawful fence." This is sufficiently broad and comprehensive to include the penalties prescribed. It is not necessary that the title to an act should be a synopsis or abstract of the entire act in all its details. It is sufficient if the title indicates clearly, though in general terms, the scope of the act. *State v. Barrett*, 27 Kan. 213. There is no error in the record, and we recommend that the judgment of the court below be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

#### BURK V. BURK.

(Supreme Court of Kansas. July 3, 1890.)

DIVORCE—ADULTERY—EVIDENCE—ADMISSIONS.

1. The admissions of a party against himself are admissible in evidence in an action for a divorce, when it appears that the admissions have not been obtained by connivance, fraud, coercion, or other improper means.

2. Divorce is a remedy protecting the innocent party, and is not intended for cases in which both parties are equally guilty; therefore, where the husband is shown to be guilty of adultery, he cannot have a divorce for adultery committed by the wife.

3. Where an action is brought for divorce upon the ground of adultery, the proof to establish the adultery must be clear, positive, and satisfactory. Although presumptive evidence alone is sufficient to establish the fact of adulterous intercourse, the circumstances must lead to it, not only by fair inference, but as a necessary conclusion. Appear-

ances equally capable of two interpretations, one an innocent one, will not justify the presumption of guilt.

(Syllabus by the Court.)

Error from district court, Linn county; C. O. FRENCH, Judge.

A. A. Harris, Blue & Rich, and James D. Snoddy, for plaintiff in error. Biddle & Smith and John C. Cannon, for defendant in error.

HORTON, C. J. This was an action brought in the court below by O. W. Burk against Texas Burk, his wife, to obtain a divorce on the ground of her adultery. The alleged *particeps criminis* was A. T. Brook. The defendant answered, denying the allegations of her adultery, and making recriminatory allegations of adultery by the plaintiff. The female with whom the plaintiff was charged with having committed adultery was Mrs. Olive Meek. Upon the trial the court granted a divorce to the plaintiff against the defendant on the ground of her adultery. She complains of the judgment.

Section 650 of the Civil Code reads: "Upon the trial of an action for a divorce or for alimony, the court may admit proof of the admissions of the parties to be received in evidence, carefully excluding such as shall appear to have been obtained by connivance, fraud, coercion, or other improper means. Proof of cohabitation, and reputation of the marriage of the parties, may be received as evidence of the marriage; but no divorce shall be granted without proof." Upon the evidence of B. B. Boggess and J. W. Cox, it clearly appears that the plaintiff confessed his adultery as alleged in the answer. The admissions were not obtained by connivance, fraud, coercion, or other improper means; nor were such admissions collusive, or for the purpose of a reconciliation with the wife. The plaintiff was present at the trial as a witness in his own behalf. He did not deny or dispute the admissions. The evidence offered on the trial we deem sufficient to establish his guilt. Divorce is a remedy provided for an innocent party. One shown to be guilty of adultery cannot have a divorce for adultery committed by the other; therefore, as the defendant established her recriminatory or counter charge, the plaintiff was not entitled to any divorce or other relief. It is not claimed that the wife ever condoned the offense of her husband. 5 Amer. & Eng. Enc. Law, 824-826; 2 Bish. Mar. & Div. (6th Ed.) § 80; 2 Greenl. Ev. (15th Ed.) § 52; *Horne v. Horne*, 72 N. C. 530; *Hoffman v. Hoffman*, 43 Mo. 547; *Mattox v. Mattox*, 2 Ohio, 234.

Further, however, it is extremely doubtful whether there was sufficient evidence introduced upon the trial to establish the adultery of the wife. The proof of adultery, in such a case as this, must be clear, positive, and satisfactory. The evidence should show that actual adultery was committed, since nothing short of the carnal act can lay a foundation for divorce for this cause. Evidence simply showing full and frequent opportunity for illicit or carnal intercourse is not alone sufficient to found an inference that the criminal act was committed.

Although presumptive evidence alone is sufficient to establish the fact of adulterous intercourse, the circumstances must lead to it, not only by fair inference, but as a necessary conclusion. Appearances equally capable of two interpretations, one an innocent one, will not justify the presumption of guilt. *Pollock v. Pollock*, 71 N. Y. 137; *Osborne v. Osborne*, 14 Atl. Rep. 217; *Koenig v. Koenig*, 9 Atl. Rep. 750; *Powell v. Powell*, 1 South. Rep. 551; *Williams v. Williams*, 2 S. W. Rep. 823; *Harberger v. Harberger*, 14 Pac. Rep. 70; 2 Bish. Mar. & Div. (6th Ed.) §§ 613-635.

In this case, the evidence showed opportunity between the wife, Texas Burk, and A. T. Brook, but there was no direct proof of the fact of adultery between them. The finding of adultery on the part of the wife is based wholly upon inferences from the fact of opportunity, and from the circumstances thereto attending. No letters from the wife to Brook, or from Brook to the wife, were in evidence. No witnesses testified to having seen any kisses, embraces, or undue familiarity between the wife and Brook. Both the defendant and Brook denied under oath the misconduct alleged, and attempted to explain all the circumstances causing the suspicions of the plaintiff. It is also significant that the plaintiff, until after the separation between himself and wife, never said anything to her about her intimacy with Brook, and never talked with Brook about it. When the plaintiff left the defendant, he was asked "what reason he had for acting that way." He replied, "He didn't know." In view, however, of the adultery of the plaintiff, the evidence offered to establish adultery on the part of the wife need not be discussed at length. We have referred to this only to show that, under the authorities, if the opportunity merely for adultery is proved, there being no evidence of the will to improve it, this does not justify the inference of guilt. It must be further shown that the parties were together under suspicious circumstances, not to be easily accounted for unless they had the corrupt design. *Mayer v. Mayer*, 21 N. J. Eq. 246. The judgment of the district court will be reversed, and the cause remanded. All the justices concurring.

#### MISSOURI PAC. RY. CO. v. HOLCOMB.

(*Supreme Court of Kansas. July 3, 1890.*)

##### CARRIERS OF PASSENGERS—FREIGHT TRAINS—CARE.

1. A railroad company that for years has been in the habit of carrying passengers on one of its local freight trains is required to exercise the highest possible degree of care and diligence to which such trains are susceptible.

2. When the caboose that is usually attached to such a freight train is in the repair shop, and a common box-car, with temporary rude seats, is substituted to accommodate passengers, and the use of such box-car is more dangerous, the degree of care on the part of the company is thereby increased.

(*Syllabus by Simpson, C.*)

Commissioners' decision. Error from district court, Miami county; J. P. HINDMAN, Judge.

W. A. Johnson, for plaintiff in error.

W. R. Wagstaff and John C. Sheridan, for defendant in error.

SIMPSON, C. Catherine A. Holcomb brought her action against the Missouri Pacific Railway Company to recover damages for personal injuries occasioned, as she alleges, by the negligent, careless, and unskillful management of the train upon which she was a passenger. These personal injuries consisted in a fracture of the upper part of the thigh bone, and other serious wounds, caused by the sudden and violent jerking of the car in which she was riding as it started from the station, throwing her with great violence out of her seat and onto the floor, thus producing the injuries complained of. Mrs. Holcomb was a widow, with a family of six children, and at the time of the injury was 55 years old, possessing an unusually strong and vigorous constitution, had not been sick for more than five years, was doing, and for years had been doing, all her own household work and washing without assistance. From the time of the injury up until about the 4th day of July, 1887, she was compelled to and did remain night and day propped up in an easy chair. After that date she became able to lie a part of the time on a couch, then she improved so that she could go about the house on crutches, but not able to ascend stairs, and she remains permanently crippled and unable to do any work, except such as she can do sitting in a chair. At the time of the last trial she had decreased in weight about 50 pounds. The train upon which Mrs. Holcomb received the injury complained of consisted of 36 freight cars, 27 empties, and 9 loaded. It was known as a local freight, scheduled to carry passengers, and had been running at about the same time for several years, carrying passengers. This train usually left Paola, going east, at 1:40 p. m., but on this day (December 10, 1886) it was about two hours behind the regular time. It usually carried more passengers from two stations east of Paola, to and from that point, than the regular passenger train, as the time of its arrival and departure to and from Paola was more convenient to the people living in the eastern part of the county than the regular passenger train. She purchased a ticket from the company's agent at Paola for passage on the train on which she received the injury, paying the regular price charged on all trains between that station and the station of Loupsburg, where she was going. Other passengers going to the two stations east of Paola also bought tickets from the company's agent for passage on this particular train. The regular caboose usually attached to this train was in the repair shop, and an ordinary box-car, fitted with two rough pine seats, covered with caboose cushions, was being used in its place. She went aboard the train at Paola, and took a seat in the box-car at the south-east side of the car, two or three feet from the sliding door on the side. The train ran to Somerset, the first station east of Paola, a distance of six or seven miles. When the train started at Somerset it did so with a violent jerk,



that threw Mrs. Holcomb on the floor of the car near the center, and inflicted the injuries complained of. She was picked up by one of the crew and a passenger and placed in a chair, and when the train stopped at Louisburg was carried in a chair to a carriage and taken to her home. At the time the train started at Somerset, with the "violent jerk" that threw Mrs. Holcomb out of her seat, a brakeman in the car was braced against the side of the car, Reid, a passenger, was holding onto the door with both hands, Huddleson, a passenger, was holding onto an iron hand hold by the side of the door, and Mathers, a passenger, had a hold on the side of the ladder. These persons all testified at the trial, explaining how they were protected from injury by the movement of the train as it started from Somerset. The case was twice tried to a jury, the first trial resulting in a verdict for \$4,643.74. This being set aside, the court sustained a motion for a new trial, and this trial resulted in a verdict for \$5,000 in favor of Mrs. Holcomb.

The following special findings were returned by the jury: "(1) Did the plaintiff, on December 10, 1886, at Paola, Miami county, Kan., get in the rear car of defendant's train No. 188, commonly known as the 'local freight'? Answer. Yes. (2) Did the defendant's ticket and station agent at Paola, Kan., tell the plaintiff on the arrival of said train, 'This is your train,' or words to that effect? A. Yes. (3) Was said train at that time, and had it been for a number of years prior thereto, used for the conveyance of freight and passengers over the defendant's line of railroad to and from Paola and Louisburg in Miami county, Kan., and other points on its said line? A. Yes. (4) Did ladies, as well as others, frequently ride upon said train? A. Yes. (5) Was the rear car of said train the only one used for conveying passengers? A. Yes. (6) Did the defendant's brakeman assist the plaintiff to enter said rear car of said train at Paola, Kan., on December 10, 1886? A. Yes. (7) Was the car the plaintiff so entered an ordinary box-car, with a long seat constructed on and along the wall on each side, which seats were covered with cushions, and which car was then being used instead of the usual caboose run on to the rear end of said train? A. Yes. (8) Was said car plaintiff entered as aforesaid used on said train for about two weeks, in lieu of the said caboose-car, to carry passengers, and did passengers, with the consent of defendant, ride in it during said time it was so used? A. Yes. (8½) Did the conductor of said train, before arriving at Somerset, take up a ticket plaintiff had purchased at the regular price of forty cents from defendant's ticket and station agent at Paola, Kan., for passage from Paola to Louisburg, in Miami county, Kan.? A. Yes. (9) How many of the passengers were aboard of said car when plaintiff's ticket was taken up by the conductor? A. Five or six. (10) While in said car on said 10th day of December, 1886, on the way to Louisburg, without any fault on her part, was she injured by the negligence of the defendant's agents,

or either of them, operating said train? A. Yes. (11) How many other passengers were on or in said car at the time the plaintiff was injured? A. Two or three. (12) At the time plaintiff sustained the injury, was she sitting properly and securely on the seat provided for passengers in the rear car of said train? A. Yes. (13) Was the plaintiff thrown violently from the seat she was sitting upon, upon her side, upon the floor of said car, by the sudden, violent, unnecessary, and negligent jerking of said train in starting the same at Somerset? A. Yes. (14) Was the injury plaintiff sustained on said train at Somerset directly caused by negligence of the defendant's agents, or either of them, in operating or managing said train, and without any negligence on the part of the plaintiff? A. Yes. (14½) By reason of the plaintiff being violently thrown from her seat in said car to the floor, by the negligence of the defendant, in violently and negligently jerking said car in starting said train, was she seriously and permanently injured, and was the upper part of her thigh bone fractured, and other parts of her body bruised and injured? A. Yes, to injury; but uncertain as to fracture. (15) Was the plaintiff, by reason of being thrown to the floor, by the negligent and violent starting of the train, rendered unconscious? A. Yes. (16) How far was plaintiff thrown from her seat by the sudden and violent starting of the train? A. Two or three feet. (17) Could the engineer, by the exercise of reasonable care and prudence, have avoided the violent jerk of the car that threw the plaintiff from her seat to the floor? A. Yes. (18) Was the engineer careless in starting the train at the time the plaintiff was thrown from her seat? A. Yes. (19) Was the train on which plaintiff was injured authorized to carry passengers? A. Yes. (20) By reason of the plaintiff being thrown from her said seat in said train at Somerset, by the negligent and violent starting of the train, did she sustain injuries which have permanently crippled and disabled her? A. Yes. (21) Was the health and constitution of the plaintiff, at the time of the injury, unusually good and vigorous for one of her age, and up to that time had she been able and did she perform the work of her household, consisting of washing, ironing, cooking, sewing, etc., for a family of four to seven persons? A. Yes. (22) Since said injury has she declined very much in flesh, and been unable to work or care for herself without assistance, and is she still in that condition? A. Yes. (23) By reason of said injury, has plaintiff suffered great pain and loss of previous good health? A. Yes. (24) Does the plaintiff still suffer pain resulting from said injury? A. Yes."

The following questions were asked by the railroad company, and answered as follows: "(1) Did the plaintiff go upon one of defendant's freight trains at Paola, to be carried upon said train to Louisburg? Answer. Yes. (2) Was plaintiff riding on one of the defendant's freight trains at the time she received the injuries complained of in this action? A. Yes. (3) When plaintiff went aboard of defendant's

train at Paola, on the 10th day of December, 1886, did she get into a box-car provided with a temporary seat for the use of the trainmen that were engaged in running the freight train? A. Yes. And also used for passengers. (4) Was there any passenger car or caboose in the train that plaintiff took passage upon at Paola for the purpose of riding to Louisville? A. Yes. An improvised caboose. (5) Had the train that plaintiff took passage in at Paola, for the purpose of riding to Louisville, any car intended solely for the carriage of passengers? A. No. (6) If the jury answer the last question in the affirmative, they will please state what kind of a car it was. A. —. (7) Was the plaintiff sitting near the end of the seat constructed of boards that had no guards to prevent her from slipping off in case of a sudden jerk of the car? A. Yes. From one to two feet from end of seat. (8) When the train started up at Somerset, did it start up with a jerk? [Answer inserted here 'Yes.'] And did plaintiff slip off the end of the seat, and fall on the floor of the car, and strike the floor with the back part of her thigh? A. No. Thrown off. (9) Was the injury received by the plaintiff caused by reason of the failure of the defendant to provide a safe car for the carriage of passengers? A. No. (10) Was the failure of the railway company to provide a safe car, furnished with convenient and well-arranged seats, the cause of the injury to plaintiff? A. No. (11) Did the plaintiff make any effort to save herself from falling off the seat when she heard the rattle of the cars in pulling out the slack? A. Yes. (12) If the jury answers the last question in the affirmative, they will state what effort was made. A. By bracing with her hands. (13) How far was plaintiff lying on the floor from the seat on which she had been sitting? A. Two to three feet. (14) In what direction was plaintiff lying on the floor from the seat where she had been sitting? A. North-west."

The first error complained of was the refusal of the trial court to give the following instruction: "If the jury find from the evidence that the train upon which the plaintiff was riding at the time she received the injury complained of was simply a freight train, and had no passenger coach or caboose for the carriage of passengers; that it was simply provided with a box-car, with improvised seats and benches for the accommodation of the men connected with the train; that they slept in it, and deposited the lamps of the cars and tools that they used in it, and it was not adapted for passengers; and the plaintiff entered the car with the full knowledge of these facts, and paid fare to be carried on said train, the same being only used or intended for the carrying of freight,—then, in the carriage of plaintiff, the defendant was simply a private carrier for hire, and as such carrier, being only a freight train, it was not under the same obligation and responsibility which attaches to common carriers of passengers by rail. The latter undertakes, for hire, to carry all passengers, indifferently, who apply for passage; and the

law for the protection of travelers subjects such carriers to very strict responsibilities. The defendant in this case would not be subject to the stringent obligations and responsibilities of a common carrier of passengers if it did not hold out itself as capable of carrying passengers safely, and had no arrangement of this train for passenger service. It was not required to provide its freight trains with the necessary means of carrying passengers. If the plaintiff knew its condition, and the relation to her when she applied for passage, she therefore took upon herself the risk incident to the mode of conveyance used by defendant. Under these circumstances, the defendant was only required to exercise such care and skill in the management and use of the train as prudent and cautious men, experienced in such business, are accustomed to under similar circumstances."

This instruction totally ignores the fact that this train had for some years been carrying passengers; that the railroad company had sold this passenger a ticket that entitled her to ride on this train; that it was the bounden duty of the company to furnish the passengers a reasonably well equipped car to ride in, and that if, by an accident, the regular caboose usually provided for passengers could not be used, and the improvised box-car used on that occasion was more dangerous to the passenger than the caboose, the degree of care on the part of the company was thereby increased. It cannot be the law that a railroad company furnishing inferior accommodations to its passengers is protected from liability on account of the inferiority. It is the law of this country, as we understand it, that a passenger riding on a freight train is entitled to demand from the railroad company transporting him the exercise of the highest possible degree of care and diligence to which such trains are susceptible. *Railway Co. v. Higgs*, 38 Kan. 375, 16 Pac. Rep. 667. The supreme court of the United States, in the case of *Railroad Co. v. Horst*, 93 U. S. 291, say, (page 295, commencing with the last paragraph on the page:) "Such is the rule of care and diligence laid down by this court in three adjudications where the action was against a carrier of persons. The first was *Railroad Co. v. Derby*, 14 How. 486. The plaintiff was traveling gratuitously on a passenger train. It was said: 'Where carriers undertake to convey passengers by the powerful and dangerous agency of steam, public policy and safety require that they should be held to the greatest possible care and diligence.' 'Any negligence in such case may well deserve the epithet of "gross." The next was *The New World v. King*, 16 How. 469. That was the case of a free passenger carried on a steamer, and injured by the explosion of a boiler. Referring to the rule laid down in the prior case, the court said: 'We desire to reaffirm the doctrine, not only as resting on public policy, but on sound principles of law.' The last case was *Railroad Co. v. Lockwood*, 17 Wall. 357. That was a case, like this, of a passenger accompanying his cattle on a freight train. It was there said: 'The highest degree of

carefulness and diligence is expressly exacted.' This is conclusive as authority upon the subject. But, upon principle, why should not the law be so in this case? Life and limb are as valuable, and there is the same right to safety, in the caboose as in the palace car. The same formidable power gives the traction in both cases. The rule is uniformly applied to passenger trains. The same considerations apply to freight trains. The same dangers are common to both. Such care and diligence are as effectual and as important upon the latter as upon the former, and not more difficult to exercise. There is no reason in the nature of things why the passenger should not be as safe upon one as the other. With proper vigilance on the part of the carrier, he is so. The passenger has no authority upon either, except as to the personal care of himself. The conductor is the animating and controlling spirit of the mechanism employed. The public have no choice but to use it. The standard of duty should be according to the consequences that may ensue from carelessness. The rule of law has its foundation deep in public policy. It is approved by experience, and sanctioned by the plainest principles of reason and justice. It is of great importance that courts of justice should not relax it. The terms in question do not mean all the care and diligence the human mind can conceive of, nor such as will render the transportation free from any possible peril, nor such as would drive the carrier from his business. It does not, for instance, require, with respect to either passenger or freight trains, steel rails and iron or granite cross-ties, because such ties are less liable to decay, and hence safer than those of wood; nor upon freight trains air-brakes, bell-pulls, and a brakeman upon every car; but it does emphatically require everything necessary to the security of the passenger upon either, and reasonably consistent with the business of the carrier and the means of conveyance employed. The language used cannot mislead. It well expresses the vigorous requirement of the law, and ought not to be departed from. The rule is beneficial to both parties. It tends to give protection to the traveler, and warns the carrier against the consequences of delinquency. A lower degree of vigilance than that required would have averted the catastrophe from which this litigation has arisen." A fair application of this rule would reach this case even if the facts were that Mrs. Holcomb was riding on a train that was used exclusively for freight, if the agent of the company had taken her money and given her a seat in a freight-car. But we are dealing with a state of facts here where it appears that this local freight was advertised to carry passengers, and had been doing so for years. The instruction refused, therefore, ignored the facts, and misstated the law. Every instruction asked for by the railroad company, about which they now complain, ignores the fact that this train was advertised to and did carry passengers. It is doubtful if they are good as applied to a freight train that was not in the habit of carrying passengers, but they are certain-

ly not good as applied to this train. A railroad company cannot for years carry passengers on one of their freight trains, and then escape liability for injuries occasioned by negligence or reckless management by denying that the ordinary rules governing common carriers for hire do not apply to their trains of this character. There were no errors committed by the trial court in refusing the instructions asked for by the railroad company. The general charge of the court was unusually liberal to the company in a case of this character. Take these selections from the instructions, and it will be seen that there was no prejudice against the company: "The company may permit passengers to ride upon its freight trains; and, when a person elects to ride as a passenger on a freight train, such passenger assumes all the dangers and discomforts ordinarily and necessarily incident to such mode of travel." "The plaintiff cannot recover for the failure of the company to provide a suitable car." It is asserted that the jury answered the second question submitted by the plaintiff below directly contrary to the evidence, but we find in the record that Reid, a passenger on the train, testifies that he saw the agent point out the train to Mrs. Holcomb, and say to her, "This is your train." The "violent jerk" was the proximate cause of the injuries to Mrs. Holcomb, causing her to be thrown from the seat onto the floor. The locomotive engineer of the train was a witness on behalf of the railroad company, and testified at the trial "that he could have moved the train so slow that you would scarcely see it moving." This is a complete answer to the claim of the company that the injuries were the result of unavoidable accident, and explodes the theory that the starting of a freight train is necessarily accompanied with a series of violent jerks, occasioned by "taking out the slack." The conduct of the engineer, and those in charge of the train, was not only reckless and grossly negligent in the management of the train, but they were also unmindful of the ordinary promptings of human nature to try in some way to alleviate the physical sufferings of a human being. The verdict and judgment are right, abstractly and judicially, and we recommend an affirmance.

PER CURIAM. It is so ordered; all the justices concurring.

GIFFEN V. CITY OF OLATHE *et al.*  
(Supreme Court of Kansas. July 3, 1890.)

DEDICATION—EVIDENCE—PLATS—ACKNOWLEDGMENT.

1. Where a town-site was surveyed, and laid out in lots, blocks, streets, and alleys, and a plat thereof made and lithographed, and distributed among the occupants of said town-site, and one of the lithographed copies of said plat was afterwards recorded in the office of the register of deeds of the county where the town-site was situated, but the same was not acknowledged; and said town-site was pre-empted by the president of a town company, duly incorporated, and a patent issued from the general government to the president of said town company, in trust for the use and benefit of the occupants of said town-site, ac-

cording to their respective interests; and G., an occupant of said town-site, executes and accepts deeds to property upon said town-site, in which the lots are described by number and block, as described in said plat,—*held* that, notwithstanding the fact that said plat was not acknowledged, there was a dedication to the public use of the streets and alleys as shown by the plat, and that the validity of said plat has been recognized by G.

2. Where land in a city was dedicated to public use for streets and alleys, but certain portions of said streets and alleys so dedicated were not needed or used by the public for more than 15 years, *held*, that the authorities of said city might order said streets and alleys opened, and all persons occupying any portion of the same will be presumed to hold them subject to the paramount right of the public.

(*Syllabus by Green, C.*)

Commissioners' decision. Error from district court, Johnson county; J. P. HINDMAN, Judge.

A. Smith Devenney, for plaintiff in error. F. R. Ogg and S. T. Seaton, for defendants in error.

GREEN, C. This was an action for an injunction against the city of Olathe and its officers to restrain them from enforcing certain orders to open portions of certain streets and alleys which had been inclosed by the plaintiff below. The trial court made the following findings of fact: "(1) The court finds that the defendant is a city of the second class, duly incorporated and organized as such under the laws of the state of Kansas. (2) That, in the year 1857, John T. Barton surveyed and laid off the south-east quarter of section 26, and the north-east quarter of section 35, all in township 23, of range 23, in Johnson county, Kan., into lots, blocks, squares, and streets for a town-site, and platted and prepared a map of the same, and designated it as the town-site of Olathe, Johnson county, Kan. (3) That at the time said Barton located on said lands, and commenced surveying and platting the same, there were no other occupants thereon except those interested in the town company, but that, while the same was being surveyed and platted, other parties came and located on said lands with the view of purchasing lots. (4) That said Barton entered said lands at the general land-office at Leecompton, Kansas territory, on the 17th day of May, 1858; the S. E.  $\frac{1}{4}$  of said section 26 (being the quarter section in which the lots, blocks, and streets hereinafter mentioned are all situated) being entered by said Barton as 'president of the Olathe Town-Site Corporation.' (5) That on said 17th day of May, 1858, there were 27 inhabitants on said lands, some on each of said quarter sections. (6) That before the completion of said survey, and the platting of said town-site, said Barton formed a town company of not less than 5 members. (7) That on the 20th day of February, 1857, the legislature of Kansas territory passed the act, offered in evidence, 'to incorporate the city of Olathe.' (8) That afterwards, and about the month of May or June, 1857, the inhabitants of said town-site held a town or city election, and said John T. Barton was elected mayor. (9) That on the 11th day of May, 1858, the legislature of Kansas territory passed the

act, offered in evidence herein, 'incorporating the city of Olathe.' (10) That in the summer of 1857 said John T. Barton had the map of said town-site lithographed, and said town company distributed numerous copies thereof among the inhabitants of said town-site, and throughout the country, and said Barton filed a copy of said map or plat in the office of the register of deeds of Johnson county; but that said copy filed as aforesaid was not acknowledged, and there was no certificate or other evidence thereon that it was filed by said Barton, or any one acting for said town company. (11) That the plats offered in evidence, including the plat filed in the register of deeds office in 1858, are copies of the original plat and map made from the original survey of said town-site by said Barton in 1857. (12) That said town company sold the lots on said town-site by the numbers of the lots and blocks as designated on said plat, and by reference thereto; and that the numbers of the lots and blocks, and the names of the streets, in said city, ever since have been, and now are, the same as designated on said original plat; and that the lots and blocks and streets in said city have uniformly been known and designated as on said original plat. (13) That on the 26th day of March, 1862, the United States issued a patent to the S. E.  $\frac{1}{4}$  of section 26, township 13, of range 23, in Johnson county, Kan., being the  $\frac{1}{4}$  section in which the lands and streets in controversy are situated, to John T. Barton, 'president of the Olathe Town Company, in trust for the several use and benefit of the occupants of the town-site of Olathe, according to their respective interests, and as the proper corporate authority under the town-site act.' (14) That said Barton has not executed any deed or other conveyance of said town-site to said town company. (15) That the proclamation of the president of the United States opening the lands on which said town-site was located for entry and settlement was officially published in the Leecompton Democrat on the 26th day of March, 1858. (16) That at the time of the survey of said town-site, in 1857, as aforesaid, the lots and blocks in said town-site, including the blocks 9, 24, and 25, and the lots in said blocks, were staked off as surveyed and platted. (17) That the streets in said city were worked and graded, and have been worked and graded, by the city authorities, as originally surveyed and platted, as aforesaid; and in the greater part of said town-site the lots and blocks have been fenced or occupied by buildings, and the travel has been on the streets as originally platted. (18) That the portion of Prairie street between blocks 9 and 24, and that portion of Spruce street between blocks 24 and 25, have never been worked or graded by said city, or traveled as streets by the public. (19) That, in 1871, the plaintiff, being employed by the city council of Olathe for the purpose, made a resurvey of said town-site and traced the blocks and streets, and made a plat according to the original survey and plat thereof, and in said survey surveyed said blocks 9, 24, and 25, but did not trace said

Spruce and Prairie streets through or between said blocks; and that the map of said resurvey was submitted to, and approved by, the city council. (20) That plaintiff has been a resident of the town-site of Olathe since March, 1858, and was a resident of the quarter section of land in which the said lots, blocks, and streets are situated in May 17, 1858. (21) That plaintiff took possession of said blocks 9 and 24, and part of block 25, in 1866, plowed the same, and in 1867 fenced said lands, and ever since said time has had all said premises inclosed in one field, farming the same from year to year during all of the time since 1867, and was in the sole, exclusive, and undisturbed possession of said premises, under claim of ownership and color of title, from the year 1866 until the 18th day or 19th day of July, 1885, at which time said defendant, by its officers, committed the acts complained of in plaintiff's petition. (22) That on the 18th or 19th day of July, 1887, the street commissioner of said city, acting under the orders and direction of the mayor and city council of said city, cut down and destroyed the fence of plaintiff across said Prairie street at the point where said street intersects the east line of blocks 9 and 24, and across Spruce street at the intersection of the east line of blocks 24 and 25, and opened said streets between said blocks; and that the cost to plaintiff of repairing said fence was \$7.00. (23) That said streets have no outlet from the west line of said blocks; and there was at the time the same were opened by said street commissioner as aforesaid no public need for the use of said streets through said blocks. (24) That all of said lots have been taxed since 1857; and that at the time plaintiff took possession of said lots, in 1866, he held tax-deeds from said Johnson county to a large number of said lots. (25) That plaintiff has sold lots in said blocks since his occupancy of the same as aforesaid, and conveyed said lots by the numbers of the lots and blocks 'as described in the plat of the town of Olathe.' And from the foregoing facts the court made the following conclusions of law: "(1) That said Spruce and Prairie streets are legal public streets through and between said blocks above mentioned. (2) That the city of Olathe has the right, by its officers, to open said streets for the use of the public between said blocks 9 and 24 and 25, and to remove all obstructions therefrom, including the fences of the plaintiff erected thereon. (3) That the plaintiff is not entitled to the relief prayed for in his petition. (4) That the temporary injunction heretofore granted herein should be dissolved."

The contentions of the plaintiff in error are that there was no lawful entry of the town-site of Olathe; that the patent thereto is void; that there was neither a statutory nor common-law dedication of the town-site; and that there was an adverse enjoyment of the alleged streets and alleys for the statutory period of 15 years. The claim is made in behalf of the city that there was a dedication of the streets and alleys and public grounds, as platted by John T. Barton, in 1857, and subsequently recognized by the plaintiff in er-

ror, and that by reason of such recognition he is estopped from questioning the validity of such plat and dedication.

1. To determine the question of the sufficiency of the dedication, it will be necessary to consider the act of congress "for the relief of the citizens of towns upon the lands of the United States, under certain circumstances:" "That whenever any portion of the surveyed public lands has been, or shall be, settled upon and occupied as a town-site, and therefore not subject to entry under the existing pre-emption laws, it shall be lawful, in case such town or place shall be incorporated, for the corporate authorities thereof, and, if not incorporated, for the judges of the county court for the county in which such town may be situated, to enter at the proper land-office, and at the minimum price, the land so settled and occupied, in trust for the several use and benefit of the occupants thereof, according to their respective interests; the execution of which trust, as to the disposal of the lots in such town, and the proceeds of the sales thereof, to be conducted under such rules and regulations as may be prescribed by the legislative authority of the state or territory in which the same is situated," etc. 5 U. S. St. at Large, 657. We are of the opinion that this act of congress conferred sufficient authority to enter the land for the purposes indicated; and this included streets, alleys, lots, blocks, and squares. This seems clear from the decision of the supreme court of the United States in the case of *Ashby v. Hall*, 119 U. S. 526, 7 Sup. Ct. Rep. 808, in construing the act of congress of March 2, 1867, which is identical, almost, in language with the above. The court said: "As thus seen, the act required the entry of land settled upon and occupied to be in trust 'for the several use and benefit of the occupants thereof, according to their respective interests.' The very notion of land settled upon and occupied as a town-site implies the existence of streets, alleys, lots, and blocks; and for the possession of the lots, and their convenient use and enjoyment, there must of necessity be appurtenant to them a right of way over adjacent streets and alleys. The entry of the land carried with it such a right of way. The streets and alleys were not afterwards at the disposal of the government, except as subject to such easement."

To supplement the act of congress, the territorial legislature passed section 11, c. 156, Laws 1855, and section 11, c. 24, Laws 1859, which provided that "the plats of all cities and towns which have heretofore been laid off, or which may hereafter be laid off, on the public lands within this territory, shall be filed with the register, and recorded as aforesaid; which plats shall accurately set forth the streets, squares, alleys, parks, and avenues, and the width and extent thereof, which are intended for public use, and when so filed they shall be deemed a sufficient conveyance of such streets, squares, alleys, parks, and avenues to such purposes; and any person occupying or in any wise obstructing such streets, squares, alleys, parks, or avenues shall be held liable for damages

as if such streets, squares, parks, or avenues had been absolutely conveyed to public use as in the third section specified." As suggested, the words, "as in the third section provided," should be, "as in the sixth section provided."

On the 17th day of May, 1858, this land, upon which the town-site was located, was entered at the general land-office at Le-compton by John T. Barton, as president of the Olathe Town-Site Corporation; and on March 26, 1862, the United States issued a patent therefor to the said Barton, president, etc., in trust for the benefit of the occupants of the town-site of Olathe, according to their respective interests, under said act of May 23, 1844. This settles the question of the dedication of this land for a town-site, and as indicated in *Ashby v. Hall*, supra, necessarily implies the existence of streets and alleys. The evidence shows, too, that there was an acceptance. The site was surveyed into lots and blocks, streets and alleys, the occupants incorporated, and the officers made deeds in accordance with the plat.

The rule with reference to dedication and acceptance has been stated by Judge Dillon, in his work on *Municipal Corporations*, (volume 2, § 628.) It should be remarked, however, that an incomplete or defective statutory dedication will, when accepted by the public, or when rights are acquired under it by third persons, operate as a common-law dedication by the owner. The supreme court of Illinois has held that an unsigned and unacknowledged plat, recorded and acted on, is effective as a common-law dedication. *Godfrey v. City of Alton*, 12 Ill. 30; *Alvord v. Ashley*, 17 Ill. 368; *City of Belleville v. Stookey*, 23 Ill. 441; *Waugh v. Leech*, 28 Ill. 488; *Fleld v. Carr*, 59 Ill. 198; *Village of Fulton v. Mehrenfeld*, 8 Ohio St. 440; *Baker v. Johnston*, 21 Mich. 319; *Banks v. Ogden*, 2 Wall. 51. The court below found that the plaintiff had taken tax-deeds from Johnson county for a large number of lots, and several in the blocks which he had inclosed, and had conveyed lots by the numbers of the lots and blocks "as described in the plat of the town of Olathe." This, we think, would amount to a dedication, so far as he was concerned. Dedication of streets and public places, properly marked and designated upon the plat of a survey of urban property, is complete upon conveyance being made of lots included in such survey, with reference to such plat, though not properly certified for record. Such conveyance works an estoppel in favor of the grantors, and no subsequent revocation can be made without their consent, and the rights so granted may be adopted and enforced by the public authorities. *Bartlett v. Bangor*, 67 Me. 460-465; 2 Dill. Mun. Corp. § 640, and cases there cited; *Brooks v. City of Topeka*, 34 Kan. 277, 8 Pac. Rep. 392. We do not think the plaintiff in error is in a position to question the entry of this land for the purpose of a town-site, or to challenge the validity of the patent issued by the government.

2. We consider, next, the claim of the plaintiff in error of the non-user of the portions of *Prairie* and *Spruce* streets,

and the alleys inclosed, and the adverse enjoyment of the same for the statutory period of 15 years. The limitation claimed by the plaintiff in error has no application to streets and alleys. The city of Olathe does not own the streets and alleys in question, or any portion of them, and could make no disposition of them; and no laches upon the part of the city, or any of its officers, could impair the rights of the traveling public. This court has said, in the case of *Gould v. City of Topeka*, 32 Kan. 485, 4 Pac. Rep. 822: "In Kansas, as well as elsewhere, cities do not own the public streets. In Kansas the fee-simple title to the streets is vested in the counties in which the cities are situated, and is so vested, not for the benefit of the counties or the cities merely, but also for the benefit of the entire traveling public, and the cities are invested only with the control and management of the streets; and this control and management is not merely for the benefit of the cities themselves, but is also for the benefit of the entire traveling public. This control of streets, however, is not wholly discretionary, or judicial, or quasi-judicial, or legislative, and is not divided or shared with other corporations, boards, or tribunals, but it is absolute and exclusive in the cities; and, as we think, it is not conferred upon them merely as a benefit which they may exercise or not at their option or discretion, but is imposed upon them, also, as an absolute and mandatory duty, which they have no right to evade or avoid. Generally, they must keep their streets in a safe and proper condition at their peril." Judge Dillon has stated the rule in his work on *Municipal Corporations*, (volume 2, § 675:) "It will, perhaps, be found that cases will arise of such a character that justice requires that an equitable estoppel shall be asserted even against the public; but, if so, such cases will form a law unto themselves, and do not fall within the legal operation of limitation enactments. The author cannot assent to the doctrine, that, as respects public rights, municipal corporations are within ordinary limitation statutes. It is unsafe to recognize such a principle."

It seems clear from reason, and the great weight of adjudicated cases, that the statute of limitations cannot be invoked against cities for a failure to open portions of streets and alleys dedicated to the public use. Cities, under our law, are charged with the imperative duty of opening and keeping in repair these thoroughfares. The obligations they owe to the public are paramount, and should control, this duty resting upon the municipalities, and these obligations of a public interest must be exercised as the public wants demand. "Immediate opening and user by the public of all the streets for their entire length, or immediate formal acceptance by some competent public authority, cannot be necessary to give effect to a dedication of land to the public use of a street by the making of a town plat, and the selling and conveying of lots with reference to the plat. A municipality must be permitted to wait its reasonable time for opening and improving its public streets, as its

own resources and the public need may allow and require, without thereby rendering its streets subject to appropriation for the exclusive use and enjoyment of individuals." *Town of Lake View v. Le Bahn*, 120 Ill. 92, 9 N. E. Rep. 269. "Until the time arrives when any street or part of a street is required for actual public use, and when the public authorities may be properly called upon to open it for public use, no mere non-user of any length of time will operate as an abandonment of it, and all persons in possession of it will be presumed to hold subject to the paramount right of the public. This principle is fully recognized and applied in the two following cases, closely analogous in their facts to this case: *Town of Derby v. Alling*, 40 Conn. 410; *Henshaw v. Hunting*, 1 Gray, 210. If this principle is a sound one in relation to the plats of cities and villages in the old states of Connecticut and Massachusetts, it is especially well grounded in reason in its application to the plats of western cities and villages, which must have a chance of growth commensurate with the public necessity, which will not be lost by mere lapse of time within the above rule." *Reilly v. City of Racine*, 51 Wis. 526, 8 N. W. Rep. 417; *Meler v. Railroad Co. (Or.)* 19 Pac. Rep. 610; *Grogan v. Hayward*, 6 Sawy. 498, 4 Fed. Rep. 161; *Shea v. City of Ottumwa*, 67 Iowa, 39, 24 N. W. Rep. 582; *Cheek v. Aurora*, 92 Ind. 107; *Kopf v. Utter*, 101 Pa. St. 27. The plaintiff below failed to show that he had such a possession of the streets and alleys in question as would bar the right of the public, acquired under dedication. The court below committed no error in refusing to grant the perpetual injunction prayed for, and we therefore recommend an affirmance of the judgment.

PER CURIAM. It is so ordered; all the justices concurring.

#### JUNG V. LIEBERT.

(*Supreme Court of Kansas. July 3, 1890.*)

PLEADING AND PROOF—VARIANCE—BILL OF PARTICULARS.

Where there is a variance between the allegations of a bill of particulars and the facts proved and specially found by the jury on the trial, yet, if it be a case where an amendment to a bill of particulars ought to be allowed to conform it to the facts proved and found, the judgment in favor of the plaintiff will not be reversed on account of the variance, if no substantial rights of the defendant have been prejudiced.

(*Syllabus by the Court.*)

Error from district court, Ellsworth county; S. O. HINDS, Judge.

*Ira E. Lloyd*, for plaintiff in error. *S. P. Harrison*, for defendant in error.

HORTON, C. J. Mrs. Theresa Liebert brought her action against Phillip Jung before a justice of the peace of Ellsworth county, to recover \$72, for 24 weeks of work as a housekeeper, at \$3 per week, and for \$25 for money paid out by her for the defendant. After a trial before the justice of the peace, the case was taken by appeal to the district court of Ellsworth county. Judgment was rendered in that

court in favor of the plaintiff for \$60.30. The defendant brings the case here. He complains that the evidence does not show that Mrs. Liebert paid out \$25 or any other sum for him. He further complains that he is not liable for any railroad fare or expenses paid or incurred by Mrs. Liebert in coming to Kansas. It appears from the evidence that in March, 1886, Phillip Jung, who was 65 years of age and a widower, lived at Blackwolf, in this state, and by correspondence with Mrs. Liebert he induced her to come to Kansas and keep house for him and his son, who was then 20 years of age. Mrs. Liebert worked for the defendant 24 weeks. About a week after she came to Blackwolf the defendant asked her what her expenses were in coming to his house. She told him. He answered "that the amount was pretty high, but he would have to pay it." While Mrs. Liebert was serving as housekeeper, her daughter married Arthur Jung, the son of the defendant. Soon after this marriage, Mr. Jung, the defendant, carried Mrs. Liebert to the railroad station at Ellsworth, where she took the train for Milwaukee. He gave her \$25, and said to her that it was in full of her services. Before that time he had paid to her \$3 upon her wages. The jury, in addition to their general verdict, made special findings of fact. The following findings are not supported by any evidence: "Question. Before the plaintiff came to Ellsworth county, Kan., did defendant promise to pay the plaintiff her railroad fare and expenses to Blackwolf, Kan., or to any part in Ellsworth county, Kan.? Answer. Yes. Q. Was there anything said or written to plaintiff about railroad fare, or paying expenses, until after the arrival of plaintiff at the residence of defendant, at Blackwolf? A. Yes." If it were not for other findings, these would reverse the judgment; but, in view of the facts developed upon the trial and the following special findings of fact, we think the special findings above quoted are immaterial. The special findings which show the liability of the defendant for railroad fare are as follows: "Question. After the plaintiff arrived, did defendant promise to pay her railroad fare or expenses? Answer. Yes. Q. What were the services of plaintiff worth per week while she was working for defendant? A. \$2.50, and board and fare to Kansas. Q. How many weeks in all did she work for defendant? A. Twenty-four." These findings are supported by the evidence. It is further contended that Mrs. Liebert is not entitled to recover her railroad fare or expenses, under the special findings of the jury, because she only charged in her bill of particulars for her work as housekeeper three dollars per week. It was decided in *Railroad Co. v. Caldwell*, 8 Kan. 244, that "though there be a variance between the allegations of a petition and the facts proved on the trial, yet, if it be a case where an amendment of the petition ought to be allowed to conform it to the facts proved, the judgment will not be reversed on account of such variance." See, also, *Railway Co. v. Montelle*, 10 Kan. 127; *Baird v. Truitt*, 18 Kan. 124; *Pape v. Bank*,



20 Kan. 446; *Mitchell v. Milhoan*, 11 Kan. 626; *Gas Co. v. Schillefer*, 22 Kan. 470; *Grandstaff v. Brown*, 23 Kan. 178.

Though no formal amendment was made or requested in the trial court, we think as *Mrs. Liebert* was clearly entitled to her railroad fare or expenses, and, as the defendant was notified upon the trial of her intention to claim the same, we may properly treat the case as if an amendment to the bill of particulars, to accord with the special findings of the jury, was in fact made. Therefore we hold that no substantial rights of the defendant have been prejudiced. An account or bill of particulars filed with a justice of the peace is not usually framed with much care or nicety, and the strict rules applicable to the construction of pleadings are not to control such accounts or claims. Morally and legally, the plaintiff below is entitled to the amount she has recovered, and this court ought not, on account of a mere technicality, which does not effect the substantial rights of the parties, to set the judgment aside. The judgment of the district court will be affirmed. All the justices concurring.

#### DENVER, M. & A. RY. CO. v. COWGILL.

(Supreme Court of Kansas. July 3, 1890.)

APPEAL — RECORD — RAILROADS — INSUFFICIENT CATTLE-GUARDS—ACTION—EVIDENCE.

1. Where the record of a case brought to the supreme court fairly admits of two interpretations, that one which will sustain the ruling of the trial court will be adopted in preference to an interpretation which would overthrow such ruling.

2. An action was begun before a justice of the peace against the railway company to recover damages alleged to have been caused by the failure of the company to construct and maintain proper cattle-guards where its road enters and leaves the plaintiff's inclosure. The case was removed to the district court, where it was tried upon the plaintiff's bill of particulars. No pleading was filed by the company in either the justice's or the district court, and none was demanded or ordered. At the final trial the company offered to prove that when the injury happened, it had not constructed, did not own, and was not operating the railroad which passed through the plaintiff's land. This offer was refused. *Held*, error. Although no pleading was filed by the company, it was entitled to introduce evidence in support of any defense which it had. *German v. Ritchie*, 9 Kan. 106.

(Syllabus by the Court.)

Error from district court, Chautanqua county; *M. G. TROUP, Judge*.

*J. H. Richards* and *C. E. Benton*, for plaintiff in error. *J. D. McBrian* and *D. M. Pile*, for defendant in error.

**JOHNSTON, J.** This action was brought by *Henry Cowgill* against the *Denver, Memphis & Atlantic Railway Company* to recover damages alleged to have been caused by the failure of the railway company to construct and maintain proper cattle-guards at the points where its road enters and leaves his inclosure. The cause was instituted and tried before a justice of the peace, was removed from there to the district court upon petition in error, where it was finally tried on its merits, and a judgment given in favor of *Cowgill* for \$30.

No new pleadings were filed in the district court, and the railway company alleges that *Cowgill* was permitted to prove and recover damages done to his grass and pasture, and that such damages were not named or claimed in his bill of particulars. The record contains two copies of the bill of particulars, in one of which damages are alleged and claimed for grass that was destroyed, and in the other it is not mentioned. The omission in the one may have been an error in transcribing, or possibly the bill of particulars may have been amended in the district court so as to include damages for the grass that was consumed. At any rate, proof of injury to the grass was admissible under one copy of the bill of particulars found in the record; and, where the record admits of an interpretation which will sustain the ruling of the district court, that interpretation should be given to it.

Another and more serious objection to the judgment is a want of proof that the defendant company constructed, owned, or operated the railroad which passed through *Cowgill's* farm, and further, that the defendant company was not permitted to show that the road was constructed, owned, and operated by other companies during the time when the injury complained of occurred. The company offered to show that the road in question was constructed, owned, and operated by the *Fitzgerald & Mallory Construction Company* up to February 15, 1887, and that since that time it has been owned and operated by the *Missouri Pacific Railway Company*; and further, that the *Fitzgerald & Mallory Construction Company*, as well as the *Missouri Pacific Railway Company*, were each distinct and separate companies from the *Denver, Memphis & Atlantic Railway Company*. This testimony was excluded on the ground that it was incompetent and inadmissible under the pleadings. It should have been admitted. If the defendant company had not constructed, and did not own or operate, the road when the injuries were inflicted, it cannot be held liable for them. It cannot be held responsible for damages occasioned by any other company upon a railroad with which it had no connection; and, if there was any proof offered by plaintiff below which would make the company liable, then the offer of testimony by the company was both competent and material. No objection was made to the competency of the witness. The only objection was that the testimony was incompetent and inadmissible under the pleadings. There was but a single pleading in the case, and that was the bill of particulars of *Cowgill*. No pleading of any kind was filed by the company, either before the justice of the peace or in the district court; and there was no demand or order that one be filed. That being the case, it was proper for the company to introduce evidence in support of any defense which it might have. *German v. Ritchie*, 9 Kan. 106. The only allegation in the plaintiff's bill of particulars which stood admitted for want of a verified denial was the existence of the defendant as a railway corporation. All other allegations in regard to the relation of

the defendant to the road in question, and as to whether it had in any manner occasioned the damages, were open to be established or controverted by the testimony of the parties. It may be, as claimed, that the witness offered would not have sustained this defense; but, there being no objection to his competency, the company was entitled to examine him upon the questions suggested, and to an opportunity to establish this defense, which was the only one offered by them. The company, however, cannot escape liability for damages occasioned by the Fitzgerald & Mallory Construction Company, if that company was a mere construction company, and was building and operating the road as the agent of the defendant railroad company; nor will it avoid liability if, after constructing its road, it leased the same to the Missouri Pacific or some other railway company. *Railway Co. v. Curl*, 28 Kan. 622; *Railway Co. v. Morrow*, 32 Kan. 217, 4 Pac. Rep. 87. Neither would the fact that the Missouri Pacific or some other railway company had purchased the stock, or a majority of the shares of stock, of the Denver, Memphis & Atlantic Railway Company, relieve the latter from the duty of maintaining proper cattle-guards on the road, or prevent a recovery against the defendant for the damages sustained by reason of the omission of such duty. The company, however, was entitled to make its defense, although no pleading was filed by it; and the ruling of the court in excluding the evidence to sustain such defense was material error. The judgment will be reversed, and the cause remanded for a new trial. All the justices concurring.

**BAKER WIRE CO. V. KINGMAN *et al.***

(*Supreme Court of Kansas. July 3, 1890.*)

**ATTACHMENT—AFFIDAVIT—SUFFICIENCY—AMENDMENT.**

The plaintiff, in an action upon a claim before due, obtained an attachment upon an affidavit which sets forth the grounds therefor as follows: The defendants "are about to convert a part of their property into money for the purpose of placing it beyond the reach of their creditors; have property which they conceal; have rights in action which they conceal; have assigned, removed, and disposed of a part of their property with intent to hinder, delay, and defraud their creditors; are about to assign, remove, and dispose of a part of their property with intent to hinder, delay, and defraud their creditors." The defendants moved to discharge the attachment for insufficiency of the affidavit, and the court held the affidavit to be insufficient; when the plaintiff immediately asked leave of the court to file an amended affidavit, which was then and there presented to the court, and was amply sufficient under section 230 of the Civil Code, but the court refused and discharged the attachment. *Held error.*

(*Syllabus by the Court.*)

Error from district court, Saline county; S. O. HINDS, Judge.

R. A. Lovitt and Chas. A. Miller, for plaintiff in error. Garver & Bond, for defendants in error.

VALENTINE, J. This was an action brought in the district court of Saline county on June 21, 1888, by the Baker Wire Company, a corporation of the state

of Iowa, against Freeman Kingman, Frank Kingman, A. D. Kelley, and J. T. Kelley, copartners as Kingman & Kelley, to recover on two promissory notes and an account not due. An affidavit was filed in the case for an attachment, setting forth, among other grounds therefor, that the defendants "are about to convert a part of their property into money for the purpose of placing it beyond the reach of their creditors; have property which they conceal; have rights in action which they conceal; have assigned, removed, and disposed of a part of their property with the intent to hinder, delay, and defraud their creditors; are about to assign, remove, and dispose of a part of their property with intent to hinder, delay, and defraud their creditors." An order of attachment was granted by the probate judge, issued by the clerk of the district court, and levied upon property of the defendants by the sheriff. Afterwards the defendants filed a written motion to discharge the attachment for the alleged reason that the grounds set forth in the foregoing affidavit were not true. This motion coming on to be heard in the district court, the defendants then interposed an oral motion to discharge the attachment because of the alleged insufficiency of the aforesaid affidavit. The court then held that the affidavit was not sufficient, and thereupon the plaintiff asked leave of the court to file an amended affidavit, which was then and there presented to the court, but the court refused and discharged the attachment; and to reverse this ruling of the district court the plaintiff, as plaintiff in error, brings the case to this court.

The original affidavit filed in this case was drawn principally under section 190 of the Civil Code, and was sufficient for an attachment if the claim upon which the action was brought had been due; but, as before stated, the claim was not due, and hence the affidavit should have been drawn exclusively under section 230 of the Civil Code, which reads as follows: "Sec. 230. Where a debtor has sold, conveyed, or otherwise disposed of his property, with the fraudulent intent to cheat or defraud his creditors, or to hinder or delay them in the collection of their debts, or is about to make such sale or conveyance or disposition of his property, with such fraudulent intent, or is about to remove his property, or a material part thereof, with the intent or to the effect of cheating or defrauding his creditors, or of hindering or delaying them in the collection of their debts, a creditor may bring an action on his claim before it is due, and have an attachment against the property of the debtor."

It will be seen that the grounds for the attachment, as stated in the original affidavit, were not stated in the form prescribed by section 230 of the Civil Code, and were therefore subject to criticism; but the plaintiff presented an amended affidavit which was in every way sufficient under section 230 of the Civil Code, and we think the court should then, instead of discharging the attachment, have overruled the defendant's second mo-

tion, and should have permitted the plaintiff to amend its affidavit by filing its amended affidavit. It will be noticed that the grounds set forth in the original affidavit, and the grounds required by section 230 of the Civil Code, and which were amply set forth in the amended affidavit, are not so very different. That affidavits for attachment may be amended, see the following cases: *Burton v. Robinson*, 5 Kan. 287; *Ferguson v. Smith*, 10 Kan. 396; *Wells v. Danford*, 28 Kan. 487; *Tracy v. Gunn*, 29 Kan. 508; *Bunn v. Pritchard*, 6 Iowa, 56. And that courts may commit material and substantial error by discharging attachments for insufficient affidavits, without giving the plaintiff in the particular case an opportunity to amend his affidavit, see the second, third, and fifth of the above-cited cases. The order of the court below discharging the attachment will be reversed, and the cause remanded, with the order that the court below permit the plaintiff to amend its affidavit as requested, and for further proceedings. All the justices concurring.

#### HOGUE v. MACKAY *et al.*

(*Supreme Court of Kansas. July 3, 1890.*)

##### VENDOR AND VENDEE—CONTRACT—EVIDENCE.

1. In a negotiation between parties for the sale of property the price of \$137.50 was agreed upon, and a payment of \$7.50 was made thereon. The balance, \$130, was to be paid in installments of \$20. One of the parties understood and agreed that an installment was payable every 80 days thereafter until all was paid, while the other understood and agreed that an installment was payable every 90 days thereafter. *Held*, that there was no sale.

2. The plaintiff brought an action to recover the possession of the property, and the jury returned a general verdict in his favor, but made special findings showing that the minds of the parties did not meet upon one of the substantial conditions of the sale. The court set aside the general verdict, and gave judgment in favor of the defendant upon the special findings. *Held* no error.

(*Syllabus by the Court.*)

Error from district court, Johnson county; J. P. HINDMAN, Judge.

*John T. Little*, for plaintiff in error. *J. W. Barker*, for defendants in error.

JOHNSTON, J. This was an action of replevin brought by Hiram M. Hogue against John Mackey and David Swartz to recover a wooden building of the value of \$137.50, which was standing upon leased ground, and was personal property. Hogue claimed to have purchased the building from Swartz on November 9, 1886, at an agreed price of \$137.50; that he then paid \$7.50 of the purchase money, and that the balance of the purchase price was to be paid in installments of \$20 every 90 days, for which notes were to be executed on a certain subsequent day. Swartz claimed that he negotiated a sale of the building to Hogue for the price stated, and received a payment of \$7.50, as Hogue claimed; but the agreement was that the balance was to be paid in installments of \$20 every 30 days. When Hogue refused to execute the notes for these installments, payable every 30 days, Swartz sold the

building to Mackey, and Hogue then brought this action to recover its possession. The only matter in dispute between Hogue and Swartz was as to the times when the deferred payments were due. The jury found a general verdict in favor of Hogue, but they also made special findings of fact that were inconsistent with the general verdict. The court set aside the general verdict, and gave judgment upon the special findings in favor of the defendants. This was a correct ruling. The jury found that negotiations were had between the parties on the day stated, when the price of the building was agreed upon and payment made, as the plaintiff claims, but that Hogue stipulated and understood that he was to make payments of \$20 every 90 days, while Swartz stipulated and understood that payments of that amount were to be made every 30 days. It thus appears that the minds of the parties did not meet upon one of the substantial conditions of the sale. There must have been a concurrent assent of both to the same terms and conditions in order to bind either. The findings clearly show that there was not that assent, and hence there was no contract or sale. There being no sale, Hogue has neither ownership nor right of possession in the building. Therefore the general verdict in his favor was erroneous. Where the special findings are inconsistent with the general verdict, the former must prevail, and if they cover the issues in the case, and are consistent with each other, and are supported by the testimony, the general verdict should not only be set aside, but judgment must be given in accordance with the special findings. Civil Code, § 287; *Railway Co. v. Lyon*, 24 Kan. 748; *Clark v. Railway Co.*, 35 Kan. 350, 11 Pac. Rep. 184. The question of the sufficiency of the evidence to support the findings is not before this court, for the reason that the case made does not show that it contains all the evidence. There is such a statement in the certificate of the judge, which is attached to the case made; but this is insufficient. *Eddy v. Weaver*, 37 Kan. 540, 15 Pac. Rep. 492; *Railroad Co. v. Grimes*, 38 Kan. 241, 16 Pac. Rep. 472; *Insurance Co. v. Hogue*, 41 Kan. 524, 21 Pac. Rep. 641; *Hill v. Bank*, 42 Kan. 364, 22 Pac. Rep. 324. The judgment of the district court will be affirmed. All the justices concurring.

#### WINSTON v. BURNELL.

(*Supreme Court of Kansas. July 3, 1890.*)

##### MORTGAGES—EVIDENCE—APPEAL—RECORD.

1. Upon an issue whether a written instrument which was in form an absolute conveyance was intended as a mortgage, an instruction was given by the court that the fact must be proved by a clear preponderance of the evidence. *Held* to be a correct rule as to the measure of proof.

2. Errors assigned upon a refusal to give instructions are not available where the record does not properly show that it contains all the instructions that were given.

(*Syllabus by the Court.*)

Error from district court, Jewell county; CLARK A. SMITH, Judge.

*T. S. Kirkpatrick* and *J. H. Mechem*, for

plaintiff in error. *C. Angevine*, for defendant in error.

JOHNSTON, J. This was an action in ejectment, brought by Alexander Winston against C. P. Burnell to recover a quarter-section of land situate in Jewell county. The trial in the district court was with a jury, and resulted in favor of the defendant. The principal errors alleged by the plaintiff are based upon rulings of the court in charging the jury, and upon the sufficiency of the evidence; but the condition of the record is such as to preclude an examination of some of the most important questions presented in the plaintiff's brief. The record contains no recital that the copies of the pleadings found in the case made are those which were filed in the district court; nor are any of the entries of the steps and proceedings taken in the case, and which appear to be copied in the record, properly described or identified. Although very defective in this respect, there is perhaps sufficient in the record, such as copies of file-marks, the titles to the various pleadings and orders, and the character of the subject-matter which they contain, to indicate that they belonged to and were filed as a part of the proceedings in the present case. We think there is at least sufficient in the record to resist the motion for a dismissal of the proceeding. We cannot, however, review the evidence to determine whether it is sufficient to sustain the verdict and judgment that were rendered, because the case made, as served, contains no statement that it embraces all the testimony given on the trial. It has been repeatedly decided that a statement to that effect in the certificate of the judge, which is attached to the case made, is not sufficient. *Eddy v. Weaver*, 37 Kan. 540, 15 Pac. Rep. 492; *Railroad Co. v. Grimes*, 38 Kan. 241, 16 Pac. Rep. 472; *Insurance Co. v. Hogue*, 41 Kan. 524, 21 Pac. Rep. 641; *Hill v. Bank*, 42 Kan. 364, 22 Pac. Rep. 324; *Hogue v. Mackey*, 43 Kan. —, ante, 477. It appears that Burnell, who was in the possession of the land in controversy, joined with his wife in the execution of a conveyance of the same to the plaintiff. It was in the form of a warranty deed; but Burnell claimed that the conveyance was intended as a mortgage to secure an indebtedness of \$1,000 due from him to the plaintiff. This is the main issue in the case, and the evidence thereon is conflicting and unsatisfactory; but, in the absence of all the testimony, the approved verdict of the jury is conclusive. Complaint is made, however, of the charge of the court in respect to the measure of proof necessary to sustain the defense of Burnell. The plaintiff asked for an instruction that parol testimony to establish that an absolute conveyance was intended as a mortgage must be positive, and so clear as to leave no doubt as to the intention of the parties. Instead of giving that instruction, the court charged that "the burden of proving by preponderance of the evidence that said deed was intended only to secure the payment of money rests upon the defendant; and, unless he has proved this by a clear preponderance of the evidence, you will find for the plaintiff." A

higher and more satisfactory character of proof is required to establish that an instrument or conveyance is not what it purports to be than is necessary in ordinary civil cases. Generally a mere preponderance is sufficient; but when parties deliberately execute a written conveyance, there is a strong presumption that it expresses their intentions, and more than a bare preponderance of parol proof is required to remove this presumption and to show a contrary intention. Some of the courts declare that in such cases the proof must be "clear," others that it must be "convincing," others that it must be "satisfactory," and still others that it must be "clear of all reasonable doubt." These expressions substantially convey the same idea, and require the same degree of proof. To establish a fact by the clear preponderance of the evidence, the proof must be clear of reasonable doubt. We think the instruction given was not erroneous. *McMillan v. Bissell*, 63 Mich. 66, 29 N. W. Rep. 737; *Sloan v. Becker*, 34 Minn. 491, 26 N. W. Rep. 730; *Gardner v. Weston*, 18 Iowa, 535; *Knight v. McCord*, 19 N. W. Rep. 310; *Miner v. Hess*, 47 Ill. 170; *Kent v. Lasley*, 24 Wis. 654; *Stockbridge Iron Co. v. Hudson Iron Co.*, 107 Mass. 290; *Guernsey v. Insurance Co.*, 17 Minn. 104, (Gil. 83); *Hopper v. Jones*, 29 Cal. 18; *McClellan v. Sanford*, 26 Wis. 595; 1 Story, Eq. Jur. § 157; 1 Jones, Mortg. c. 8; see, also, *Gabbey v. Forgeus*, 38 Kan. 62, 15 Pac. Rep. 866. There are numerous errors assigned on the refusal of instructions requested by the plaintiff, but these are not available. The record fails to show that all the instructions given are preserved in the record, and therefore the court cannot say that those refused were not given, or that any error was committed by the refusal. See Kansas cases first above cited; *Wilson v. Fuller*, 9 Kan. 176; *DaLee v. Blackburn*, 11 Kan. 190; *Ferguson v. Graves*, 12 Kan. 39; *Railroad Co. v. Brown*, 14 Kan. 469; *Bard v. Elston*, 31 Kan. 274, 1 Pac. Rep. 565. The objections to the ruling of the court on the admission of testimony are not material, and furnish no ground for a reversal. The judgment of the district court must be affirmed. All the justices concurring.

#### RICHARDSON v. EMMERT.

(Supreme Court of Kansas. July 3, 1890.)

#### COVENANT NOT TO ENGAGE IN TRADE — BREACH — INJUNCTION.

1. Miss E. purchased of Mrs. R. a millinery business in the city of Ft. Scott, and Mrs. R. covenanted in writing that she would "never enter into, or be interested in any manner in, the millinery business in that city." Prior to the purchase by Miss E., Mrs. R. had carried on the millinery business in Ft. Scott for 10 years. During that time she had built up a large trade. After Miss E. had made the purchase, she took possession of the store, and carried on the business at the old place; Mrs. R. having transferred to her the lease of the store-room. After the purchase by Miss E., Mrs. R. and her husband left the country, and went to Ireland. Soon afterwards they returned to Ft. Scott. The husband sold the homestead, the title of which was in his name; and, with the money so obtained, they commenced to carry on the millinery business in Ft. Scott in the name of the husband, Mr. R., but Mrs. R. had the principal supervision of it. She bought the

millinery they offered for sale. An advertisement was placed in the city papers notifying the public of Mrs. R.'s display of millinery, and inviting the ladies of the city to call and see her goods. *Held*, that upon the facts of the case, and the finding of the trial court against Mrs. R., the opening up and carrying on of the millinery business in the name of Mr. R., the husband, of which business Mrs. R. had the principal supervision, was a violation by Mrs. R. of her covenant, and she could be restrained by injunction.

2. In the written agreement for the sale of the millinery goods, containing the condition that Mrs. R. would "never enter into, or be interested in any manner in, the millinery business in Fort Scott," was the following clause: "In case of any differences, they shall be settled by arbitration, the first party selecting one, the second party one, and the two so selected the third; and their decision shall be final and accepted." *Held*, that this clause did not oust the courts of their legitimate jurisdiction; and, *held, further*, that upon the written contract of the parties, and the pleadings in the case, this clause was no bar to an action brought by Miss E. against Mrs. R. to enjoin her from being interested in the millinery business in Ft. Scott.

(Syllabus by the Court.)

Error from district court, Bourbon county; C. O. FRENCH, Judge.

*Dillard & Padgett* and *A. A. Harris & Son*, for plaintiff in error. *Ware, Biddle & Cory*, for defendant in error.

HORTON, C. J. On the 8th day of July, 1886, Mrs. Rosana Richardson, the wife of M. J. Richardson, sold to Miss Louisa U. Emmert a stock of millinery goods in the city of Ft. Scott for \$2,000. A written agreement was signed and executed by the parties at the time of the sale. Mrs. Richardson covenanted, among other things, that she would "never enter into, or be interested in any manner in, the millinery business in the city of Fort Scott." Prior to the purchase by Miss Emmert, Mrs. Richardson had carried on this business in Ft. Scott for 10 years. During that time she had built up a large trade. After Miss Emmert had made the purchase, she took possession of the store, and carried on the business at the old place; Mrs. Richardson having transferred the lease of the store to her. In February, 1887, Mrs. Richardson, with her husband, left Ft. Scott, going to Ireland. They returned to Ft. Scott in the winter of 1888; and on April 12th of that year they commenced to carry on the millinery business in a room opposite the street where Miss Emmert was in business. On the back of the store the sign was, "Richardson." On the front the sign was, "M. J. Richardson." The business was carried on in the name of M. J. Richardson, but Mrs. Richardson had the supervision of it. She bought the dry goods and millinery they offered for sale. About the time the millinery business was opened up in the name of M. J. Richardson, the following advertisement, with the consent of Mrs. Richardson, was published in the leading newspaper of Ft. Scott: "Thursday is the day set for the grand millinery opening at M. J. Richardson's, at Bright's old stand on Main street. The rapid growth of Ft. Scott has had the effect to cause all our merchants to buy larger and finer stocks of goods this season than ever before, and particularly is this so in the line of millinery goods. The ladies of the

city and county have never before had so fine an opportunity to make selections of styles and goods to their taste as at present; and foremost among our merchants to take the lead in their line is M. J. Richardson, at Bright's old stand, the Main-Street milliner. Mrs. Richardson is well known, and her taste in the purchase and selection of fine goods is superb. She has bought, and is displaying, a stock of millinery goods this season that is more beautiful and exquisite than ever before; and every lady in the city will be pleased by a visit to her store on Thursday next, the occasion of her grand opening. She invites all the ladies of the city and county to call and see her display of goods." Afterwards the following advertisement was published, with the consent of Mrs. Richardson, in another paper of Ft. Scott: "The ladies of Fort Scott and vicinity are cordially invited to visit the new and attractive millinery and dry goods store of M. J. Richardson, on Main street, in Bright's old stand. \* \* \* They have just opened another invoice of those elegant French sateens, which have been so pleasing and satisfactory to former purchasers. As to prices the public is assured that nowhere can better bargains be attained. These goods were purchased for cash, and the best discount secured. Therefore the lowest possible prices can be made to customers. The ladies are cordially asked to call, and confirm these statements by personal examination." This action was brought on March 14, 1888, by Miss Emmert, to enjoin Mrs. Richardson from entering into, or being interested in any manner in, the millinery business at Ft. Scott, and also for damages. The trial court granted the injunction prayed for, and rendered judgment against Mrs. Richardson for costs. No damages were allowed. Mrs. Richardson complains, and brings the case here.

The contention is that Mrs. Richardson, since the sale of her stock of millinery goods to Miss Emmert, has never entered into, or become interested in any manner in, the millinery business in the city of Ft. Scott; that she is simply aiding her husband in the conduct of his business; and that the assistance rendered by her to her husband is not a violation of the letter or spirit of her contract with Miss Emmert. As the trial court granted the injunction prayed for, and rendered a judgment for costs against Mrs. Richardson, the general finding of the trial court is against her. We must assume that, if the evidence and the inferences establish that Mrs. Richardson has violated her contract, the judgment must be sustained. That such contracts as were entered into between Mrs. Richardson and Miss Emmert are valid, see *Roller v. Ott*, 14 Kan. 609. All contracts of this kind are to some extent against public policy, and their provisions are not to be extended by construction or implication. *Id.* There is sufficient in the evidence, in view of the general finding of the trial court, to show that Mrs. Richardson, after her sale of her stock of millinery goods, entered into, and again became interested in, the millinery business in Ft. Scott, in violation of her contract. The

business, evidently, is carried on for the joint benefit of Mr. and Mrs. Richardson, but under her supervision. The husband furnished the money in the business from the sale of the homestead of the parties, the title of which was in his name, and the store is operated in his name; yet it is carried on for the interest of the wife, as well as the husband. Both are interested. Under her contract, Mrs. Richardson cannot become interested in any millinery business in Ft. Scott, in competition or opposition to Miss Emmert. *Guerand v. Dandeleit*, 32 Md. 561.

It is claimed that the cases of *Harkinson's Appeal*, 78 Pa. St. 196, and *Tabor v. Blake*, 61 N. H. 83, are decisive against the judgment of the trial court. In the *Harkinson Case* the mother sold a bakery, and covenanted that she would not engage in the same business, directly or indirectly, in the same place, for 10 years. Within that time she established her son in the same business in the same place, advancing him money as she had done to her other children in their business. The trial court found as a fact that the business was carried on in good faith by the son, and not by the mother, and, as no actual damage was shown, an injunction was refused. *MERCUR, J.*, in delivering the opinion in that case, said: "In the present case the appellant did not erect nor furnish the establishment with any intention that she would engage in the business, or be in any manner interested therein. In furtherance of her plan for aiding her children, she had substantially advanced to him his supposed share in her estate. It was invested in that particular for his benefit, and not hers. The effect was the same as if she had given or loaned to him money, with a knowledge that he intended so to use it. It is certainly going very far to say that, by the general terms used in this agreement, a parent has covenanted to control the business of her son by withholding from him his share in her estate. \* \* \* The appellant denies in her answer that she has encouraged and promoted the business of others with the intent and effect of injuring complainant. On the contrary, she alleges and avers that she has advised and encouraged the old customers of her place to continue their custom, and has endeavored to remove objections on their part to purchasing of the appellee." That case is quite different from this. Mrs. Richardson has not advised or encouraged her old customers to continue their custom with Miss Emmert, nor has she endeavored to remove objections on their part from purchasing of Miss Emmert. Again, the mother in that case invested her money for the particular benefit of the son, and not for herself. In this case Mrs. Richardson does not obtain wages or pay for her services; but, in carrying on the business, the fair inference from the evidence is that she is interested in the business the same as her husband. Both get the benefit. In the *Tabor Case*, *Blake* agreed that "he would not open, or cause to be opened, a grocery, a billiard or an eating saloon for trade in the village of Woodsville." Subsequently, Mrs. Blake, his wife, opened an eating saloon in

the village, and her husband acted as her agent in carrying it on. The finding of the court was that the business belonged to the wife, and that, as the husband conducted the business in good faith as her agent, he did not violate his agreement. The findings of fact in that case were in favor of the party who had covenanted not to again engage in business, but in this case the finding is against such party. In many respects the cases are similar, but yet the facts are somewhat different. With the finding of the court against Mrs. Richardson, which is sustained by the evidence, we think it cannot be said, as in the *Tabor Case*, that the defendant has not violated her contract.

The written contract contained the following clause: "In case of any differences, they shall be settled by arbitration, the first party selecting one, the second party one, and the two so selected the third; and their decision shall be final and accepted." It is contended that Miss Emmert cannot maintain any action until the prescribed method of arbitration has been pursued, or some valid excuse exists for not pursuing it. We do not think that the clause in question was intended to oust the courts of their legitimate jurisdiction. Evidently the differences referred to related only to the inventory, the articles purchased, the money to be paid, and other matters of that kind. *2 Wood, Ins. § 456*. Again, the defendant did not allege in her answer that she offered to arbitrate, or that she had selected any person for arbitration. The judgment of the district court will be affirmed. All the justices concurring.

#### EMMERT v. RICHARDSON.

(*Supreme Court of Kansas. July 3, 1890.*)

COVENANT BY WIFE—BREACH BY HUSBAND—INJUNCTION.

In an action brought to enjoin Mr. R. from entering into, or being interested in, the millinery business in Ft. Scott, it was alleged in the petition that Mrs. R., the wife, who was carrying on a millinery business in Ft. Scott, sold out her stock of goods to Miss E. for a valuable consideration, and covenanted in writing that she would "never enter into, or be interested in any manner in, the millinery business in that city;" that subsequently Mr. R., the husband, opened up and carried on a large dry goods store in Ft. Scott, which contained a stock of millinery; and that Mrs. R. had the control and management of this stock. It was not alleged, however, that Mrs. R. furnished the money to buy the millinery goods, or to operate the store. *Held*, that it did not appear from the allegations of the petition that the name of the husband was used as a mere cover and blind to conceal the interest of the wife; and, *held, further*, that Mr. R., the husband, cannot be enjoined, on account of the contract between his wife and Miss E., from entering into, or being interested in, the millinery business in Ft. Scott.

(*Syllabus by the Court.*)

Error from district court, Bourbon county; C. O. FRENCH, Judge.

*Ware, Biddle & Cory*, for plaintiff in error. *W. P. Dillard* and *A. A. Harris*, for defendant in error.

*HORTON, C. J.* This was an action in the court below for an injunction, brought by *Louisa U. Emmert* against *M.*

J. Richardson, to restrain him from entering into, or being interested in any manner in, the millinery business at Ft. Scott. The defendant demurred to the petition. The demurrer was sustained, and the plaintiff brings the case here. It appears from the pleadings that on the 8th day of July, 1886, Mrs. Rosana Richardson, the wife of M. J. Richardson, sold to Miss Louisa U. Emmert a stock of millinery goods in that city. The contract between the parties was in writing, which was signed by Mrs. Richardson and Miss Emmert. Mrs. Richardson covenanted in the contract, among other things, that she would "never enter into, or be interested in any manner in, the millinery business in the city of Ft. Scott." M. J. Richardson, the husband, did not sign the contract. After her purchase, Miss Emmert took possession of the store and goods formerly owned by Mrs. Richardson, and carried on the business in the old place. In the spring of 1888, M. J. Richardson opened up, and now carries on, a large dry goods store in Ft. Scott. The store contains a stock of millinery. Of this stock Mrs. Richardson has the control and management.

We have just held in the case of *Richardson v. Emmert*, ante, 478, that the written contract between those parties was binding, and that Mrs. Richardson could be enjoined, under her covenant, from entering into, or being interested in any manner in, the millinery business in Ft. Scott. But the husband, M. J. Richardson, did not sign the written contract, and is not bound thereby. If he desires to carry on a dry-goods store in the city of Ft. Scott, and have a millinery department conducted in connection with it, he cannot be prevented from so doing by the written contract between his wife and Miss Emmert. Such contracts, while valid, are to some extent against public policy, and their provisions will not be extended by construction or implication. *Roller v. Ott*, 14 Kan. 609. This case is not like that of *Guerand v. Dandeleit*, 32 Md. 561, where the capital employed by the father, as well as the property occupied by the business, belonged to the father, who had covenanted not to engage in his trade again, and where the business was in the son's name merely as a cover and blind. It is not alleged in the petition that Mrs. R. furnished the capital to operate the store or millinery business; and, for aught that appears in the pleading, the business may be carried on for the interest and benefit of both, and not for Mrs. R. alone. No injunction ought to be issued against M. J. Richardson to prevent him from carrying on, in his own name, the dry-goods business that he is conducting, whether he is selling millinery goods or not. The judgment of the district court will be affirmed. All the justices concurring.

HOWELL et al. v. SCOTT, Sheriff.

(Supreme Court of Kansas. July 3, 1890.)

TAXATION—PROPERTY SOLD AFTER TIME FOR LISTING—PURCHASER—INJUNCTION.

1. The person who owned certain personal property on the 1st day of March, 1886, is under a  
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legal obligation to list such property for taxation for the year 1886, when called upon by the assessor to do so, and to pay the taxes thereon, notwithstanding he sold and transferred the same on the 8th day of March, 1886.

2. A stock of merchandise that had been in the county during the entire preceding year was sold and transferred on the 8th day of March, 1886. Thereafter the purchaser was assessed, and a tax-warrant issued, under which the sheriff threatened to levy on the property. Held, that the purchaser was not liable, under paragraph 6864, Gen. St. 1889, to pay the taxes levied on such property, it being the duty of the vendor who owned the property on the 1st day of March, 1886, to list the same for taxation; and that the purchaser was entitled to an injunction restraining the levy of the tax-warrant.

(Syllabus by Simpson, C.)

Commissioners' decision. Error from district court, Washington county; E. HUTCHINSON, Judge.

Smith & Solomon, for plaintiffs in error. S. H. Hamilton, for defendant in error.

SIMPSON, C. The plaintiffs in error, Howell Bros., brought this action in the district court of Washington county to perpetually enjoin the levy of a tax-warrant issued to the sheriff of that county on certain lumber and other personal property belonging to the plaintiffs in error. The case was tried to the court, and conclusions of fact and law made as follows:

"On the 8th day of March, 1886, C. F. Allen was engaged in the lumber business, and had lumber-yards at the city of Washington, in Washington township, and at Morrow, in Mill Creek township, in Washington county, Kan. That said Allen had been running and operating said yards at said places for more than one year prior to March 1, 1886. That on the 8th day of March, 1886, said C. F. Allen sold both of said lumber-yards and all the lumber therein to George W. Howell, doing business under the firm name and style of Howell Brothers, for the sum of \$15,951.83, taking therefor three notes of Howell Brothers for the sum of \$5,217.27 each, payable in 4, 5, and 6 months respectively; and on said March 8th, 1886, said Allen turned over to the plaintiff the lumber in said yards. Said yards were bought by Howell to be conducted as retail lumber-yards, and have so been run by him ever since. Before the said March 8, 1886, neither Howell Brothers nor Geo. W. Howell owned personal property in Washington county. On the 22d day of April, 1886, one Hayes was managing the Washington yard, and, when asked by the assessor to make out a statement for Howell Bros. covering the average amount of merchant's stock for the preceding year, he objected, and told the assessor that Howell Brothers owned no lumber or other personal property in Washington county on the 1st day of March, 1886, or theretofore. The assessor told Hayes to make out the statement, anyway, and, if the tax was wrong, it would be fixed, or words to that effect. Thereupon said Hayes made out a personal property statement in words and figures following, to-wit:

"STATEMENT OF PERSONAL PROPERTY,  
"In the township City of Washington,  
in the county of Washington, in the pos-



session or under control of Howell Bros., as liable to taxation on the first day of March, A. D. 1886, whose residence on said first day of March was school-district No. —.

DESCRIPTION OF PERSONAL PROPERTY.	NUM-BER.	ASSESSED VAL. Dollars. Cents.
Horses, six months old and over	4	115
Neat cattle, six months old and over		
Mules and asses, six months old and over		
Sheep, six months old and over		
Hogs, six months old and over		
Goats, six months old and over		
Farm implements		
Wagons		
Pleasure carriages, of every description		
Gold watches		
Silver watches		
Plate and jewelry		
Piano-fortes		
Other musical instruments		
All interest on bonds of the United States, amount of		
All bonds and int. on bonds of any state, Co., Dist., or municipality, actual value		
All other bonds not exempt from taxation, —, —, actual value		
Stocks in any company, or corporation, —, actual value		
Shares in national banks, —, amt. of		
Moneys		
Credits, \$ —, less legal deduction, \$ —, actual value		
Average amount of merchant's stock for preceding year, \$6,000.00, actual val.	3,000	
Average amount of merchant's moneys and credits for preceding year, —, act. val.		
Av. amt. of manufacturer's moneys and credits for preceding years, —, actual value		
Av. amt. of manufacturer's stock for preceding year, —, actual value		

DESCRIPTION OF PROPERTY.	NUM-BER.	ASSESSED VAL. Dollars. Cents.
Shares in any vessel or boat, —, actual value		
Tax-sale certificates, —, amt. of		
Judgments, amt. of		
Notes, amt. of		
Mortgages, amt. of		
Aggregate value of all other personal property, \$800, actual value		286
Total amount		3,881.00
Constitutional exemptions, amt. of		
Total taxable property		

"State of Kansas, — county, ss.: I do solemnly swear that in the above statement I have truly set forth all personal property which by law I was required to list, either on my own account or in behalf of others, according to the best of my knowledge. [Signed] HOWELL BROS. Per Manager, HAYES. Sworn to before me, and subscribed in my presence, this 22d day of April, A. D. 1886. W. H. COLLINS, Assessor."

"That the statement of the Morrow Yard was made under similar circumstances to the assessor of Mill Creek township, but the average amount of merchant's stock for the preceding year and other personal property was less. That the amount of personal taxes assessed to Howell Brothers in Washington township for the year 1886 was \$197, and the penalty and fees were \$6.40. That the amount of per-

sonal taxes assessed to Howell Brothers in Mill Creek township for the year 1886 was \$21, and the penalty and fees \$1.13. That, upon the failure of the plaintiff to pay said taxes and penalties, execution or tax-warrants were issued in due form at the proper time against the plaintiff, and were placed in the hands of the defendant for service, and he was proceeding, as sheriff of Washington county, to take possession of the plaintiff's lumber under the same, in Washington county, where this action was brought. That C. F. Allen, from whom the plaintiff bought said lumber-yards, left the state immediately after the sale, and has not been a resident of Kansas since. That the plaintiff got the money to pay for said lumber-yards, and to pay said notes, from S. R. Howell and H. N. Jewett, then composing the firm of Howell, Jewett & Co., said firm letting plaintiff have the money upon an indebtedness existing from Howell, Jewett & Co. to George W. Howell, not shown to be listed anywhere for taxation. Said Howell, Jewett & Co. at the time were doing business at Atchison, Kan., and had bank accounts in Chicago and Omaha, and said Jewett lived in Omaha, and S. R. Howell in Chicago. They did a jobbing lumber business at Atchison, Atchison county, Kan., in 1885 and 1886, and listed their personal property for taxation in Atchison county in those years as follows:

1885	\$3,980
1886	3,390

"That they carried on lumber business at no other place than at Atchison, Kan. That the above and foregoing show all the proceedings had to list, assess, or collect personal tax from the plaintiff doing business as Howell Brothers for the year 1886."

On these facts the trial court concluded, as a matter of law, that the plaintiffs in error were not entitled to an injunction restraining the levy of the tax-warrant on their property.

The sole question here is whether the property was taxable as the property of George W. Howell, he having bought the same on the 8th day of March, 1886. The tax-laws bearing on this question are as follows: Gen. St. 1889, par. 6857: "All property shall be listed and valued as on the first day of March in the year in which the same is assessed, and the transfer or sale of any taxable personal property subsequently to the first day of March shall not authorize any person to omit the same from his list, although such list be not made until after the sale or transfer of such property; but all such property shall be listed for taxation in the same manner as if no sale or transfer thereof had been made." Par. 6862. *Statement*. Sec. 16. "Every person, company, or corporation who shall own or hold, subject to his control, any personal property within this state which shall have been purchased with a view of being sold at an advanced price or profit, or which shall have been consigned to him for the purpose of being so sold, shall be held to be a merchant; and when such person shall be required, according to the provisions of

this act, to make and deliver to the assessor a statement of his personal property, he shall include in such statement the value of the personal property appertaining to his business as a merchant; and in estimating the value of such property he shall estimate the average value of such articles of personal property which he shall have had in his possession or under his control during the year next preceding the first day of March preceding the time of making such statement, or during that portion of said year which he may have been engaged in said business. Par. 6863. *Average Value.* Sec. 17. In order to arrive at the average value of such property, he shall estimate the amount on hand as nearly as may be, in each month in the preceding year, or such portion thereof as he may have been engaged in such business, then add the several monthly estimates, and divide the aggregate by the number of months he may have been engaged in business. No consignee shall be required to list for taxation any property consigned to him for the mere purpose of being forwarded. Par. 6864. *Report to County Clerk.* Sec. 18. Every person, company, or corporation, who shall commence merchandising, trading, or freighting in any town, city, or village in this state, after the first day of March and before the first day of November in any year, and the value of whose personal property so employed shall not have been listed for taxation in any other county in this state, shall report, under oath, to the clerk of the county in which such person, company, or corporation is engaged in business, the probable amount of the average value of personal property intended by such person, company, or corporation to be so employed; and such amount shall be entered by said clerk on the assessment roll of the county in which such business may be carried on, and such property shall be taxed the same as if the same had been returned by the proper assessor. Par. 6865. *Failure; Forfeiture.* Sec. 19. If any person, company, or corporation shall commence merchandising, trading, or freighting, as designated in the foregoing section, and shall not, within one month thereafter, report in accordance with the requirements of section sixteen of this act, such person, company, or corporation shall forfeit and pay four per cent. on the value of the personal property by him or them so employed, and the value of such property shall be ascertained by the testimony of witnesses called by the treasurer of the county in which such business may be carried on; and the said forfeiture shall be collected by such treasurer by a suit before any justice of the peace or court having jurisdiction thereof; and when such forfeiture shall be collected the amount shall be distributed in the same proportion as other taxes: provided, it shall be the duty of said treasurer to notify such merchant of the above requirement of law, at least ten days before the commencement of such suit. Par. 6866. *Manufacturer, When.* Sec. 20. Every person, company, or corporation who shall hold or purchase personal property for the purpose of adding to the value thereof, by

any process of manufacturing, refining, or by the combination of different materials, shall be held to be a manufacturer; and, when such company or corporation shall be required to make out a statement of other personal property for taxation, he or they shall state the average amount of all articles purchased or held for the purpose of being used in such process of manufacturing, refining, or combining, which he or they shall have had on hand during the year next preceding the first day of March preceding the time of making such statement, which amount shall be ascertained by estimating the amount of such property on hand in each month of the preceding year, or such portion thereof as he or they may have been engaged in such business; then add the several monthly estimates, and divide the aggregate by the number of months he or they have been engaged in such business, and such statement shall be verified on oath, as required in other cases."

It seems to us that the plain intent of the legislature, as manifested by paragraph 6857 of the tax-law, is that all personal property in the state shall be listed for the purposes of taxation by the owner thereof on the 1st day of March in each year; that it is the duty of each owner to list the property he owns on the 1st day of March, for this section expressly provides "that the transfer or sale of any taxable personal property subsequently to the 1st day of March shall not authorize any person to omit the same from his list, although such list be not made until after the sale or transfer of such property." It is plain from this statute that it was the duty of Allen to list this lumber and other personal property, whenever called upon by the assessor, as of the 1st day of March, 1886, the same being at that time his property. By no possible construction of this section of the tax-law can it be said that it was the duty of Howell Bros. to list this specific personal property for taxation. It is equally certain that the duty of listing this property was imposed upon Allen.

The only other question remaining is whether or not there is any other provision of the tax-law requiring the owner of personal property who purchased it after the 1st day of March, such property having been in the county and owned by some other person prior to that time, to list it for taxation, the previous owner having failed to do so. It is claimed by the county attorney that Howell Bros. were merchants within the meaning of paragraph 6862 of the tax-law as contained in the General Statutes of 1889, and consequently by that paragraph and by that of 6864 it was their duty to list. The rule established by paragraph 6857, that all property shall be listed and valued as on the 1st day of March in the year in which the same is assessed, and the transfer or sale thereafter shall not authorize the owner on the 1st day of March to omit the same from the list, is a general one, and applies to all personal property of every kind and nature. Paragraph 6862 defines a "merchant," and provides that he shall list the average value of the stock in trade

during the preceding year. Paragraph 6863 provides how this average value for the preceding year shall be ascertained. Paragraph 6864 provides that every merchant who shall commence business after the 1st day of March, and before the 1st day of November, and who shall not have listed his personal property in any other county in the state, shall report the same to the clerk of the county, etc. This paragraph provides for the taxation of a merchant's stock that has been shipped into the county from another state, or from some other county in the state, and has not been listed in the county from which it has been removed, but, in our judgment, has no application to a stock of merchandise that has been in the county of Washington during all of the preceding year, and was subject to taxation under the general provisions of the tax-law, and whose owner on the 1st day of March, 1886, was under a legal obligation to list it. Regarding this as the construction of these various parts of the tax-law, it follows that Howell Bros. were not required to list this specific personal property for taxation for the year 1886, and that the trial court erred in its legal conclusion. Accepting the findings of fact made by the trial court as conclusive, the case is reversed and remanded, with instruction to the court below to grant the injunction restraining the levy of the tax-warrant.

PER CURIAM. It is so ordered; all the justices concurring.

BOARD OF COUNTY COMMISSIONERS OF  
KEARNEY COUNTY V. RUSH *et al.*

(*Supreme Court of Kansas. July 3, 1890.*)

VENUE IN CIVIL CASES—SUIT BY COUNTY FOR  
ILLEGAL ALLOWANCES.

Where an action is brought under section 39, c. 25, of the act relating to counties and county officers, to recover illegal allowances, the action is not for the recovery of a penalty imposed by the statute, within the terms of section 48 of the Civil Code. Therefore, where an action is brought in the county where the illegal claims were allowed, but service of the summons is upon a defendant in another county, and judgment is rendered upon default, without any appearance by the defendant, the judgment is wholly void, as the court has no jurisdiction of the person of the defendant.

(*Syllabus by the Court.*)

Error from district court, Kearney county; A. J. ABBOTT, Judge.

The plaintiff filed a petition on March 16, 1889, a copy of which, omitting the title, is as follows, to-wit:

"The plaintiff complains of the defendant, and says that the county of Kearney, in the state of Kansas, was at all the times herein mentioned an organized county of said state; that the defendant the First National Bank of Larned, Kan., was at all times herein mentioned a corporation duly organized under the laws of the state of Kansas; that the defendant J. W. Rush was at all times herein mentioned an officer and duly-authorized agent of said defendant the First National Bank of Larned, Kan.; that on or about the 9th day of August, 1888, the board of county commissioners of the county of Kearney,

without any warrant or authority of law for so doing, and at the special instance and request of the said defendants, J. W. Rush and the First National Bank of Larned, Kan., issued and delivered to the said defendants, and caused to be delivered to said defendants, in the form prescribed by law, one county order or warrant of said county of Kearney of the denomination and amount of eight thousand dollars, by the terms of which the treasurer of Kearney county, Kan., was ordered and directed to pay to the said J. W. Rush or bearer the said sum of \$8,000 out of any money in the treasury not otherwise appropriated; that said order and warrant is not in plaintiff's possession, or within its knowledge, reach, or control, by reason whereof plaintiff is unable to attach a copy thereof to this petition; that said allowance was made, and said order and warrant was issued to said defendants as aforesaid, without any account containing the items of the pretended claim for which the same was issued, verified by affidavit, setting forth that the same was just and correct, and remained due and unpaid, having first been presented to said board of county commissioners as required by law, and without any verification whatever of the pretended claim or account for the payment of which said sum of money was so as aforesaid appropriated; that prior to the commencement of this action plaintiff demanded of the defendants that they return and refund to said county of Kearney said order and warrant, or the amount of money appropriated thereby, or any bonds of the said county of Kearney, if any they held in lieu thereof, which said defendants, and each of them, refused, and still refuse, to do; that the defendants have wrongfully taken and appropriated the proceeds of said order and warrant to their own use; and that by reason of the foregoing plaintiff is entitled to recover from the said defendants said sum of eight thousand dollars so as aforesaid wrongfully allowed and appropriated to said defendants, together with an additional amount equal thereto on account of the wrongful taking thereof, and the refusal of the said defendants to return and refund said order and warrant, or the amount of money thereby appropriated, on demand duly made.

"Second cause of action: And plaintiff further says that on or about the 9th day of August, 1888, the board of county commissioners of said county of Kearney, without any warrant or authority of law for so doing, and at the special instance and request of the said defendants, J. W. Rush and the First National Bank of Larned, Kan., issued and delivered to said defendants, and caused to be issued and delivered to said defendants, in the form prescribed by law, one county order or warrant of the said county of Kearney of the denomination and amount of seven thousand dollars, by the terms of which the treasurer of said Kearney county, Kan., was ordered and directed to pay to the said J. W. Rush or bearer the said sum of seven thousand dollars out of any money in the treasury not otherwise appropriated; that said order and warrant is not

in the plaintiff's possession, or within its knowledge, reach, or control, by reason whereof plaintiff is unable to attach a copy thereof to this petition; that said allowance was made, and said order and warrant was issued, to said defendants as aforesaid, without any account containing the items of the pretended claim for which the same was issued, verified by affidavit setting forth that the same was just and correct, and remained due and unpaid, having first been presented to the said board of county commissioners as required by law, and without any verification whatever of the pretended claim or account for the payment of which said sum of money was so as aforesaid appropriated; that prior to the commencement of this action plaintiff demanded of the defendants that they return and refund to said county of Kearney said order and warrant, or the amount of money appropriated thereby, or any bonds of said county of Kearney, if any they held in lieu thereof, which said defendants, and each of them, refused, and still refuses, to do; that the defendants have wrongfully taken and appropriated said order and warrant, and the proceeds thereof, to their use; and that by reason of the foregoing, plaintiff is entitled to recover from the said defendants said sum of seven thousand dollars so as aforesaid wrongfully appropriated and allowed to said defendants, together with an additional amount equal thereto on account of the wrongful taking thereof, and the refusal of said defendants to return and refund said order and warrant, or the amount of money thereby appropriated, on demand duly made.

"Third cause of action: And plaintiff further says that on or about the 9th day of August, 1888, the board of county commissioners of said county of Kearney, without any warrant or authority of law for so doing, and at the special instance and request of the said defendants, J. W. Rush and the First National Bank of Larned, Kan., issued and delivered to said defendants, and caused to be issued and delivered to said defendants, in the form prescribed by law, one county order or warrant of the said county of Kearney of the denomination and amount of five hundred twenty-eight and 95-100 dollars, by the terms of which the treasurer of said Kearney county, Kan., was ordered and directed to pay to the said J. W. Rush or bearer the said sum of five hundred twenty-eight and 95-100 dollars out of any money in the treasury not otherwise appropriated; that said order and warrant is not in plaintiff's possession, or within its knowledge, reach, or control, by reason whereof plaintiff is unable to attach a copy thereof to this petition; that said allowance was made and said order and warrant was issued to said defendants, as aforesaid, without any account containing the items of the pretended claim for which the same was issued, verified by affidavit setting forth that the same was just, and remained due and unpaid, having first been presented to said board of county commissioners as required by law, and without any verification whatever of the pretended claim or account for the pay-

ment of which said sum of money was so as aforesaid appropriated; that prior to the commencement of this action plaintiff demanded of the defendants that they return and refund to said Kearney county said order and warrant, or the amount of money appropriated thereby, or any bonds of said county of Kearney, if any, they held in lieu thereof, which said defendants, and each of them, refused, and still refuses, to do; that the defendants have wrongfully taken and appropriated said order and warrant, and the proceeds thereof, to their use; and that by reason of the foregoing plaintiff is entitled to recover from the said defendants said sum of \$528.95, so as aforesaid wrongfully appropriated and allowed to said defendants, together with an additional amount equal thereto on account of the wrongful taking thereof and the refusal of said defendants to return and refund said order and warrant, or the amount of money thereby appropriated, on demand duly made.

"Wherefore plaintiff prays judgment against the said defendants, J. W. Rush and the First National Bank of Larned, Kan., for the sum of \$31,057.90, with six percent. interest thereon from the 15th day of March, 1889, and for costs of this action."

On filing the petition a summons was issued by the clerk of the district court of Kearney county to the sheriff of Pawnee county, and there served upon each of the defendants. Afterwards a judgment was rendered by default against each of the defendants, as follows: "It is therefore considered, ordered, and adjudged that the plaintiff, the board of county commissioners of Kearney county, Kan., do have and recover of and from the defendants, J. W. Rush and the first National Bank of Larned, Kan., the total sum of \$31,213.18, with interest thereon at six per cent. per annum from this date until paid, and for all costs of this action, taxed at \$13.91, and hereof let execution issue." The defendants, at the same term of the court, appearing specially for the purpose of the motion only, moved to vacate and set aside the judgment, for the following reasons: "*First*, that the court had no jurisdiction of the subject-matter of this action; *second*, that it had no jurisdiction of the persons of the defendants, or either of them; *third*, that neither of said defendants ever appeared in said action, and that the summons in said action was served upon them in Pawnee county, Kan., as will fully appear from the records and files in said cause; *fourth*, that said judgment is absolutely void upon the face of the record, as no appearance was ever made in said cause or summons served upon said defendants, or either of them, in Kearney county, Kan., as appears fully from the record in said cause." The court, having heard the motion, sustained the same, and the plaintiff brings the case to this court for review.

*Ady & Nicholson, J. A. Wilson, and J. M. Johnson*, for plaintiff in error. *C. N. Sterry*, for defendants in error.

HORTON, C. J., (after stating the facts as above.) This was an action commenced

in Kearney county by the board of commissioners of that county against J. W. Rush and the First National Bank of Larned, under section 39, c. 25, of the act relating to counties and county officers. The section reads: "All fees, costs, or other allowances, or any fees obtained from or allowed against any county, when the same are not authorized by law, and not refunded on demand, may be recovered back in a civil action, in the name of the proper county, in any court of competent jurisdiction; and on the rendering of the judgment in any such case the justice, or the court rendering the same, shall add one hundred per cent. to the same, to go to the county, and also a fee of ten dollars if in a justice's court, and twenty-five dollars if in the district court, to go to the county attorney or other person prosecuting the same." Gen. St. 1889, par. 1658. A summons was issued by the clerk of the district court of Kearney county to the sheriff of Pawnee county, and served in that county on each of the defendants. Judgment was rendered upon default against each of the defendants for \$31,213.18. This judgment was subsequently set aside by the district court, upon the ground that the court had no jurisdiction of the defendants, or either of them. This proceeding has been brought to reverse the ruling of the district court.

It is claimed by the plaintiff that the action in the court below was for the recovery of a penalty imposed by statute; therefore, that the action was properly brought in Kearney county, and the service of the summons properly made in Pawnee county. Section 48, Civil Code. At most, the action is prosecuted to recover illegal allowances, and a penalty. The penalty, if any, follows as an incident to the recovery of the illegal allowances. An action could not be brought under the statute for the penalty only, nor could an action under the statute be brought for the recovery merely of the attorney's fee. There must be a verdict, or general finding, for a specific amount, before 100 per cent. can be added. The illegal fees, costs, or other allowances sued for must first be ascertained, and then, on the rendering of the judgment for such illegal fees, costs, or other allowances, it is the duty of the court to add 100 per cent. to the same. If the action is before a justice, an attorney's fee of \$10 must be added. If the action is pending in the district court, an attorney's fee of \$25 must be added. The action, therefore, in our opinion, is not merely for the recovery of a penalty imposed by statute, but is an action for the recovery of illegal fees, costs, or other allowances, and when such fees, costs, or other allowances are determined by a verdict or finding, the court is to add 100 per cent. and the attorney's fees prescribed. The action, therefore, does not come strictly within the provisions of said section 48. Under the statute the cause of action or subject-matter must all be for the recovery of a penalty. We cannot, and ought not to, extend the terms of the section to embrace cases not within its language. While the percent. to be added is a large amount, the principal is the same as if only one or

more per cent. were to be added, and the action is no more for a penalty than if only a small per cent. in place of 100 per cent. were to be added on the rendering of the judgment. The district court, in rendering judgment, had no jurisdiction over either of the defendants, and therefore committed no error in subsequently vacating the same. Section 55, Civil Code. If an action could have been brought, or had been brought, for the recovery of the penalty only, a different question would be presented. It is urged that the petition is fatally defective. In view of the conclusion we have reached, we need not decide this now. We would suggest, however, that, if the action is prosecuted, it would be better if the petition is amended so as to expressly allege that the money was drawn from the county treasurer upon the orders or warrants of the board of county commissioners, or that the orders or warrants were refunded into county bonds. The judgment of the district court will be affirmed. All the justices concurring.

*OSWEGO TP. et al. v. ANDERSON et al.*  
(Supreme Court of Kansas. July 3, 1890.)

MUNICIPAL BONDS—TOWNSHIP—CITY DETACHED—  
APPORTIONMENT BY CONTRACT.

1. The village of Oswego, situated within and forming a part of the township of Oswego, Labette county, undertook, in 1871, to incorporate as a city of the second class, under chapter 59, Laws 1871, which was an unconstitutional and void act. Afterwards, city officers, except city assessor, were elected within the city, and the inhabitants thereof exercised many of the privileges and performed many of the duties provided and imposed by law upon cities of the second class. The township elections, however, were held within the city in 1871, 1872, and 1873, and the people of the city participated in the elections, and voted for the election of township officers, and upon all other questions submitted at such elections. No city assessor was chosen during the years 1871 and 1872, but the inhabitants of the city joined with the people of the township, and selected a township trustee, who assessed the property of the township and city, and the trustee and assessor thus chosen was a resident of the city. The township officers for the years 1871 and 1872 were residents and citizens of the town at the time of their election, and continued as such during their terms of office. Persons resident within the town were candidates for township officers against persons residing outside of the limits of the town, and in some cases defeated the outside candidates at the township elections. During the years 1871 and 1872 a large amount of township bonds were voted and issued in aid of railroads, and the petitions for the bond elections were signed by the inhabitants of the town, and they were largely instrumental in calling the elections and in voting the bonds upon the township. The voting place and precinct for all these township elections were within the corporate limits of the city. In June, 1880, the people of the city took steps to organize Oswego as a city of the second class, and perfected the organization under the general law. *Held*, that the act of 1871, under which the city attempted to incorporate, furnished no authority for a separation of the city from the township; and, further, that the attempted organization, and the steps and acts done and performed by the people of the city, did not create such a *de facto* municipality as will separate it from the township, and release the people therein from the bonds which they assisted in voting upon the township; nor are they relieved from the payment of funding bonds issued by the township to cancel and satisfy the bonds orig-

inally issued, although the people of the city took no part in the funding operations. *Brown v. Milliken*, 42 Kan. 769, 23 Pac. Rep. 167.

2. A contract between the city officers and the township officers, and to which the holders of the bonds were not parties, adjusting the bonded debt between the city and the township, and stipulating that, upon payment of a certain sum of money by the city to the township, the city will be released from the lien of such bonds, and from taxation to pay the same, is unauthorized and void, and will not prevent a levy of taxes upon the property of the entire territory subject to taxation for the payment of such bonds in accordance with law.

*(Syllabus by the Court.)*

Error from district court, Labette county; JOHN N. RITTER, Judge.

Action brought by Joseph Anderson and many other citizens and tax-payers of the city of Oswego to enjoin the collection of taxes levied upon their property situate within the corporate limits of the city of Oswego. The petition is in three counts. The first count is for an injunction against a ten-mill tax levied to pay interest on \$78,000 of funding bonds issued by Oswego township; the second seeks to enjoin a six-mill tax levied to pay interest on \$46,000 of funding bonds issued by the township; and the third is for an injunction against a three-mill tax levied to pay interest on \$20,000 of the funding bonds of the township. It is alleged that the bonds were issued when the city of Oswego was not a part of the township, and the plaintiffs allege that their property within the city is not liable for the payment of the bonds, and that the taxes levied for that purpose are illegal. After the issues had been closed by answer and reply, the cause was submitted to the court upon a statement of facts agreed upon between the parties, which is as follows:

"(1) The township of Oswego was duly organized, as one of the municipal townships of Labette county, in the year 1867, and as so organized included within the incorporated limits all the following territory, to-wit: Commencing at the intersection of the north line of the congressional township 33 south, with the east line of Labette county; running thence south, along the east line of said county, to the south line of said congressional township; thence west, to the west line of range 22 east; thence north, to the north line of said congressional township; thence east to the place of beginning.

"(2) That on February 8, 1870, the inhabitants of a portion of the territory of said township, to-wit, the south-east quarter of the north-west quarter, the south-west quarter of the north-east quarter, the east half of the south-west quarter, and the south-east quarter of section 16, and the south-west quarter of section 15, and the north half of the north-east quarter of section 21, all in township 33 south, range 21 east, became and were duly incorporated as a town or village, under the provisions of chapter 108, Gen. St. 1868.

"(3) That on the 1st day of July, 1870, there was issued by the proper county officers, for and in behalf of Oswego township, one hundred bonds, for \$1,000 each, aggregating \$100,000, bearing interest at 7 per cent. per annum, payable annually,

which bonds were issued in payment of a subscription of said township to the capital stock of the Missouri, Kansas and Texas Railroad Company, under the provisions of chapter 90 of the Laws of 1870, and pursuant to an election held in said township on the 17th day of May, 1870, at which the question as to whether said subscription should be made and bonds issued was submitted to the voters of said township.

"(4) That on the 15th day of October, 1872, said township issued twenty bonds, of \$1,000 each, aggregating \$20,000 for the purpose of securing the building of two bridges across the Neosho river in said township, which bonds bore interest at the rate of ten per cent. per annum, payable semi-annually. Said bonds were issued under the provisions of chapter 68 of the Laws of 1872, and pursuant to an election held on the 30th day of July, 1872, at which the question as to whether said bonds should be issued was submitted to the qualified electors of said township.

"(5) That on the 2d day of September, 1872, there was issued by the proper county officers, for and in behalf of said township, eighty bonds, of \$1,000 each, aggregating \$80,000, bearing interest at the rate of 10 per cent. per annum, payable semi-annually, which bonds were issued in payment of a subscription of said township to the capital stock of the Memphis, Carthage and Northwestern Railroad Company, under the provisions of Chapter 68 of the Laws of 1872. That only \$30,000 or thereabouts of these bonds were ever delivered. The residue were placed in escrow, and it is claimed by the township that the terms of the escrow have not been complied with, and said bonds have not been delivered. That there was no election held in said township directly authorizing the subscription of stock and issuance of bonds to the Memphis, Carthage and Northwestern, but on the 20th day of December, 1871, there was an election held authorizing the subscription of the same amount of stock and the issuance of the same amount of bonds to the State Line, Oswego and Southern Kansas Railroad Company, which company assigned all of its rights, subscriptions, and franchises to the Memphis, Carthage and Northwestern Railroad Company; and it is claimed by the parties instrumental in having said bonds issued that so long as the amount was the same, and the company proposed to build the road on the same line, and was the assignee of the former company, that no new election was necessary, and the bonds were accordingly issued.

"(6) That at the time the elections were held, as set forth in paragraphs 3, 4, and five hereof, the usual and only voting place and precinct for said township was within the corporate limits of said village or city of Oswego, the inhabitants of which participated in and voted at each of said elections. That the inhabitants of said village were generally in favor of the propositions submitted at said elections, signed the petitions therefor, and were largely instrumental in calling the elections, and carrying them in favor of the propositions submitted.

"(7) That for many years no interest has been paid on any of the bonds mentioned, except about \$1,200 upon a judgment which had been rendered for interest upon the bridge bonds mentioned; the citizens of the township, aided, advised, and encouraged by the citizens of Oswego city, contesting in the courts the validity of each of the different issues of bonds mentioned. That all of said bonds passed into the hands of persons who claimed to be innocent holders thereof for value, and numerous judgments were rendered in the circuit court of the United States for the district of Kansas against the township for interest that had accrued and matured upon each of the several issues of bonds described. That in March, 1885, the indebtedness of said township on account of said bonds and accrued interest, including judgments for unpaid interest, amounted to \$350,000 or more.

"(8) That on the 2d day of March, 1885, for the purpose of funding and canceling a portion of said indebtedness, said township issued the \$78,000 in bonds described in the petition, of which \$48,000 were issued to compromise and cancel more than \$130,000 of the indebtedness outstanding against said township, on account of said Missouri, Kansas and Texas Railroad bonds mentioned in the third paragraph hereof, and \$30,000 for the purpose of compromising and canceling more than \$90,000 of the indebtedness outstanding against said township on account of the Memphis, Carthage and Northwestern Railroad bonds mentioned in the fifth paragraph thereof. That said bonds were issued in compliance with the provisions of chapter 170 of the Session Laws of 1881, as amended by chapter 157 of the Session Laws of 1883.

"(9) That for the purpose of compromising and canceling the indebtedness existing against said township on account of said bridge bonds, and two of said Missouri, Kansas and Texas bonds, which, including accrued interest and judgments thereon, amounting to \$63,000 or more, said township, on the 1st day of August, 1887, issued its bonds to the amount of \$50,000, of which \$4,000 have been paid, and the residue of which are the \$46,000 of bonds mentioned in the second cause of action in the petition. That said bonds were used in compromising and canceling the indebtedness existing against the said township on account of said bridge bonds, and on account of two of the Missouri, Kansas and Texas Railroad bonds hereinbefore described.

"(10) That for the purpose of compromising and canceling another portion of the indebtedness existing against said township on account of a judgment rendered against it on a portion of the Missouri, Kansas and Texas Railroad bonds before mentioned, amounting to about \$45,000, said township, on the 1st day of January, 1888, issued \$20,000 in bonds, which, together with about \$2,700 in money paid by said township, were used for the purpose of compromising said judgment, and which are the bonds mentioned in the third cause of action in the petition; it being agreed at the time, as a part of

said compromise, by the trustees of said township, that if default was made in the payment of any of the installments of interest maturing on said funding bonds or the principal thereof, then that said judgment should be in full force and effect against said township. Said judgment was taken against said township by a confession of judgment made by G. A. Cooper, township trustee, upon bonds, a portion of which were not due at the time said judgment was taken. The judgment creditor in whose favor said judgment was taken was Geo. S. C. Dow, who has since died, and proceedings are now pending to revive said judgment in the name of his executrix.

"(11) That before the bonds mentioned in paragraphs 9 and 10 were issued, elections were held in said township as then constituted, at which the question as to whether said funding bonds should be issued or not was submitted to the qualified electors of said township, which election in each case resulted in favor of the issue of said bonds by the majority required by law, and said bonds were issued in all respects in compliance with the law, and are valid and outstanding obligations against said township. None of the citizens or inhabitants of the city of Oswego took part in the elections mentioned in this paragraph.

"(12) That in March, 1871, the authorities of the village or city of Oswego caused to be taken the steps prescribed by section one, c. 59, of the Laws of 1871, and on the 16th day of the same month, and within twenty days after the presentation of the petition required by said act, enacted an ordinance dividing the city into wards, and providing for holding an election as provided by section two of said act. Said election was held on the first Monday in April, 1871, and at each city election since that time said city has claimed the right to and has elected the officers, (not including city assessors,) and has exercised many of the privileges and performed many of the duties provided or imposed by law upon cities of the second class. That the territory claimed by said city as included within its incorporate limits under this incorporation is described as follows: All the territory hereinbefore described in paragraph second. That in 1873 ordinances were enacted by said city purporting to add to the city limits the following territory: The west half of the south-west one-fourth of section 16, and the north-east one-fourth of the north-west one-fourth of the north-west one-fourth of section 21, all in township 33, range 21, Labette county, Kan. That in 1880 ordinances were enacted by said city purporting to add to said city the following territory, to-wit: The south-east one-fourth of section 17, and commencing at the south-east corner of the south-west one-fourth of section 17, thence north 80 rods, thence west 76 rods, thence south 80 rods, thence east 76 rods, to the point of beginning; the west one-half of the north-east one-fourth of section 20; the north half of the north-west one-fourth of section 21; the north half of the south-west quarter of the north-east quarter of section 21; the north



one-half of the north-west one-fourth of section 22, commencing at the south-east corner of lot 3, section 15, thence north 6 rods, thence west 80 rods, thence south 6 rods, thence east 80 rods, to place of beginning; all of lot 2 in section 16 lying west of the county road, running from Commercial street, in the city of Oswego, to the Neosho river bridge; the south-east one-fourth of the north-west one-fourth of section 16; and the south one-half of the south-west one-fourth of the north-west one-fourth of section 16,—all in township 33, range 21. That in 1881 ordinances were passed purporting to add to said city the following territory: Lot No. 3 in section 15, and lot No. 2 in section 16, all in township 33, range 21. That the proceedings of the city council show that a city assessor was appointed in 1872 and in 1873, and that since that time the city has appointed an assessor each year; and, further, that, since and including the year 1872, the city of Oswego has had a board of education and a police judge.

"(13) That the township elections for the years 1870, 1871, 1872, and 1873 were held in said city, and within the territory described in the second and twelfth paragraphs hereof, the inhabitants of said city participating and voting at such elections for township officers, and on all other questions submitted at such elections, and citizens residing in said city were elected to several of the township offices for three years, and served as such. That C. F. Winton, T. E. Clark, and H. P. Newlon were elected to the offices of township trustee, treasurer, and clerk, respectively, of said township, at the election held in April, 1871, and qualified and served as such officers; the said T. E. Clark and H. B. Newlon at the time of said election, and during their entire term of office, residing within and being citizens of said city. That Joseph Nelson, H. L. Woodford, and Andy Monfort were elected to the offices of township trustee, treasurer, and clerk, respectively, of said township for the year 1872, and qualified and served as such; all of said officers at the time of said election and during their entire term of office residing within and being citizens of said city. That in several cases the persons named were candidates for said offices against persons residing outside of the limits of said city, and defeated such outside candidates at the election held in said city as aforesaid. That for the years 1871 and 1872 said city had no city assessor, the territory included therein being assessed by the trustee of said township.

"(14) That in May or June, 1880, the territory described in the second paragraph hereof, together with some adjacent territory which was added thereto from the township, attained a population of two thousand or more, which fact was duly ascertained and certified to the governor of this state, who thereupon, to-wit, on the 18th day of June, 1880, by public proclamation, declared said city subject to the provisions of the act governing cities of the second class, being chapter 100 of the Laws of 1872.

"(15) That a short time before the \$20,000 in bonds described in the tenth para-

graph hereof were voted and issued, to-wit, on the 20th day of August, 1887, the question having been raised as to whether the city was or would be liable for funding bonds issued by the township, an instrument in writing was executed by the officers of the city and township, a copy of which is hereto attached, marked 'A,' and made a part hereof.

"(16) That on the 1st day of July, 1887, the officers of Oswego township, and the mayor and clerk of the city of Oswego, executed the instrument attached to the amended reply, and made a part hereof.

"(17) That on the 3d day of January, 1888, the city of Oswego paid to Oswego township the sum of \$2,000, on account of the \$23,750 mentioned in said instrument, but since that time said city has not made any further payments on account thereof.

"(18) That taxes were levied for the years 1875, 1876, and 1877 on all the property in Oswego township and city to pay the interest which had accrued on the bridge bonds mentioned in the fifth paragraph thereof, and for the year 1875 to pay a judgment or judgments for interest thereon, which taxes were paid by the plaintiffs in so far as they then owned taxable property in said city for those years, and by all other tax-payers therein.

"(19) That for ten years, to-wit, from 1877 to 1887, the township of Oswego had no qualified or acting township officers, the township being assessed by the so-called assessor appointed by the board of county commissioners of said county; and the funding operations during the period prior to 1887 were conducted by an agent or agents appointed for that purpose. That C. M. Condon acted for several years with others in that capacity. In 1883 the said C. M. Condon, J. B. Draper, A. T. Shrout were such agents; the first named being at all times a citizen of the city of Oswego, and during a portion of the time he was so acting being the mayor of said city.

"(20) That the defendant W. H. Porter was and is the duly-qualified and acting treasurer of Labette county. That as such he was about to collect the taxes mentioned in the petition. That all the plaintiffs are the owners of taxable property within the limits of the city of Oswego, and that the taxes mentioned in the petition were levied for the purpose of paying the interest maturing on the bonds described in paragraphs 8, 9, and 10 hereof, and that such taxes are liens and charges upon the property owned by said plaintiffs in said city.

"(21) That the term 'village,' 'city,' or 'incorporation,' as used in the sixth or any of the paragraphs hereof, shall not be held or construed as in any manner affecting the question as to whether the city of Oswego was or was not at such times a city of the second class. The question as to such incorporation shall be determined from the facts stated, and not from the name or term designating such city or village.

"(22) The parties are to have the right to introduce such proof as they may desire concerning the matters stated in paragraph 12 and paragraph 4, and as to any other not herein agreed upon.

"(23) The parties reserve the right to object to the relevancy and materiality of the facts herein agreed upon."

During the progress of the trial the parties in open court made other admissions of fact, as follows: "It is admitted that since the year 1873 there has been a city assessor appointed by the city of Oswego. It is admitted that in the year 1888 the taxes were levied as alleged in the petition. That said city included within its corporate limits all the territory described in the petition as being within the corporate limits of said city. It is admitted by both parties there was an agreement of a certain character entered into between the city and township, a copy of which is set up in the reply, and also set up in the findings of fact with reference to the settlement of what are known as the 'Bolles' and 'Bolles Claims.' It is admitted that in the years 1870, '71, '72, and '73, the assessed valuation of the property now claimed by the plaintiffs to be the city of Oswego, and the property outside of the city of Oswego in Oswego township, was about the same. That since that time the property within said city has materially increased in value, and is now, and at the time of the making of the levy complained of in this case was, largely increased over the valuation at the time before stated, and is and was at the time of the levy complained of in this action largely in excess of the value of the property within Oswego township as then constituted. That at the time of the first division of the territory as claimed by the city the taxable property in the township outside of the city and within the city was substantially equal. That on the same territory, respectively, at the last assessment before the levy of the tax complained of, the assessed value of the same property within the city was in the proportion following: 3-5 in the city and 2-5 in the township on the same territory as on the first division as at the time of the first division. It is admitted that for the year 1888 the assessed value for Oswego city as then constituted was more than double that of Oswego township as then constituted, and that this difference in value in favor of the city was made up partly from the increase of the value of the property within the city, and partly from additions which were made to the city by taking in the territory which had theretofore been a part of the township."

After the case was submitted, and on the 1st day of June, 1889, the court was about to announce its decision in the case, when it suggested that, if the pleadings showed a willingness on the part of the plaintiffs to pay the portion of the tax levied for the purpose of paying interest on \$48,000 of the funding bonds issued to refund bonds issued to the Missouri, Kansas & Texas Railway Company, it would make the injunction as to the balance of the tax, and which had been levied to pay the interest on \$30,000 funding bonds issued to fund the Memphis, Carthage & Northwestern Railway bonds, issued by the township, perpetual. The amendment was made as suggested, and the court thereupon found that five-thirteenths of

the 10-mill tax mentioned in the first cause of action is not a legal tax upon property within the limits of the city of Oswego, and that eight-thirteenths of the 10-mill tax is a legal tax against the property of the plaintiffs within the limits of the city. It further found that the taxes described in the second and third causes of action were legal and valid taxes against the property of the plaintiffs, and against all of the taxable property within the limits of the city of Oswego. Judgment was rendered that the temporary injunction against the five-thirteenths of the 10-mill levy should be made perpetual, and that as to the eight-thirteenths of the 10-mill levy, as well as the other taxes complained of, the injunction should be dissolved. Exceptions were taken by each party to the rulings adverse to them, and the case has been brought to the supreme court for review, both parties alleging error.

*Kimball & Osgood, for plaintiffs. Morrison & McCune, for defendants.*

JOHNSTON, J., (after stating the facts as above.) Three classes of bonds which have been issued by Oswego township, Labette county, are involved in this action. The first is what is known as the "Missouri, Kansas & Texas Railroad Bonds," issued July 1, 1870, in pursuance of an election held May, 17, 1870; the second were bridge bonds, originally issued October 15, 1872, in pursuance of a vote taken July 30, 1872; and the third class were the Memphis, Carthage & Northwestern Railroad bonds, issued September 2, 1872, upon a vote taken December 20, 1871. The vote last mentioned authorized the issuance of \$80,000 of bonds to the state Line & Southern Kansas Railway Company, which company transferred its rights, subscriptions, and franchises to the Memphis, Carthage & Northwestern Railroad Company, after which, and upon the date mentioned, \$30,000 of the amount voted was delivered to the latter company. The validity of these various classes of bonds was contested in the federal court, and judgments sustaining their validity and in favor of the holders of each class, were rendered. When the indebtedness arising from the issuance of these bonds amounted to about \$350,000, the township compromised and reduced the debt to \$148,000, and issued funding bonds to that amount to satisfy and cancel the original debt. The township of Oswego originally included the territory which now constitutes the city of Oswego, and in March, 1871, steps were taken to organize and incorporate the village of Oswego as a city of the second class in pursuance of the provisions of chapter 59 of the Laws of 1871. It is contended by the plaintiffs below, who were tax-payers within the city of Oswego, that since that time Oswego has been at least a *de facto* city of the second class, and that the territory now composing the city was not a part of the township at the time the bonds were issued, and therefore not liable for the indebtedness represented by them, nor liable for any funding bonds based thereon. Some taxes were levied upon the property within the village and collected from the

tax-payers thereon after the attempt to organize Oswego as a city of the second class, in 1871, but both the township and the city resisted the payment of these bonds for several years, and until a compromise and settlement was effected, in 1885. The tax-payers within the city now resist the payment of the taxes levied to meet the funding bonds issued to compromise and cancel the bonds above mentioned, but the court below sustained the tax levy to meet the first two classes of bonds,—that is, the Missouri, Kansas & Texas Railway bonds and the bridge bonds; and it enjoined the collection of the third class, namely, the Memphis, Carthage & Northwestern bonds; and of this latter ruling the township complains.

The recent case of *Brown v. Milliken*, 42 Kan. 769, 23 Pac. Rep. 167, is an apt, and to a great extent a controlling, authority in the present case. The attempted organization of the city of Oswego in 1871, like that of Chetopa, was wholly void, and did not operate to create a municipality, and to take it out of the township of Oswego. Chapter 59 of the Laws of 1871, under which both Oswego and Chetopa undertook to incorporate, was a direct violation of that provision of the constitution, which prohibits the legislature from conferring corporate powers by a special act. *City of Council Grove*, 20 Kan. 619; *Brown v. Milliken*, supra. It furnished no authority for a separation of the city as a municipality from the township, nor will it, or the action of the people thereunder, relieve the tax-payers and property within the city from a bonded debt which its people voluntarily incurred as a township debt after the passage of the act. It is true that a corporation organized under an invalid law is sometimes held to be a corporation *de facto*, in order that justice may be done to innocent parties; but to sustain the claim of the defendant in error, that a *de facto* organization and separation from the township had been perfected, would work a legal injustice. While steps were taken under the void act to incorporate, and in some respects the people of the city acted as if their purpose was to carry on a separate municipality, yet the steps and acts taken and performed did not create such a *de facto* municipality as will separate it from the township, and relieve the people therein from the debt which they were largely instrumental in voting upon the township as it then existed. A *de facto* organization such as would separate the city from the township was not only not recognized by the people of the township outside of the city, but was not recognized and acquiesced in by the people within the city during the years when the bonds in question were voted and issued. It is true that an election for the purpose of choosing some city officers was held in April, 1871, and that since that time the city has claimed the right to elect, and has elected, some of the officers, and "has exercised many of the privileges and performed many of the duties provided or imposed by law upon cities of the second class." They did many things, however, during the same time, which were incon-

sistent with the organization and maintenance of a separate municipality. The people within the city, during all the years from 1871 to 1873, inclusive, acted and voted with the city in choosing township officers, voting township bonds, and upon all other questions submitted at township elections. The voting place and precinct for said township at these elections was within the corporate limits of the town of Oswego, and the inhabitants of the town signed the petitions for the bond elections, and were largely instrumental in calling the elections, and carrying them in favor of the propositions submitted. The people within the town had no city assessor during the years 1871 and 1872, but joined with the people of the entire township in selecting a township trustee, who assessed the property of the township and town; and, more than that, the trustee and assessor thus chosen resided within the limits of the town. The township treasurer and clerk chosen at the election in 1871 were residents of the town, and continued as such during their entire terms of office; and the trustee, treasurer, and clerk, who were chosen in 1872, were residents and citizens of the town at the time of the election, and continued as such during their entire terms of office. It further appears that persons resident within the town were candidates against persons residing outside of the limits of the town, and defeated the outside candidates at the township elections. In all these things the people of the town acted as though they were inhabitants of the township, and their conduct was consistent with the theory that the site of the town in which they resided was within the territorial limits of the township. It is fair to presume that these large debts would not have been incurred had it not been for the action of the inhabitants of the town. They signed the petitions calling the elections, and generally voted in favor of the bond propositions submitted at such elections. The people within the town, as well as without, proceeded upon the theory that all the electors in both places had the right to vote a township debt, and that the property of the entire township, including that of the town, would be liable for the payment of such debt. Then, again, the person who acted for the township in funding the debt in question was a resident of the town, and since the debt was funded the people of the town have contributed to some extent towards the payment of the funding bonds that were issued. Subsequently, and in June, 1880, the people of the town took steps to organize as a city of the second class under the general law, and thus to some extent they recognized the fact that no separation had occurred prior to that time. We are clearly of opinion that at the time the bonds in question were authorized and issued the town of Oswego did not constitute a *de facto* city of the second class, such as separated it from the township, and therefore the case of *Brown v. Milliken*, supra, is inapplicable and controlling authority.

It appears from the record that the validity of the bonds originally issued by the

township has been tried and determined in the federal courts, and the question suggested, as to whether the Memphis, Carthage & Northwestern Railway bonds were legally issued, is not before us. The bonds passed into the hands of persons claiming to be innocent holders thereof for value, and judgments were rendered against the township for interest that accrued and matured thereon prior to the funding of the debt. There was due on these bonds at the time they were funded about \$90,000, but the representatives of the township succeeded in making a compromise which reduced the debt to \$30,000. Under the authority of *Brown v. Milliken*, supra, and the cases there cited, it must be held that the tax levied upon the property within the city of Oswego for the payment of this debt was legal, and the judgment of the district court enjoining its collection is to that extent erroneous.

There are two other serious objections urged by the township against the judgment rendered against the tax, but, in view of the conclusion we have reached upon the merits of the question, it is unnecessary to discuss and determine them. The defendants in error complain of the judgment rendered against them dissolving the injunction as to the tax levied to pay the interest on the funding bonds issued to compromise and fund the Missouri, Kansas & Texas Railway bonds and the bridge bonds. They contend that the court erred in ignoring an agreement made between the mayor and clerk on the part of the city, and the township officers in behalf of the township. The agreement was dated July 1, 1887, and by it the township agreed to compromise and settle \$63,000 of the debt, which it is recited might be compromised for \$47,500 in cash, or \$50,000 in the bonds of the township; and the city officers agreed that in consideration of the township assuming the payment of the \$47,500, either by payment of cash or the issue of its bonds, the city would pay \$23,750 in five equal installments, which should be received in full of all obligations on the part of the city on account of the \$63,000 indebtedness. In pursuance of this agreement, and on January 3, 1888, the city paid to the township the sum of \$2,060, but no other or further payments have been made on account of the agreement. It does not appear that the mayor and clerk of the city were authorized by any vote of the people or the city council to enter into such a contract, neither does it appear that the township officers were authorized by a vote of the people of the township to adjust the indebtedness, or to relieve any portion of the territory subject to taxation therefrom from the payment of its proportionate share of such debt. The indebtedness was a lien against the property of the township and city, and no authority is given by the legislature or otherwise for these subordinate officers to change the course of taxation, or to shift the burden of the debt from one portion of the municipality to another. Aside from this, the creditor who held the indebtedness was not a party to the agreement, and no arrangement between the tax-payers could affect the right of the

creditor to have a levy extended upon all the property subject to taxation for the payment of his debt. We think there was no authority whatever in the officers to make the agreement, and that the court properly ignored the same in the rendition of its judgment.

The further point is made against the tax levied to pay interest on funding bonds issued to compromise and cancel a judgment rendered against the township on what were known as the "Missouri, Kansas & Texas Railway Bonds," and the interest thereon. It appears that the township trustee confessed judgment on a portion of the bonds before they were due. The judgment, however, stands unreversed, and the funding bonds issued in satisfaction of the judgment and the debt were for a much less sum than the original debt. The judgment was a finality, and, the creditor having accepted the funding bonds, the judgment is satisfied and canceled, and both the city and the township are released from the payment of the judgment or the original indebtedness which it represented. The funding bonds issued to compromise and cancel the judgment are binding obligations against the township, and certainly it would be estopped from setting up the irregularity that a part of the debt was not due when the judgment was rendered; and, that being true, every taxpayer of the township, including the defendants in error, are likewise estopped. *Brown v. Milliken*, supra. Further than that, all parties to this proceeding have agreed that these funding bonds, which were executed and delivered in satisfaction of the judgment, were "issued in all respects in compliance with the law, and are valid outstanding obligations against said township."

Our opinion is that the judgment of the court below in favor of the township, and dissolving the injunction, is correct, and should stand. That part of the judgment, however, which perpetually enjoins the levy and collection of taxes to pay the interest upon the \$30,000 bonds issued to compromise and cancel the Memphis, Carthage & Northwestern Railway bonds issued by the township should be reversed, and the cause remanded, with the direction to dissolve the temporary injunction theretofore granted against the levy and collection of all the taxes, and to render judgment in favor of the defendants below for costs. That will be the judgment of this court. All the justices concurring.

**BROWN et al. v. JAMES H. CAMPBELL Co.**

(*Supreme Court of Kansas. July 3, 1890.*)

**REMOVAL OF MORTGAGED GOODS—SALE BY AGENTS.**

A chattel mortgage was properly deposited in the office of the register of deeds, and was valid; and the mortgage debt was not paid, although it had been due for some time, and the mortgagee never had the actual possession of the property. The wife of the mortgagor transported the property to another county, consigned it to, and placed it in the possession of, a commission merchant or broker for sale, who sold and delivered the same to others, and paid over the proceeds of the sale to the consignor, the wife of the mortgagor; and all this was done without the knowledge or consent of the mortgagee, and without any actual

knowledge on the part of the commission merchant or broker concerning the mortgage, or the rights of the mortgagees. *Held* that, as the mortgage was properly on file in the office of the register of deeds, and valid, the commission merchant or broker was bound to take notice of the same, and of the rights of the mortgagees, and that, by selling and delivering the property to others, he made himself liable to the mortgagees as for a conversion of the property.

(*Syllabus by the Court.*)

Error from district court, Wyandotte county; O. L. MILLER, Judge.

*Shinn & Yeager* and *W. H. H. Freeman*, for plaintiffs in error. *Alden & McGrew*, for defendant in error.

VALENTINE, J. This was an action brought in the district court of Wyandotte county by George W. Brown, and C. W. Brown, partners as Brown Bros., against the James H. Campbell Company, a corporation and a live-stock commission merchant, to recover from the defendant the sum of \$1,400, with interest, for the alleged conversion of 45 head of neat cattle belonging to the plaintiffs as mortgagees. A trial was had before the court and a jury, and judgment was rendered in favor of the defendant; and the plaintiffs, as plaintiffs in error, bring the case to this court for review.

The principal facts of the case are substantially as follows: On September 27, 1888, C. J. Blanchard, who resided in Cowley county, and who owned and possessed the cattle above mentioned, in that county mortgaged the same, along with some other personal property, to the plaintiffs. The mortgage was executed to secure a debt of \$2,050, \$600 of the same to become due in 90 days, and the remainder thereof, \$1,450, to become due in 90 days. The mortgage was deposited in the office of the register of deeds on the next day, to-wit, September 28, 1888. There was no stipulation in the mortgage as to who should have the legal title or the possession of the mortgaged property, but the mortgagor was permitted to retain the possession thereof. The mortgaged property was not to be removed from Cowley county. The mortgage debt has never been paid. On February 12, 1889, without the consent or knowledge of the plaintiffs, the cattle were transported by railroad from Cowley county to Kansas City, Wyandotte county, Kan., in the name of M. A. Blanchard. This M. A. Blanchard was Martha A. Blanchard, the wife of C. J. Blanchard, the mortgagor. The cattle were consigned to, and placed in the possession of, the defendant, which, as aforesaid, is a corporation and a commission merchant or broker. On the next day the defendant, in the ordinary course of business, sold and delivered the cattle, in four different lots, to different purchasers, received the proceeds of the sale, and paid the same, less commission, over to the consignor, M. A. Blanchard. All this was done without the consent or knowledge of the plaintiffs. The defendant at the time had no actual knowledge of the chattel mortgage, nor any knowledge that any one except the consignor claimed to have any interest in the property. The case was tried in the court below upon the theory that the

plaintiffs were negligent in not taking the possession of the cattle within a reasonable time after the mortgage debt became due, and that if the defendant sold the property, and paid over the proceeds to the consignor, innocently, without any knowledge of the plaintiff's claim, and only as a commission broker, it was not liable. For instance, the court gave, among others, the following instructions: "If the jury find from the evidence that said defendant did not purchase the cattle in controversy, and sell and dispose of the same, as its own, but that said cattle were shipped by M. A. Blanchard to the defendant as live-stock commission merchants, to be sold by said defendant as the agent for and on account of the said M. A. Blanchard, and the proceeds of said sale paid over by said defendant to the said M. A. Blanchard, in the ordinary course of business, without actual notice to said defendant of the rights or claim of said plaintiffs thereto, then said defendant is not guilty of a conversion of said cattle or their proceeds, and you will find for the defendant." "If the jury find from the evidence that the plaintiffs permitted the mortgaged property described in the mortgage introduced in evidence in the case to remain in the possession of the mortgagor for a considerable length of time after the conditions of the mortgage had been broken, and that, by using reasonable diligence after default in the conditions of said mortgage, said plaintiffs could have obtained possession of said property, and subjected the same in payment of the debt secured thereby, then I instruct that it was the duty of said plaintiffs so to do within a reasonable time; and if the plaintiffs failed to so take possession of said property, and subject it to the payment of said indebtedness, within a reasonable time after default in the conditions of said mortgage, they were guilty of negligence, and cannot recover in this action, unless you find that the defendant had actual notice of the plaintiffs' mortgage, in which case you will find for plaintiffs."

The statutes in this state do not, in express words, enact that a chattel mortgage shall in any case be valid, or shall in any case be notice to any person; but by the strongest of implications, we think, they enact that every chattel mortgage, duly and honestly executed, deposited in the office of the register of deeds, shall be valid, and shall be notice as to all the world for the period of one year, unless the mortgage debt is sooner satisfied, and shall remain valid and notice as to all the world for each succeeding year, provided the mortgage debt remains unsatisfied, and provided a sufficient renewal affidavit is filed prior to the expiration of each succeeding year. Mortgage Act, §§ 9, 11. Our statutes also provide that, "in the absence of stipulations to the contrary, the mortgagee of personal property shall have the legal title thereto, and the right of possession." *Id.* § 15. In other words, where there are no stipulations to the contrary, the mortgagee is the owner of the mortgaged property, and has the right to the possession thereof from the execution of the mortgage until it is satisfied or ceases

to have validity, whether the debt is due or not; and there are no stipulations to the contrary in the present mortgage. Our statutes also provide that, when a chattel mortgage is satisfied, it shall be the duty of the holder thereof to enter satisfaction thereof of record, and, if he fails to do so within 30 days after demand therefor, he is liable to pay a penalty for his failure of \$100. *Id.* §§ 8, 16. It will therefore be seen that our statutes require that the existence of every chattel mortgage, and whether it is still valid and in force or not, shall be shown by the records in the office of the register of deeds.

The defendant claims that it is not liable in this action, for several reasons, among which are the following:

It claims that it was not bound to take notice of the plaintiffs' mortgage, although it was duly deposited in the office of the register of deeds; and it cites the case of *Frizzell v. Rundle*, 12 S. W. Rep. 918, (decided by the supreme court of Tennessee in January, 1890,) and also cites *Roach v. Turk*, 9 Heisk. 708. This is certainly not the law in Kansas, for the implications of the statutes, and of all the decisions of this court, are certainly to the contrary, and that a chattel mortgage, duly executed, and on file in the office of the register of deeds, is notice, as above stated, to all the world.

The defendant also claims that the plaintiffs were negligent in not taking the possession of the mortgaged property immediately after the mortgage debt became due, and that for this reason the mortgage ceased to operate, and became void; and it cites the following cases from Montana and Illinois, to-wit: *Travis v. McCormick*, 1 Mont. 148; *Reed v. Eames*, 19 Ill. 594; *Cass v. Perkins*, 23 Ill. 382; *Barbour v. White*, 37 Ill. 164; *Reese v. Mitchell*, 41 Ill. 365; *Hanford v. Obrecht*, 49 Ill. 146; *Wylder v. Crane*, 53 Ill. 490; *Lemen v. Robinson*, 59 Ill. 115; *Arnold v. Stock*, 81 Ill. 407; *Dunlap v. Callon*, 88 Ill. 82. This, we think, is also against the implications of our statutes, and against the views heretofore entertained by the entire bench and bar of this state, and is against the great weight of authority.

The defendant also claims that it is not liable for the reason that it was only a mere agent or servant of the consignor, transferring the property from the consignor to the purchaser, and asserted no right, title, or interest in or to the property with reference to itself; and it relies upon the cases heretofore and hereafter cited. Among its cases cited in support of this claim is the case of *Rogers v. Hule*, 2 Cal. 571, where it is held that an auctioneer selling stolen property in the regular course of his business, and paying over the proceeds to the felon, without notice that the goods were stolen, is not liable. This decision, we think, is against all authority, and is not good law. See *Mechem, Ag.* § 915, and cases there cited. The defendant also cites *Burditt v. Hunt*, 25 Me. 419, and *Leuthold v. Fairchild*, 35 Minn. 99, 100, 27 N. W. Rep. 503, 28 N. W. Rep. 218. These cases seem to enunciate the doctrine that a mere servant, agent, or carrier, who in good faith transports the goods from one

place to another, or otherwise assists in disposing of the goods, without asserting or claiming any right, title, or interest in himself, or any right to transfer any right, title, or interest in the property to another, is not liable. This may be correct; but, if so, then it will hardly apply to this case. A person can never be held liable for a conversion of personal property unless he claims or asserts some right, title, or interest in himself or in another adverse to the interest of the owner. The defendant also cites *Spooner v. Holmes*, 102 Mass. 503, which seems to decide that an innocent seller of certain stolen negotiable coupons payable to bearer, and which could be transferred by mere delivery, was not liable. For the purposes of this case, this may be admitted to be good law, but it does not apply to this case. The case of *Kimball v. Billings*, 55 Me. 147, seems, however, to enunciate a different doctrine. The defendant also cites *Hathaway v. Brayman*, 42 N. Y. 322. In this case it was decided that a mortgagor of chattels, in possession, has a right before default to sell and deliver the mortgaged property subject to the mortgage. This, we think, is good law, provided the mortgagor sells the property in good faith, and without any intent to hinder, delay, or defraud his creditors, and especially the owner of the mortgage debt. If the mortgagor, however, should sell the mortgaged property without reference to the mortgage debt, or with any intent to hinder, delay, or defraud the holder of the mortgage, he would commit a criminal offense; and the sale would, in all probability, be void. *Gen. St.* 1889, pars. 2233, 2452.

The plaintiffs cite the following cases, among others, with regard to the rights of mortgagees of chattels where innocent parties, without the consent of the mortgagees, have interfered or intermeddled with the mortgaged property: *Coles v. Clark*, 3 Cush. 399; *Spraghtons v. Hawley*, 39 N. Y. 441; *Moloughney v. Hegeman*, 9 Abb. N. C. 403; *Marks v. Robinson*, 82 Ala. 69, 2 South. Rep. 292; *Poole v. Adkisson*, 1 Dana, 110; *Nichols v. Barnes*, 3 Dak. 148, 14 N. W. Rep. 110; *Phillip Best Brewing Co. v. Pillsbury & Hurlbut Elevator Co.*, 5 Dak. 62, 37 N. W. Rep. 763; *White v. Phelps*, 12 N. H. 382. The plaintiffs also cite the following among other cases which have no particular relation to chattel mortgages, but which assert the general principles regarding the liability of persons who, as servants or agents of others, interfere or meddle with property not belonging to their master or principal: *Barnhart v. Ford*, 37 Kan. 520, 15 Pac. Rep. 542; *Kimball v. Billings*, 55 Me. 147; *Koch v. Branch*, 44 Mo. 542; *McCormick v. Stevenson*, 13 Neb. 70, 12 N. W. Rep. 828.

In the case of *Coles v. Clark*, *supra*, the syllabus reads as follows: "Where the mortgagor of goods, of which the mortgagee had the right of immediate possession by a mortgage duly recorded, induced the mortgagee, by false and fraudulent representations, to allow the goods to remain in his possession for a certain period, during which the mortgagor, for the purpose of cheating and defrauding the mortgagee, sent the goods to an auction-

eer, by whom they were sold, and the proceeds paid over to the mortgagor, it was held that the mortgagee might maintain trover for the goods against the auctioneer, although the latter did not participate in the fraud of the mortgagor, and had no knowledge, in fact, of the existence of the mortgage." In the case of *Sprights v. Hawley*, supra, a portion of the syllabus reads as follows: "Where the mortgagor of chattels, in possession thereof, after default in the payment of the mortgaged debt, fraudulently delivered them to a third person for sale, representing that they were his property, and the third person, as agent for the mortgagor, sells the chattels, such third person is liable to the mortgagee for the value thereof notwithstanding he acted in good faith, believing that the chattels were the property of the mortgagor, and paid the proceeds of the sale, which he made, to the mortgagor, without reward for his services." In the case of *Marks v. Robinson*, supra, a portion of the syllabus reads as follows: "A factor or commission merchant receiving and selling cotton for a mortgagor, without actual notice of the mortgage, is liable in trover to the mortgagee if the mortgage has been properly recorded in the county in which the cotton was raised."

Mr. Jones, in his work on *Chattel Mortgages*, (3d. Ed. § 460,) uses the following language: "An absolute sale of the mortgaged property by the mortgagor, or any one claiming under him, in exclusion of the rights of the mortgagee, is a conversion of it for which the mortgagee may maintain trover. This is upon the general principle that assuming to one's self the property and right of disposing of another's goods is a conversion. \* \* \* If a mortgagor, for the purpose of defrauding the mortgagee, sends the mortgaged goods to an auctioneer, by whom they are sold, and the proceeds paid over to the mortgagor, the mortgagee may maintain trover for the goods against the auctioneer, although the latter did not participate in the fraud, and had no knowledge of the existence of the mortgage. In such action the plaintiff need not show that the mortgagor is wholly irresponsible. An absolute sale of the mortgaged property by the mortgagor's assignee for the benefit of creditors is a conversion, and he is liable to an action of trover by the mortgagee." Mr. Boone, in his work on *Mortgages*, (section 280,) uses the following language: "If a mortgagor of chattels, or any one claiming under him, sells the entire property, as owner, in exclusion of the rights of the mortgagee, such sale is a conversion of the chattels, and the mortgagee may maintain trover therefor." Mr. Mechem, in his work on *Agency*, (section 915,) uses the following language: "An auctioneer who receives and sells stolen property is liable to the true owner as for a conversion, although he acted in good faith, and received the property in the usual course of trade. So an auctioneer would undoubtedly be liable as for a conversion who, having received property for sale from one not having authority to cause it to be sold, proceeded to sell it, or to pay over the proceeds, after notice of the

rights of the true owner, and without his authority; and it has been held that an auctioneer who in good faith received and sold property for one whom he supposed to have the right to direct the sale, but who in fact had no such right, was guilty of a conversion." Judge Story, in his work on *Agency*, (section 312,) uses the following language: "A fortiori, if the principal is a wrong-doer, the agent, however innocent in intention, who participates in his acts, is a wrong-doer also. Thus, if an auctioneer should be employed by a sheriff to sell goods at auction which he had unlawfully seized upon an execution, as if the goods did not belong to the execution debtor, the auctioneer who should sell would be liable to an action for the tortious conversion equally with the sheriff. So, if the agent of a merchant who had received goods from a bankrupt after a secret act of bankruptcy should, pursuant to orders from his principal, sell the goods, an action of trover would lie in favor of the assignees against the agent, however ignorant he might be of the defect of title; for a person is guilty of a conversion who intermeddles with the property of another without due authority from the true owner, and it is no answer that he acted as an agent, under the authority of a person supposed at the time to be entitled as the owner." Judge Cooley, in his work on *Torts*, (star page 451,) uses the following language: "One who buys property must, at his peril, ascertain the ownership; and, if he buys of one who has no authority to sell, his taking possession in denial of the owner's right is a conversion. The vendor is equally liable whether he sells the property as his own or as officer or agent, and so is the party for whom he acts, if he assists in or advises the sale. So it is no protection to one who has received property, and disposed of it in the usual course of trade, that he did so in good faith, and in the belief that the person from whom he took it was owner, if in fact the possession of the latter was tortious." Mr. Wait, in his work on *Actions and Defenses*, (volume 6, p. 140,) uses the following language: "Every person who aids or assists in the conversion of property, whether with knowledge of the facts, or in ignorance thereof, is responsible to the owner for all the damages sustained by him." In 4 *Amer. & Eng. Enc. Law*, 108, the following language is used: "The action of trover is founded on the right of property and possession; and any act of a party, other than the owner, which militates against this conjoint right, in law, is a conversion. It is not necessary for a manual taking to make conversion, nor that the party has applied it to his own use. The question is, does he exercise dominion over it in exclusion or in defiance of the owner's right? If he does, that is conversion, be it for his own or another's use. It is conversion if one takes the property of another, and sells, or otherwise disposes of it, without the owner's authority; or if he takes it for a temporary purpose only, in disregard of the owner's right, it is conversion. The word 'conversion,' by a long course of practice, has acquired a technical meaning, and



means detaining goods so as to deprive the owner, or person entitled to possession of them, of his dominion over them. Any carrying away of a chattel for the use of one without the owner's consent, or for a third party, amounts to a conversion, because it is inconsistent with the general right of dominion which the owner has in it, who is entitled to the use of it at all times and in all places. Such an asportation is conversion."

We think the defendant is liable. The mortgage was valid. It had been executed and deposited in the office of the register of deeds less than one year prior to the sale. The defendant was bound to take notice of the mortgage, and of the plaintiffs' rights thereunder; and in law the plaintiffs were the owners of the property, and had the absolute right to the possession and the control thereof. The defendant sold and delivered this property to different persons, not under the mortgage, or subject to the mortgage, but independent thereof, and as the absolute property of M. A. Blanchard, and attempted to give to the purchasers the absolute title thereto, and absolute control and dominion over the same. All this was in violation of the plaintiffs' rights, and rendered the defendant liable to the plaintiffs as for a conversion of the property. The judgment of the court below will be reversed, and cause remanded for a new trial. All the justices concurring.

#### SOUTHERN KAN. RY. CO. v. SCHMIDT.

(*Supreme Court of Kansas. July 3, 1890.*)

#### RAILROADS—KILLING STOCK—HIGHWAY CROSSING.

In an action against a railroad company for damages to stock injured at a public crossing, by reason of the failure to sound the whistle 80 rods from the crossing, and the further reason that the speed of the train was not slackened, and there is some evidence to show that the signal was not given, and that the train did not slow up, and the injury might have been prevented if the signal for the crossing had been given, or the train slackened, the verdict of a jury, otherwise supported by evidence, will not be disturbed.

(*Syllabus by Green, C.*)

Commissioners' decision. Error from district court, Allen county; L. STILLWELL, Judge.

*George R. Peck, A. A. Hurd, and Robert Dunlap*, for plaintiff in error. *G. A. Amos*, for defendant in error.

GREEN, C. This suit was commenced before a justice of the peace in Allen county, and appealed to the district court. Plaintiff's bill of particulars alleged, in substance, that on April 26, 1886, the plaintiff's agent was moving a lot of cattle, 53 in number, along the public highway, and in doing so it was necessary to cross the track of the railroad company. When the cattle got to the track, a freight train which was one hour late came along and ran into the cattle, crippling two so that they had to be killed; that the engineer could plainly see them; that the whistle was not blown 80 rods from the public highway; that if the whistle had been sounded plaintiff's agent would have been able to have prevented the cattle from be-

ing on the track; that there were hedge fences on either side of the railroad which prevented plaintiff's agent from seeing the train. Plaintiff's agent did not hear the train, as the whistle was not blown until it was within 100 yards of the crossing; and that the negligence of the defendant consisted in not sounding the whistle as required by law, and in not checking the speed of the train after the engineer saw the cattle. He asked for damages in the sum of 50 dollars. The evidence of the plaintiff showed that he was taking his herd of about 53 head of cattle to a pasture some 4 miles north of where he lived. The herd was in charge of his hired man, and the plaintiff went ahead about half a mile. As he crossed the railroad track where the accident occurred, he looked up and down the railroad, and saw no train or smoke. That he could see one and one-half miles south from where the road crossed the track. That the regular time for the train to pass this point going north was about 2 o'clock P. M. On the day the cattle were injured it passed this crossing after 3 o'clock. At the time the train crossed the road where the cattle were injured the plaintiff was about one-half mile north-east of the crossing. As the train was running north approaching the crossing, the danger signal for cattle was heard 30 or 40 rods from the crossing, and was heard again very near or upon the crossing. There was a hedge fence on each side of the railroad, which rendered it difficult for the engineer to see very far on each side of the track. The train was running at the speed of from 15 to 20 miles an hour. The engineer could not have stopped the train in time to prevent the injury after the second whistle. The cattle were struck and injured, so that it was necessary to kill one cow, of the value of \$30, and one heifer, worth \$20. The train was going up grade at this particular point, and there was no evidence to indicate that the engineer slackened the speed of the train after giving the first cattle alarm, and the only slowing up was occasioned by the train going up grade. There was some evidence showing that the signal was not given at the whistling post. When the man in charge of the cattle first heard the train, he rode up to the crossing to do what he could to get the cattle off the track. A demurrer was interposed to the evidence of the plaintiff below, and was overruled. The company offered no evidence in the court below. The jury returned a verdict for the plaintiff for \$50. Motion of the defendant below for new trial was overruled, and judgment rendered for the plaintiff for the amount of the verdict.

The plaintiff in error complains that the alleged negligence to sound the whistle 80 rods from the public crossing was not the cause of the accident, and therefore the company is not liable; that the failure to sound the whistle must have been the proximate cause of the injury; and that the defendant below could only be liable for damages sustained by reason of such neglect. No complaint is made of the instructions of the court. We have examined the evidence in this case very carefully, and are not prepared to say that the injury

was not caused by reason of the failure to sound the whistle. We cannot say positively what the result would have been, under all the circumstances of the case, if the whistle had been sounded where the law required it to be done. It might have given sufficient time to have moved the cattle over the railroad track. A part of the herd had already crossed, and it would hardly have been prudent to have attempted to drive the cattle back and separate the herd. The facts as presented to us in the record would seem to indicate that it was a part of wisdom for the man in charge to use his best efforts to get the cattle over the crossing as speedily as possible, rather than to attempt to turn them back; and, if the proper warning had been given, when the train was 80 rods from this crossing, he might have had sufficient time, by hurrying up the herd, to get them over. We think there was some evidence upon which to base a finding. Again, the evidence indicates that the speed of the train was not slackened, save the natural slowing up of the train as it went up grade. It may be that the jury based the verdict upon this ground of negligence. We cannot say. We do not feel disposed, under the evidence as it appears to us, to disturb the verdict of the jury in the court below, and therefore recommend that it be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

#### CHICAGO, K. & N. RY. CO. v. BROWN.

(Supreme Court of Kansas. July 3, 1890.)

##### INJURIES TO EMPLOYE—DEPOSITIONS—EVIDENCE.

1. The action involves the question of negligence on the part of the defendant railway company. Held doubtful as to whether any negligence is shown as against the railway company, though the question is not decided.

2. The action also involves the question as to whether the defendant railway company or another railroad company is liable for the injuries complained of; and, in order to prove that the defendant railway company was the party liable, the plaintiff, with the permission of the court, but over the objections and exceptions of the defendant, introduced parol evidence showing that certain time-checks were made out in the name of the defendant, although no evidence was introduced tending to show that these time-checks were lost or destroyed, or that any search had ever been made for them, or that any notice had ever been given to either of the railroad companies, or to any one else, to produce them. Held, error.

3. It is error to permit the deposition of a resident of the county to be introduced in evidence over the objections of the adverse party unless it is first shown that the witness' oral testimony cannot be procured.

4. An instruction which, in effect, makes the defendant railway company responsible for any negligence or mismanagement on the part of any agent or employe, while it permits the plaintiff, another employe, to recover against the railway company, although he may have been guilty of slight negligence, is erroneous.

(Syllabus by the Court.)

Error from district court, Pratt county; S. W. LEBLIE, Judge.

John E. Dolman and W. F. Evans, for plaintiff in error. Ellis & Johnston, for defendant in error.

v.24p.no.9—32

VALENTINE, J. This was an action brought before a justice of the peace of Pratt county, by J. H. V. Brown against the Chicago, Kansas & Nebraska Railway Company, for injuries alleged to have been received by the plaintiff through the negligence of one of the employes of the railway company. At the time the alleged injuries occurred, the plaintiff was employed as a sectionman under Daniel Shanahan, the section foreman, and the duties of both were upon what was known as the Chicago, Kansas & Nebraska Railway; but who their employer was,—whether the Chicago, Kansas & Nebraska Railway Company, or the St. Joseph & Iowa Railroad Company,—was and is a disputed question. The principal allegations of the plaintiff's bill of particulars were and are as follows: "That on or about the 13th day of December, 1887, while plaintiff and the said Daniel Shanahan were engaged in operating and propelling a hand-car of defendant upon the railroad of defendant in said Pratt county, Kan., the said Daniel Shanahan carelessly and negligently, and without the fault or negligence of the plaintiff, pushed and displaced a certain water cask, keg, or small barrel, standing upon said hand-car, so as to cause the said cask, keg, or small barrel to take a position immediately under the handle of said hand-car, which plaintiff was holding and operating, so that two of the fingers of plaintiff's right hand were caught on the downward stroke of said handle, between said handle of said hand-car and the top of said cask, keg, or small barrel, and the said fingers of said plaintiff were thereby crushed, cut, and lacerated, and the bone of one of said fingers fractured." The case was taken to the district court of Pratt county, where it was tried before the court and a jury, and judgment was rendered in favor of the plaintiff, and against the defendant, for \$109.41; and the defendant, as plaintiff in error, brings the case to this court for review.

It is certainly doubtful whether any culpable negligence was shown as against Shanahan or as against any railroad company. If any such negligence was shown, it was shown wholly and entirely by the testimony of the plaintiff below, Brown, and wholly and entirely as against Shanahan. It appears that on the evening of December 13, 1887, at about 6 o'clock, Shanahan and Brown were returning from their work by means of a hand-car which they themselves operated and propelled. They were moving eastwardly—Shanahan in front, and Brown in the rear. An empty water-keg was standing on the car, about the middle of the car east and west, and on the south side of the car. Brown was well acquainted with the work. He had already worked upon the railway, performing precisely the same kind of duties, 43 days, and it was always their custom to go to and from their work by means of a hand-car; and they always carried a water-keg with them in the manner aforesaid, full of water in the morning, and empty in the evening. As to how the accident occurred, with the incidents connected therewith, Brown testi-

fied as follows: "I, being behind, had one hand in the center. There were three places,—one in the center, and one at each end; and I sometimes, in order to ease my hand, sometimes took the center bearing. I had to get on at the right-hand side, and I got on at the center place, and had my left hand in the center hole. The keg was between me and Shanahan. My right hand was directly behind the keg, and the keg was directly behind Shanahan. That was how we propelled the hand-car. After I had got on, and the linch-pin was found, they did not wait for us, and the others had worked their hand-car so fast were losing ground; and Shanahan made an effort to propel the hand-car more rapidly, and in order to do so gave himself a wide swing, and placed his foot on the keg. He was very thickly dressed,—had on an overcoat, I don't know how many shirts and pants, and thick pants over them. In making the effort to propel the hand-car, he threw the keg, throwing it under my handle. \* \* \* Question. Where was Mr. Shanahan, with reference to the keg? Answer. East of the keg. Shanahan struck against it, and threw it back. Q. With what? A. I think his feet, or it may be with his leg. He made this big swing to work faster, and pushed against the keg both. Q. You think it was his feet, then? A. His feet and body. \* \* \* Q. Were you looking at the keg?

A. I was, sir. I saw the keg, and Shanahan, too. Q. And Shanahan, too? A. Yes, sir; I saw Shanahan's feet and body push the keg. Q. You saw it before it came under the handle? A. Yes, sir; I did, sir. Q. You saw it when it started? A. I did, sir. It did not take much time." Brown also testified that, during all the time he worked on the railway, he noticed the keg; that "it was one of the things to look after. It was every man's duty to look about, to watch the things on the car." He also testified as follows: "I could swear I noticed it ninety-nine hundredths of the time." Shanahan testified that he did not move the keg, nor even touch it. He did not know what moved it. Shanahan also testified that he told Brown to keep a sharp lookout for the keg, and to go from the end where he was, and to the north side, and he would be all right. Brown, however, in his testimony denied all this.

Under the evidence in this case, we can almost say as a matter of law that no culpable negligence was shown as against any railroad company or railway company; but, as the judgment of the court below must be reversed for other reasons, it is unnecessary to so decide, and we shall not do so.

It is further claimed that the court below erred in permitting Brown, over the objections and exceptions of the defendant, to testify with regard to certain time-checks. Brown was not only a sectionman, but he also acted as the clerk for the section foreman, Shanahan,—keeping his books, making out time-checks, etc. One of the questions presented and litigated in the court below in this case was whether the plaintiff was at the time of the accident working for the Chicago, Kansas &

Nebraska Railway Company, or for the St. Joseph & Iowa Railroad Company; and to prove that he and all the other sectionmen on that railroad were working for the Chicago, Kansas & Nebraska Railway Company, he testified, over the objections and exceptions of the defendant, that all the time-checks were made out in the name of the Chicago, Kansas & Nebraska Railway Company, and this he testified to without any further foundation for the introduction of such testimony than that he did not have such time-checks in his possession or under his control. No evidence was introduced that they were lost or destroyed, or that any search had ever been made for them, or that any notice had been given to either of the foregoing railroad companies, or to any one else, to produce them. We think this was error. *Brock v. Cottingham*, 23 Kan. 383, 388, 389, and cases there cited. During the time while Brown worked upon the railroad, Shanahan, the section foreman, kept a book entitled: "Chicago, Kansas & Nebraska Railway Company, St. Joseph & Iowa Railroad Company, lessee. Time-Roll," etc.,—in which book, Brown, as Shanahan's clerk, kept the time of service of the different sectionmen; Brown himself making the entries therein. In all probability the time-checks were made out in the name of the same railroad company.

It is further claimed that the court below erred in permitting the deposition of John Whaley to be introduced in evidence. The objections urged against this testimony were that Whaley was in the county, and that he would have been present at the trial if he had been subpoenaed, and that the deposition was also incompetent, irrelevant, and immaterial. The deposition itself showed that the witness was a resident of the county. We think the court below erred, but it is doubtful whether the exception to its introduction was sufficient.

It is also claimed that the court below erred in giving the following among other instructions to the jury: "Our statute provides that every railroad company organized or doing business in this state shall be liable for all damages done to any employee of such company in consequence of any negligence of its agents, or by any mismanagement of its engineers or other employees, to any person sustaining such damage; and if you believe from the evidence in this case that the injury complained of by plaintiff occurred in consequence of any negligence or mismanagement of any agent or employee of defendant, and without any greater want of carefulness on the part of plaintiff than was reasonably to be expected from a person of ordinary caution in the situation in which the plaintiff was at the time of said injury, then your verdict should be for the plaintiff. But if you believe from the evidence that the plaintiff was at the time of the injury guilty of contributory negligence,—in other words, that his own negligence contributed to said injury,—then the plaintiff cannot recover in this action. The law, however, does not require the greatest care and caution, but only such

reasonable care, such as a man of ordinary prudence would exercise under similar circumstances; and, although you may find that the plaintiff was guilty of slight negligence, yet if you believe from the evidence that there was great negligence on the part of the defendant, causing said injuries complained of, then such slight negligence on the part of the plaintiff would not defeat his right of recovery in this action." This instruction, it will be seen, makes the railway company responsible for "any negligence or mismanagement of any agent or employe," while it permits the plaintiff to recover although he may have been guilty of "slight negligence." It does not treat the parties alike. This is error. Each party, in such cases, is required to exercise ordinary care and diligence; and neither is required to exercise any greater degree of care or diligence. Shanahan was not required to exercise any greater degree of care or diligence than was Brown. If the railway company was liable because of "any negligence" on the part of Shanahan, then the plaintiff should not be allowed to recover if he himself was guilty of "any negligence," whether "slight" or otherwise; and if the plaintiff may recover, and still be guilty of "slight negligence," then the defendant should not be held liable because of "slight negligence" on the part of Shanahan, which would certainly be included in "any negligence." Neither party, however, is responsible for merely "slight negligence," which means simply a want of great or extraordinary care, while both parties are responsible for "ordinary negligence," which means a want of ordinary care. The word "negligence" is used in various ways. It sometimes means a failure to exercise the greatest or most extraordinary care, although the party has in fact exercised great care, and all the care required of him in the particular instance. This is usually termed "slight negligence." It may sometimes mean the failure to exercise ordinary care, or in other words that degree of care which an ordinarily prudent person would exercise under like circumstances, although the party has exercised some care, and it may be only slightly less than ordinary care. This is usually termed "ordinary negligence." And it may sometimes mean a failure to exercise that degree of care, whether slight, ordinary, or great, which is required in the particular instance, although the party may have exercised some care, and it may be only slightly less than the degree of care required. This is termed "culpable negligence." In the present case, both Brown and Shanahan were required to exercise ordinary care, and not to be guilty of ordinary negligence; and neither was bound to exercise any greater degree of care or diligence, nor responsible for any less degree of negligence. The statute relied on by the plaintiff (Gen. St. 1889, par. 1251) uses the words "any negligence;" and, in so using the same, it undoubtedly intends any culpable negligence, or any negligence above what is permissible. Or, in other words, it means a want of that degree of care required in the particular instance. The statute is evidently based upon the theory that, when a party

has exercised that degree of care required in the particular instance, he is not guilty of any negligence, although it would be possible for him to have exercised a much greater degree of care. The statute certainly does not mean that the highest possible degree of care shall be exercised, and that the party shall be liable for the slightest possible degree of negligence, thereby treating any possible want of care, however slight, as culpable negligence. If the court below meant what we think the statute means, then we think the court below, to that extent, was right. But, from the whole of the instruction, it cannot be said that the language thereof means this; for, while it is said, in substance, that "any negligence" will defeat the defendant, it is also said that "slight negligence" will not defeat the plaintiff, and "slight negligence" is certainly included within "any negligence." The court probably meant by the use of the words "slight negligence" only a failure to exercise great or extraordinary care; but it was unfortunate that it used these words with reference to the plaintiff, Brown, after using the words "any negligence" with reference to the defendant and to Shanahan, for the court should have applied precisely the same degree of negligence to all. If the court, by the use of the words "any negligence," meant a degree of negligence greater than ordinary negligence,—and any other meaning than ordinary negligence would make the instruction erroneous,—then, when it used the words "slight negligence," it would seem, unquestionably, to have meant a degree of negligence greater, though perhaps only slightly greater, than ordinary negligence, which would be gross negligence, and which would make the instruction equally erroneous. But if the court, by the use of the words "slight negligence," meant merely a failure to exercise great or extraordinary care, then it would seem that by the use of the words "any negligence" the court would mean a much less failure,—a failure to exercise only the greatest or most extraordinary degree of care; and in that way the court would make the defendant railway company liable for the slightest and most trivial negligence, which would also make the instruction erroneous. The defendant railway company is responsible for any culpable negligence, but not necessarily so for "any negligence;" and the plaintiff would be responsible for any slight culpable negligence, but not necessarily so for any "slight negligence." But to use the words "slight negligence" and "any negligence" in the same instruction in different senses, and without any explanation, would be misleading and erroneous. With these words "any negligence" and "slight negligence," as used in the same instruction in this case, without any explanation as to what was meant by the words "any negligence," the instruction is certainly erroneous. As above stated, both Brown and Shanahan were required to exercise ordinary care, or that degree of care which an ordinarily prudent person would exercise under like circumstances, and neither was required to exercise any greater degree of care. This instruction would probably, however, lead

the jury to think that the railroad company, through its agents and employees, was bound to exercise the greatest possible degree of care, and was liable for the slightest possible degree of negligence, which is not the correct rule.

On the side of the plaintiff, however, it is said that this instruction was not properly excepted to. After a copy of all the instructions is given in the record, numbered from 1 to 6, then the following language is used: "And the said instructions from one to 6, inclusive, are all the instructions given by the court to the jury in this case, \* \* \* to the giving of which instructions numbered 1, 2, 3, 4, 5, and 6, and to each of them severally, the defendant then and there excepted." The first instruction includes what is above quoted, and the figure "1", representing its number, is placed nearly in the middle of the instruction, and not at the beginning, where it should be placed, and what we have quoted comes before the figure; and, for this reason, it is claimed that the instruction was not properly excepted to. It is clear, however, that the whole of this instruction was intended to be numbered "1," and the whole of it was intended to be excepted to, and we think the court and the parties so understood it.

Other questions are presented in this case, but we do not think that it is necessary to discuss them. The judgment of the court below will be reversed, and the cause remanded for a new trial. All the justices concurring.

#### ATCHISON, T. & S. F. R. CO. v. DWELLE.

(Supreme Court of Kansas. July 3, 1890.)

PASSENGERS—FARE—TENDER AFTER EXPULSION  
BEGUN—EXCESSIVE DAMAGES—REMISSION—NEW TRIAL.

1. Before a railroad company can collect excess fare from a passenger who has not purchased a ticket, under the provisions of chapter 189 of the Laws of 1886, it must have a ticket-office open for the sale of tickets at the station where passage is taken at least 30 minutes prior to the departure of the train. A keeping of the office open for 30 minutes prior to the advertised time of departure will not suffice where the train is behind time. If the office is not open, with an agent in the same, ready upon call to sell tickets, long enough before the actual departure of the train, whether delayed or not, to enable passengers to purchase tickets and safely board the train, no excess fare can be collected.

2. In an action to recover damages for expulsion from the train for refusal to pay the fare demanded, the following instruction was given: "That if the passenger refused, when demanded, the fare he knew, or ought to have known, was justly due, and persisted in such refusal until the company, in the exercise of its right to expel him therefor, had taken the necessary steps to put him off, by commencing to stop the train, or seizing the person, if such seizure was necessary, such plaintiff was a trespasser, and by such act and conduct relieved the company of its obligation to carry him; and he could not reimpose such obligation on the company by making a tender of the sum due after having once refused it for the purpose and under the circumstances stated, and having put the company to the trouble of the performance of acts necessary to his safe and proper expulsion." *Held* to be a correct rule under the facts of the case.

3. An instruction, that, if the jury "believe from the evidence in the case that the plaintiff

refused to pay the amount demanded of him, but that such refusal was not for the purpose of defrauding the company, or unjustly withholding its legal dues, or vexing, annoying, delaying, or putting to inconvenience the company's employees, but was done in good faith, under a mistaken belief that he was under no legal obligations to pay all that was demanded, and such honesty of purpose and belief was apparent from the manner, temper, demeanor, and conduct of plaintiff and the circumstances of the case, the company was bound to accept the sum previously refused, if tendered at any time before the actual expulsion, or after such expulsion and before the starting up of the train," is *held* to be erroneous.

4. Where counsel for the prevailing party in addressing the jury brings before them extraneous matters and statements of facts not in evidence, which are calculated to divert the attention of the jury from the issues in the case, and to excite passion and prejudice against the losing party, and the trial court upon a motion for a new trial finds and states that the verdict returned by the jury was grossly excessive, and that it was probably given under the influence of passion and prejudice arising from the misconduct of the prevailing party, the verdict should be set aside and a new trial granted.

(Syllabus by the Court.)

Error from district court, Marion county; FRANK DOSTER, Judge.

Action by J. C. Dwelle to recover damages from the Atchison, Topeka & Santa Fe Railroad Company for wrongfully and forcibly ejecting him from one of its passenger trains. The plaintiff alleges that on April 13, 1887, he went to the station of Cedar Grove for the purpose of taking passage on the next train of the defendant to the city of Florence; that when he arrived at the station there was no agent or person authorized to sell tickets at the station, and he was unable to procure a ticket for such passage; that he then went upon the train, and tendered 18 cents, which was the legal fare due from Cedar Grove to Florence; that the tender of 18 cents was refused, and the collector of the company demanded 10 cents in excess of the legal fare; that he thereupon tendered the sum of 28 cents, but the servants of the company refused to accept the tender or to carry him upon the train, and forcibly and unlawfully ejected him from its cars, midway between Cedar Grove and Florence, whereby he was greatly delayed and injured; and he prayed damages in the sum of \$25,000. The answer of the defendant was a general denial. A trial was had with a jury, and, after hearing the testimony, the following instructions were given by the court to the jury:

"Instructions. Gentlemen of the Jury: The defendant is a common carrier, and bound to carry on its passenger trains all persons who pay legal rates of fare, and who conform to all the reasonable rules of the company, and who do not deport themselves to the annoyance or danger of the passengers, or its own employees. Our statute declares 'that in every case where any passenger on any railroad shall fail or neglect to purchase a ticket for his or her journey prior to taking passage on the train of such railroad company, it shall be lawful for such railroad company to charge and collect from such passenger, in excess of the legal rate of fare, the sum of ten cents for each journey of fifteen miles or less, and the sum of fifteen cents for

each journey of more than fifteen miles, and not exceeding fifty miles, and the sum of twenty-five cents for each journey of fifty miles or more: provided that this shall not apply to any passenger taking passage on any railroad trains [from any station] at which such railroad company fails to keep tickets on sale, or at which such company shall neglect or fail to keep its ticket-office open for the sale of tickets at least thirty minutes immediately prior to the starting of such train.' Laws 1886, c. 139. The right of a railroad company to discriminate in its rates of fare between those purchasing tickets and those who do not depends upon its compliance with the provisions of this statute in regard to keeping its ticket-office open for the required length of time. By keeping the ticket-office open is meant keeping an office reasonably convenient of access and exit, with an agent in the same or at hand, ready upon call to sell its tickets long enough before the starting of its train to enable passengers to purchase tickets and safely board the train. Only upon compliance with these legal requirements does it obtain the right to charge the excess fare to a passenger who has not purchased a ticket; and of course, in a case where it has no right to demand the excess fare, it has no right to expel a passenger who refuses to pay it when demanded. Hence, if you believe from the evidence in this case that at the Cedar Grove station, on the day the plaintiff got on the defendant's train, it did not keep its ticket-office open in the manner and for the time hereinbefore stated, so that plaintiff was unable to purchase a ticket before entering the cars, the defendant's employees had no right to demand an excess of fare from him, or to expel him for refusing to pay it. But, on the other hand, if you believe from the evidence that the defendant did so keep its ticket-office open at such station, but the plaintiff did not purchase a ticket before entering the cars, the employees of the defendant had a right to demand the excess fare, and had a right to expel plaintiff if he refused to pay the same; and the failure of the plaintiff to reach the railroad station in time to purchase a ticket before the train started would not relieve him from the obligation to pay such excess fare. A person entering a railroad car should promptly, on demand, produce and deliver to the proper employe a ticket for his passage; or, if he has no ticket, and has no legal excuse for failure to provide himself with one, should promptly, on demand, tender in money the legal chargeable fare, including excess, if any there be; and upon a refusal by him to do so, if such refusal is with the intention and for the purpose of defrauding or unjustly withholding from the company its just dues, or unreasonably and wantonly vexing, delaying, annoying, or putting to inconvenience the company's employes, he becomes a trespasser, and may be at once ejected from the train, unless prior to the time the company commences to exercise its right of ejection, as by commencing to stop its train for that purpose, or the seizure of his person by its servants for the purpose of putting him off, he re-

cants and offers to pay or deliver the ticket, in which case the company is bound to accept the same, and allow him to ride; but if his refusal to pay or deliver a ticket is not done to defraud the company, or to vexatiously annoy, delay, or inconvenience its employes, but is done with an honest belief as to his right to so refuse, and such motives for refusal are apparent from his temper, demeanor, and conduct, and all the circumstances of the case, then the company is bound to accept the legal charges from him, if tendered at any time before his expulsion, or even after the expulsion and before the starting up of the train. Hence, if you believe from the evidence in this case that the plaintiff, with intent to defraud the defendant, and withhold from it its just dues, or for the purpose of vexatiously annoying, delaying, and putting to inconvenience the company's employes, refused, when demanded, to pay the fare he knew or ought to have known was justly due, and persisted in such refusal until the company, in the exercise of its right to expel him therefor, had taken the necessary steps to put him off, as by commencing to stop the train, or seizing his person, if such seizure was necessary, such plaintiff was a trespasser by such acts and conduct, relieved the company of its obligation to carry him, and he could not reimpose such obligation on the company by making a tender of the sum due after having once refused it for the purpose and under the circumstances stated, and having put the company to the trouble of the performance of acts necessary to his safe and proper expulsion; but, notwithstanding such refusal for such purpose, and under such circumstances, if the plaintiff, prior to the taking of such steps by the company to expel him, tendered the proper amount to the proper employe, he was bound to accept it and permit the plaintiff to ride.

"But, on the other hand, if you believe from the evidence in the case that the plaintiff refused to pay the amount demanded of him, but that such refusal was not for the purpose of defrauding the company, or unjustly withholding its legal dues, or vexing, annoying, delaying, or putting to inconvenience the company's employes, but was done in good faith, under a mistaken belief that he was under no legal obligations to pay all that was demanded, and such honesty of purpose and belief was apparent from the manner, temper, demeanor, and conduct of plaintiff, and the circumstances of the case, the company was bound to accept the sum previously refused, if tendered at any time before the actual expulsion, or after such expulsion and before the starting up of the train. In the expulsion of a passenger from a train no more force should be used than is necessary, and if any more is used by the company's employes than is necessary, the company is liable in damages from injuries resulting from such excessive force, if it is employed in the interest of the company, and to effect the company's purpose in removing the passenger; but if an employe of the company, after expelling such passenger, makes the contest his own, and commits an assault and battery

after such expulsion, the company would not be liable. It is the duty of a person to avoid injury to himself as far as he reasonably can, and a person in a contest with another cannot, even though he be in the right, for the purpose of increasing the damages to himself, or for the purpose of subjecting his antagonist to other or greater liabilities, invite such antagonist to exert force upon him, or hold out against him until he does exert such force, when he knows such force will be exerted and injuries inflicted, and when all his legal rights as to the subject-matter of the contention can be preserved to him by peaceably submitting. In other words, a person cannot, when it is not necessary to the maintenance of his legal rights, invite another to commit a wrong upon him, or knowing that such other will commit such wrong, and that he cannot prevent it or successfully resist it, hold out until he does, and then claim damage for the wrong done. A person is entitled to as much damage for a wrong done or injury quietly endured as though he violently resisted, when he knows that such resistance will be unavailing. Hence, if you believe from the evidence in this case that the plaintiff, even though in the right in refusing to pay the sum demanded of him, yet, nevertheless, invited the defendant's employees to forcibly eject him, or knowing that they would do so, and that he could not successfully resist, yet, nevertheless, refused to leave the train when ordered, he cannot recover for any physical injuries he may have sustained in resisting expulsion, unless they were caused by the use of unnecessary force in expelling him. He can, however, recover damages for any physical injuries sustained by him in resisting expulsion, which were caused by the use of any unnecessary force or violence employed by the company's servants. But if you should believe from the evidence that plaintiff, for the purpose of making a case against the defendant company, and not in an honest assertion of what he thought were his legal rights, told defendant's employees to stop the train, and put him off, he cannot recover, and your verdict should be for the defendant. If a person is wrongly expelled from a railroad train, he is entitled to recover all damages he has actually sustained; such as loss of time, labor, inconvenience, and expense incident to traveling at another time, or by other modes of conveyance to the place he was endeavoring to reach, for the physical pain endured by him, and such mental suffering as grows immediately out of or results directly from such physical pains, provided such physical and mental pains are not the result of such force as was necessary to employ in expelling him, and which he did not invite, or could have avoided by refraining from a hopeless and unreasonable resistance, and also such damages as will compensate for the sufferings of outraged and humiliated feelings, natural to a man who is compelled to submit to such an indignity in such a public place. And when a wrongful expulsion of a passenger occurs, and such expulsion is accomplished by or accompanied with acts of gross oppression, wan-

ton disregard of the rights and feelings of the person expelled, and wanton disregard of the duties imposed upon the company, a kind of damages, called 'exemplary,' may be allowed; that is, damages which the law allows for the purpose of teaching the offending party lessons of good citizenship, respect for the rights and feelings of others, and regard for the duties resting upon him, the offending party; but in all such cases the damages should be reasonable in amount, not awarded through any passion or prejudice excited by the misconduct of the wrong-doer, but should be tempered and proportioned to the necessities of the case, the magnitude of the offense, the wrong actually endured, and the lesson to be taught. Hence, in this case, if you believe from the evidence that plaintiff is entitled to recover at all, he should be allowed, as a matter of right, to compensation for the labor, inconvenience, and expense of being compelled to go to his place of destination at another time, and by other modes of conveyance, if any were resorted to, for physical pain endured by him which resulted from the force employed in expelling him, provided he did not invite the employment of such force, or unreasonably awaited its employment when he might have avoided it, and for such mental suffering as directly resulted from and grew out of such physical pain, and for such humiliation and degradation as were imposed upon him by being compelled to leave the train, under imputation publicly cast upon him of having refused to pay his fare, or having violated the relations of passenger and carrier between himself and the company. In addition to these items of compensatory damages, the exemplary damages before spoken of may be awarded, if, in the exercise of a sound judgment, you believe from the evidence the case requires the same for the reasons and purposes stated. No rules exist for the measurement of damages awarded for physical and mental pain, or for the endurance of a humiliating expulsion from a train of cars, but such damages must, nevertheless, bear, so far as it is possible to discover the same, an exact relation to the injuries inflicted, and cannot be awarded as a matter of guess-work, or captiously and recklessly, but should be as nearly compensatory, in a money point of view, as it is possible to estimate the same, and the distinction between such damages for such injuries and the exemplary damages before spoken of should be kept fully in mind, so as not to confound the two, or award the one for reasons which alone justify the other. The burden is upon plaintiff to prove his case, that is, the wrongfulness of his expulsion from the train, and the amount of his damages, by the preponderance or greater weight of the evidence; not necessarily by the greater number of witnesses, but by witnesses of greater credibility, intelligence, and knowledge of the matters about which they testify. You should take into account the interest which witnesses have in the result of the controversy, and the bias and prejudice they may have, if any, against either of the parties, and if you believe from the evidence that any witness has willfully



sworn falsely to any material matter, you are at liberty to disregard the whole of his testimony because of that fact. You are the exclusive judges of all the evidence in the case of what it was or was not, and of the credibility of all the witnesses."

The jury returned a verdict in favor of the plaintiff, and assessed his damages at \$4,000, and in answer to special questions stated that \$3,000 of the amount was allowed as punitive damages. A motion for a new trial was made upon the grounds, among others, of misconduct of the plaintiff, excessive damages given under the influence of passion and prejudice, and that the verdict was not sustained by sufficient evidence. The court ruled that the motion for a new trial would be sustained unless the plaintiff would remit one-half of the compensatory damages, and also one-half of the punitive damages; and thereupon the plaintiff entered a remitter as to one-half of the amount of the verdict, the sum of \$2,000, and the court then overruled the motion for a new trial. The railroad company excepts, and brings the case to this court for review.

*Geo. R. Peck, A. A. Hurd, and J. G. Egan, for plaintiff in error. Keller & Dean, for defendant in error.*

JOHNSTON, J., (after stating the facts as above.) J. C. Dwelle was expelled from one of the trains of the Atchison, Topeka & Santa Fe Railroad Company on April 13, 1887, for the reason that he refused to pay the fare which the collector of the train demanded of him. He took passage on the train at the station of Cedar Grove for the purpose of going to Florence, a distance of six miles. He reached Cedar Grove about the time of the arrival of the train, and after the station agent had left the ticket-office and gone to the forward part of the train to assist in loading the baggage that was being taken on at that station. There was no one in the ticket-office at the time from whom he could have purchased a ticket. After boarding the train, the collector demanded his fare, when Dwelle tendered the sum of 20 cents. The collector informed him that, as he had no ticket, he must pay 10 cents in excess of the regular fare, which was 18 cents. Dwelle claimed that the excess could not be collected, for the reason that there was no one in the ticket-office from whom he could purchase a ticket, but the collector insisted on the payment of the 28 cents, and returned the 20 cents which Dwelle had before given him. There is a dispute in the evidence as to what subsequently occurred. The collector claims that Dwelle insisted that he would not pay the excess, and told him to stop the train and put him off; and the collector went forward and informed the conductor that a passenger had refused to pay his fare, and he desired him put off. Dwelle, however, claims that he endeavored to pay the excess fare before any steps were taken to stop the train. After the collector went forward for the conductor, Dwelle went towards the rear of the coach, when he met another collector and tendered to him the fare, which was at first taken, but

about that time the first collector returned with the conductor of the train, and the second collector, being informed of what had previously occurred in relation to Dwelle's fare, returned the money given to him. After a parley between Dwelle and the trainmen, during which Dwelle several times tendered the full amount of 28 cents as fare, he was put off the train. He violently resisted the efforts to eject him, and after being put off he climbed on another portion of the train a second time, and the trainmen were again required to use force in removing him from the train. There is testimony that so much time was taken in removing him that the train was stopped for a period of five minutes for that purpose. He claims that one of his legs was strained and injured in the struggle. Error is assigned on the refusal of the court to instruct the jury that if the ticket-office at Cedar Grove was open for the sale of tickets for 30 minutes prior to the schedule time for starting the train, and the plaintiff failed to purchase a ticket during that time, and did not tender a ticket upon the train, that he was bound to pay the excess fare; and, further, that the defendant was not bound to keep open its ticket-office after the schedule time for the starting of the train. Testimony was offered tending to show that the train from which Dwelle was ejected was about 10 minutes behind time when it reached the Cedar Grove station. The court refused this instruction, and instructed the jury that before the railroad company could require the payment of excess fare from a passenger who had not purchased a ticket, it must appear that it kept its ticket-office open, with an agent in the same, ready upon call to sell tickets, long enough before the starting of the train to enable passengers to purchase tickets and safely board the train. The statute which authorizes a railroad company to discriminate in its rates of fare between those who purchase tickets and those who do not, contains the following proviso: "This act shall not apply to any passenger taking passage on any railroad train [from any station] at which such railroad company fails to keep tickets on sale, or at which such company shall neglect or fail to keep its ticket-office open, for the sale of tickets, at least thirty minutes immediately prior to the starting of such train." Laws 1886, c. 139. It is contended that it will subject the companies to great inconvenience and hardship to require them to keep an agent at his post, not only 30 minutes before the schedule time of departure, but also during the time that trains are unavoidably delayed, as they frequently are. The statute must control; and its terms are so plain that little question can arise as to their meaning. No right to charge an excess fare is given unless the company keeps an office open for the sale of tickets immediately prior to the departure of the trains. No mention is made of the schedule time of starting the trains, nor is there anything in the language of the statute indicating that the office should only be kept open 30 minutes prior to the advertised time of the departure. The exception is expressly made to apply to any

passenger taking passage on "any railroad train," and requires the ticket-office to be open 30 minutes before the starting of such train, and not 30 minutes before the advertised time of starting such train. It might be that, in the absence of a statute, a regulation such as is contended for might be deemed a reasonable one, such as the courts would enforce; and that seems to have been the holding of the courts in the cases cited by the plaintiff in error. *Railroad Co. v. South*, 43 Ill. 176; *Swan v. Railroad Co.*, 132 Mass. 116. The legislature, however, has determined what a reasonable regulation is in order to found a right for the charge of excess fare, and we are therefore not called upon to determine what, in our opinion, would be a reasonable regulation in that respect. *Porter v. Railroad Co.*, 34 Barb. 353; *Nellis v. Railroad Co.*, 30 N. Y. 505; *Chase v. Railroad Co.*, 26 N. Y. 523. There is a conflict in the evidence as to whether Dwelle arrived at the depot in sufficient time to have purchased a ticket, and to have safely boarded the train; but if he did, and there was no opportunity for him to purchase a ticket after his arrival, the company had no right to demand more than 18 cents from him, nor any right to eject him from the train. Whether the tender of the excess was made by Dwelle before any steps were taken to remove him from the train is also a disputed question by the evidence. The court properly ruled that if he "refused, when demanded, to pay the fare he knew, or ought to have known, was justly due, and persisted in such refusal until the company, in the exercise of its right to expel him therefor, had taken the necessary steps to put him off, as by commencing to stop the train, or seizing his person, if such seizure was necessary, such plaintiff was a trespasser, and by such acts and conduct relieved the company of its obligation to carry him, and he could not reimpose such obligation on the company by making a tender of the sum due after having once refused it for the purpose and under the circumstances stated, and having put the company to the trouble of the performance of acts necessary to his safe and proper expulsion; but, notwithstanding such refusal for such purpose and under such circumstances, if the plaintiff, prior to the taking of such steps by the company to expel him, tendered the proper amount to the proper employe, he was bound to accept it and permit the plaintiff to ride." Complaint is made, however, of that part of the charge immediately following the portion above given. It is as follows: "But, on the other hand, if you believe from the evidence in the case that the plaintiff refused to pay the amount demanded of him, but that such refusal was not for the purpose of defrauding the company, or unjustly withholding its legal dues, or vexing, annoying, delaying, or putting to inconvenience the company's employes, but was done in good faith, under a mistaken belief that he was under no legal obligations to pay all that was demanded, and such honesty of purpose and belief was apparent from the manner, temper, demeanor, and conduct of plaintiff, and the circumstances of the

case, the company was bound to accept the sum previously refused if tendered at any time before the actual expulsion, or after such expulsion and before the starting up of the train."

It is contended that the motive of the passenger, or whether he acted in good faith, and under a mistaken belief that an unjust demand had been made of him, cannot affect the case. It is said that the person in charge of the train must, in the interest of the public as well as the company, act promptly, and should not be required to take the *ex parte* statements of the passenger in regard to whose fault it was that no ticket was purchased. It is claimed, in the present case, that the collector did inquire of another passenger who came upon the train at the same station, and learned from him that the office was open, and that tickets could have been purchased there. It is further urged that it is unreasonable to compel a conductor to institute an investigation as to the motives of a passenger, whether he is acting in good faith and under a mistaken belief that he was tendering all the fare that could be rightfully required of him; but his proper course, when the collector insisted on the payment of the excess, was to pay the fare demanded, and afterwards, when opportunity is given for investigation, to apply for a refund or seek redress against the company. The following cases are cited as supporting the contention: *Railroad Co. v. Nichols*, 8 Kan. 505, 519; *Railway Co. v. Rice*, 38 Kan. 398, 401, 16 Pac. Rep. 817; *Railroad Co. v. Ganta*, 38 Kan. 608, 17 Pac. Rep. 54, and cases therein cited.

A majority of the court are of the opinion that that portion of the instruction which required an acceptance of a tender of the amount demanded at any time before the expulsion, or after the expulsion, and before the starting of the train, where the refusal was in good faith, and made under a mistaken belief that there was no legal obligation to pay the sum demanded, is erroneous. In the opinion of the writer the rule of the instruction is both reasonable and correct, and, further, the entire charge states the law aptly, fairly, and fully as it arises under the facts of the case. Of course, the person in charge of the train should not be required to read the mind of a passenger, nor be governed in his action by the motives of the passenger which are not manifest. As will be seen, the instruction only required the collector to accept the tender when it appeared from the manner, temper, demeanor, and conduct of the plaintiff, and the circumstances of the case, that the refusal of the excess fare was not to defraud the company or withhold from it all its legal dues, nor to vex or annoy the employes, but that the passenger was honestly mistaken as to a fact, or as to what was legally due from him. No excess fare could be collected if the ticket-office was not open for the purchase of tickets until the departure of the train, and an honest mistake as to this fact may be readily made by either the conductor or the passenger. If a passenger, acting in good faith, makes such a mistake, and

refuses a demand for excess fare, and his honesty is apparent to the collector or conductor of the train, and if, when he learns his mistake, either before or after his expulsion, he tenders all that is demanded, it is reasonable and right that his tender should be accepted, and he should be allowed to ride. No good purpose can be accomplished by denying his right to ride under such circumstances.

It is next urged that the verdict was excessive, and was given under passion and prejudice, due to the misconduct of the prevailing party. There is good reason for this complaint. The misconduct referred to was the statement of matters not pertinent to the case, and which were calculated to arouse the prejudice of the jury, by the counsel for the plaintiff below. In the course of the argument it was said that the defendant railroad company is a powerful corporation, which holds its employees and servants in a vise, and requires them to go and come to the witness stand and testify at its behoof and dictation; that railroad companies are looked upon with suspicion and prejudice; and that such prejudice is well founded. It was stated that the government gave to the railroad company 10 alternate sections of land on either side of the railroad to aid in the building of its road; that that land was worth, on an average, to the railroad company, \$5 an acre, which is \$3,200 for every section, and which would be \$32,000 a mile that the railroad got to assist in the building of its road. It is then stated that it is a lamentable fact that, notwithstanding all these things, the railroad company makes a studied and determined effort to bleed the people all along its line. An objection was made to the remarks of counsel, as not based on the facts, and as being an appeal to the passion of the jury, which objection was overruled. In further argument counsel continued to inveigh against railroad companies, claiming that they controlled legislation, and that the act in relation to collection of excess fare was for the benefit of railroad companies, and was dictated by them. It was further stated that the odor around railroad offices was such as to demoralize men, and to make them disregard their solemn obligations and their duties to their fellow-men; and, further, that it tended to make them disregard their solemn oaths when they come upon the witness stand; that they are educated to throw baggage and destroy it, to throw it off the trains and tumble it in heaps; and, further, that they are educated to snub passengers on every occasion, and not to give a civil answer when asked a civil question. It was stated that the employees of the company performed its bidding without regard to right or wrong, and that they go on the witness stand to testify to whatever they are given to understand by the railroad company that they want them to testify to. It was stated that there are few men who dare to enter into litigation with a railroad company, because it has a legal department, and has lawyers hired by the year, and therefore had no care what the cost of the litigation might be. A com-

parison was made between the defendant company and another railroad company which operated a road through the town where the court was held, in which it was stated that the policy of one was to treat everybody decently, rightfully, and well, while the policy of the other was different, and that the defendant should be taught a lesson by the imposition of heavy punitive damages. In speaking of witnesses who had given testimony against the plaintiff below, an allusion was made to the fact that there was a man killed down there about six years ago, and that there were some of these witnesses who would cut another man's heart out, men who would kill another man's cow, and would steal another man's rocks, and that these were the kinds of men whom the railroad company had brought to assail Dwelle's reputation for truth and veracity. This line of argument was continued at considerable length. These statements were not based on the testimony, and most of them were wholly incompetent, and of a very prejudicial character. It requires no discussion to show that counsel went far beyond the scope of legitimate argument, and their course in dragging extraneous matters and facts before the jury, which manifestly tended to excite their prejudices, merits disapproval, and the setting aside of the verdict which was apparently influenced by the misconduct. *Huckell v. McCoy*, 88 Kan. 54, 15 Pac. Rep. 870, and cases cited. In the course of the argument counsel for the plaintiff below read from the case of *Railroad Co. v. Weaver*, 16 Kan. 462, and over the objection of the opposing party. That portion which was read contained expressions of the opinion of the writer with regard to the rule of accountability of railroad companies, and also of the conduct of the servants and employees of railroad companies towards the public. If the law of the *Weaver Case* is pertinent and proper, it should have been presented to the jury in the charge of the court. The statement of what purports to be facts in the opinion, read to the jury, was also inapplicable, and should have been excluded. These facts were not introduced in evidence before the jury, nor in fact could they have been. Hearsay evidence is not admissible, whether given by a witness, stated by one of the counsel in his argument to the jury, or read from the official report of a decision made by the supreme court. All matters not in evidence, and not pertinent to the issue, cannot be brought before the jury upon any pretense. In the case of *State v. Wait*, ante, 354, (decided at the present term,) the question of the right of counsel to read to the jury from an opinion published in the supreme court reports statements with regard to facts in another case is denied, and numerous cases are cited in support of that ruling. All these matters were calculated to divert the attention of the jury from the testimony and the real issues in the case, and to prejudice them against the defendant. It is claimed, and is true, that objections were not made to all of the statements, but the attention of the court was called to the objectiona-

ble language at the beginning of the argument, and, as that was overruled, the party refrained from pressing further fruitless objections. The question is fairly raised by the objection that was made and the exception that was taken, and it was the duty of the court thereafter to regulate the course of the argument, and to exclude from the jury the extraneous and improper statements. *Prima facie* these statements were prejudicial, and where it appears that they may have prejudiced the jury, and led to the bringing in of the verdict that was rendered, a new trial should be granted. We are not left to determine from the statements of counsel alone as to whether the verdict was influenced by the passion and prejudice of the jury. The court below, who watched the conduct of the trial, and the effect of the argument upon the jury, has found that the verdict was excessive, and that it was probably influenced by the misconduct of the prevailing party. In passing upon the motion for a new trial, the court makes the following statement: "My judgment is, gentlemen, and it has been since the verdict and findings were returned, that the amount of damages awarded in this case is excessive, and, considering the argument of counsel to the jury, might have been given under the influence of passion and prejudice. Upon that point I fear that I committed error myself in allowing the address of plaintiff's counsel, over the protest and objections of the counsel for the defense. It struck me throughout as being heated and inflammatory, and calculated to arouse the passion and prejudice of the jury. It struck me at the time as being a character of address that would be difficult for a jury, unless exceptionally discreet and fair-minded and strong-minded, to resist." The court, having thus found, ordered a new trial, unless the plaintiff below would remit one-half of the damages, and in pursuance of that direction the judgment was reduced from \$4,000 to \$2,000. We think the court should have gone further, and have granted a new trial absolutely. If the jury were influenced by passion and prejudice in rendering the verdict which the court found to be excessive to so great an extent, there were sufficient grounds for holding that the entire verdict, and all the questions in the case, were likewise influenced. From the testimony in the case, we agree with the judgment of the district court that the verdict is excessive, and when it is found that a verdict so grossly excessive as this has probably been influenced by passion and prejudice, this court will not hesitate to reverse the judgment and grant a new trial. *Railroad Co. v. Cone*, 37 Kan. 567, 15 Pac. Rep. 499; *Steinbuechel v. Wright*, 23 Pac. Rep. 560; *Cassin v. Delany*, 38 N. Y. 178. The judgment of the district court will be reversed, and cause remanded for a new trial. All the justices concurring.

TOWN OF PENDLETON V. SAUNDERS *et al.*  
(Supreme Court of Oregon. May 18, 1889.)

WATER COMPANIES—CONTRACTS—CONSTRUCTION—  
EVIDENCE—EXPERTS.

1. When the town of Pendleton contracted to pump water into a reservoir to the full capacity

of its pumps whenever the first parties to the agreement desired to make a test of the reservoir, not exceeding once each week for 90 days, such agreement did not impose the duty on said town of doing more than run its pumps to their full capacity during the time they were usually and reasonably run.

2. It was not required to incur extraordinary or unusual expense for that purpose, or to increase its force of engineers, if the one then employed was capable of running the pumps to their full capacity during the hours he was accustomed to run the same.

3. If the supply of water failed for any cause without the city's fault, so that the reservoir could not be filled at the times required by S. & C., such failure did not put the city in default.

4. If the cistern from which the supply of water was drawn was inadequate, or if, on account of the season, there was a scarcity of water, the city would not be responsible therefor.

5. The "tests" provided for in the agreement were designed for the equal benefit of both parties, and their purpose was to enable both parties to know by actual experiment when the reservoir was completed, by being water-tight.

6. So far as either party to the contracts mentioned in the pleadings has bound himself, he must substantially perform his agreement, and neither is bound beyond the terms of his agreement.

7. Language used in a contract must generally be held to be used in its ordinary and usual sense and signification; but when such rule would give the language no force or effect whatever, or would lead to an absurdity, the court may examine the context, and view the whole subject-matter in the light in which the parties evidently viewed it, and ascertain the meaning of the language they used by their situation, the subject-matter of the contract, the context, and all the circumstances attending the execution of such contract.

8. Subdivision 9, § 706, of Hill's Code, makes the opinion of a witness competent evidence respecting the identity or handwriting of a person, where he has knowledge of the person or handwriting; and also his opinion on a question of science, art, or trade, when he is skilled therein.

9. An expert is one instructed by experience; and to become such requires a course of previous habit and practice, or of study, so as to be familiar with the subject.

LORD, J., dissenting.

(Syllabus by the Court.)

Appeal from circuit court, Umatilla county; JAMES A. FEE, Judge.

J. J. Balleray, for appellants. Wirt Minor and L. B. Cox, for respondent.

STRAHAN, J. The object of this suit is to recover damages against the defendants for the alleged violation of the conditions of a certain bond executed by the defendants to the plaintiff. It appears from the complaint that on the 11th day of November, 1886, the defendants Saunders & Church contracted with the plaintiff to construct, build, erect, and put in for the plaintiff, in accordance with certain specifications, a system of water-works, including a reservoir, which they agreed should be constructed and built pursuant to the said specifications, and should have, when built, the capacity of holding 500,000 gallons of water, and be water-tight; and for such system of water-works, built according to such plan and specifications, the plaintiff was to pay them \$25,375 in bonds of the town of Pendleton, which were to be received by the contractors in payment at 6 per cent. above par. That said Saunders & Church entered upon the performance of said contract, and did build and

put in a system of water-works for the plaintiff, pursuant to said argeement, and substantially in accordance with the specifications therefor, in all respects, save and except that the said Saunders & Church failed and neglected to dig, build, and construct a reservoir for water which should contain and hold 500,000 gallons, and have the capacity for holding so much water, and be water-tight, and did notify this plaintiff, and claim, that they had completed said system of water-works, pursuant to such contract, and did call upon the plaintiff for the contract price of the same. That plaintiff examined said system of water-works, and particularly the reservoir, and finding the same not built according to said contract, and particularly that the said reservoir was not built pursuant to the specifications therefor, and not to be water-tight, did refuse to accept said system of water-works, and to pay the balance of the contract price for the same; and at said time plaintiff had paid Saunders & Church, on said agreement, the sum of \$22,200 in bonds of the town of Pendleton, at the agreed price of 6 percent. above par; and there still remained unpaid upon said contract price the sum of \$3,115, which plaintiff refused to pay over to Saunders & Church because of their default in putting in said system of water-works according to contract, and particularly because of their failure to construct a reservoir pursuant to said contract, and make the same water-tight, as required by the specifications. That Saunders & Church, for the purpose of inducing plaintiff to accept the system of water-works so constructed, and particularly to induce the plaintiff to pay them the balance of the contract price of said system of water-works, entered into a new contract with plaintiff, as follows:

"This agreement made and entered into by and between C. P. Church and R. Saunders, as partners under the firm name of Saunders & Church, parties of the first part, and the committee on fire and water of the town of Pendleton, composed of W. F. Matlock, E. Reith, and S. Rothchild, parties of the second part, witnesseth, that the parties of the first part, for and in consideration of the acceptance by the town of Pendleton of the water-works system constructed for said town by the parties of the first part in its present condition, and the payment by the town of Pendleton to said first parties of the sum of the water bonds of the town of Pendleton, in the denominations of one thousand dollars each, and numbered 22, 23, 24, 25, 26, 27, 28, and 29, and of the sum of one hundred and ninety-two and forty-eight one-hundredths dollars, by warrant drawn on the town treasury, that being the balance of the price agreed upon by the first and second parties as due to said first parties from said second parties upon the full and complete completion of said water-works system, the parties of the first part agree to and with said second parties that within ninety days from the date of the signing of the contract the reservoir of the water-works system of the town of Pendleton shall contain at least 500,000 gallons of water, or as much as can be put in

the reservoir by pumping; and that said reservoir, when containing 500,000 gallons of water, or as near thereto as possible, shall not lose from evaporation and filtration more than one and one-half inches of water, vertical measure, during each twenty-four hours; and that if said reservoir, when containing said amount of water, at the expiration of said period of ninety days, shall lose more than one and one-half inches of water by filtration and evaporation during each twenty-four hours, then that the said first parties shall, at their own cost and expense, within twenty days thereafter, make said reservoir water-tight by walling up the north, east, and west walls of the same, with hard-burned brick laid in cement mortar, and shall plaster the same with cement and black, sharp sand, mixed in the customary proportions for cementing cisterns, on the inside of the walls of said reservoir to a depth of at least three-eighths of an inch. That the parties of the first part make, sign, execute, and deliver to the town of Pendleton a good and sufficient bond in the penal sum of four thousand dollars, with two or more sureties to be approved by the common council, conditioned for the faithful performance of their part of the terms of this agreement. That the parties of the second part, for and in consideration of the covenants and agreements of the first parties herein mentioned, and by them to be kept and performed, hereby agrees to and with said parties, not as individuals, but for and on behalf of the town of Pendleton, to accept for said town, subject to the conditions and covenants mentioned in this agreement, the water-works system constructed for the town of Pendleton by the first parties in the condition the same is now in, and to pay and deliver upon the filing of this contract, duly signed and executed by the parties thereto, accompanied with the bond of the first parties heretofore mentioned, with the recorder of the town of Pendleton and the approval of the same by the common council water bonds of the town of Pendleton, in denominations of one thousand dollars each, and numbered 22, 23, 24, 25, 26, 27, 28, and 29; also a warrant of said town, drawn on the town treasurer, for the sum of one hundred and ninety-two and forty-eight one-hundredths dollars. And it is further understood and agreed by and between the parties to this agreement that during the time mentioned in this agreement for the completion of said reservoir, that the town of Pendleton will pump water into said reservoir to the full capacity of its pumps, (except what water shall be needed for consumption in said town,) whenever the first parties may desire to make a test of said reservoir, not exceeding once each week; and that the said first parties shall have the right, during said time, to bleed the reservoir as often as they may deem it necessary for the repairing of the same. And it is further understood and agreed by and between the parties to this agreement that W. F. Matlock, E. Reith, and S. Rothchild, parties of the second part, in the signing and execution of this agreement, assume no personal responsibility, and are not to

be held in any way personally liable thereon, but that they sign and execute the same for and on behalf of the town of Pendleton. In witness whereof the parties have hereunto set their hands and seals, this 21st day of June, 1887. 1. SAUNDERS & CHURCH. [L. s.] 4. W. F. MATLOCK. [L. s.] 2. E. REITH. [L. s.] 3. S. ROTHCHILD. [L. s.] In the presence of JOHN J. BALLERAY, THOS. FITZGERALD, as to signatures 1, 2, and 3, 4."

That the foregoing agreement is the agreement or contract between Saunders & Church and the town of Pendleton mentioned in the bond hereinafter set forth. That on the 17th day of June, 1887, the defendants duly made and executed to the plaintiff their certain bond, in the words and figures following, to-wit:

"Know all men by these presents that we, C. P. Church and R. Saunders, Zoeth Houser, Lee Moorhouse, C. B. Wade, and W. T. Chalk, are held and firmly bound unto the town of Pendleton in the just and full sum of four thousand dollars, (\$4,000,) for the payment of which sum to the said town of Pendleton we, and each of us, do by these presents bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Signed with our hands and sealed with our seals, this 17th day of June, A. D. 1887. The condition of the above obligation is such that, whereas, the above-bonded C. P. Church and R. Saunders are about to enter into a contract with the town of Pendleton, supplementary to the contracts now existing between said C. P. Church and R. Saunders, on one part, and the said town of Pendleton, on the other, providing for the construction of the system of water-works in the said town, which contract bears date, or is to bear date, the 21st day of June, A. D. 1887, and which contract provides for the doing of certain work on the reservoir belonging to said water system, in case the same shall be necessary to make said reservoirs water-tight: Now, therefore, if said C. P. Church and R. Saunders shall strictly conform to and perform all their covenants contained in said contract, and abide by and perform all the covenants and conditions therein contained on their part, then this obligation to be and become void; otherwise, to be and remain in full force and virtue. Signed and sealed the day and year above written. CHARLES P. CHURCH. [L. s.] R. SAUNDERS. [L. s.] Zo. HOUSER. [L. s.] LEE MOORHOUSE. [L. s.] C. B. WADE. [L. s.] W. T. CHALK. [L. s.] Signed, sealed, and delivered in presence of JOHN J. BALLERAY, W. E. CREWS, G. W. PITTOCK, P. E. GEROULD."

That said bond was, on the 23d of June, 1887, approved by the common council of the town of Pendleton. That at said time there remained due the contractors from the town of Pendleton \$3,115, and also \$5,567.48 for extra material and labor; and plaintiff thereupon paid the same, as per said agreement herein set forth; and plaintiff has performed all other conditions and promises by it on its part to be performed, pursuant to the agreement set forth. That defendants C. P. Church and R. Saunders have not performed nor ob-

served the conditions of the above-stated agreement, nor the promises on their part to be observed and performed, but have made default therein. That said reservoir has never had the capacity to contain 500,000 gallons of water without losing more than 1½ inches of water, vertical measure, by filtration and evaporation, during each consecutive 24 hours, nor less than 11 inches, vertical measure, during such period. That the defendants R. Saunders and C. P. Church were duly notified, and well knew the condition of said reservoir, and the fact that the same was not water-tight, and would not, at the expiration of the 90 days specified, contain the said amount of water without losing more than 1½ inches of water, vertical measure, by filtration and evaporation, during each consecutive 24 hours, nor less than 24 inches; but have failed, neglected, and refused to make said reservoir water-tight, and have failed, neglected and refused to wall up the north, east, and west walls of said reservoir, and to cement the same, or to do any act or thing to make said reservoir water-tight, or to observe or perform the conditions of said contract or bond, and still neglect and refuse so to do; and by reason thereof the conditions of said bond have become broken, and the obligation has become absolute, and plaintiff is damaged in the sum of \$2,270. That by reason of the default of the said C. P. Church and R. Saunders in constructing said reservoir, and in making the same water-tight, as provided in the written agreement of June 21, 1887, above set forth, plaintiff was compelled to run its pumps constantly, in order to keep a supply of water in said reservoir, and to furnish its cisterns with water, and was compelled to employ for such purpose other and extra labor, to-wit, an additional engineer, for the period of 112 days, and did actually pay as wages for the same the sum of \$281, and plaintiff is specially damaged in said sum of \$281. That by reason of the said default of said C. P. Church and R. Saunders, and by reason of said reservoir failing to hold the water pumped into it, plaintiff was compelled to run its pumps and engine constantly, in order to keep a supply of water in said reservoir, and to furnish its customers with water, and was compelled to use and burn much larger quantities of wood, to-wit, 112 cords, and that said wood was reasonably worth \$4.49 per cord, and plaintiff was thereby specially damaged in the sum of \$502.88. That by reason of the default of said Saunders & Church the plaintiff was compelled to run its engine at a higher pressure than it would have run the same, and drive its pumps at a greater rate of speed, and frequently it was compelled to shut the water off from the reservoir, and to supply its customers with water directly from its pumps, and by reason thereof plaintiff's engine and pumps were much worn and damaged, and plaintiff was thereby damaged in the further sum of \$200. Said complaint was duly verified and filed.

To this complaint defendants filed a general demurrer, and, the demurrer having been overruled, the defendants answered.

By the answer, defendants admit the contract made by Saunders & Church with plaintiffs, dated November 11, 1886, and that Saunders & Church proceeded under the same to construct a system of water-works for plaintiff, and gave notice to plaintiff that they had completed the same. They admit that at the time Saunders & Church gave notice to plaintiff of the completion of said water-works they had been paid the sum of \$22,200, and there was still due on the said contract the sum of \$3,115, and the further sum of \$5,567.48 for extra work and for material. They admit that on the 17th day of June, the defendants executed the bond set out in plaintiff's complaint, and that on the execution of said bond the plaintiff paid to Saunders & Church the sum then due them. The answer then denies specifically every other allegation of plaintiff's complaint, including the alleged inducement for signing the contract and bond sued on in this cause, and set out in plaintiff's complaint. Defendants alleged in their said answer the following new matter: That at the time said Saunders & Church gave such notice, and made such demand, (that is, gave notice that they had completed their contract, and demanded the balance then due them,) they had completed said system of water-works, including said reservoir, according to the said contract, and said plans and specifications therefor. That plaintiff being unprepared, at the time of the completion of said work, to make a test thereof, and being unwilling to accept the same without such test, and refusing to pay said Saunders & Church the balance of the contract price for said works, namely, the sum of \$3,115, besides the sum of \$5,567.48 due said Saunders & Church for extra work and materials, and said Saunders & Church being about to sue the plaintiff for said sums due them, the plaintiff and defendants, to avoid litigation, entered into the contract set up in plaintiff's complaint. That after the making of the contract mentioned in plaintiff's complaint, dated November 11, 1886, by and between Saunders & Church and the plaintiff herein, the said Saunders & Church did build and construct for plaintiff the said system of water-works in the town of Pendleton, including the reservoir belonging to said system, in strict accordance with the plans and specifications which formed a part of said contract, except where the same were changed by the direction and at the request of plaintiff, and did build and construct said reservoir so that the same had a capacity of, and was capable of holding, more than 500,000 gallons of water, and was when holding such quantity of water, and at all times, water-tight; and said Saunders & Church thereupon demanded of plaintiff the balance of the contract price of said system of water-works, which then amounted to \$3,115, and the price of extra work done thereon and material furnished therefor, which amounted to the sum of \$5,567.48. That plaintiff, without any just cause or reason therefor, declined to pay said sums due said Saunders & Church, and declined to test and receive said system of water-works till Saunders & Church would enter

into and sign the contract of June 21, 1887, and furnish the bond which was set out in plaintiff's complaint. That, after the signing of said agreement and bond set out in plaintiff's complaint, the defendants Saunders & Church, during the time therein mentioned and provided for the completion of said reservoir, repeatedly requested plaintiff to pump water into said reservoir to the full capacity of its pumps, (except what water was needed for consumption in said town,) in order to make tests of said reservoir; but that plaintiff neglected and refused, at all times, to comply with said request. That within 90 days from the signing of said contract of June 21, 1887, the said reservoir was capable of containing, and did contain, 500,000 gallons of water, and did not lose from evaporation and filtration more than  $1\frac{1}{2}$  inches of water, vertical measure, during each or any consecutive 24 hours, and was then, and has been ever since, water-tight. That said Saunders & Church have kept and performed, on their part, all the provisions and promises contained in said agreement of June 21, 1887, set out in plaintiff's complaint, which were to be kept and performed on their part, and that none of the conditions of said bond set up in the plaintiff's complaint, and on which his action is brought, have been broken.

The reply put in issue the new matter contained in the answer. A trial before a jury resulted in a verdict and judgment for the plaintiff in the sum of \$2,250, from which judgment this appeal is taken. The notice of appeal contains 26 assignments of error, but those only which were specially insisted upon at the argument here will be noticed.

1. The liability of the defendants in this action must be measured by the contract which Saunders & Church made with the plaintiff, dated June 21, 1887, and the bond made pursuant thereto, signed by all of the defendants, dated June 17, 1887. Though bearing different dates, these writings were delivered at the same time, took effect simultaneously, and must be construed together as a part of the same transaction. By the first, Saunders & Church covenanted with the plaintiff that upon the full and complete completion of said water-works system the parties of the first part agree to and with said second parties that, within 90 days from the date of the signing of the contract, the reservoir of the said water-works system of the town of Pendleton shall contain at least 500,000 gallons of water, or as much as can be put in the reservoir by pumping; and that said reservoir, when containing 500,000 gallons of water, or as near thereto as possible, shall not lose from evaporation and filtration more than  $1\frac{1}{2}$  inches of water, vertical measure, during each 24 hours; and that if said reservoir, when containing said amount of water, at the expiration of said period of 90 days, shall lose more than  $1\frac{1}{2}$  inches of water by filtration and evaporation during each 24 hours, then that the said parties shall at their own cost and expense, within 20 days thereafter, make said reservoir water-tight by walling up the north, east, and west



walls of the same with hard-burned brick, laid in cement mortar, and shall plaster the same with cement and black, sharp sand, mixed in the customary proportions for cementing cisterns, on the inside walls of said reservoir, to the depth of at least three-eighths of an inch. The bond signed by all the defendants recites the making of this contract, and then continues: "And which contract provides for the doing of certain work on the reservoir belonging to said water system, in case the same shall be necessary to make said reservoir watertight: Now, therefore, if said C. P. Church and R. Saunders shall strictly conform to and perform all of their covenants contained in said contract, and abide by and perform all the covenants and conditions therein contained on their part, then this obligation to be and become void; otherwise, to be and remain in full force and virtue." The agreement made between Saunders & Church with the town of Pendleton also contained the following provision: " \* \* \* That during the time mentioned in this agreement for the completion of said reservoir, that the town of Pendleton will pump water into said reservoir to the full capacity of its pumps, except what water shall be needed for consumption in said town, whenever the first parties may desire to make a test of said reservoir, not exceeding once each week, and that said first parties shall have the right during said time to bleed the reservoir," etc. These provisions of the contracts between the parties necessarily assume that, although the possession of the system of water-works had passed from the contractors to the town of Pendleton, the reservoir was incomplete, and they provide for a time within which the contractors might complete it; that is, make it watertight. A means of making certain tests is also provided; that is, the town of Pendleton will pump water into said reservoir to the full capacity of its pumps whenever the first parties may desire to make a test of said reservoir, not exceeding once in each week; but this provision did not impose the duty on the town of Pendleton of doing more than to run its pumps to their full capacity during the time they were usually and reasonably run. It was not required to go to extraordinary or unusual expense for that purpose, or to increase its force of engineers, if the one already employed was capable of running the pumps to their full capacity during the hours he was accustomed to run the same. If the city did all of this, it performed the full measure of its duty in this particular, and was not in default. If the supply of water failed, for any cause, without the city's fault, so that the reservoir could not be filled at the time required by Saunders & Church, such failure did not put the city in default. Its agreement was to run its pumps, and I have indicated the extent of its duty in that particular; but if the cistern from which the supply of water was drawn was inadequate, or if, on account of the season, there was a scarcity of water, the city would not be responsible therefor. The city had as much interest in these tests as had Saunders & Church. They were designed for the

equal benefit of both parties. The undoubted object was to enable them to know by actual experiment when the reservoir was completed, by being watertight. But I do not think the terms of this contract bring the case within the principle laid down in the numerous cases cited by appellants' counsel on that subject. Those cases state elementary law, and their authority and binding force is fully recognized and admitted; but they are not applicable to the particular facts disclosed by this record. So far as either party to this record has bound himself to perform any act or thing, we hold he must substantially perform his agreement, and that neither is bound beyond the terms of his contract; and this is the substance of all the authorities cited on this subject by appellants' counsel. Without entering into a more particular specification, these general observations dispose of a number of the assignments of error by the appellants adversely to them. A more particular specification would tend to too great prolixity, and I deem it unnecessary.

2. But there is one charge given by the court to which an exception was taken, which is not covered by what has been said, which charge is as follows: "If you find that the supply-pipe of the reservoir did allow water to escape through its gates, and that such escape was due to the failure of the gates to shut by reason of gravel getting into the pipe, and if you further find that such gravel got into the pipe from the reservoir after the 21st day of June, 1887, and before the expiration of ninety days, by reason of its imperfect construction, and in its ordinary use, I instruct you that such loss was within the scope of the undertaking of the contractors, and they are to be held responsible therefor. I charge you that filtration, in the sense used in these instructions, means leakage from the reservoir from any cause owing to its defective construction, and its incapacity by reason thereof to hold water." Further on in this charge, the court remarked, on the same subject: "The burden of proof is upon the plaintiff, the town of Pendleton, to show that, at the expiration of the ninety days mentioned in the contract, the reservoir lost by evaporation and filtration, and from no other cause, one and one-half inches of water in twenty-four hours." Appellants' counsel contend that the word "filtration," used in the contract, is there used in its ordinary sense, and that these instructions are erroneous, because they assume that it was used in a different sense. The ordinary rule undoubtedly is that language used in a contract is to be understood and held to be used in its ordinary and usual sense and signification; but within that rule this word would have no signification whatever. The meaning ascribed to it by lexicographers is the act or process of filtering,—the mechanical separation of a liquid from the undissolved particles floating in it; and the process of filtering is defined, "to purify or defecate, as liquor, by causing it to pass through a filter or porous substance that retains a feculent matter." In the sense in which the word is used in the contract, it plainly

imports a method of losing water from the reservoir. The words are, "shall not lose from evaporation and filtration more than one and one-half inches," etc. To claim that the word, in this connection, can have, or was designed to have, its ordinary signification, is an absurdity. Looking at the subject-matter of this contract, its object, the situation and surroundings of the parties, and particularly the connection in which the word occurs therein, we are not prepared to say the court misinterpreted it to the jury. The only question that does not seem clear to us is whether or not it is admissible in such case to employ interpretation at all; but, looking at the whole subject-matter in the light in which the parties evidently viewed it when they made the contract, we think that we may properly look for the meaning of the words they used in the context, and in the surroundings and situation of the parties, and the subject-matter itself. Thus viewing the matter, we are not satisfied that the court erred in its charge to the jury now under consideration. Section 700 of the Code aids this view of the matter. By that section it is provided, "When the terms of an agreement have been intended in a different sense by the different parties to it, that sense is to prevail against either party in which he supposed the other understood it; and, when different constructions of a provision are otherwise equally proper, that is to be taken which is most favorable to the party in whose favor the provision was made."

3. The defendants took some exceptions to the introduction of evidence which require notice. R. A. Habersham, who has been a practical civil engineer for 30 years, was called by the plaintiff, and testified, without objection, in substance: "I was at the reservoir of the town of Pendleton yesterday. I have the elevation of the hill on which it is situated. I found the top of the reservoir wall about one hundred and forty feet above the pumping-house. I took it with a barometer. That is a recognized mode of taking elevations. I have had experience in blasting and digging out excavations in the ground and in soil of the same character as that out of which the reservoir was digged. The effect of blasting is to shake up and loosen such ground, and might have a tendency to give rise to fissures and apertures in the surrounding earth. I have made a test to determine as to whether rock of the character as that out of which the reservoir was digged would resist leakage of water. I tested some of the same rock by putting it in water for twenty-four hours. When I took it out, some of the pebbles still stuck together; but generally it had fallen apart, and showed no evidence of having anything in the nature of cement in it. The matrix in which the pebbles were enveloped is mostly volcanic ash, with very little cohesiveness about it. I have had experience in building walls to resist water. If the material into which the reservoir is excavated is solid, whether it be earth or hard pan, it would not require any brick or stone lining at all. It would be sufficient to plaster it with cement to

prevent absorption. If it is necessary to make a wall on account of one weak spot in the excavation, then a wall—(provided the backing is put in well, and made solid, before any masonry is begun) a wall four inches of brick, laid in good cement, and laid as you describe, would be sufficient; but this estimate makes no allowance for any unfaithful or bad work. It must be absolutely sound. For a proper backing I should want a stone backing, or else clay rammed in hard. Irregularities in the side I should have filled in with either concrete or good hard clay, well tamped in." After further describing the backing necessary to make the wall safe, etc., the plaintiff's counsel asked the witness the following question: "I would ask you to state what effect freezing would have on the wall you speak of?" This was objected to, and the objection overruled, and an exception taken, and the witness then answered: "It would be liable to crack the wall." The witness further testified, under exception: "The hole in which the reservoir is built not being water-tight, the reservoir would leak down to the bottom of this crack, and, if the clay support were to continue alternately freezing and thawing, it would break off in the neighborhood of that soft place. The tendency would be to yield at all parts of the wall within the reach of this breaking up." This witness, also, under exception, gave his opinion to the jury on several similar points in the controversy. Frank Duprat, Felix Roumagoux, and R. Paschal, who were stone-masons, and who constructed the walls in the reservoir for the city, to make the same water-tight, were each asked various questions tending to elicit their opinions as to the kind of walls necessary to be reasonably safe and durable, what would be the effect upon the wall of water running behind it and freezing, etc.; and to each and all of these questions the defendants' counsel objected, for the reason that the same was irrelevant and immaterial; which objections being severally overruled, exceptions were duly taken. A. J. Ford, who was a brick-mason, and had had experience in building cisterns and walls, also gave his opinion as to the kind of a wall that would be water-tight and reasonably durable.

If these were not proper subjects for expert evidence, or if the several witnesses offered did not possess the requisite knowledge to enable them to give an opinion, the evidence offered should have been excluded on the ground of its incompetency. But counsel did not make that objection. They relied upon its immateriality and irrelevancy, and insisted on no other objections. Under the plaintiff's view of this case, this evidence was both relevant and material. It tended to show the nature and character of the wall the plaintiff was required to construct in order to make the reservoir reasonably durable and water-tight. It was material and relevant as tending to show the extent of the labor and material which were necessary to construct such wall, and which would, to some extent, aid the jury in determining the amount the plaintiff was required to expend in its construction. But, allow-

ing the defendants the benefit of the other objection,—that such evidence was incompetent,—still the exceptions could not be sustained. Section 706 of Hill's Code provides: "In conformity with the preceding provisions, evidence may be given on the trial of the following facts: \* \* \* (9) The opinion of a witness respecting the identity or handwriting of a person, when he has knowledge of the person or handwriting; his opinion on a question of science, art, or trade, when he is skilled therein. \* \* \* This statute merely indicates the general rule admitting expert testimony, and I think all the testimony to which exceptions were taken, on the subject indicated, were of that nature. Each of the witnesses appeared to be skilled in the particular science, art, or trade to which the questions related. "An expert is \* \* \* one instructed by experience, and to become one requires a course of previous habit and practice, or of study, so as to be familiar with the subject." *Nelson v. Insurance Co.*, 71 N. Y. 453. "An expert must have made the subject upon which he gives his opinion a matter of particular study, practice, or observation, and he must have particular and special knowledge on the subject." *Jones v. Tucker*, 41 N. H. 546. "Knowledge of any kind, gained for and in the course of one's business as pertaining thereto, is precisely that which entitles one to be considered an expert, so as to render his opinion, founded on such knowledge, admissible in evidence." *Buffum v. Harris*, 5 R. I. 251. And 1 Greenl. Ev. § 440, is an authority to the same point. All of the evidence offered on the subjects indicated above was clearly admissible, and a more particular discussion of the subject would be unprofitable, and is unnecessary.

4. A point was made during the argument here that the writings sued on were without consideration, and the same question was made prominent during the trial in the court below; but I am unable to discover any force in the appellants' contention on this point. The writings declared on are under seal, and seal always imports a consideration. But that is not all. The mutual covenants and agreements of the parties are a sufficient consideration to support such mutual promises. The judgment of the lower court is affirmed.

THAYER, C. J., concurring. LORD, J., dissenting.

ON REHEARING.

(June 10, 1890.)

THAYER, C. J. This case was argued, submitted, and decided at the last term of this court sitting at the town of Pendleton. Some doubt prevailed, however, in the minds of some of the members of the court, as to the correctness of the conclusions arrived at; consequently it was concluded to grant a rehearing. The facts of the case are pretty fully set out in the opinion rendered at the former hearing; but, as it will enable me more clearly to express my views in regard to it, I shall briefly advert to them. The appellants, with certain other persons as their sureties, on the

17th day of June, 1887, executed to the respondent a bond or obligation for the payment to the respondent of the sum of \$4,000. Said bond contained the following condition and recital: "The condition of the above obligation is such that, whereas, the above-bounden C. P. Church and R. Saunders are about to enter into a contract with the town of Pendleton, supplementary to the contract now existing between said C. P. Church and R. Saunders, on one part, and the said town of Pendleton, on the other, providing for the construction of the system of water-works in said town, which contract bears, or is to bear, date the 21st day of June, A. D. 1887, and which contract provides for the doing of certain work on the reservoir belonging to said water system, in case the same shall be necessary to make said reservoir water-tight: Now, therefore, if said C. P. Church and R. Saunders shall strictly conform to, and perform all their covenants contained in, said contract," etc., "then this obligation to be and become void," etc. The agreement referred to in the bond contained the following stipulations: "That the parties of the first part, for and in consideration of the acceptance by the town of Pendleton of the water-works system constructed for said town by the parties of the first part in its present condition, and the payment by the town of Pendleton to said parties of the sum of water-bonds by the town of Pendleton, in the denomination of one thousand dollars each, and numbered 22, 23, 24, 25, 26, 27, 28, and 29, and of the sum of one hundred and ninety-two and 48-100 dollars, by warrant drawn on the town treasurer, that being the balance of price agreed upon by the first and second parties, as due to said first parties from said second parties upon the full and complete completion of said water-works system, the parties of the first part agree to and with said second parties that within ninety days from the date of the signing of this contract the reservoir of the water-works system of the town of Pendleton shall contain at least five hundred thousand gallons of water, or so much as can be put into the reservoir by pumping; and that said reservoir, when containing said 500,000 gallons of water, or as near thereto as possible, shall not lose from evaporation and filtration more than one and one-half inches of water, vertical measure, during each twenty-four hours; and that if said reservoir, when containing said amount of water, at the expiration of said period of ninety days, shall lose more than one and one-half inches of water by filtration and evaporation during each twenty-four hours, then that the said first parties shall, at their own cost and expense, within twenty days thereafter make said reservoir water-tight by walling up the north, east, and west walls of the same with hard-burned brick, laid in cement mortar, and shall plaster the same with cement and black, sharp sand, mixed in the customary proportions for cementing cisterns, on the inside of the walls of said reservoir to a depth of at least three-eighths of an inch." "And it is further understood and agreed by and between the

parties to this agreement that during the time mentioned in this agreement for the completion of said reservoir, that the town of Pendleton will pump water into said reservoir to the full capacity of its pumps, (except what water shall be needed for consumption in said town,) whenever the first parties may desire to make a test of said reservoir, not exceeding once each week; and that the said first parties shall have the right, during said time, to bleed the reservoir as often as they may deem it necessary for the repairing of the same."

These provisions of the said bond and contract indicate very clearly the *status* of the affair between the parties at the time of their execution. The appellants had contracted with the respondent to construct and put in for the latter a system of water-works, including a reservoir, which reservoir was to be built according to certain specifications, was to have the capacity of holding 500,000 gallons of water, and be water-tight. They had ostensibly, I suppose, completed the works, and were claiming that they were entitled to their pay. The officers of the city having the charge of the business were probably suspicious that the reservoir might not be water-tight; hence they withheld payment until the bond and supplemental agreement were executed. They thereby evidently sought to secure to the city a full compliance, upon the part of the appellants, with the terms of the original contract in the respect mentioned; and the rights of the parties in the premises depend upon the construction of the supplemental contract, which must be construed in view of the surrounding facts and circumstances. The parties understood, no doubt, that it might be necessary to wall up the said three sides of the reservoir, and plaster the walls, as provided in the supplemental contract, in order to render it water-tight; and the time and opportunities agreed to be given to the appellants to test and examine it were for the purpose of enabling them to ascertain with certainty whether or not it was necessary to do that. The important consideration in the matter was to secure a water-tight reservoir. The appellants had agreed in the original contract to construct such a one, and they were not relieved from the obligation by the supplemental contract. The object and purpose of walling up the sides and doing the plastering, as therein provided, were to secure that result, which the parties evidently supposed would accomplish it beyond a peradventure. The language of the instrument is that the said appellants shall "make said reservoir water-tight by walling up," etc. The respondent agreed, it is true, that it would pump water into the reservoir to the full capacity of its pumps, ("except what water shall be needed for consumption in said town,") whenever the first parties may desire to make a test of said reservoir, not exceeding once each week; and that said first parties should have the right, during said time, "to bleed the reservoir" as often as they might deem it necessary. This imposed an obligation upon the respondent, but I doubt very much whether it was

such a one that neglect upon the part of the respondent to observe it would constitute a defense in favor of the appellants in an action against them for a breach of the original contract to construct a water-tight reservoir. It certainly would not, unless such neglect could be construed into a positive acceptance by the respondent of the reservoir in the condition it was in at the time of the execution of the supplemental contract; although it would have been a good answer to a charge by the respondent of a failure on the part of the appellants to build the wall and do the plastering, in the absence of clear proof that the reservoir could in no other manner be made water-tight. Under either of these contracts the appellants were obligated to construct a reservoir which would hold water. The second contract differs from the first one only in its prescribing the mode in which the reservoir was to be made water-tight. The importance of its being so made is obvious. A leaky reservoir, constructed for the purposes of supplying a town with water, would be worthless, and render the water-system which it was intended to maintain a total failure. The parties to the said contracts understood this perfectly, and had the fact in view at the time of their execution.

The appellants' counsel insist that, if a contract is not ambiguous or uncertain, it is the duty of the court to take the contract as it finds it, and enforce the stipulations which the parties themselves have made, as they are only bound to the extent of those stipulations. If the counsel mean by this that the courts, in their construction of contracts, are bound by the literal words contained therein, taken according to their strict signification, they are very wide of the mark. If the intention of the parties to the contract is manifest, of course "the court should enforce the stipulation which they themselves have made." A knowledge of such intention cannot always, however, be gained from the abstract meaning of the language which the parties employ in their contracts, but must be ascertained many times from the idea which was sought to be conveyed by the use of it. Nor should the interpretation of the language be confined to its specific meaning, as general words in a contract or other instrument often imply important obligations that are binding upon the parties. The case in hand furnishes a good illustration of the principle suggested. The appellants, in the original contract with the respondent, undertook to build and construct a reservoir which should be water-tight. The terms of the undertaking were general, yet an implied obligation was thereby created to the effect that the appellants would do whatever might be necessary to make such water-tight reservoir. If, therefore, it were necessary, in order to prevent the reservoir from leaking, to wall up the four sides thereof, and plaster the entire inside "with cement and black, sharp sand," they were just as much obligated to do it under the general terms of the contract as they would have been had it been definitely specified therein. And I

think the language of these second contract, read by the light of surrounding circumstances, was sufficiently broad to require the appellants, in case it were necessary to render the reservoir water-tight, to construct permanent and durable walls on the said three sides of the reservoir, in such a manner as to resist the force of the elements common to the locality and climate where it is situated, and to which they are liable to be subjected.

I do not agree with the view maintained by the learned counsel for appellants that the construction of the walls, without regard to their permanency or durability, although it might answer the letter of the contract, would be sufficient to absolve the appellants from their obligations in the premises. The performance of the work specified in the contract was to effectuate an object. It was intended to secure to the town of Pendleton a system of water-works that would endure as long as improvements of that character usually continue. It was intended to have stability, and its establishment was contracted for with a view to that result. No performance of the work, therefore, not done in accordance with the spirit of the contract, should be regarded as a compliance with its terms. Hence the said walls, if built at all, were required to be constructed so as to be protected from frosts, as far as skill would enable it to be done, and have such a "backing" as would support them, and prevent water during the rainy seasons from getting behind them. And the obligation of the appellants to construct walls of that character and solidity is fairly inferable from the terms and conditions of the said contract. The testimony, therefore, offered by the respondent to show "what would have been a proper wall to have used in the reservoir to have held water, to stand a reasonable length of time, taking into consideration the weather and the frost which were liable to occur, the wall to be constructed of the material and in the manner provided in the supplemental contract," and as to what effect frost would have upon the walls, was competent.

Nor do I agree with the view indicated by said counsel, that the respondent was required to comply strictly with its agreement to pump water into the reservoir as provided in said contract, in order to entitle it to recover in the action. I think that a substantial compliance by the respondent with the agreement was sufficient, if the appellants wholly failed to perform the contract on their part. The agreement was made to enable the appellants to test the reservoir in order to ascertain whether or not it was "water-tight," and to give them an opportunity to repair any leakage which might be found in it. If, therefore, the respondent so far complied with its said agreement as to allow the appellants to accomplish that purpose, they could have no just grounds for complaint. It was immaterial whether the reservoir was filled with water one time or a dozen times, in order to discover if it leaked or not. Whenever the water was pumped into it, such fact could be readily ascertained. The appellants had

the right, under the second contract, to draw the water off,—“to bleed the reservoir as often as they may deem it necessary for the repairing of the same;” and any willful neglect on the part of the respondent to fill it so that tests could be made for the purpose of ascertaining whether or not it needed repairing would have been a good defense to a recovery upon said contract. The appellants had the right to ascertain by a practical test, if they were ignorant of the fact, whether or not it was necessary to repair the reservoir in order to make it water-tight; but if, as the court charged the jury, they were afforded reasonable opportunities for ascertaining the fact, or if they had knowledge without making such test that it would not hold water, they should not then be absolved from their undertaking.

The issues in this case were mainly issues of fact. The appellants maintained that it did not require the three walls of the reservoir to be walled up and plastered as specified in the supplemental contract, in order to render it water-tight. They claim that they established that fact by the tests made, and also claim that the respondent had failed to give them the opportunity to make the tests, and do the repairing of the reservoir, as it agreed to do in and by said contract. These were the questions to be determined in the case, and they were very proper ones to be submitted to a jury. The bill of exceptions shows that cogent proof was introduced on the part of the respondent tending to show that the reservoir was not water-tight, and could not be made so without bestowing thereon the additional work, labor, and expense referred to; also that the appellants had been given, in accordance with said contract, reasonable opportunity to make the test and do the necessary repairing, and that they had neglected to avail themselves of it. The jury found a verdict for the respondent; and unless they were misled by the rulings of the court, to the prejudice of the appellants, the judgment appealed from should not be disturbed.

The appellants' counsel complain of many of the rulings of the court at the trial, of certain of the instructions given to the jury, and of the refusal of the court to give those which they requested. I have examined these various rulings, and conclude that there was no error committed in making them which would authorize a reversal of the judgment. I entertain some doubt in regard to the correctness of the following instructions given by the court to the jury: "If you find that the supply-pipe of the reservoir did allow water to escape through its gates, and that such escape was due to the failure of the gates to shut by reason of gravel getting into the pipe, and if you further find that such gravel got into the pipe from the reservoir after the 21st day of June, 1887, and before the expiration of the ninety days, by reason of its imperfect construction, and in its ordinary use, I instruct that such loss was within the scope of the undertaking of the contractors, and they are to be held responsible therefor;" "that filtration, in the sense used in the

instructions, meant leakage from the reservoir from any cause owing to its defective construction, and its incapacity by reason thereof to hold water." The escape of water through the supply-pipe of the reservoir, whatever may have been the cause, could not mean "filtration" as defined by the dictionary. But the parties to the said contract certainly did not intend to use the word in the sense in which it is defined. They could not have meant by it the act or process of filtering. They undoubtedly intended it in the broadest sense which could be implied therefrom, viz., "passing through." They must have meant the escape of the water contrary to the design of the system, which could be obviated by the "walling up of the walls of the reservoir," and doing the plastering, as specified, as no other view would be consistent with the obvious intention of the parties. The system of water-works put in by the contractors under the original contract with the city could only be operated by pumping water from a well near the river, and forcing it through a receiving pipe, where it was held by means of gates in the pipe, in order that it might be drawn off through the mains which supplied the town. The contract provided that the reservoir should be water-tight, hence the parties certainly intended that it should be constructed so as to enable the gates to be closed, otherwise it could not hold water. The supplemental contract was entered into merely for the purpose of carrying out the terms of the original one; consequently it was the duty of the appellants, if the reservoir had been so constructed as to prevent the gates from being used for the purpose for which they were designed, to repair it in that particular. They stipulated, in effect, that at the end of 90 days the reservoir should be virtually water-tight; if not, they would make it so by the mode agreed upon.

The theory of the respondent's counsel at the trial of the case in the circuit court was that the action of the water upon the walls of the reservoir, owing to its imperfect construction, loosened and set in motion particles of gravel, which found their way into the supply-pipe, and prevented its gates from closing, thereby causing a waste of water through the same. In view of the testimony on the part of the respondent in support of this theory, the said instruction was based; and I am of the opinion, after a due consideration of the two contracts, the nature of the subject-matter thereof, and circumstances connected therewith, that it was properly given. The judgment appealed from will therefore be affirmed.

AMERICAN MORTG. CO. v. HUTCHINSON *et al.*  
(Supreme Court of Oregon. June 10, 1890.)

TRIAL BY JURY—BONA FIDE PURCHASERS—QUITCLAIM DEED.

1. A circuit court has no authority to try an action at law involving an issue of fact without a jury, unless a jury trial is waived in the manner provided in the Civil Code. If such court deem such a case a proper one to be determined upon the law, it must direct the jury to return a ver-

dict in favor of the party which the court considers entitled to it under the proofs.

2. A subsequent purchaser against whom an unrecorded conveyance is void, under section 3027, Ann. Code Or., must be a purchaser in good faith and for a valuable consideration, of "the same real property, or a portion thereof," included in the unrecorded conveyance, and must be a purchaser under a form of conveyance or other instrument which purports to convey the property. Hence a purchaser under a mere quitclaim deed, which only purports to remise, release, and quitclaim the right, title, and interest of the grantor in and to the property, will not be regarded "a purchaser of the same real property or any part thereof."

3. Where F. was owner of a parcel of land which he conveyed to E., but E., having failed to pay for the land, conveyed it back to F., who neglected for several years thereafter to record the deed, and in the mean time E. executed a deed of quitclaim to D., who took the deed without actual notice of the prior conveyance by E. to F., except such as might be presumed or inferred from the character of the deed or the condition of the deed record of the county, and D. thereafter executed a quitclaim deed to the land back to E., who then executed a like deed to the land to W., who finally executed a deed of warranty to it to C., and several quitclaim deeds were thereafter made to it by C. and his grantees, containing covenants of warranty against the grantors, and it was finally purchased by the respondent under a mortgage foreclosure against some of the intermediate claimants, the land during all the time remaining vacant and unoccupied, *held*, that the said deeds did not constitute the grantees therein purchasers of the same real property, or any part thereof, conveyed by E. to F., within the meaning of said section of the Code.

4. Whether if E., when he executed the deed to D., had had possession and seisin of the land, and D. had taken possession thereof under the deed to him, it would have constituted him such subsequent purchaser, under said section of the Code, *quære*.

(Syllabus by the Court.)

Appeal from circuit court, Union county; JAMES A. FEE, Judge.

The respondent herein, a private corporation, commenced an action against the appellants to recover possession of certain real property situated in said Union county, alleging that they wrongfully withheld from said respondent the possession thereof. The appellants denied the allegations contained in the complaint, and alleged ownership of the property in themselves. A reply was filed denying the allegations of new matter set up in the answer. Thereupon the said parties entered into the following stipulation: "It is hereby stipulated by and between the plaintiff and defendant in the above-entitled action that the following is a complete and perfect abstract of all the conveyances to the land in controversy in this action, to-wit: The east one-half of the south-west one-fourth of section 23, township two south, of range thirty-nine east; and that said abstract may be received and read in evidence at the trial of said cause in lieu of the originals or certified copies: State of Oregon to E. J. Flanery. Grantor conveys by said deed, dated December 9, 1872; recorded October 3, 1873, Book B, page 247; consideration, \$100. E. J. Flanery to John E. Chrisman. Grantor conveyed by warranty deed, dated October 23, 1873; recorded October 23, 1873, Book B, pages 248 and 663; consideration, \$50. John F. Chrisman to T. H. Foster. Grantor conveyed by warranty deed subject to mortgage to the

state, dated October 10, 1874; recorded June 10, 1876, Book B, page 664; consideration, \$20. T. H. Foster and wife to F. Elliot. Grantor conveyed this and 240 acres of other land by deed of bargain and sale, dated April 24, 1876; recorded June 20, 1876; Book B, page 665; consideration, \$1,400. F. Elliot and wife to T. H. Foster. Grantor conveyed this and 240 acres of other land by quitclaim and special warranty against grantors or others claiming by, through, or under them, dated December 31, 1877; recorded February 23, 1883, Book F, pages 666 and 698; consideration expressed, \$1. The true consideration is as follows: The grantor F. Elliot, having failed to pay the consideration for the conveyance from T. H. Foster and wife to him, reconveyed to Foster and wife for that consideration, to-wit, \$1,400. T. H. Foster and wife to S. O. Swackhamer. Grantors convey deed of bargain and sale dated May 2, 1881; recorded May 2, 1881, Book E, page 184; consideration, \$500. That subsequent to the execution and record of the last-named conveyance, and prior to the hereinafter described conveyance from T. H. Foster and wife to M. B. Baird, the said S. O. Swackhamer and wife reconveyed the said land to said T. H. Foster by quitclaim deed for the consideration of \$500, but that said deed was not placed on record. F. Elliot and wife to Van B. De Lashmutt. Grantors conveyed this and 240 acres of other land by quitclaim deed dated June 16, 1881, and recorded June 20, 1881, Book E, page 247; consideration, \$800. The grantee took this conveyance without actual notice of the prior conveyance of F. Elliot and wife to T. H. Foster, except such as will be presumed or inferred from the character of the deed, or the condition of the deed record of Union county, Or. Van B. De Lashmutt and wife to F. Elliot. Grantor conveyed this and 240 acres of other land by quitclaim deed, dated August 10, 1881; recorded September 2, 1881, Book E, page 328; consideration, \$1. F. Elliot and wife to T. A. Wood. Grantor conveyed this and 240 acres of other land by quitclaim deed, dated August 21, 1881; recorded September 2, 1881, Book —, page 329; consideration, \$500. Grantee took this conveyance without personal notice of the prior conveyance of this land by F. Elliot and wife to T. H. Foster, except such as will be presumed or inferred from the character of the deed, or the condition of the deed record of Union county, Or. T. A. Wood to Brazella Chapman. Grantor conveyed this and 240 acres of other land by quitclaim deed, dated November 3, 1881; recorded November 10, 1881, Book E, page 399; consideration, \$500. Brazella Chapman to T. A. Wood. Grantor conveyed this and 240 acres of other land by quitclaim deed, dated November 10, 1881; recorded September 7, 1882, Book F, page 307; consideration, \$500. T. A. Wood to J. H. Cavanaugh. Grantor conveyed this and 240 acres of other lands by warranty deed, dated September 19, 1882; recorded September 27, 1882, Book F, page 309; consideration, \$1,200.00. J. H. Cavanaugh to D. K. Smith. Grantor conveyed this and 240 acres of other lands by quitclaim deed,

with special warranty against grantor, or any others claiming through or under him, dated March 5, 1883; recorded April 5, 1883, Book F, page 758; consideration, \$650. D. K. Smith to J. H. Cavanaugh. Grantor conveyed this and 240 acres of other lands by quitclaim deed, with special warranty against grantor, and all others claiming under or through him, subject to the mortgage of the American Mortgage Co. of Scotland, limited, dated April 27, 1883; recorded April 30, 1883, Book G, page 55; consideration, \$1. T. H. Foster and wife to M. B. Baird. Grantor conveyed by warranty deed, dated Feb. 9, 1884; recorded February 22, 1884, Book G, page 606; consideration, \$800. J. H. Cavanaugh to D. K. Smith. Grantor conveyed this and 80 acres of other lands by quitclaim deed, with special warranty against grantor, and all others claiming through or under him, dated May 1, 1884; recorded May 17, 1884, Book G, page 705; consideration, \$3,000. D. K. Smith to J. H. Raley. Grantor conveyed this and 240 acres of other lands by quitclaim deed, with special warranty against grantor, and all others claiming through or under him, dated Dec. 26, 1884; recorded January 13, 1885, Book H, page 399; consideration, \$559.00. The American Mortgage Company of Scotland, Limited, vs. D. K. Smith, J. H. Raley, M. A. Raley, C. P. Huntington, Charles Miller, W. R. S. Foye, and Albert Gullatin. Foreclosure of mortgage and sale on execution thereunder, and purchased by this plaintiff at said sheriff's sale on the — day of —, 1885. Said foreclosure was had under mortgage held by this plaintiff against this D. K. Smith on said land and other lands, which was recorded in Mortgage Record, Book —, at page —, on the — day of —, 188—, the consideration being \$——. That said sheriff's sale was afterwards confirmed, and deed regularly issued to this plaintiff. That neither these defendants, nor those through whom they claim, were parties to said foreclosure. J. H. Hutchinson and W. R. Hutchinson vs. Nelson Shoonover, Administrator, and the widow and heirs of M. B. Baird, deceased. Foreclosure of mortgage and sale by the sheriff on execution thereunder, and purchase by these defendants at said sheriff's sale on the 10th day of April, 1888, and certificate of said purchase issued by said sheriff to them, and that said land has not been redeemed. Said foreclosure and sale was had under a mortgage in favor of these defendants, and against M. B. Baird and wife, the consideration being the sum of \$1,200. This plaintiff was not a party to said foreclosure. It is further agreed that the recitals and memoranda, following each conveyance in said abstract, may be admitted in evidence as explanatory thereof. It is also agreed that said land was vacant and unoccupied during all the time covered by the conveyances mentioned in said abstract. This agreement shall not be held binding on either of the parties in any subsequent suit pertaining to this property."

The case was tried by a jury, and the only evidence adduced at the trial was the stipulation above set out; and verdict was rendered for defendant, which was



afterwards, on motion of plaintiff, set aside, and a new trial granted. A second trial was had before a jury, and the same evidence, and no other, offered; and after instructions by the court the jury again rendered verdict for the defendants. Plaintiff again moved the court to set aside the verdict, and for judgment upon the stipulation, which motion the court granted, and then gave judgment for plaintiff for possession of the land in question, plaintiff having waived all claim for damages, which is the judgment appealed from.

*J. W. Shelton*, for appellants.

If the stipulation showed on its face that the respondent was entitled to recover in the action, still the trial court had no power beyond the setting aside of the verdict and the granting of a new trial. It is a settled law of this state that a grantee in a quitclaim deed acquires no title to the land sought to be conveyed if his grantor had none which he could lawfully convey. *Baker v. Woodward*, 12 Or. 3, 6 Pac. Rep. 173; *Richards v. Snyder*, 11 Or. 501-511, 6 Pac. Rep. 186; *Swift v. Mulkey*, 14 Or. 59-64, 12 Pac. Rep. 76; *Gest v. Packwood*, 34 Fed. Rep. 368-372; *Hastings v. Nissen*, 31 Fed. Rep. 597. To the decisions of our own state may be added: *Villa v. Rodriguez*, 12 Wall. 323-338; *May v. Le Claire*, 11 Wall. 217-232; *Marshall v. Roberts*, 18 Minn. 405, (Gil. 365); *Everest v. Ferris*, 16 Minn. 26, (Gil. 14); *Brown v. Jackson*, 3 Wheat. 449-451; *Baker v. Humphrey*, 101 U. S. 494-499; *Dickerson v. Colgrove*, 100 U. S. 578-584; *Postel v. Palmer*, 71 Iowa, 157, 32 N. W. Rep. 257; *Watson v. Phelps*, 40 Iowa, 482; *Mann v. Best*, 62 Mo. 491; *Kearney v. Vaughan*, 50 Mo. 284.

*R. Eakin*, for respondent.

A quitclaim deed first recorded will convey a fee-simple title to the grantee therein as against a prior unrecorded deed. *Fox v. Hall*, 74 Mo. 315; *Pettingill v. Devlin*, 35 Iowa, 344; *Fash v. Blake*, 38 Ill. 363; *Brown v. Oil Co.*, 97 Ill. 214; *Rowe v. Beckett*, 30 Ind. 154; *Mansfield v. Dyer*, 131 Mass. 200; *Chapman v. Sims*, 53 Miss. 154; *Pom. Eq. Jur.* §§ 758-760. *Baker v. Woodward*, 12 Or. 3, 6 Pac. Rep. 173, only applies to the effect of a quitclaim deed as against an outstanding equity; hence the statement in the opinion in that case that "the grantor can, by such kind of deed, convey the residuum of the estate he has, and no more," has reference to the legal effect of the deed standing alone, and does not determine its effect under the recording act. *Allison v. Thomas*, 72 Cal. 562, 14 Pac. Rep. 309; *Graff v. Middleton*, 43 Cal. 341; *Frey v. Clifford*, 44 Cal. 343; *McConnel v. Reed*, 38 Amer. Dec. 126; *Brown v. Jackson*, 3 Wheat. 449; 12 Cent. Law J. 129; *Richardson v. Levi*, 3 S. W. Rep. 446; *Martin v. Morris*, 22 N. W. Rep. 530; *Hamilton v. Doolittle*, 37 Ill. 482. A quitclaim deed as part of a chain of title is sufficient. *Sherwood v. Moelle*, 36 Fed. Rep. 478; *Snowden v. Tyler*, (Neb.) 31 N. W. Rep. 661; *Raymond v. Morrison*, (Iowa,) 13 N. W. Rep. 332; *Bryant v. Buckner*, (Tex.) 2 S. W. Rep. 452.

*THAYER, C. J.*, (after stating the facts as above.) The circuit court erred in trying the case after having set aside the verdict

of the jury. It has no authority to try any action at law unless a jury trial is waived in the manner provided in the Civil Code. If the court had deemed it its duty to determine the case in favor of the respondent upon the law, it should have directed a verdict in favor of the respondent at the trial. As the case stands, this court has no alternative but to reverse the judgment, and remand the cause for a new trial. This is sufficient to dispose of the case so far as this court is concerned, but, as it must go back for a new trial, it becomes our duty to declare the law applicable to the matters involved. The question presented is whether a conveyance of real property, not recorded as provided in title 1, c. 21, p. 1356, Ann. Code, is void as against a subsequent purchaser of the same property whose conveyance is first recorded, where the purchase is by quitclaim deed and there is no evidence, aside from the record, showing the subsequent purchaser to have been a purchaser in good faith and for a valuable consideration; and whether the execution of a mere quitclaim deed to real property by a grantor who had previously conveyed it by deed to another grantee, but which deed was not recorded at the time of the execution of the quitclaim deed, constitutes a conveyance of "the same real property."

Counsel for respondent virtually concedes that a purchaser under a quitclaim deed takes subject to outstanding equities in the property existing at the time of the purchase, whether the purchaser had knowledge of them or not; but he contends that such a deed, under the recording act, stands upon the same footing as other forms of conveyance, and, if first recorded, is as effectual to annul a prior unrecorded deed to the same property. The question has given rise to much deliberation on the part of courts, and earnest discussion among law-writers, though it is generally conceded that a grantee in a mere quitclaim deed acquires no right against outstanding equities which were valid against his grantor. *Postel v. Palmer*, 71 Iowa, 157, 32 N. W. Rep. 257; *Martin v. Morris*, 22 N. W. Rep. 525. Such, also, is the doctrine of the supreme court of the United States, and of the courts of this state, as will be seen by a reference to the authorities cited in the appellants' brief herein. But it is claimed by many that such a deed effectually destroys the right of a grantee under a prior deed not recorded as required by the registry act, although it would not affect a prior equity in his favor which was binding upon the grantor. This, to my mind, is a somewhat strange view. Why the rights of the grantee under the prior deed should be cut off when a charge upon the property created in his favor by the grantor would not be, seems remarkable. It may be said that the prior grantee had the right to and should have put his deed upon record; but it may with as much reason be said that he should have had the charge upon the property put in a form that would have entitled it to be recorded, and had it so done. The claim, it seems to me, amounts to this: If the owner of real property were to create a trust against it

in favor of another, and then execute a quitclaim deed to the property to a third person, it would not affect the trust, although the grantee in the quitclaim deed had no knowledge of it; but if he had executed a deed outright to the *cestui qui trust*, and then quitclaimed his interest in the property to a third person, and the prior deed had not been recorded, the rights of the grantee in the prior deed would be lost. According to that kind of logic, the grantee in the prior deed would have a better standing in such a case if his deed were not witnessed or acknowledged so as to entitle it to be recorded, as he would then clearly have an outstanding equity which would be shielded from the effects of the quitclaim deed. The form of the deed under which the respondent claims title herein is not set out in the stipulation further than that it is stated to be a quitclaim deed. We must therefore infer that it is a remise, release, and quitclaim of the right, title, and interest of the grantor in and to the property in suit. It did not purport to convey the property to the grantee, it only conveyed to him such right as the grantor might have therein; and it would be difficult to perceive how the former could have expected to acquire any right in the premises unless the latter might own an interest in them. The terms of the deed were satisfied whether the grantor was owner of the property in fee, or had no estate whatever in it. The grantee bargained for no quantity or quality of estate; he bought whatever the grantor might have, be the same more or less; and I do not see what *legerdmain* could be resorted to which would vest him with an interest that the grantor had previously divested himself of, and was then owned by a third party.

Purchasers of real property should be left free to make their own bargains, and the courts have no right to undertake to give them something which they did not buy, and the vendor did not own. The office of a quitclaim deed is well understood, and although it is effective, under modern legislation, to convey all the estate which the grantor could lawfully convey by a deed of bargain and sale; but a material difference is still recognized between the two forms of conveyance. A grantor, under the former conveyance, only intends ordinarily to convey such right to or interest in the property as he may have, and the grantee does not expect to acquire anything beyond that; while, under the latter, the parties usually intend and expect a transfer of the property itself.

It would be absurd for a grantee under a mere quitclaim deed to undertake to claim that he took title to the property freed from the previous acts of the grantor affecting that title. There is nothing in the nature of that character of conveyance which assures the grantee indemnity from such acts. He has no reason to believe that he has purchased a clear title to the

property, or anything more than what the terms of his deed indicate. He does not undertake to purchase what his grantor has already sold and conveyed to another, whether the deed of conveyance is registered or unregistered; but he purchases what the grantor has remaining, if anything. This view, I think, is sustained by a majority of the cases cited by respondent's counsel herein, and I believe that it is by the weight of authority generally. In the earlier case, (*Brown v. Jackson*, 3 Wheat. 450), which is cited by said counsel, such a deed was held by the supreme court of the United States not to affect a prior unrecorded deed, where its language showed that it was only intended to operate upon the right, title, and interest which the grantor had at the time of its execution. What else a strictly quitclaim deed could operate upon I am not able to discover. In *McConnel v. Reed*, 38 Amer. Dec. 124, an early Illinois case, cited by said counsel, the language of the court is well calculated to be misleading as regards the nature and character of a quitclaim deed. At pages 126, 127 the court says: "A deed of release and quitclaim is as effectual for the purpose of transferring title to land as a deed of bargain and sale; and the prior recording of such deed will give it a preference over one previously executed, but which was subsequently recorded. In this respect there is no distinction between different forms of conveyance. As a general rule, the one first recorded must prevail over one of older execution, when made in good faith, and when it appears to have been the intention of the parties to convey again the same lands which had been previously conveyed. But where the terms of the second deed do not necessarily embrace the land previously conveyed, and, on the contrary, are such as to show that it was not the intention of the grantor to include them, the court will give it such construction as not to embrace them, and will not allow it to operate to the prejudice of the purchaser." In that case one Arnett was owner of 80 acres of land, and on the 21st day of March, 1835, executed to the plaintiff a deed of release thereof, which was recorded on the same day; and on the 1st day of July, 1837, also executed to plaintiff a deed of bargain and sale for the same land, confirming and explaining the former deed of release. The defendant gave in evidence a deed from Arnett to one Rixford, dated May 12, 1827, and recorded October 1, 1836; and also several other deeds, constituting a connected chain of title to the said land from Rixford to himself. The court held that the deed of release from Arnett to the plaintiff, if unexplained, would transfer the land, of the title to which the grantor had not previously divested himself, by a valid transfer duly recorded; but that the plaintiff had furnished such evidence of the intention of the grantor, by introducing the deed of bargain and sale from Arnett to himself, as forbade such an interpretation of the conveyance; and sustained the defendant's prior deed, concluding from the extraneous evidence that it might be fairly inferred that Arnett only intended by the

quitclaim deed to transfer all right, title, and interest therein which he then had. According to this decision, the plaintiff would have been secure in his title to the land under his deed of release if he had been content with it; but, in order to make assurance doubly sure, he, two years thereafter, unfortunately obtained the second deed, which enabled the court to ascertain what the grantor's intention was in the first one, and this resulted in his losing the property. I think the case was correctly decided, but do not agree with the views expressed in the opinion announced by the learned court. In my opinion, the court was in error in holding that the prior recording of a deed of release and quitclaim would give it a preference over one previously executed, but which was subsequently recorded; also in its holding that the words, "remise, release, and forever quitclaim all right, title, and interest to all and every part, \* \* \* unexplained, would transfer all and every part of the tract of land designated, of the title to which the grantor had not previously divested himself, by a valid transfer, duly recorded." Nor do I admit that if said words, unexplained, would have had the effect to transfer such title to the said grantee, they could be so explained as to convey an opposite meaning, by showing that the grantor at a subsequent time executed to him a second deed declaring what his intention and design were in making the first one; or that words in a deed, having a fixed and settled meaning, can be explained in that way to mean something different from what they purport to in the instrument, and which the law attaches to them. If such rule were to obtain, the tenure by which real property is held would be very insecure.

The latter case, and others following it, seem to have gotten the Illinois courts into a line of error, as to the effect of a quitclaim deed, which has become chronic, and from which they are unable to extricate themselves. In *Brown v. Oil Co.*, 97 Ill., 214, in which case the question arose, the supreme court of that state seemed to realize its helpless condition and inability to rid itself of the unfortunate precedent which had been established. Chief Justice DICKER, in speaking for the court, says: "Counsel for appellants insist with much force that the grantee in such a quitclaim deed as that of Pollock, made in 1865, [a deed of all right, title, interest, claim, or demand of the grantor in and to the property,] is not a subsequent purchaser in good faith of the same thing which was conveyed by his former deed to Brown. Were this an open question before us, the suggestions presented in their argument would be entitled to very great consideration; but the question is settled in this state by a line of authorities which constitute a rule of property, and ought not to be disturbed by the courts." So the court, following the "line of authorities," held that, as the deed did not contain words manifesting an intention not to include lands previously granted, or words suggestive of a former conveyance of the same land by the grantor, the grantee therein would be a purchaser thereof, and

protected by the registry act. It must, it seems to me, be humiliating to be compelled to make such a holding. The idea that the deed in question did not manifest an intention not to include lands previously granted, I can only regard as preposterous. Words may be and often are inserted in that form of deed which change its nature, but it then ceases to be a quitclaim deed, and becomes, in effect, a deed of bargain and sale. The Texas courts seem to have had much experience with that class of cases. The supreme court of that state in *Richardson v. Levi*,—reported in 3 S. W. Rep., at page 444, which is one of the cases cited by respondent's counsel, held that a deed which purports to convey only the right, title, and interest of the grantor will not protect the grantee against prior unregistered instruments; but not so where the deed purports to convey more than such right, title, or interest. In that case the granting clause in the deed was, "grant, bargain, sell, demise, release, and forever quitclaim under the said \* \* \*, his heirs and assigns, the following lots of land," etc.; and the court held that the grantee therein had his election in what way to take, and might take, what either of these words would convey; that he was not restricted by the fact that his estate under one of the words would be of less value than under another; that he might therefore escape being charged with notice under the "quitclaim" by electing to take under the "grant, bargain, and sale."

There is a class of cases which hold that a grantee under a quitclaim deed will acquire a good title as against a prior grantee of the land from the same grantor, where the prior conveyance is not recorded as required by the registry act, and the grantee under the quitclaim deed is shown to be a purchaser in good faith and for a valuable consideration. *Fox v. Hall*, 74 Mo. 315; *Graff v. Middleton*, 43 Cal. 341; and *Frey v. Clifford*, 44 Cal. 335,—belong to that class, and would seem to support the view of respondent's counsel. But the decisions in the two California cases appear to be questioned by TEMPLE, J., in *Allison v. Thomas*, 72 Cal. 562, 14 Pac. Rep. 309. The learned judge, in delivering the opinion of the court, after remarking that a purchaser of the right, title, and interest of a judgment debtor took subject to all equities and secret defects, at page 564, 72 Cal., and page 309, 14 Pac. Rep., says: "We do not overlook the case of *Graff v. Middleton*, in which it was held that under the twenty-sixth section of the recording act, then in force, a quitclaim deed received in good faith and for a valuable consideration would prevail over a prior unrecorded deed. That decision is made to turn upon the language of that statute defining the word 'conveyance.' This ruling was followed in *Frey v. Clifford*, 44 Cal. 343, where the description of the estate conveyed was 'all my right, title, and interest,' of the grantor. Unless these cases are justified by the peculiar wording of the statute, they seem to be against the decisions elsewhere upon the subject. It has been uniformly held that a conveyance of the right, title, and interest of the grantor vests in

the purchaser only what the grantor himself could claim, and that the covenants in such deed, if there were any, were limited to the estate described;" citing in support of the view a number of authorities.

I have no particular fault, however, to find with the doctrine that a grantee under a quitclaim deed acquires a good title to the property as against a prior grantee thereof under the circumstances above mentioned. Where the grantor in such a case is in possession of the property, and executes the deed for a valuable and adequate consideration to the grantee who takes possession of it under the deed, I think it would be a wholesome and just rule to hold that his title to the property was superior to that of the grantee under the prior unrecorded conveyance, or to any outstanding equity against the property of which he had no notice. But whether he would be able to assert such superiority of title, under the strict rules of law, I express no opinion, as it is unnecessary to do so under the circumstances of this case. I do, however, maintain that a grantee under a mere quitclaim deed reciting a nominal consideration, where no possession of the property is given under the deed, acquires no right to it as against a prior grantee, whether the deed of such grantee be recorded or not. The view which I entertain upon this subject is well expressed in the concluding part of an article by Charles C. Marshall, published in volume 33, pp. 244, 245, of the Albany Law Journal, which is as follows: "It will be seen from this review of the authorities that the force and effect of a deed of quitclaim is a matter not requiring adjudication by the courts. Its force is certainly dependent, not upon its distinguishing words, but upon the intention of the parties as expressed in the deed. It may, in the absence of possession by the grantee or releasee, be void, as stated in *Branham v. Mayor*, [24 Cal. 606.] and *Bennett v. Irwin*, [3 Johns. 36;] or, if an intent to convey be recited, as in *Lynch v. Livingston*, [6 N. Y. 422,] it may have the force and effect of a deed of bargain and sale. The intent seems to be the controlling element, and this may be expressed in various ways,—by a formal recital, by the existence of some prior estate in the release, by words of grant other than 'remitse, release, and quitclaim.' Indeed, an adequate consideration or a covenant of warranty seems in some of the cases to imply an intent to convey the estate, as in the Massachusetts cases above referred to. But it is difficult to see wherein any intent can be implied in a naked quitclaim, by which we mean a quitclaim deed without covenants, and expressing only the nominal consideration of one dollar. As above intimated, it seems a matter of some doubt whether the protection of the recording acts could be extended under such a deed, for such a deed is perfectly consistent with the existence of a prior unrecorded deed to some third person. As it purports to release only such right as the releasor may have in the premises described, and as its nominal consideration of one dollar must in most cases be conspicuously inadequate, there

seems sufficient to put the purchaser on his guard. If A., being actually vested with the fee to certain real estate, executes a quitclaim deed thereof to B., it is certain the fee would pass. The question is, is the record conclusive evidence of the existence of the fee in A? If A. had conveyed the fee to C. by a prior unrecorded deed, what is to prevent C. from setting up his unrecorded deed when there is nothing on the record from A. save the quitclaim deed? The two deeds do not conflict. The quitclaim deed, with its nominal consideration, purports to convey only such rights as A. may actually have. It may be something or nothing; and the recording act, it is suggested, will not give to an instrument of record any greater force or larger meaning than that expressed by its words."

The same view, substantially, is also expressed by WATTS, J., in delivering the opinion of the court in *Thorn v. Newsom*, 64 Tex. 161, wherein he says: "While non-registered deeds are declared void by the statute as to subsequent purchasers for value and without notice, still the doctrine is well settled that a subsequent purchaser, although for value and without actual notice, who takes under strictly a quitclaim deed, that is, one by which the chance of title and not the land itself is conveyed, will not be accorded the protection of the statute, for the obvious reason that he contracted for the interest only that his vendor then had in the land. If the vendor had previously divested himself of the title to a portion or all of the land, to the extent of the divestiture there would be no right remaining in the vendor to pass by the quitclaim to the vendee. It is the then interest of the vendor for which he contracts, and it is to such interest only that he is entitled under the quitclaim deed."

There are many other authorities bearing upon this question which might be noticed, but they are too numerous and extensive to attempt it. Several of them, notably *Chapman v. Sims*, 53 Miss. 154, and *Fox v. Hall*, 74 Mo. 315, support the position assumed herein by respondent's counsel. I think, however, that the weight of authority and reason are against it. The circumstances under which the deeds in the Elliot line of title herein were executed are not shown in the stipulation of the parties upon which the case was tried. All that appears therefrom is that Elliot quitclaimed that land and 240 acres of other land to De Lashmutt in June, 1881, and De Lashmutt in August, 1881, quitclaimed it back to Elliot. Then Elliot quitclaimed it to Wood, August 21, 1881, and Wood, in November, 1881, quitclaimed it to Chapman, who in the same month quitclaimed it back to Wood. After the parties had thus tossed about their pretended title to the property for more than a year, Wood, on the 19th day of September, 1882, executed the warranty deed to Cavanaugh upon which the respondent's counsel predicates his point that "a quitclaim deed as part of a chain of title is sufficient." This deed is the only deed which purports to convey the land, though the subsequent ones from Cavanaugh and his grantees

contained covenants against the grantor. The facts in the case are not, therefore, like those in *Sherwood v. Moelle*, 36 Fed. Rep. 478. There the chain of title was made up of warranty deeds with the exception of one quitclaim deed; while here it is made up of quitclaim deeds, with the exception of one warranty deed. The facts in the two cases also differ in another particular. In *Sherwood v. Moelle* the testimony showed that the grantee in the quitclaim deed "acted in good faith, in ignorance of the outstanding title not apparent of record, and paid full value for the land;" while in this case there is no evidence upon those points except that the grantee, De Lashmuth, took the conveyance from Elliot without actual notice from Elliot and wife, except such as might be presumed or inferred from the character of the deed or condition of the county records. But the main difficulty in the respondent's case is that Wood had nothing in the premises to convey or that Cavanaugh could expect to receive; he had no possession of the land, either actual or constructive. Foster and his grantees were in the constructive possession of it under the deed from Elliot and wife to Foster. The deed to De Lashmuth, and from him to Wood, conveyed no interest in the land to either of them. Elliot had neither possession, right to possession, nor right of property therein. If he had had seisin of the land his deed to De Lashmuth, and the deed from De Lashmuth to Wood, might have vested it in the latter, and thereby have constituted a claim of title. And I am not able to understand from the said stipulation how said last-named parties under the said quitclaim deeds can be said to have been subsequent purchasers "of the same real property, or any portion thereof;" which was conveyed by Elliot back to Foster, within the meaning of section 3027, Ann. Code; and, if their said transactions did not constitute them subsequent purchasers of the same property, then the conveyance to Foster was not affected thereby, and the deed to Cavanaugh did not entitle him and his grantees to the protection of said provision of the Code. The judgment will be reversed, and the cause remanded, as before indicated.

GOVE *et al.* v. ISLAND CITY MERCANTILE & MILLING CO.

(Supreme Court of Oregon. June 10, 1890.)

CONTRACT—ABANDONMENT—RECOVERY ON QUANTUM MERUIT.

When one performs services for another on a special contract, and for any reason, except a voluntary abandonment, fails to fully comply with his contract, and the service and material have been of value to him for whom they were rendered and furnished, he may recover for such material and services their reasonable value, after deducting therefrom any damages the party for whom such materials were furnished and services were rendered has sustained by reason of such failure. *Steeple v. Newton*, 7 Or. 110; *Tribou v. Strowbridge*, Id. 156; and *Todd v. Huntington*, 13 Or. 9, 4 Pac. Rep. 295,—approved and followed.

(Syllabus by the Court.)

Appeal from circuit court, Union county; JAMES A. FEE, Judge.

The material portion of the complaint is as follows: "That heretofore, to-wit, between the 1st day of May, 1886, and the 1st day of January, 1887, at Union county, state of Oregon, the plaintiffs, at the special instance and request of the defendant, and for its use and benefit, furnished a large amount of material and machinery in, about, and for the rebuilding, construction, and repair of a certain flouring-mill of the defendant, and, at its special instance and request, between said dates, did and performed a large amount of work and labor for the defendant in the rebuilding, construction, and repair of said mill and its attachments; that said material and machinery, furnished to the defendant as aforesaid, and said work and labor done and performed for the defendant by the plaintiffs as aforesaid, were and are reasonably worth the full sum of \$8,134.25; that said sum of \$8,134.25 long since became, and is now, due and payable, and that no part of said sum except the sum of \$5,631.00 has been paid thereon; that said sum of \$8,134.25 became due and payable prior to January 1, 1887, and that there is now due and unpaid for said work, labor, material, and machinery, after deducting said partial payment, the sum of \$2,503.15, with interest," etc., "and the same has been demanded," etc. The answer, after denying the plaintiffs' allegations, avers that said labor was performed and material and machinery furnished under a written contract, which is set forth in the answer. The answer further avers that the plaintiffs did not perform or comply with the conditions of said contract on their part in this: "That the mill-wright work performed by the plaintiffs upon said mill was not done in a thoroughly workman-like or substantial manner, but that it was done in an unworkman-like and unsubstantial manner; that the material and machinery furnished by the plaintiffs was not first-class of its kind, or suitable for the purposes used, but that it was indifferent in quality, and not at all adapted to the purposes expressed in said contract; that the plaintiff did not demonstrate that said mill, when constructed by them, had a capacity of sixty barrels of flour in twenty-four hours' time, or that it was capable of making as good flour, or as much flour per bushel of wheat, as any mill in eastern Oregon, when grinding the same kind of wheat, and that in fact said mill, when abandoned by plaintiffs, did not have a capacity of sixty barrels of flour in twenty-four hours' time, or any greater capacity than forty-five barrels in said time; and that it was not capable of making as much flour per bushel of wheat, or of as good quality, as other mills in eastern Oregon, when grinding the same kind of wheat." The answer alleges also that the mill was not completed ready to run until September 20, 1886. The answer denies that the material, machinery, and labor were worth more than \$5,200, and denies that the defendant accepted the mill, etc. The reply admits the execution of the written agreement pleaded in the answer, and alleges that the plaintiffs

"fully complied with the conditions of said contract set up in said answer, on their part, excepting that a small portion of the machinery furnished under said contract was not in every respect what it should have been, and that the defects therein were not discovered by them at the time; that the plaintiffs, in good faith, endeavored to comply with the conditions of said contract, on their part, in every respect; and that an exact compliance therewith, in every respect, became and was impracticable." The plaintiffs gave evidence tending to prove the issues on their part, after which the defendant introduced evidence tending to controvert the plaintiffs' evidence, and to support the issues tendered by the defendant, after which the court gave numerous instructions to the jury, as follows: "(1) The plaintiffs, having undertaken, by their contract, to remodel the defendant's mill, and so construct it that it shall thereafter have a capacity of sixty barrels of flour in twenty-four hours' time, and should be capable of making as good flour, and as much per bushel of wheat, as any mill in eastern Oregon, when grinding the same kind of wheat, are bound to a strict performance of the terms of their contract in each of these particulars; and if you find that the plaintiffs failed to perform their contract fully in any one of these respects, but that said mill, as turned over to the defendant, in September, 1886, was intrinsically incapable of accomplishing such results, and that the plaintiffs voluntarily abandoned their work before said mill was made to fully comply with said contract in these particulars, they have no right of recovery in this action, and your verdict must be for the defendant, unless you find that such performance was prevented or waived by the act of the defendant, or that some service of value above the amount actually paid was rendered by the plaintiffs to the defendant, and by it voluntarily accepted; or unless you find that the contract, after its execution, was modified by the defendant's agreement to increase the power, and that such increase of power might have made the mill fulfill the guaranty of the contract. (2) An acceptance within the terms of the last instruction must be one in regard to which the defendant had an option to take or reject. It must be voluntary. The fact that the defendant took possession of the mill in controversy in the condition in which it was left by the plaintiffs is not to be held to prejudice any right it may have to resist the payment herein sought to be enforced against it. It had a perfect right to take possession of said mill, and operate it to the best advantage possible under the circumstances, and from this fact alone the defendant is not to be held to have waived the performance of any stipulation resting upon the plaintiffs, or to have excused any default into which you may find the plaintiffs fell in the execution of the contract in the particulars above referred to. (3) Before the plaintiffs had a right to call on the defendant to accept the mill and make final payment specified in the contract, it was incumbent on them to demonstrate by an actual test

that the mill, as remodeled by them, would grind sixty barrels of flour in twenty-four hours' run, by actually grinding that amount, and that it would make as good flour, and as much per bushel, as any mill in eastern Oregon, when grinding the same kind of wheat; and, having failed to establish such test by evidence, your verdict must be for the defendant, unless you find that they were absolved from so doing by some modification or rescission of the contract. (4) I charge you that under the written contract entered into between the parties the plaintiffs were under obligation to build a mill which would accomplish the stipulated results with the water-power as it existed at the time of the execution of the contract, and you will be so governed in arriving at your verdict, unless you find that the contract was after its execution modified by a further agreement whereby the defendant undertook to supply a greater power." The court, of its own motion, gave the following charge: "(5) But I instruct you that the provisions in this contract that plaintiffs should construct a mill of sixty barrels' capacity, and capable of making as much flour, and of as good quality, from a bushel of wheat as any other mill in eastern Oregon, were of the essence of the contract, and in this respect plaintiffs are bound to establish to your satisfaction that these terms were complied with before they can recover, or that they were absolved from so doing by some modification or rescission of the contract, or were excused or prevented by defendant from so doing." The court refused to give the following charges, requested by appellant's counsel: "(1) If you find from the testimony that the plaintiffs constructed the mill mainly according to the written contract; that the work was done, and the material and machinery furnished, in good faith, with the intent on the part of the plaintiffs to comply with said contract, and that the plaintiffs did not willfully abandon the performance of said contract, then the plaintiffs are entitled to recover from the defendant the reasonable value of said work, material, and machinery, not exceeding the contract price, less all payments heretofore made, and what it would cost to remedy the defects in said mill, and to make it correspond with said contract." A verdict was returned for the defendant, upon which a judgment was duly entered, from which this appeal is taken.

W. M. Ramsey, for appellants. L. B. Cox and R. Eakin, for respondent.

STRAHAN, J., (after stating the facts as above.) Upon the trial in the court below, exceptions were taken to each of the foregoing instructions, and also to the refusal of the court to give the instruction asked by the appellants. The correctness of these rulings presents the only question necessary to be considered on this appeal. The instructions given by the court practically present but one question, and that is whether or not, where a mechanic or builder binds himself by a written contract to erect or repair a building or machinery, and he performs, not literally according to the

terms of the contract, but still in such a manner as to be of some value to the owner, and the owner accepts it and uses it, in an action on a *quantum meruit* he may recover for the reasonable value of such labor or materials, notwithstanding his failure to substantially perform the written contract. The instructions given by the court in effect declare that no recovery can be had in such case, while the one asked on the part of the plaintiffs, and which was refused by the court, states the converse of that proposition. An examination of what is the correct rule of law on that subject, therefore, becomes necessary. In making this examination it will be more convenient to first consider the instruction which the plaintiffs requested, because, if that stated the law correctly, the instructions given by the court were necessarily incorrect.

In a case like the one under consideration "the law \* \* \* implies that the work done and the materials furnished were to be paid for. The general rule of law is that while a special contract remains open, that is, unperformed, the party whose part of it has not been done cannot sue in *indebitatus assumpsit* to recover a compensation for what he has done until the whole shall be completed. \* \* \* But the exceptions from that rule are in cases in which something has been done under a special contract, but not in strict accordance with that contract. In such a case the party cannot recover the remuneration stipulated for in the contract, because he has not that which was to be the consideration of it. Still, if the other party has derived any benefit from the labor done, it would be unjust to allow him to retain that without paying anything. The law, therefore, implies a promise on his part to pay such a remuneration as the benefit conferred is really worth, and to recover it *indebitatus assumpsit* is maintainable. Such is the law now in England and in the United States, notwithstanding many cases are to be found in the reports of both countries at variance with it." Mr. Justice WAYNE, in *Dermott v. Jones*, 23 How. 233; *Manufacturing Co. v. Phelps*, 130 U. S. 520, 9 Sup. Ct. Rep. 601. "The defense is that it was not done in a workman-like manner. In such cases the rule is well established that the plaintiff may recover on a *quantum meruit* and *quantum valebat* what the work done and materials furnished were worth, where, as in this case, the parties cannot rescind and stand *in statu quo*, but one of them must derive benefit from the labor of the other." Mr. Justice WORKS, in *Katz v. Bedford*, 77 Cal. 319-322, 19 Pac. Rep. 523. *Trowbridge v. Barrett*, 30 Wis. 661, was an action to recover for a balance due for putting up a stationary engine and boiler, where it appeared that the plaintiff had not fully performed his part of the contract, and the court said: "There is no arbitrary rule of law which, in violation of every principle of natural justice, defeats the plaintiffs' right of recovery in such case, and permits the defendant to enjoy the fruits of such labor and expenditures without making remuneration therefor. The defendant had the right to recoup all damages sustained by him by reason of

the failure of the plaintiffs to fully perform their contract with him." This doctrine is supported by an overwhelming weight of authority. *Newman v. McGregor*, 5 Ohio, 349; *Allen v. McKibbin*, 5 Mich. 449; *Howell v. Medler*, 41 Mich. 641, 2 N. W. Rep. 911; *Hayward v. Leonard*, 7 Pick. 181; 2 Pars. Cont. 523; *Woodward v. Fuller*, 80 N. Y. 312; *Heckmann v. Pinkney*, 81 N. Y. 211; *Cutter v. Powell*, 2 Smith, Lead. Cas. 61; *Dermott v. Jones*, 2 Wall. 1. And this court is fully committed to the same doctrine. *Steeple v. Newton*, 7 Or. 110; *Tribou v. Stowbridge*, Id. 157; *Todd v. Huntington*, 13 Or. 9, 4 Pac. Rep. 295. Without in any manner entering upon the discussion of the conflicting opinions and reasons to be found in the books on this vexed subject, it is sufficient to say that these cases are decisive of the question presented by the instruction under consideration. It stated the correct rule of law as announced by this court in the three cases above cited, and the same should have been given. It results, also, that the instructions which were given by the court, and which are contrary to the doctrine of these cases, were erroneous, and should not have been given. In the trial of this case the court below evidently undertook to apply what was said by this court in *Gove v. Milling Co.*, 16 Or. 93, 17 Pac. Rep. 740, to the facts disclosed by this record. That was an action between the same parties, founded upon the written contract, and it was held that before the plaintiffs could recover on that contract they must show a compliance with its terms. This is an action on a *quantum meruit* to recover the reasonable value of the material and labor, and we hold that it will lie. This distinction is noted in several of the cases above cited, and particularly in *Todd v. Huntington*, supra. Upon the retrial of this action in the court below the plaintiffs will be entitled to recover whatever amount they can show their work and material placed in the defendant's mill were reasonably worth, subject to the right of the defendant to recoup from that amount such damages as it has sustained by the deviations from the written contract by the plaintiffs. These are the questions upon which the rights of the parties depend, and no doubt the trial court will exercise the power of amendment liberally, so as to fully present them for trial before a jury. The judgment appealed from must be reversed, and the cause remanded to the court below for a new trial.

#### STATE v. STERRITT.

(Supreme Court of Oregon. June 10, 1890.)

#### MOVING DISEASED SHEEP WITHOUT PERMIT — INDICTMENT.

1. In an indictment under section 3352, Hill's Code, guilty knowledge need not be alleged. In declaring the acts mentioned in that section punishable, the legislature was exercising the police powers of the state, and in such case the indictment need not allege that the party knew the act complained of was unlawful.

2. An indictment under section 3352, Hill's Code, for moving diseased sheep, which fails to follow the descriptive words of the statute by al-



leging the ownership of the sheep, is bad on demurrer.

(*Syllabus by the Court.*)

Appeal from circuit court, Grant county; MORTON D. CLIFFORD, Judge.

The grand jury of Grant county returned into court the following indictment against the appellant: "D. Sterritt is accused by the grand jury of Grant county and state of Oregon, by this indictment, of the crime of unlawfully moving sheep infected with scab from place to place without first having obtained a traveling permit therefor, committed as follows: The said D. Sterritt, on the 1st day of April, A. D. 1889, in the county of Grant and state of Oregon, having then and there a band of sheep, of about 1,500 head, infected with scab, did unlawfully move said band of sheep over and across the range of one E. Mumford, a distance of about fifteen miles, he, the said D. Sterritt, then and there having no traveling permit to move said sheep, contrary to the statute in such cases made and provided, and against the peace and dignity of the state of Oregon." This indictment is founded on section 3352, Hill's Code, which is as follows: "Any person, company, corporation, or association desiring to move his or their sheep, which are not sound, or are infected or affected with scab, or with any infectious or contagious disease, shall obtain from the inspector a traveling permit; but such permit shall only be granted for the purpose of moving said sheep to some place where they may be treated for said disease, and by such route as the inspector may designate." The defendant demurred to said indictment on the following grounds, among others: "That said indictment does not show that the defendant knew that said sheep were infected with scab at the time of their alleged removal; that said indictment does not show that defendant was the owner of said sheep at the time of their alleged removal." The demurrer was overruled; and the defendant, having pleaded not guilty, upon a trial before a jury was convicted, and sentenced to pay a fine, from which judgment this appeal is taken.

W. M. Ramsey, for appellant. J. L. Rand, Dist. Atty., for the State.

STRAHAN, J., (*after stating the facts as above.*) Upon the argument in this court the appellant mainly relied upon the objections taken by the demurrer to the indictment.

1. The first objection insisted upon was that the indictment failed to allege knowledge of the defendant that the sheep had the scab at the time of their removal. In a very large class of offenses, and mainly those that were classed as *mala in se* at common law, guilty knowledge is necessary to complete the offense, and it must be alleged. But in that other class, wrongs which are forbidden by statute, and more especially those offenses which are made punishable in furtherance of the public policy of the state, such as the exercise of the police powers, the collection of revenue, and the like, are punishable whether the offender had guilty knowledge or not. This distinction was lately

sustained in this court in *State v. Chas-tain*, 23 Pac. Rep. 903, and is adhered to. The offense under consideration belongs to the latter classification, and is punishable whether the accused party knew the sheep were diseased or not. The doing the act under the circumstances defined in the statute is what is punishable; and, when the pleader brings the offense within the descriptive words of the statute, it is generally sufficient.

2. The next objection is that the indictment does not show that the defendant was the owner of said sheep at the time of their alleged removal. This objection must be sustained. "Any person \* \* \* desiring to move his \* \* \* sheep," not the sheep of another, must obtain the permit. These words are a part of the statutory definition of the offense; and in such case the indictment should follow the language used in the statute, and expressly charge the described offense on the defendant, or it will be defective. It is necessary that the defendant should be brought within all the material words of the statute, and nothing can be taken by indictment. 1 Whart. Crim. Law, § 364. It follows from this view of the law that the indictment is defective; and the judgment of conviction must be reversed, and the cause remanded to the court below, with directions to sustain the demurrer to the indictment.

PARK *et al.* v. HIGBEE.

(*Supreme Court of Utah.* July 12, 1890.)

WRITS—PUBLICATION—PRACTICE.

1. A judgment by default against a non-resident defendant obtained on an order of publication that does not direct a copy of the complaint and summons to be mailed to defendant, nor specify the length of time it is to be published, is void, under 3 Comp. Laws Utah 1888, p. 241, requiring that such order should direct such copy to be mailed, and providing the length of time that the summons shall be published, and providing that service shall be complete at the expiration of the time prescribed by the order for publication.

2. Where the rights of third persons have not intervened, such judgment will be set aside on motion by defendant, even after the expiration of the term at which it was rendered, but defendant will be ruled to enter appearance and answer the complaint.

Appeal from district court, first district; H. P. HENDERSON, Judge.

J. G. Sutherland, for appellants. Chas. C. Dey, for respondent.

BLACKBURN, J. This is a suit in partition under the statutes. The respondent is a non-resident. An order of sale of the property was made September 11, 1888, by default, and was sold for the sum of \$3,500 to the plaintiff Boyd Park, October 13, 1888. An order confirming the sale was made the same date. On November 9, 1889, a motion was made by respondent to set aside default and judgment, and all subsequent proceedings thereunder; she appearing specially for the purpose of the motion. On December 9, 1889, the court being fully advised in the premises, ordered that said motion be sustained, and that said decree, and all proceedings thereunder, be set aside and vacated, to which or-

der defendant duly excepted. From this last order this appeal is taken. The motion was based on the alleged fact that the defendant was never served with process, and the court had not acquired jurisdiction of her person. It is claimed by appellants that the respondent was duly served with process by publication. The order of publication was made on affidavit, and is as follows: "It is ordered that service of summons issued in this action be made by publication in the Standard, a newspaper published at Ogden, in the county of Weber, of said Utah territory, according to the statute made and provided." Dated May 7, 1888. The grounds on which the judgment and subsequent proceedings were set aside are that the order of publication did not direct that a copy of the summons and complaint be sent by mail to the defendant, and did not specify the length of time publication should be made, and, these being matters of substance, no jurisdiction of the person of the defendant was secured, and therefore the judgment and subsequent proceedings are void. The statute (2 Comp. Laws Utah, 241) provides, among other things, that the order of publication shall direct that a copy of the summons and complaint be forthwith mailed to the defendant, if her or his residence is known. It further provides that the summons be published for such length of time as shall be deemed reasonable, and, in case of non-resident defendants, for at least four weeks, and that service shall be complete at the expiration of the time prescribed by the order for publication. As the order did not specify the time of publication, the service never became complete, and the defendant could not be in default until the service was complete, so that the judgment and default thereon are a nullity. This conclusion is axiomatic, and needs no authorities in support.

The other defect in the order of publication is also, as we think, of substance. These provisions are mandatory, and should be strictly followed. They are *stricti juris*. Ricketson v. Richardson, 26 Cal. 152; Settlement v. Sullivan, 97 U. S. 444; Galpin v. Page, 18 Wall. 350; Forbes v. Hyde, 31 Cal. 342; McMinn v. Whelan, 27 Cal. 300. But is contended by appellants that this order of publication was afterwards cured by an order *nunc pro tunc*. If such order was made, it does not appear in the record, and cannot be considered by us. It is also contended that an order could not be set aside after the term expires, on motion. It will be remembered that the rights of no third persons had been acquired in this case; for one of the plaintiffs was the purchaser at the sale, and he was bound to take notice of all defects and irregularities. Appellants also say that these defects in the order of publication was the act of the court, and not of the appellants. This cannot help them, for all the orders and judgments and acts of the court and of clerks and juries were irregular and void, are chargeable to the parties procuring them, and it is their duty to see that they are correct. Being made in their favor, it is a conclusive presumption that they were

made by them. We therefore think this judgment is a nullity. But the contention of the appellant is that the motion to set aside the judgment came too late; for the rule is, the court has no power over its record after the term expires at which the record is made. This is the rule in the courts of the United States, where the distinction between law and equity is the practice, while the new procedure obtains in this territory. In the case of Bronson v. Schulten, in 104 U. S. 416, 417, cited by appellants, the court, through MILLER, J., says: "But to this general rule an exception has crept into practice, in a large number of the state courts. \* \* \* The exception, however, has its foundation in the English writ of error *coram vobis*,—a writ which was allowed to bring before the same court in which the error was committed some matter of fact which had escaped attention, and which was material in the proceeding. These were limited generally to the facts that one of the parties to the judgment had died before it was rendered, or was an infant and no guardian had appeared or been appointed, or was a *feme covert*, and the like, or error in the process through default of the clerk." The error in this case is in the process shown by the record. The court further says: "In Pickett's Heirs v. Legerwood, 7 Pet. 144, this court said that the same end sought by that writ is now in practice generally attained by motion, sustained, if the court required it, by affidavits. \* \* \* There has grown up, however, in the courts of law a tendency to apply to this control over their own judgments some of the principles of the courts of equity in cases which go a little further in administering summary relief than the old-fashioned writ of error *coram vobis* did. This practice has been founded, in the courts of many of the states, on statutes which conferred a prescribed and limited control over the judgment of a court after the expiration of the term at which it was rendered. In other cases the summary remedy by motion has been granted as founded in the inherent power of the court over its own judgments, and to avoid the expense and delay of a formal suit in chancery. It can easily be seen how this practice is justified in courts of the states where a system has been adopted which amalgamates the equitable and common-law jurisdiction in one form of action, as most of the rules of procedure do."

From this we may infer that where the new procedure obtains it is not against good and reasonable practice to allow a judgment to be set aside on motion, after the term expires at which it was rendered, when the record shows it was rendered without jurisdiction of the person of the defendant in the action. We can see no good reason, when the rights of third parties have not intervened, as in this case, why this respondent should be relegated to the delay and expense of a suit in chancery to get rid of a void judgment, when the rights of the appellants are in no wise injured by obtaining the same result by motion on proper notice. The appellants cannot be benefited by this judgment, for the record shows it is absolutely void.

Why, then, should they complain? In California the rule is that a court has no control over its record after the term at which it was made has expired; but the supreme court, in the case of *Bell v. Thompson*, 19 Cal. 707, cited by appellants, say, in closing the opinion: "Under the effect of the decisions heretofore made by this court, we think it must be considered as settled in this state that no motion can be entertained by a district court to set aside a judgment on any ground, including that of want of jurisdiction over the person of the defendant in the action in which the judgment was entered, after the expiration of the term in which it was entered, unless its jurisdiction is saved by some motion or proceeding at the time." We infer from this that, if the defendant is made to submit to the jurisdiction of the court and be ruled to answer, the motion can be entertained. This seems to us reasonable. In our judgment, this is the right conclusion. The decree is affirmed, and the cause remanded, and the district court is directed to enter the appearance in full of the defendant, and rule her to answer the complaint in a reasonable time, to be fixed by the court. The costs of this court to abide the event of the suit.

ZANE, C. J., and ANDERSON, J., concur.

BARTCH V. CUTLER, Clerk.

(Supreme Court of Utah. July 12, 1890.)

COUNTY OFFICERS—FEES AND COMPENSATION.

A county court, composed of a probate judge and three selectmen, (1 Comp. Laws Utah 1888, § 178,) who by section 209 receive a fixed compensation for all time employed in county business, cannot bind the county for an additional salary to the probate judge appointed, by resolution of the court, "superintendent of county affairs," to attend to the duties imposed upon it by law.

On petition for writ of *mandamus*.

G. W. Cumming, for petitioner. C. S. Varian, for the People.

ANDERSON, J. This is an original proceeding in this court, in which the plaintiff prays that a writ of mandate issue herein against the defendant, as clerk of the county court of Salt Lake county, requiring him to issue to plaintiff a warrant on the treasurer of said county, for \$208.33 as salary alleged to be due plaintiff for services rendered in the month of December, 1889, as "superintendent of county affairs." The plaintiff alleges in his petition that he is, and since October 23, 1889, has been, the legal and acting probate judge of Salt Lake county, and, as such probate judge, a member of the county court of said county; that on the 19th day of November, 1889, by resolution of the county court, he was appointed the superintendent of county affairs, and that his duty as such superintendent were and are "to have and exercise supervision and control of the public buildings of said county, and of its public roads and bridges, and work done upon the same, the supervision, care, and maintenance of paupers and insane persons, including the approval of bonds of county and precinct officers, and examina-

tion of cases of insane persons, and to generally exercise such active supervision over the affairs of the county as is by law required of the county court aforesaid, outside the regular attendance upon the sessions of said court; all of such acts and duties being and to be subject to the order and approval of said court." It is further alleged that the plaintiff's salary as such superintendent was fixed by said county court at \$2,500 per annum, and that, in consideration thereof, he entered upon and has performed his duties as such superintendent from the date of his appointment up to and including the 31st day of December, 1889. It is alleged that "the labors connected with such position are arduous, and are such as are by law laid upon the county court," and that, in performing them, plaintiff has acted "merely as an employee of said court, except in the matter of examination of cases of insanity, and the approval of the bonds of county and precinct officers, and that it is impracticable, owing to the nature of the duties to be performed, to have more than 1 member of the county court designated to perform said labor." Plaintiff presented to the county court a bill, itemized and verified, for his salary as superintendent for the month of December, 1889, for \$208.33, which was allowed, and defendant, as clerk of the county court, was ordered to draw a warrant in favor of plaintiff for that amount upon the county treasurer, which the defendant refused to do; and plaintiff prays that a writ of mandate issue out of this court against the defendant, requiring him to issue said warrant. The defendant, having been served with notice of the application for the writ, appeared, and demurred to plaintiff's petition on the ground that it did not state facts sufficient to constitute a cause of action.

1 Comp. Laws 1888, § 178, provides that "each county shall have a county court, consisting of a probate judge of such county and 3 selectmen." Section 184 provides that "the county courts must be held at their respective county-seats on the first Monday in March, June, September, and December in each year, and oftener if they deem it necessary." Section 187 provides that "the county courts, in their respective counties, have jurisdiction and power under such limitations and restrictions as are prescribed by law." Section 201 provides that "no member of the court must be interested, directly or indirectly, \* \* \* in any contract made by the court or other person, in behalf of the county, for the erection of public buildings, the opening or improvement of roads, or the building of bridges, or for other purposes." Section 204 provides that "all claims against the county presented by members of the county court for *per diem* or mileage, or other service rendered by them, must be itemized and verified as other claims, and must state that the service has been actually rendered." Section 209 provides that "the probate judge and selectmen shall each receive from their county \$4 per day for each day actually employed in attending to business pertaining to the county court, together with mileage at the rate of 20

cents per mile in going only from their residences to the county-seat, at each session of the court attended by them." Section 90 fixes the fees to which the probate judge is entitled for certain specified services, and provides that he shall have, "for any other service not herein provided for, a reasonable compensation."

By the provisions of section 90 of the statute above quoted, it will be seen that for any service rendered by plaintiff as probate judge, where no fee for such service is fixed by law, he is entitled to a reasonable compensation. The claim for such compensation is to be allowed by the county court upon a bill therefor being presented, itemized and verified, showing the particular service rendered," etc. Section 196, Comp. Laws. It will further be seen that, as a member of the county court, plaintiff is entitled to "\$4 per day for each day actually employed in attending to business pertaining to the county court, together with mileage." Any and all claims of plaintiff "for *per diem* or mileage, or other services rendered" by him, must be presented to the county court, "itemized and verified as other claims, and must state that the service has been actually rendered;" and he is entitled to recover compensation from the county for his services in no other manner, nor in any greater or different amount, than that fixed by the statute, or allowed by the county court, for services actually rendered.

The rule is well settled that a public officer is bound to perform the duties of his office for the compensation fixed by the law. 1 Dill. Mun. Corp. 315; *Evans v. City of Trenton*, 24 N. J. Law, 764; *Territory v. Carson*, 16 Pac. Rep. 569; *Jones v. Supervisors*, 14 Wis. 518; *Fawcett v. Woodbury Co.*, 55 Iowa, 154, 7 N. W. Rep. 483. In *Evans v. City of Trenton*, supra, it is said: "This rule should be very rigidly enforced. The statutes of the legislature, and the ordinances of our municipal corporations, seldom describe with much detail and particularity the duties annexed to public offices; and it requires but little ingenuity to run nice distinctions between what duties may, and what may not, be considered strictly official, and, if these distinctions are much favored by courts of justice, it may lead to great abuse." The plaintiff bases his claim in this case on the resolution of the county court appointing him superintendent of county affairs, and fixing his salary as such superintendent at \$2,500 per year; and his acceptance of such appointment, and performance of the duties it imposed. But section 201, heretofore quoted, prohibits any member of such court from being interested, directly or indirectly, in any contract made by the court or other person, in behalf of the county, for any purpose. The resolution of the court appointing plaintiff superintendent of county affairs, and his acceptance of such position, constituted a contract, and was void because prohibited by the statute. Its effect, also, if carried out, would be or might be to increase his compensation as an officer; and it was, there-

fore, void, as against public policy, independently of the statute. *Gilman v. Railroad Co.*, 40 Iowa, 200, and cases cited.

It is probably true that the business of the county is such as to require attention between the regular sessions of the county court; and we think, under 1 Comp. Laws, § 191, the court may appoint one or more of its members as a committee to have supervision of such business during the interval between the sessions of the court, and to report at its regular sessions, and that such committee would be entitled to compensation for such service at a rate not exceeding four dollars per day for the time actually and necessarily employed, together with mileage. But the county court, being a court of special and limited jurisdiction and powers, cannot create an office, and appoint one of its members to fill it at a fixed salary; nor can it bind the county by a resolution or contract to pay one of its members a fixed yearly sum for performing duties which, as is alleged in this case, are devolved by law upon such court. If the labors of the court can be parceled out in this manner, and fixed and extra compensation allowed therefor, it can create an office or appointment for each of its members, and without limit as to the salary allowed, and thereby increase the compensation of its members at their pleasure.

Under the arrangement between plaintiff and the county court, he would be entitled to draw from the county treasury, as superintendent, nearly seven dollars per day for every day in the year, including Sundays and legal holidays, when he could perform none of the duties of his position. During the sessions of the county court, he would also be entitled to four dollars per day as a member of such court, and, while engaged in his duties as probate judge, he would be entitled to the fees provided by law for those duties, and yet, notwithstanding the performance of his duties as probate judge and member of the county court would, while so engaged, prevent the performance of his duties as superintendent, his salary as superintendent would continue without interruption. The alleged fact that such has been the former practice of the county court does not add strength to the plaintiff's claim. We think the court has no such power, and its exercise would lead to great abuses. The appointment of plaintiff as a so-called superintendent of county affairs, at a fixed salary, was without authority of law, and void, and created no liability against the county for such salary. The application for writ of mandate is therefore denied.

ZANE, C. J., and HENDERSON, J., concur.

BLACKBURN, J. I concur in the judgment of the court, but I think when a member of the court does county business by appointment, when the court is not in session, he is entitled to a reasonable compensation for such services, and is not limited to a *per diem* allowance of four dollars.

**MARKS et ux. v. CULMER et al.**

(Supreme Court of Utah. July 12, 1890.)

**TRESPASS—MEASURE OF DAMAGES—EVIDENCE.**

1. The claimant of the premises, who institutes the proceeding, and the attorney, who directs the constable to execute a writ of restitution, which is void, are liable for actual damages necessarily incurred in the proper execution of the writ, and not for exemplary damages arising from the acts of the constable unauthorized by the mandate of the writ.

2. Neither the claimant nor the attorney are liable for damages occasioned by the constable's removing the furniture from the house on the disputed premises, and leaving it out of doors.

3. Where evidence tending to prejudice the jury is introduced for the purpose of implicating a defendant, as to whom a nonsuit is granted, the jury should be charged to disregard it as to the other defendants.

4. The damages for the destruction of a house on the premises is the cost of replacing it, and its value while that is being done.

Appeal from district court, first district.

*J. G. Sutherland and Arthur Brown*, for appellants. *D. Evans, Geo. Sutherland, S. R. Thurman and E. S. Varian*, for respondents.

**HENDERSON, J.** This cause was commenced in the first district court at Provo, by Wolf Marks and Anna Marks, against William H. Culmer, Jabez G. Sutherland, John T. Sullivan, Daniel S. Dana, Delos Lombard, Harvey K. Tompkins, and Belle Tompkins. The complaint alleges that the plaintiffs are husband and wife, and that the defendants Harvey and Belle Tompkins are husband and wife, and that each of the said defendants, individually, participated in the wrongs therein stated; and, for the first cause of action, it alleges "that on the 19th day of December, A. D. 1887, the said defendants unlawfully, with force and arms, and with a multitude of people, broke and entered a certain dwelling-house, the property of plaintiff Anna Marks, situated about 10 feet southerly of the store known as 'A. Marks' Store,' in the village or mining camp of Eureka, Juab county, territory of Utah, and forcibly ejected said plaintiff, and put her out of said house, and broke the doors and windows of, and tore down and destroyed, the same, and took out and threw away, broke and destroyed, certain household goods, furniture, wearing apparel, money, and goods and chattels of the value of three thousand dollars, to the damage of said plaintiffs in the sum of five thousand dollars." And, for a second cause of action, it alleges that the defendants, at the same time and place, "forcibly, unlawfully, willfully, and wantonly and by force, with a multitude of people, broke and entered the same dwelling-house described in the first cause of action, and took out and destroyed, and threw away and carried away, certain moneys, household goods, wearing apparel, furniture, and other goods and chattels, [particularly describing them.] then and there the property of the said plaintiff Anna Marks; that plaintiffs were thereby damaged in the sum of three thousand dollars." Judgment is prayed for on both causes of action. The defendants an-

swered, denying all the material allegations of the complaint, alleging that the lands upon which the house mentioned in the complaint stood was a part of the premises known as the "Eureka Hotel," in Eureka Mining Camp, in Juab county; that the title and right to the possession thereof, subject only to the paramount title of the United States, was in the defendant Culmer; that the defendant Belle Tompkins and her husband, Harvey Tompkins, was, prior to the erection of the house, in possession of said property under Culmer, and that plaintiff Anna Marks, just prior to the time stated in the complaint, by force and arms, and by willful trespass, entered upon said premises so in the possession of said defendants Belle and Harvey Tompkins, and erected said house, contrary to law and their rights; that thereupon said defendant Belle Tompkins, acting under the advice of defendant Sutherland, who is an attorney at law, commenced suit before John E. Hills, a commissioner of this court at Provo, against said Anna Marks, pursuant to the Code, to eject her therefrom, and regain possession; that said suit was prosecuted to judgment in favor of defendant Belle Tompkins, upon which a writ of restitution was issued, which was delivered to defendant John T. Sullivan, who was constable of Eureka precinct, and that he executed the same by putting plaintiff Anna Marks and her goods out of said premises; that it was done carefully," etc.

The case was brought to trial before a jury, and from the evidence it appeared that the premises are situated in Eureka, a mining camp in Juab county; that the entire settlement or village is on lands belonging to the United States, not subject to entry except for mineral, and that no entry had ever been made on any of the lands involved, and that occupants only have a possessory right as against others, subject to the paramount title of the United States; that defendant Culmer was recognized as, and was, the owner of this possessory right to what is known as the "Eureka Hotel" property. The hotel building was situated on the south side of the main street of the settlement, with cellar and out-houses in its rear; and west on the street, perhaps 50 or 60 feet from the hotel, was the hotel barn. Immediately west of the barn, leaving only an alley-way about 10 feet wide, was a store building owned and occupied by the plaintiffs. This was a long building, extending back from the street considerable further than the hotel barn. This store building was divided into two parts. In the front part, Mrs. Marks carried on a mercantile business of some kind; and the back part was used as a dwelling, in which they lived. Culmer did not live at Eureka. He had rented the hotel property to Mrs. Tompkins, who was herself carrying on the hotel business; her husband being in other business, and residing with her. The premises back of the barn, and adjoining the rear of the store building, were claimed by Culmer and his tenant, Mrs. Tompkins, as part of the hotel premises, and to be in their actual possession, while Mrs. Marks claimed that it was not occupied by them,

or at least that it was not so exclusively in their possession as to preclude her from taking possession; and out of this dispute this controversy has arisen. This being the condition of things, some time before the alleged trespass, Mrs. Marks assumed to take possession of ground in the rear of the hotel barn. This was resisted by Mrs. Tompkins. The testimony on the trial was very conflicting as to the possession of this piece of ground at that time. Many witnesses testified that it was inclosed with the hotel property, and that Mrs. Marks removed the fence; and many testified to the contrary. During the year previous to the alleged trespass, both parties (Mrs. Tompkins and Mrs. Marks) had tried to maintain a possession as against each other; Mrs. Marks removing the fences erected by Mrs. Tompkins. Several affrays and arrests had resulted; and on one occasion, at least, Mrs. Marks used a revolver. A short time before the alleged trespass, Mrs. Marks entered upon the land with a force of men, and commenced the erection of a small building at right angles with her store building commencing within three or four feet of the south-east corner thereof, and extending west back of the barn. Mrs. Tompkins remonstrated, and telegraphed for Culmer, who also went to Eureka, and remonstrated with Mrs. Marks, and tried to make the workmen desist, and offered to pay them to tear down what had then been erected. Culmer thereupon went to Salt Lake, and consulted his attorney, defendant Sutherland, who directed him to institute proceedings in the name of his tenant, Mrs. Tompkins, to recover possession of the land. Sutherland thereupon commenced an action under the forcible entry and detainer act against Mrs. Marks, before Commissioner Hill, at Provo. The summons in this case was served on Mrs. Marks before she had completed the house, or moved into it; but she finished and moved into it before the return-day.

In the case before the commissioner, there was some misunderstanding as to the time when it was to be tried, which resulted in judgment passing for the plaintiff by default on the 17th day of December, 1889. Sutherland and Culmer were present at the rendition of judgment, and a writ of restitution was issued; and Sutherland delivered it to defendant Lombard, who was subpoenaed as a witness on that trial, and directed him to take it to Eureka, and deliver it to a constable, and to say to the constable that it was his direction to serve it, and, if he was resisted in its execution, to cause the persons so resisting to be arrested. Lombard took the writ to Eureka, and delivered it to defendant Sullivan, who was a constable, telling him what Judge Sutherland had said. This was all that defendant Lombard had to do with the matter. Sullivan proceeded to serve the writ on the 19th. The testimony as to what occurred was very conflicting; but it sufficiently appears that Sullivan went to Mrs. Marks, at the store where she and her husband were, and asked to see her in the house; that, when they went there, he explained to her the business. She wanted time to com-

municate with her attorney at Provo. This Sullivan refused. She requested time to consult one Watts, an attorney in town, which was granted. Sullivan retired. When he returned, with assistance, to remove the furniture, he found the doors closed. He demanded admission, threatening to break open the doors. Mrs. Marks was armed, with a revolver in each hand, and threatened to shoot him if he broke in. Thereupon, Sullivan went before defendant Dana, who was a justice of the peace, and made complaint, and obtained a warrant, and went back with a number of persons whom he had called to assist him, some of them armed with guns. Upon their approaching the house, Mrs. Marks laid down on her bed, and put her revolvers under her pillow. Sullivan broke open the door, and with assistance took Mrs. Marks from the bed, and carried her before Dana. The plaintiff's testimony showed that this was done in a harsh and cruel manner, and that she was treated by Dana, when brought before him, with great indignity. This testimony was allowed, against defendants' objection. Sullivan then returned to the store, and requested the plaintiff Wolf Marks' permission to put the furniture in the back part of the store. This was refused. Sullivan then removed the furniture and goods in the house therefrom, and placed them near the door, at the rear end of the store building, and delivered the house to Mrs. Tompkins and her husband, who at once tore it down, and put up a fence inclosing the ground in their premises. Sullivan again went to Wolf Marks in the store, after removing the goods, and told him where they were, and requested him to take them into the building, which Marks refused, saying he would have nothing to do with them. These goods remained there for several weeks, and were then taken into the store building; and it was claimed by the plaintiffs that when they were taken back into the building a large portion of them were gone, among which was \$550 in money, and a large amount of valuable goods, and that the balance was spoiled. At the conclusion of the plaintiffs' testimony the defendants moved for a nonsuit as to defendants Lombard, Dana, and Culmer, to which the plaintiffs consented as to Lombard; and it was granted by the court as to Dana, and denied as to Culmer.

At the close of the testimony the court, among other things, charged the jury that the writ of restitution issued by Commissioner Hill was absolutely void, and of no effect whatever, and was no justification for any act done by any of the defendants under it, and further charged the jury as follows: "With reference to the property removed from the house, the court instructs you that if you shall find for the plaintiff, after having assessed the value of the house, you will then proceed and calculate as to the value of the property removed from it. Upon that subject the court instructs you this to be the law: that, although these defendants may have been guilty of a trespass and a wrong in removing this property from this house, nevertheless it was the duty of the plain-

tiff and her husband to exercise reasonable care and diligence in its preservation, if they had opportunity to do so. If one of you shall pass a wheat field of another, and wantonly pull down his fence, and cattle are ranging near by, and the owner shall stand by, and see the fence down, and the cattle near by, it is his duty to put that fence up, and exercise reasonable care and diligence in avoiding damages. The man could not pass by, and leave the fence down, and make the original trespasser liable for any such damage as he himself could have reasonably avoided by his own exertion in putting up the fence. (13) I may further say to you, if you believe that these transactions were wanton, were malicious, were the result of a combination on the part of all these people to oust this woman at all hazards, without regard for her rights,—if the proof shall demonstrate a purpose upon these defendants of that kind,—then you may go further, and give such additional damages to compensatory damages, (concerning which the court has been instructing you,) by way of punishment, as in your sound discretion seems to be just and proper. It is commonly called 'smart money,' or 'punitive damages.' It is that class of damages that a jury may be allowed to give, in case of trespass, where the wrongs were done with a bad motive, and a reckless disregard of the rights of others. (14) If you find, upon the instructions I have given you, for the plaintiff, and you find that it was no part of the original design of Sullivan and Culmer and Sutherland to tear down this house, and if you find, under the instructions I have given you, that they are not liable for the trespass in tearing down the house, then you will give only such a verdict against them as may have resulted from their connection with it, as under the instructions I have heretofore given you; and then you will give such damages against Tompkins and wife as their connection may warrant, under the instructions I have given you, together with damages for the destruction of the house. So that, gentlemen, you can only find separate verdicts, as I have indicated to you, if and when you shall find that it was no part or result of the original design to destroy this house by all these people. (15) If you shall find it was no part, you shall give separate verdicts. If it was a part of the original design, they are all liable, and you will give a round verdict against all." Exception was duly taken to all these instructions by defendants. The jury returned a verdict in favor of the plaintiffs for \$2,500 against defendants William H. Culmer, Belle Tompkins, Harvey Tompkins, and Jabez G. Sutherland, and in favor of the defendant John T. Sullivan. The defendants moved for a new trial, which was denied. Judgment was entered pursuant to the verdict, and the defendants appeal from the order denying the motion for new trial, and from the judgment.

As to the instructions of the court that the writ of restitution issued by Commissioner Hill was absolutely void, this court held in that case (*People v. Hills*, 16 Pac. Rep. 405) that the commissioner had no

jurisdiction over the case. This decision was made after the alleged trespass, and the appellants do not contend in this court that the writ of restitution was valid. This record presents the question as to the proper rule of damages, and the degrees of responsibility of the various defendants. The verdict, to say the least, is peculiar. The court instructed the jury that the writ of restitution was no justification to any of the defendants. The testimony showed that defendant Sullivan was the only one of the defendants who had anything to do with the removal; yet the jury find in his favor, and against the other defendants. Strictly, this verdict in favor of Sullivan could only be accounted for upon the ground that the land where the house stood was part of the hotel property, and was in the actual possession of Mrs. Tompkins, and that Mrs. Marks entered by a trespass, in which event the court told the jury that the defendants had the right to remove her and her goods from the premises without regard to the writ of restitution, using no more force than was necessary for that purpose. The verdict against the other defendants rebuts that construction of the verdict; and we are only left to infer that the jury found that Sullivan, being an officer, and having a writ fair on its face, did nothing but what the mandate of the writ required, and did not go beyond it, or act oppressively or harshly, and that, therefore, he ought not to be liable. There was abundant evidence to support the latter proposition; but, according to the instruction, Sullivan was liable for the actual damages for obeying the mandate of his writ, unless the removal was wholly justified.

The court submitted to the jury the question as to exemplary damages, and full value of the house, and of the loss in personal property as to all of the defendants, and refused to charge them, as requested, that there was no evidence in the case that defendants Sutherland and Culmer were liable for anything but such actual damages as would have been necessarily incurred by the proper execution of the writ, if it had been legal; and in this we think the court erred. The only evidence in the case tending to show that defendant Sutherland was liable was the fact that he directed the writ to be served, and, in case it was resisted, to resort to legal proceedings.

Judge Cooley, in his work on Torts, (page 131,) says: "An attorney who delivers a writ to an officer for service does not personally assume any responsibility in respect thereto, except to this extent: that he is understood as directing the officer to proceed to obey the command of the writ. If, therefore, the writ is illegal, and the officer makes himself a trespasser in serving it, the attorney is liable as joint trespasser with him; but if the officer exceeds the command in the writ, or does anything which its command, if legal, would not justify, the attorney is not responsible, unless he counsels or assists in it, in which case his liability rests upon the same ground as that of any other participant in a trespass." This, we think,



expresses the correct rule. The only other circumstance which it is claimed connected Sutherland with the trespass, or establishes a liability against him for exemplary damages, was that he was guilty of some unfairness in the conduct of the case before Hills, in taking judgment, and in refusing to delay the issuing of the writ of restitution. If this were true, it only would show that he was anxious for the benefit and advantage which a writ of restitution would give his client, but is not evidence that he intended anything beyond what such a writ would give him. Parties are only liable for such wrongs as they have participated in committing, or approved or ratified or directed or authorized. Cooley, Torts, 127; 1 Wat. Tresp. § 22 et seq. In this case, there was no evidence that Sutherland participated personally in the trespass. He was not in Eureka, and knew nothing of what was being done. There is no evidence that he ratified it afterwards. He can only be liable for directing and authorizing it. The only authority or direction shown in this case was contained in the writ of restitution, and his liability would not extend beyond its proper execution. The instructions given left the jury to infer that, under the evidence, they might assess damages against Sutherland beyond the actual damages for the proper service of the writ; and by giving "a round verdict" against the four defendants jointly, and for a sum greatly in excess of the actual damages, it is plain that they did so understand it.

It was strongly urged on the argument that the verdict is not in excess of the actual damages as testified to by the plaintiff Mrs. Marks, that the value of the goods actually taken and carried away was over \$2,000, and that the value of the house destroyed was \$550. It would be sufficient answer to this to say that the testimony was very conflicting upon that subject, and that this court could not undertake to determine this question of fact; but there was no evidence in the case tending to show an asportation of goods by any of the defendants but Sullivan. There was no evidence that Sutherland or Culmer authorized or directed or participated in or ratified an asportation. It was not within the mandate of the writ. But, as before shown, the jury have found that there was none by Sullivan. It is more than probable that the jury found from the evidence that whatever was lost of the goods was chargeable to the want of care and attention of the plaintiffs themselves.

There is no evidence tending to show that there was anything done with the goods on the day of the removal but to remove them from the house, and set them upon the platform around the rear door of plaintiffs' store; and the only evidence of loss is an inventory taken by plaintiff five or six weeks after, when they were taken from the platform into the store, at the advice of McClelland. The excuse offered for this delay and inattention is wholly unsatisfactory, and was no doubt so considered by the jury. So that, so far as Sutherland and Culmer are concerned, the asportation of goods was no part of

the damage with which they can be charged. As to the destruction of the house, there is no evidence tending to show that Culmer, when he was in Eureka, a few days before the acts complained of, and while Mrs. Marks was building the house, tried to employ men to take it down and remove it. This may be considered as evidence tending to show his authority for this part of the transaction. The only other circumstance, shown by the evidence, tending to show liability on the part of Culmer, is that he directed suit to be brought; but the mere fact that a party directs suit to be brought, or directs process to be issued, does not charge him with responsibility for an abuse of the process. If the writ is void, but he acts in good faith, he is not chargeable for acts beyond or in excess of its mandate. Cooley, Torts, 131; Averill v. Williams, 1 Denio, 501; Adams v. Freeman, 9 Johns. 118. But, as to Sutherland, there was no evidence whatever as to his participation in it except what could be inferred from his relations with the parties as their attorney in the case before Hills; and this was insufficient to charge him with it. The commencement and prosecution of the action before a commissioner who had no jurisdiction was not, of itself, evidence of malice or bad faith. In People v. Hills, supra, this court said: "We entertain no doubt that the commissioner is acting in good faith, as there has been diversity of opinion in the profession, and among commissioners, as to the construction of the statute under consideration." This applies equally to the parties and attorneys. That was the first authoritative decision upon the question. We think the court erred in submitting to the jury the question of exemplary damages as to all of the defendants, and in not charging, as requested, that there was no evidence tending to show that defendants Culmer and Sutherland were liable for an asportation of the goods, and that defendant Sutherland, at least, would not be liable for any damages other than such actual damages as were occasioned by the proper execution of the writ of restitution.

We also think that the court erred in not withdrawing from the jury the testimony relative to what took place in Dana's office. This testimony was highly colored and extremely sensational, and was well calculated to prejudice the jury. It was received, against the objection of the defendants, for the purpose of implicating Dana in the transaction complained of. When it was found that it was an entirely separate transaction, and a nonsuit as to Dana was granted for that reason, the attention of the jury should have at least been called to that testimony, and they should have been directed to disregard it.

The charge relative to the actual damage for the destruction of the house was also misleading, so far as actual damages were concerned; the property being of such a nature that it could be readily reproduced. Its value to the plaintiffs would be what it would cost to reproduce it, and the value of its use while that was being done. Loker v. Damon, 17 Pick. 284; Baker v. Drake, 53 N. Y. 216; 3 Suth. Dam.

475, 476. For these errors the judgment should be reversed, and a new trial had.

ZANE, C. J., and BLACKBURN and ANDERSON, JJ., concur.

SAUNDERS V. SIOUX CITY NURSERY & SEED CO.

(Supreme Court of Utah. July 12, 1890.)

CERTIORARI—JURISDICTION OF JUSTICE—SERVICE ON AGENT.

1. Where the name of the defendant corporation was correctly given in the title of the complaint, with the addition, "a corporation under the laws of the state of Iowa, defendant," and, so described, was referred to in the allegations, this was a sufficient averment of corporate existence.

2. Comp. Laws Utah 1888, § 8021, provides that justices of the peace shall have jurisdiction in their respective precincts or cities; and therefore it is no objection to a justice's jurisdiction that the person served with summons as defendant's agent resided in a different precinct from that in which the justice held his court.

3. Section 3208 which provides that a defendant foreign corporation may be summoned by service upon its acknowledged agent in this territory, or, if no such agent is found, on any person in its employ, or who has any of its property in charge, is valid, and service upon its attorney, who also had some of its property in charge, was good, when no general agent could be found.

4. Under section 8719, which provides that "a writ of review may be granted when an inferior tribunal, board, or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board, or officer, and there is no appeal, nor \* \* \* any plain, speedy, and adequate remedy at law," *certiorari* will not lie to review a judgment by default rendered by a justice, since an appeal lies therefrom.

Appeal from district court, third district; T. J. ANDERSON, Justice.

*Hoge & Burmister*, for appellant. *Frank B. Stephens*, for appellee.

ZANE, C. J. The plaintiff instituted an action in a justice's court against the defendant to recover \$266.70, a balance due the former, as alleged, for services as salesman. It appears from the record that the defendant failed to appear at the trial, and the justice entered a default, and upon the papers and evidence found the above amount to be due the plaintiff, and entered judgment against the defendant therefor; and, upon application of the defendant, the district court ordered a writ of *certiorari*. To this writ the plaintiff entered his appearance, and moved the court to quash it, among others, for the following reasons: *First*, that the justice regularly pursued his authority, and acted within his jurisdiction; *second*, that the defendant had the right of appeal; *third*, that defendant had a plain, speedy, and adequate remedy without the writ. The district court found that the judgment of the justice was valid, and affirmed it. From the latter ruling the defendant has appealed to this court.

The appellant insists that the complaint was fatally defective, and that no evidence was admissible under it, for the reason that it contained no allegation of corporate existence. In the title of the complaint the name of the defendant is given, and its corporate existence is declared in the following language: "The Sioux City

Nursery and Seed Co., a corporation under the laws of the state of Iowa, defendant." The title of a complaint should contain the name of the court in which it is filed, and the names of the parties to the action. In this case the name of the defendant is given, and it is further described by the statement that it has a corporate existence under the laws of the state of Iowa; and, so described in the title, it is referred to in the allegations of the complaint as defendant. In construing such a complaint, the title, when so referred to, must be regarded as a part of it; and, so construing the complaint, it clearly appears that the action is against the defendant as a corporation. That fact appearing, the defendant should have answered denying its corporate existence, if it intended to contest that fact. In the case of *Cement Co. v. Nobel*, 15 Fed. Rep. 502, the court said: "The declaration in the commencement merely states that 'the Union Cement Company of Buffalo, New York, plaintiff herein,' by attorney, 'complaints,' etc., and does not otherwise aver the fact that plaintiff is a corporation. Was the objection to the admission of the notes well taken? I am of opinion that it was not, and that the notes were properly admitted. It is not necessary for a plaintiff corporation to allege that it is a corporation in the pleading; it is sufficient to state in the commencement of the declaration the name of the corporation, as was done here, just as the name of a natural person suing is stated." And in *Academy v. McKechnie*, 90 N. Y. 618, the court said: "And, finally, it is insisted that the action cannot be maintained, because the complaint does not allege the plaintiff to be a corporation. The plaintiff sued as a corporation, and the answer does not contain an affirmative allegation that the plaintiff is not a corporation. Without such an allegation in the answer, proof of the corporate existence of the plaintiff was unnecessary."

It is also claimed that the justice did not obtain jurisdiction of the defendant, because the court was held in the fifth precinct, and the person on whom the summons was served resided in the fourth. It appears from the record that both precincts were within the limits of the city of Salt Lake. The statute (Comp. Laws Utah 1888, § 3021) provides that justices of the peace shall have jurisdiction within their respective precincts or cities. And division 9, § 3537, Comp. Laws Utah 1888, provides that, unless the case falls within an exception mentioned in the other eight divisions, the suit must be commenced in the precinct or city in which the defendant resides. The service under consideration was governed by the ninth division; and, subject to the right to change the place of trial as provided by law, it requires the trial to be in such precinct or city. It is sufficient if the person to be served resides in the city in which the trial is to occur. In some states a defendant may be sued before any justice of the county. In order that parties may not be compelled to attend trial at distant and inconvenient places, the legislature of this territory has required the suit to be brought in the pre-

inct or city in which the defendant resides. The boundaries of cities are not so extended as to make it inconvenient and burdensome for parties to attend trial before any justice within their limits.

It is further urged by defendant that the justice did not obtain jurisdiction of the defendant for the reason, as alleged, that the service of summons on Theodore Burmister was void. It appears from the record that Mr. Burmister, at the time of the service, was an attorney of the defendant, and employed in the collection of certain claims due it, and that he was then intrusted by it with the possession of certain of its property. The last clause of division 5, § 3208, Laws Utah, supra, provides that when the defendant is a foreign corporation, and has an acknowledged agent in this territory, service may be made on such agent, or, if no such agent is found, on any person in its employ, or who has any of its property in charge." The evidence shows that the officer, before making service, made diligent search for another agent of the defendant on whom to make it, but was unable to find one in the territory. The service is good if the provision of the statute above quoted is valid. This statute is based upon the presumption that a person intrusted by a foreign corporation with the possession of its property will, in the discharge of his duty, communicate to it the service upon him of any process against such corporation issued in any suit that may result in a judgment and execution that may deprive him of his possession and such corporation of its property. The probabilities are, under such circumstances, that the corporation will be informed of the pendency of the suit. The principle involved is similar to that when the law authorizes service made by a copy left at the defendant's usual place of abode with some person of sufficient age and capacity, or in cases of constructive notice. The legislators doubtless thought the authority to make such service might be necessary to meet the contingencies which might arise in the administration of public justice. Conceding human motives their usual play, such service is likely to result in actual notice to persons whose rights may be affected by such methods and modes of procedure. Such laws are based on the assumption that men will be prompt to protect their own interest, and diligent in the discharge of their duties to those who have reposed confidence in them. We are of the opinion that the law authorizing the service as it was made in this case is valid.

The plaintiff insists on his part that the writ of review was unauthorized, and that the judgment appealed from should not be disturbed, for the reason that it simply affirmed the judgment of the justice that the effect of the affirmance was the same as a dismissal of the writ would have been. The circumstances under which a writ of review may issue are stated, and its office defined, in the following sections of the Compiled Laws of Utah, supra, § 3718: "The writ of *certiorari* may be denominated the 'writ of review.'" Section 3719: "A writ of review may be granted \* \* \* when an inferior tribunal, board,

or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board, or officer, and there is no appeal, nor in the judgment of the court any plain, speedy, and adequate remedy." Section 3725: "The review upon this writ cannot be extended further than to determine whether the inferior tribunal, board, or officer has regularly pursued the authority of such tribunal, board, or office." The writ will not issue if there is an appeal from the judgment, order, or proceeding complained of. Nor will it issue if, in the judgment of the court, there is any plain, speedy, and adequate remedy without it.

The laws regulating the practice of the courts in issuing the writ of *certiorari*, and as to its office and the scope of their authority to act in the cases, and upon the subjects brought before them by means of the writ, have been greatly changed by acts of parliament, and, in the states and territories of this Union, by legislative enactments. These changes and differences in the laws of the various states explain many of the apparent conflicts in the decisions of the courts. And some courts, instead of following the laws of their own states, have been governed by precedents based on statutes of other states widely differing. In volume 1, Bac. Abr. (6th Ed.) p. 559, it is said that "*certiorari* is an original writ issuing out of chancery or the king's bench \* \* \* to the judges or officers of inferior courts, commanding them to return the records of a cause depending before them, to the end the party may have the more sure and speedy justice;" and mentions, among the special causes for the writ: "Where there is just reason to apprehend that the court below may be unreasonably prejudiced against the defendant, or where there is so much difficulty in the case that the judge below desires that it may be determined in the king's bench, or where the king himself gives special direction that the cause shall be removed, or where the prosecution appears to be for a cause not properly criminal." And volume 1, Tidd, Pr. (1st Amer. Ed.) p. 397, reads: "The writ of *certiorari* is a writ issuing sometimes out of chancery, and sometimes out of the king's bench; \* \* \* and lieth where the king would be certified of any record which is in the treasury, or in the common pleas, or in any other court of record, or before the sheriff and coroners, or of a record before commissioners, or before the escheater." And on page 412, same volume: "But, though the record be brought up on this writ into the court above, yet they do not take up the cause where the record leaves off, but begin the whole proceedings *de novo*." From these quotations it appears that this writ was of wide application during its earlier history; that it was used to remove causes, both criminal and civil, for trial from inferior courts to a superior one. Removal of causes for such purposes are now accomplished by appeals, and for a review of alleged errors by a writ of error or an appeal. Such appeal or writ of error, under the American practice, is the ordinary means of removing a cause for trial, or for a review of er-

rors from an inferior to a superior court. *Certiorari* must be regarded as an extraordinary remedy, and should only be used where the ordinary one cannot lie. Under the laws of some states, however, the writ of *certiorari* is still used as a mode of appeal from courts not of record, such as justices' courts. In some it is also used to review proceedings of inferior courts of record commissioners, magistrates, and officers exercising judicial powers. In some it is also employed as an auxiliary process to bring up a complete return or record on an appeal, and in some it lies to remove criminal causes to a higher court, and in aid of the writ of *habeas corpus*. In view of the changes that have been made as to the application and office of the common-law writ of *certiorari* since its first employment in the administration of public justice, and of the differences in the statute of the various states regulating the practice with respect to it, it is not surprising that the authorities are apparently conflicting. The general rule of practice as to its issuance, under statutes similar to that in force in this territory, is laid down by Dillon in his excellent work on Municipal Corporations, § 743: "From inferior jurisdictions, an appeal or writ of error exists only as it is provided by law, but, where a remedy by writ of error or by appeal is given, a common-law *certiorari* cannot be sustained. But if an appeal, where it exists, is improperly denied, or if the party is deprived of it by fraud or accident, he may have his whole case reviewed by *certiorari*, both as to matters of law and fact; and, where the right of appeal is not allowed or does not exist, the aggrieved party is still entitled to have his case reviewed by a superior tribunal." Section 3725 of the Utah statute quoted limits the inquiry to the question as to whether the inferior tribunal, board, or officer has regularly pursued the authority of such tribunal, board, or officer. In *Ducheneau v. House*, 4 Utah, 363, 10 Pac. Rep. 427, a writ of review had been issued by the district court to bring up for review a case in which a justice of the peace had rendered judgment before the time to answer had expired. In the decision of it the court said: "Such an action is within the general jurisdiction of a justice's court, and hence an appeal would be an adequate remedy. Whether the court in *Golding v. Jennings*, 1 Utah, 135, was correct in saying that a writ of *certiorari* would be proper when the court below acted without its jurisdiction, and did not simply exceed it, it is not now necessary for us to decide; but where the justice is acting within his general jurisdiction as to the subject-matter, but exceeds his jurisdiction as to the party by rendering judgment before the time to answer has expired, and relief by way of appeal is open to the party, we think he is bound to resort to the appeal. We cannot see wherein it is not an adequate remedy."

Upon further consideration of the question, the court is of the opinion that a writ of *certiorari* or review will not lie when the right of appeal exists, when the justice has acted or has entered judgment without first having acquired jurisdiction

of the matter of the suit, or when he has acted without his jurisdiction, as well as when he simply exceeds his jurisdiction in some respect in the trial of the cause, or has not obtained jurisdiction of the person of the defendant. In either case, an appeal is the ordinary remedy provided by the statutes of this territory. In deciding the case on appeal, a wider and fuller inquiry and scope is authorized and permitted, and more complete and adequate remedy and justice is afforded. If the appellate court decides that the court below did not have jurisdiction of the subject-matter of the suit, it can dismiss the action; but if it decides that the lower court had such jurisdiction, it may try the case on its merits, and do complete justice between the parties. But upon review the appellate court can only determine whether the inferior tribunal regularly pursued its authority. This rule, however, is subject to the qualification that if a party is deprived of his right of appeal by fraud or accident, or if he has lost it without fraud on his part, he may have a writ of review. So far as the rule touching review announced in *Golding v. Jennings* and *Ducheneau v. House*, supra, conflicts with the rule laid down in this case, they are overruled. The judgment of the district court is affirmed.

HENDERSON and BLACKBURN, JJ., concur.

TOPONCE v. CORINNE MILL, CANAL & STOCK CO.

(Supreme Court of Utah. July 12, 1890.)

CORPORATIONS—RIGHT OF OFFICERS TO COMPENSATION FOR SERVICES—LIMITATIONS.

1. In an action by the vice-president of a corporation, against the company, to recover for services as general manager, it must be shown by a preponderance of evidence that the services were clearly outside of his duties as an officer of the company; and, where the jury are charged that such is the law, it is not error to refuse to charge that the burden of proof is on plaintiff to establish such fact.

2. Where, in such action, plaintiff claims for services, and also for money paid out and expended for defendant, and defendant counter-claims on an open running account for money received by plaintiff to its use, and other items, extending up to the time of the commencement of the action, those items of plaintiff's demand, both for services and for money paid out, which occurred more than two years prior to the bringing of the action, are not barred under Code Civil Proc. Utah, § 196; for, by section 200, it is provided that in an action on an open account, where there have been reciprocal demands between the parties, the cause of action accrues from the time of the last item proved in the account on either side.

3. Where the evidence establishing plaintiff's claim is not entirely satisfactory, but the jury have found for him as to a part of it under proper instructions, the verdict will not be set aside.

Appeal from district court, first district; H. P. HENDERSON, Judge.

Bennett & Bradley, (W. H. Dickson, of counsel,) for appellant. J. M. Kimball and Sutherland & Judd, for respondent.

ANDERSON, J. The plaintiff sued the defendant on account on several distinct causes of action, one of which, the third, was for services rendered to the defendant,

at its request, as its general manager, from January 1, 1883, to December 1, 1887, which services are alleged to be reasonably worth \$250 per month, and aggregating \$14,750. The defendant, by its answer, denied specifically each count or cause of action set forth in the complaint except the fourth. It also set up a counter-claim against the plaintiff, and pleaded the statute of limitations as to all that part of the plaintiff's demand which claimed for moneys paid out and expended, or for services rendered, prior to June 8, 1886. The jury, in addition to the general verdict in favor of the plaintiff, returned a special verdict as to each cause of action sued on. There was a motion by defendant for a new trial, which was overruled; and the appeal is from the order overruling this motion, and from the judgment rendered on the general verdict.

The defendant requested the court to instruct the jury that the burden of proof was upon the plaintiff to establish that the services for which he claimed compensation were clearly outside of his duties as an officer or director of the corporation. This the court refused, except as given in the general charge by the court. It is contended in argument that the equivalent of this instruction was not given, and that the refusal to give the instruction asked, or its equivalent, was error. As a general proposition, the instruction asked was correct. The plaintiff, ordinarily, must show, by a preponderance of the evidence, all the necessary facts to establish his cause of action. But it is not essential that such facts should be shown by the evidence offered by the plaintiff. It is sufficient if they are shown by the evidence introduced in the case, whether by the plaintiff or by the defendant. If the facts necessary to establish the plaintiff's cause of action, or any one of them where there are several, appear from the evidence introduced, it is sufficient. Hence, it is not necessarily error for the court to fail, or even refuse to give when asked, such an instruction as the one requested in this case. But the jury should be instructed in all cases that the facts necessary to entitle a party to recover on his cause of action or counter-claim should appear from the evidence introduced, by a preponderance thereof. This, we think, was done in this case. The jury was told that "if a director or president or secretary of an incorporated company expects a salary, or expects compensation for his services, \* \* \* as such officer, he must show an express authority, or an express contract, for the wages he claims, either by a vote of the board of directors, or by some express contract entered into between him and the company." Again the jury were told that: "You must find, before the plaintiff can recover upon this cause of action, in the first place, that the services that were rendered were clearly outside of his duties as vice-president and director, and that they were rendered under such circumstances as raises an implied promise to pay for the services on the part of the company; and, unless that is shown, he cannot recover for any services rendered to the company under this cause of ac-

tion." Further on, in its instructions to the jury, the court, referring to another cause of action, said: "You must find upon all these causes of action; this one as well as every other. It is the duty of the plaintiff to establish by a preponderance of evidence what the services or expenditures were. He must show them definitely and specifically." The court further said to the jury: "You are the sole judges of the facts in this case, and of the credibility of all the witnesses, and the weight of the testimony." We think the foregoing extracts from the instructions given by the court are the equivalent of that requested by the defendant, and that there was no error in the court not giving the instruction asked in the terms requested.

The defendant requested the court to instruct the jury that the plaintiff could not recover for any sums of money paid, laid out, or expended by him for the defendant prior to June 5, 1886, nor for any services rendered by him for the defendant prior to said date, because they were barred by paragraph 1, § 196, Code Civil Proc., which instruction was refused by the court; and the refusal is claimed as error. The section of the statute as to the time within which actions may be begun is as follows: "Sec. 196. Within two years: (1) An action upon a contract, obligation, or liability not founded upon an instrument of writing, also upon an open account for goods, wares, and merchandise, and for any article charged in a store account: provided, that action in said cases may be commenced at any time within two years after the last charge is made, or the last payment is received." This action was begun June 9, 1888. The account of plaintiff for money paid and expended, and the services rendered by plaintiff for the defendant as its general manager, began January 1, 1883, and continued without interruption until about December, 1887. The defendant denied, in its answer, there was due plaintiff for money expended for its use in or about its business, or otherwise, "any sum in excess of the credits allowed plaintiff on plaintiff's open, running account with defendant, hereinafter alleged as a counter-claim." The answer of defendant alleged four different causes of action as counter-claims against the plaintiff, arising out of the transactions between them, being for money received by plaintiff on sales of defendant's live-stock, for pasturage of plaintiff's cattle on defendant's range, and for a "balance upon an account for money loaned, paid out, and expended to and for plaintiff, and for goods and materials furnished to him, and for divers and sundry other items and matters of charge, all on open, running account, and at plaintiff's request, between January 27, 1883, and June 10, 1888, amounting in all to about \$30,000." The jury found specially the sum of \$2,658.82 due the defendant from plaintiff on its counter-claim, "upon open account," which was deducted from the amount found due the plaintiff; and the verdict was for the remainder. Section 3149, Comp. Laws 1888, provides that, "in an action brought to recover a balance due upon a mutual, open, and current ac-

count, where there have been reciprocal demands between parties, the cause of action shall be deemed to have accrued from the time of the last item proved in the account on either side." According to the allegations of the parties, there was "a mutual, open, and current account," and "reciprocal demands," between them, from January 1, 1883, down to the commencement of the action; and the instruction asked by defendant's counsel was properly refused.

It is contended that the evidence was insufficient to justify the verdict and judgment. The evidence was all contained in the record, and is too voluminous to be reviewed here at length. It shows that the plaintiff and one Kerr owned, substantially, all the stock. Kerr was made a director and president of the company, while the plaintiff was made a director and vice-president. The other directors had each but a small quantity of stock,—just enough to enable them to be made directors. The plaintiff, without having been formally appointed manager of the defendant's business, assumed the duties of manager, with the knowledge and acquiescence of the directors, and controlled its operations and superintended its affairs, from January, 1883, to December, 1887, with the exception of a large number of sheep which were kept in Wyoming, and which were under the care of Kerr, who made no charge for his services. The business of the defendant, as declared in its article of incorporation, consisted of "a general ranching, milling, canal, and live-stock business. It was to take up, appropriate, purchase, use, and sell water, water rights, water appropriations and powers; to buy, construct, operate, use, and sell water flumes, ditches, and other water; \* \* \* to buy, improve, add water privileges to, and sell agricultural and other lands; \* \* \* to buy, manufacture, and sell flour, lumber, merchandise, agricultural products, and live-stock; to construct, buy, operate, and sell mills, mines, ranches, manufactories, water, \* \* \* canals, ditches, and real estate connected therewith," etc. It had a mill, ranch, and some live-stock near Corinne, Utah, and a number of claims on the public lands, mostly desert entries, and large herds of sheep in Wyoming, and pastured horses and cattle belonging to others on its ranches. The plaintiff made all contracts for the company; bought and sold land and live-stock; had charge of all horses and cattle delivered at the ranch; looked after the litigation in which the defendant was frequently engaged; and, in the language of the plaintiff when testifying, his duties as manager consisted of "tended to the business of the company, chasing fellows off the land, trying to guard the land, tending the stock on the ranch, digging ditches, superintending putting up fences, all contracts, and so forth." The court instructed the jury, in substance, that, the evidence having shown that the plaintiff was a director and officer of the defendant, he could not recover for services rendered for the defendant as such director or officer unless there was an express contract between

him and the defendant providing compensation for such services; that, if the plaintiff rendered services clearly outside of his duties as an officer or director of the corporation, the law would imply a promise on the part of the company to pay him the reasonable value thereof, unless the circumstances under which the services were rendered negatived the presumption that he was to receive compensation for the same; that if it was not the intention of plaintiff to charge for such services while they were being rendered, or if it was the understanding of those engaged with him in the enterprise that the services he was rendering were simply as an incorporator, and without any expectation of compensation on his part other than would result from the success of the enterprise, and he was aware of such understanding on their part, then he could not recover therefor, even if he had a secret intention of claiming compensation for the same; and that in determining these questions the jury should take into consideration all the circumstances of the case, the course of business of the defendant,—whether it was the custom of the defendant to conduct its affairs by the incorporators, who should not receive payment for their services; whether plaintiff ever presented any claim to the company for the services, and other like considerations,—and that, if his claim for compensation was an after-thought, then he could not recover for the same, although they were rendered outside of his duties as a director and officer, and were valuable to the defendant. The law as given to the jury on this point is conceded by defendant's counsel to be correct, and is abundantly supported by the authorities. *Ang. & A. Corp.* § 317; *Henry v. Railroad Co.*, 27 Vt. 435; *Grundy v. Coal Co.*, 23 Amer. & Eng. Corp. Cas. 612, 617, note, 9 S. W. Rep. 414; *Shackelford v. Railroad Co.*, 37 Miss. 202; *Association v. Meredith*, 49 Md. 389, 400; *Cheaney v. Railroad Co.*, 68 Ill. 570; *Railroad Co. v. Cheaney*, 87 Ill. 446; *Bank v. Elliott*, 55 Iowa, 104, 7 N. W. Rep. 470; *Hall v. Railroad Co.*, 28 Vt. 408. It was the peculiar province of the jury, under proper instructions from the court as to the law governing plaintiff's right to recover for the services claimed to have been rendered, to determine from the evidence whether or not he was entitled to compensation therefor. The jury found the issue in plaintiff's favor. Plaintiff claimed \$250 per month from January 1, 1883, to December 1, 1887, amounting to \$14,750. The jury allowed him \$8,850, and \$688.40 interest, amounting to \$9,538.40. While the evidence to sustain this verdict is not entirely satisfactory, and while, if submitted to this court originally, on the printed testimony, a different conclusion might possibly be reached, yet, the jury having found for the plaintiff on part of his claim, and the judge who heard the case in the court below having refused to set the verdict aside, we do not think it is so far unsupported by the evidence as to justify this court in doing so. The judgment of the court below is therefore affirmed.

ZANE, C. J., and BLACKBURN, J., concur.

## GLASMANN v. O'DONNELL.

(Supreme Court of Utah. July 12, 1890.)

## QUIETING TITLE—PLEADING—EVIDENCE.

Comp. Laws Utah 1888, § 8468, provides that "an action may be brought by any person against another who claims an estate or interest in real property, adverse to him, for the purpose of determining such adverse claim." *Held* that, under a cross-complaint to quiet title, which averred the fact of adverse claim, and set out the title-deeds of defendant, evidence of mistake in the descriptions contained in such deeds, and in plaintiff's deeds, was admissible, although mistake was not averred.

Appeal from district court, third district; ELLIOT SANDFORD, Judge.

*W. H. Dickson and John M. Zane*, for appellant. *E. B. Critchlow and Le Grand Young*, for respondent.

HENDERSON, J. This action was brought by the plaintiff in the third district court to quiet title, under section 3468 of the Compiled Laws of 1888, (section 620, Practice Act.) The land in dispute is lot 6 and part of lot 5, in block 19 of what is known as "Brighton Five-Acre Farming Plat." The complaint avers the ownership and possession and right of possession of the plaintiff. It further avers that the property belonged to one Joseph A. Young on the 23d day of February, 1874, and that on that day it was conveyed by said Young to one Henry A. Grow, and afterwards by Grow to plaintiff, and that the defendant claims some interest or estate in said lands adversely to the plaintiff, but that such claim is without right or equity; and prays that the defendant be required to set forth the nature of her claim, and that it be adjudged to be invalid, and that the right and title of the plaintiff be established. The defendant answered, and denied all the allegations of the complaint, and averred that the defendant was the owner and in the possession, and entitled to the possession, of the lands in dispute, and deraigned her title by and through a deed executed by Joseph A. Young to one John D. T. McAllister on February 23, 1874, and by mesne conveyances from said McAllister to herself, all of which are particularly set forth in the answer. Along with the answer the defendant filed a cross-complaint, in which she alleged that she was the owner in possession, and entitled to the possession, of said land, and in the cross-complaint reasserts the various conveyances by which she became the owner; and further avers that the plaintiff claims an interest in said land adverse to her, and prays that said claim be decreed to be null and void, and that her title be quieted. To this cross-complaint the plaintiff answered, and reasserted his title in detail, as set forth in the original complaint. The issues thus joined were brought to trial before the court without a jury. The evidence tended to show that "Brighton Five-Acre Farming Plat" was laid out and platted before the lands were patented, and that lots were held and transferred by possessory right. The lands comprising the entire plat were finally patented by the government to Joseph A. Young. That at that time John D. T. McAllister, the de-

fendant's grantor, was the owner of this possessory right to lots 5 and 6, in block 19, and that Henry A. Grow, the plaintiff's grantor, was the like owner of lots 7 and 8. These possessory rights were recognized by the patentee, and on the 23d day of February, 1874, he undertook to convey to each their respective lands. The testimony shows that the deeds were made and delivered at the same time. The deed to McAllister described the lands conveyed as lots 5 and 6 in block 19. The deed to Grow described the lands by metes and bounds, commencing at a corner section, and after so describing it contained this further description: "Said tract being a portion of lot 9 and lots 10, 11, and 12, block 18, and lot 7, and a portion of lots 8 and 9, block 19, Brighton Five-Acre Farming Tract." The deed to Grow was first recorded. Afterwards, and some time before the commencement of this suit, it was discovered that there was a misapprehension as to the location of "Brighton Five-Acre Farming Plat" with reference to the government survey, and that by the corrected survey the section corner which was the starting point in the description by metes and bounds in the Grow deed is not where it was supposed to be, but, on the contrary, following the calls in that description, it conveyed lots 6 and a part of lot 5, instead of lots 7 and 8. All the testimony relative to possessory rights prior to the patent, and relative to the mistake or error in the Grow deed, was given by the defendant, and was received by the court against the objection of the plaintiff. The testimony was very conflicting as to possession. The court found in favor of the defendant, and against the plaintiff, and found as facts that the plaintiff had never been in possession; that the defendant had all the time been in possession; that the description in the Grow deed by metes and bounds was an error; that it was intended by all the parties to it to convey lots 7 and 8, and was not intended by any of the parties to it to convey any part of lots 5 and 6. Judgment was entered pursuant to the prayer of the cross-complaint. Motion was made for a new trial, which was denied, and the plaintiff appeals from both the judgment and order denying motion for a new trial.

The plaintiff claims that the findings of fact are not supported by the evidence. We have examined the records, and, if the evidence can be considered by the court, we think that it fully supports the findings; but it is further contended that the court erred in receiving the testimony relative to the possession of the lands before the patent was issued, and in relation to the error in the description by metes and bounds in the Grow deed, and as to what was intended by it. It will be seen that both parties are claiming by grant from Joseph A. Young; that the deeds under which they claim were made at the same time,—the one to the defendant's grantor describing the property in controversy by lots and blocks; the one to the plaintiff's grantor, by metes and bounds, which, according to the corrected survey, describes and conveys the same property, but with a



further description, which does not agree with the first. The plaintiff claims under the calls in his deed by metes and bounds, and that, the second description being indefinite, the first must prevail, and the second be disregarded; that his deed, being first put on record, is to be considered the prior conveyance, and that, therefore, the defendant got no title by her deed; that under the pleadings in this case nothing is involved but the strict legal title, and the construction of the deeds on their face; that no equitable right or title is pleaded or averred; that, therefore, the evidence should not have been received, and that there is no predicate in the pleadings for a finding impeaching the deed to Grow, or for a decree in favor of defendant. It is undoubtedly true, if the court is restricted to the mere construction of the deeds on their face, that the first description in the Grow deed, being certain and definite, must prevail over the second, which is indefinite, in that it describes the land as being part of lots, etc. The statute above referred to, under which this action is brought, reads as follows: "An action may be brought by any person against another who claims an estate or interest in real property adverse to him for the purpose of determining such adverse claim." The whole question is whether, under this statute, these pleadings present a case for equitable relief. It is true, as stated in plaintiff's brief, that none of the pleadings set out such facts as constitute either fraud, accident, or mistake; but there is a complaint under this statute by each of the parties against the other in which the ultimate facts are alleged. In the case of *Mining Co. v. Kerr*, 130 U. S. 256, 9 Sup. Ct. Rep. 511, which went up from this territory, and arose under substantially this statute, the court said: "The rule enforced in the circuit and district courts of the United States, that a bill in equity to quiet title or remove clouds must show a legal and equitable title in the plaintiff, and set forth the facts and circumstances on which he relies for relief, does not apply to an action in the territorial court founded upon territorial statutes, which unite legal and equitable remedies in one form of action." The court further held in that case that a complaint under this statute is sufficient which states the ultimate facts that the plaintiff is the owner of the lands, and that the defendant claims an interest adverse to him, without setting out the facts in detail, and that under such a complaint the plaintiff could show that a patent under which the defendant claimed title had been improvidently issued or fraudulently obtained, and was therefore void. See, also, *Ely v. Railroad Co.*, 120 U. S. 291, 9 Sup. Ct. Rep. 293. In this case both parties are actors; both have filed a complaint under the statute; each has set forth, in answer to the other's complaint, the conveyances under which they claim. If the plaintiff's complaint would authorize him to attack any of the conveyances under which the defendant claims title for fraud, accident, or mistake, there is no reason why the defendant's cross-complaint will not authorize her to do the same as to the conveyances under which the plaintiff claims. We think

there is no error in the records, and the judgment and order appealed from should be affirmed.

BLACKBURN, J., concurs. ZANE, C. J., having been of counsel, and ANDERSON, J., having heard the motion for new trial in the court below, did not sit.

#### PEOPLE V. FAIRBANKS.

(*Supreme Court of Utah.* July 12, 1890.)

##### ASSAULT WITH INTENT TO KILL—INDICTMENT.

Comp. Laws Utah 1888, § 4488, declares that "every person who, with intent to do bodily harm, and without just cause or excuse, or when no considerable provocation appears, or when the circumstances show an abandoned and malignant heart, commits an assault," is punishable, etc. *Held*, that an indictment thereunder which fails to negative the excusatory clauses is insufficient.

Appeal from district court, first district; J. W. BLACKBURN, Judge.

C. S. Varian, U. S. Atty., for the People. Saxey & Whitecotton, for respondent.

HENDERSON, J. The defendant was indicted in the first district court at Provo for the crime of "assault with a deadly weapon, with intent to do great bodily harm." The indictment is as follows: "The said defendant, Joseph W. Fairbanks, is accused by the grand jury of this court, by this indictment, of the crime of assault with a deadly weapon, committed as follows: The said Joseph W. Fairbanks, on the 19th day of February, A. D. 1890, at the county of Sevier, in said territory of Utah, and within the judicial district aforesaid, with a certain deadly weapon, to-wit, a club, an axe, and a pistol, in and upon one Russell Kelly, unlawfully, forcibly, and feloniously, did make an assault, with intent him, the said Russell Kelly, to do great bodily harm, against the peace, and contrary to the form of the statute," etc. To this indictment the defendant demurred on the ground that "the facts stated do not constitute a public offense." The court sustained the demurrer, and the prosecution appeals to this court.

The indictment is found under 2 Comp. Laws 1888, § 4488, p. 586, which is as follows: "Every person who, with intent to do bodily harm, and without just cause or excuse, or when no considerable provocation appears, or when the circumstances show an abandoned and malignant heart, commits an assault upon the person of another with a deadly weapon, instrument, or other thing, is punishable by imprisonment in the penitentiary not exceeding two years, or by fine not exceeding one thousand dollars, or by both." The claim on the part of the defendant, in support of the demurrer, is that the indictment is defective in not charging that the assault was made without considerable provocation, or under circumstances showing an abandoned and malignant heart. On the part of the people, it is contended that these are mere matters of extenuation or defense, and therefore that it is not necessary to negative them in the indictment.

In charging statutory offenses, the general rule, as stated by text-writers and

many of the cases, is that, if there is an exception in the enacting clause, (by which is meant all parts of the statute defining the offense,) the indictment must negative the exception, but, when the exception is in a subsequent clause, it need not be negated. *U. S. v. Cook*, 17 Wall. 174. Wharton, in his work on Criminal Pleading and Practice, after stating the general rule as above, in section 241 says: "This distinction has sometimes been called rude, and sometimes artificial; yet, in point of fact, it serves to symbolize a germinal point of discrimination. \* \* \* The test before us is not formal, but essential. It is practically this: Is it the scope of the statute to create a general offense, or an offense limited to a particular class of persons or conditions? In other words, is it intended to impose the stamp of criminality on an entire class of actions, or upon only such actions of that class as are committed by particular persons, or in a particular way? In the latter case the defendant must be declared to be within this class. In the former case, this is not necessary. \* \* \* It would make no matter, in such case, whether these excusatory cases be or be not given in the same clause with that prohibiting the general offense." This, we think, is a correct statement of the rule by which we should test this indictment, and is substantially the one approved in *U. S. v. Cook*, supra, to which we are cited by both parties. Tested by this rule, we think this indictment is defective. We think the statute creates an offense limited to a particular class of conditions; that it was not intended by it to impose the penalties therein provided generally upon all persons who should make an assault upon another with a deadly weapon with intent to do bodily harm, but only upon those who should do so under certain conditions. In a section immediately preceding the one under consideration the statute defines and provides a punishment for assaults in general, but, by this section, assaults committed in a certain way, and under particular conditions, are made a higher grade of offense, and severer penalties are provided therefor; and we think that to negative the existence of "just cause or excuse" is just as essential as it is to aver the intent to do bodily harm with a deadly weapon. We are referred by the appellant to the case of *People v. Nugent*, 4 Cal. 341, which seems to support the claim of appellant, and several cases in California following the rule therein stated. The case is very briefly reported, and is not satisfactory to us. No question as to whether this indictment is sufficient to charge a simple assault has been made, and we express no opinion upon it. The order appealed from should be affirmed.

ZANE, C. J., and ANDERSON, J., concur.

PEOPLE v. PARMAN.

(*Supreme Court of Utah*. July 12, 1890.)

Appeal from district court, first district.  
C. S. Varian, U. S. Atty., for the People. Sazey & Whitecotton, for respondent.

HENDERSON, J. The question presented by this record is the same as that presented by the record in the case of *People v. Fairbanks*, ante, 538, in which an opinion has just been handed down; and for the reasons therein stated the order appealed from is affirmed.

ZANE, C. J., and ANDERSON, J., concur.

NELSON et al. v. CAMPBELL.

(*Supreme Court of Washington*. May 31, 1890.)

JUSTICE OF THE PEACE—JURISDICTION.

1. Under Code Wash. § 1769, which provides that a justice of the peace may, on the application of either party, continue a case for any time not exceeding 60 days, a continuance of a case for more than 60 days will divest the justice of jurisdiction where his docket fails to show that the continuance was by consent of both parties.

2. A complaint coming into the possession of a justice of the peace, by reason of his succession to that office, will be presumed to have been filed by him, if at all, on the day he entered upon the office, though marked several days later; and citation to defendant must require him to appear within 20 days from that date, under Code Wash. § 1712, requiring defendant to be cited to appear at a time within 20 days from the filing of the complaint.

3. Defendant appeared before a justice, and asked for a continuance for one day, which was granted, and on the next day he appeared specially, and objected to the jurisdiction for certain irregularities. Held, that his appearance had not conferred jurisdiction.

SCOTT, J., and ANDERS, C. J., dissenting.

Appeal from district court, King county.

Thomas H. Campbell commenced an action against Hans Nelson, one of the appellants, in the justice's court of H. F. JONES, justice of the peace in the Seattle precinct, King county, for \$100 commission on sale of real estate. A change of venue was had to the justice's court of N. SODERBERG, justice of the peace in the same precinct. December 28, 1888, the case was tried before Justice SODERBERG and a jury. The jury failed to agree, and were discharged. The court adjourned, continuing the case to March 6, 1889. March 4, 1889, Justice SODERBERG's term of office expired. On that day, CLAUDIUS M. RIVERS, a newly-elected justice of the peace in that precinct, qualified and took charge of the records of Justice SODERBERG's court. No action was taken in the case on March 6th. April 8, 1889, Justice RIVERS issued a notice attached to the original complaint, requiring defendant to appear and answer on April 18, 1889. On that day defendant's attorney appeared and asked for a continuance for one day, which was granted. On the next day defendant appeared specially, and objected to the jurisdiction of the court, which objection was overruled, and judgment rendered for \$100 and costs, including the costs before Justices JONES and SODERBERG. Nelson sued out a writ of *certiorari* from the district court, with A. Chilberg and J. Johnson as sureties on his *certiorari* bond. The district court affirmed the judgment of Justice RIVERS, and rendered judgment against Nelson and his sureties, which it refused to set aside on rehearing; and they appeal.

(Code Wash. § 1769, provides: "When the pleadings of the parties shall have taken

place, the justice shall, upon the application of either party, if the defendant be not under arrest, and sufficient cause be shown on oath, continue the case for any time not exceeding 60 days."

*John Arthur and N. Soderberg*, for appellants. *A. E. Isham*, for appellee.

DUNBAR, J. If the appellee, in support of his judgment, relies upon the commencement of the action before Justice JONES, and which was tried before Justice SODERBERG on the 28th day of December, 1888, (and the case has evidently been tried upon that theory, from the fact that the costs in Justices JONES' and SODERBERG's court are incorporated in the judgment rendered by Justice RIVERS,) his case must fail; for the period from December 28, 1888, to March 6, 1889, the date to which the case was continued, is more than 60 days; and, under section 1769 of the Code, a justice of the peace has no authority to continue a case for more than 60 days; and upon such a continuance the court lost jurisdiction of the case, for the rule of liberal construction applied to proceedings in a justice's court does not extend to jurisdictional questions. If, on the other hand, it is contended that it is a new case, commenced at the time of the filing of the complaint by Justice RIVERS, we are confronted by section 1712 of the Code, which provides that, in the commencement of civil actions before a justice of the peace, either by service of a summons, or by service of a copy of the complaint and notice, the defendant must be cited to appear at a time which shall not be more than 20 days from the date of filing the complaint. If Justice RIVERS had any authority at all to file the old complaint, it was by reason of his succession to the office of Justice SODERBERG on the 4th day of March, 1889, at which date the complaint would come into his possession, and would be presumed to be filed, if at all. The mere fact that he did not place the file-mark on it until March 25th cuts no figure whatever. More than 20 days, then, having elapsed between the filing of the complaint, March 4, 1889, and April 18, 1889, the notice was in conflict with the requirements of the statutes. On either supposition, the court was without jurisdiction, and the judgment was void. We do not think that the appearance made by the defendant (appellant) was such an appearance as would give the court jurisdiction of the case. The judgment of the court below is reversed.

HOYT and STILES, JJ., concur.

SCOTT, J., (*dis dissenting*.) I do not agree with the opinion rendered in this case. Section 1769 of the Code only applies to a continuance upon the application of one of the parties. A cause may be continued by a justice of the peace for a longer period than 60 days with the consent of both parties. The record is silent as to why the continuance was granted, or at whose request; but, as both parties were present in court, it must be presumed, in the absence of any objection thereto by the party complaining, that the adjournment from

December 28, 1888, to March 6, 1889, was with the consent of both parties. After jurisdiction is once shown to have been obtained, the same presumptions in favor of the regularity of the subsequent proceedings apply to justices' courts as well as to courts of record. The fact that the justice who continued the cause was succeeded in office by another justice, prior to said March 6th, would not affect the proceedings. Section 1704 makes provision for such cases. The court lost jurisdiction, however, by a failure to make some sufficient disposition of the cause on March 6th, at the hour to which it had previously been adjourned. Nor could the second notice have operated to revive the suit, had the defendant failed to appear, or had he specially appeared and objected thereto. The record shows, however, that the defendant did appear on April 18th, in response to the notice. The plaintiff also appeared, whereupon the record states "defendant's attorney files a motion for continuance, motion granted, and cause continued to April 19, 1889, at 1 o'clock P. M. Subpoena issued for one witness," etc. This appearance of the defendant, and asking for an adjournment, was a general appearance, and waived all prior irregularities. The errors complained of only went to the jurisdiction of the person of the defendant, and not to the subject-matter of the action. The defendant's appearance revived the suit, and it was treated by the court and parties as a continuation thereof. The objection that the court had lost jurisdiction, and special appearance to urge the same, April 19th, came too late. It should have been made in the first instance. As to the effect of a general appearance in an action, see *Shaffer v. Trimble*, 2 G. Greene, 464; *Bazzo v. Wallace*, 16 Neb. 290, 20 N. W. Rep. 315; *Christal v. Kelly*, 88 N. Y. 235; *Toland v. Sprague*, 12 Pet. 329; *Orear v. Clough*, 52 Mo. 55; *Handy v. Insurance Co.*, 37 Ohio St. 366. Section 1712 of the Code provides that a suit may be commenced by the voluntary appearance and agreement of the parties, etc. The judgment of the district court sustaining the judgment rendered by the justice should have been affirmed.

ANDERS, C. J., concurs.

#### BOARD OF COMMISSIONERS OF KING COUNTY v. DAVIES *et al.*

(*Supreme Court of Washington*. June 2, 1890.)

#### CONSTITUTIONAL LAW—TITLES OF ACTS—EXTENSION OF CITY LIMITS.

1. Act Wash. March 27, 1890, is entitled "An act providing for the organization, classification, incorporation, and government of municipal corporations." *Held* sufficient to include sections relating to the enlargement and consolidation of municipal corporations.

2. Such act affects existing corporations, since by its terms it provides for corporations attempted to be organized under a previous void act, and existing corporations are authorized to adopt its provisions as to government and classification.

3. Act Wash. Feb. 26, 1890, provided for extending the corporate limits of cities (1) by a petition of a majority of the voters of the territory to be annexed, addressed to the council, and the passage of an ordinance declaring annexation; (2) by

its owner laying off adjacent land as an addition to the city; (3) by ordinance requesting the county commissioners to call an election, (25 residents and freeholders of the territory proposed to be annexed joining in the request,) at which election a majority of the whole vote within and without the city determines the question of annexation. *Held*, that it was repealed by implication by Act March 27, 1890, passed at the same session, providing for change of boundaries on petition of one-fifth or more of the electors of the municipality to the council, which submits the question to the electors within and without the city, a majority of each body of electors being necessary to carry annexation, and an abstract of the vote being required to be sent to the secretary of state, and the annexed territory not being liable for the debts of the old. Horr, J., dissenting.

Error to superior court, King county.

J. C. Haines, E. M. Carr, Pros. Atty., and H. R. Harris, for appellant. Junius Rochester, for appellees.

STILES, J. Plaintiffs in error constituted the board of county commissioners of King county, to whom in the month of May, 1890, a resolution of the city council of Seattle was addressed, requesting the board to submit to the qualified electors of the city, and of certain territory adjacent to the city, the question of extending the corporate limits of the city over the adjacent territory, therein described. Twenty-five residents and freeholders of the adjacent territory joined in preferring the request. The board refused the request, and, for the purpose of obtaining a judicial construction of the law of the case, joined with the defendants in error in a friendly action in the superior court of King county, substantially in the form of a petition for a writ of mandate against the board, to require it to proceed in accordance with the request, under the provisions of the act of the legislature approved February 26, 1890, entitled "An act to provide for the extending and enlarging of the corporate limits of any city, town, or village in this state, and for consolidating and uniting cities, towns, and villages, and declaring an emergency." It was agreed that the terms of the act had been complied with in all formal requirements of it, and the defense of the board was based upon two grounds, viz.: (1) That the territory proposed to be annexed was in two widely separated tracts; (2) that the act of February 26th was repealed by implication by an act approved March 27, 1890, entitled "An act providing for the organization, classification, incorporation, and government of municipal corporations, and declaring an emergency." The court below held against the board, and this writ of error is to obtain a review of its decision.

The first objection raised by the board would furnish matter for serious discussion, owing to the peculiar situation of the territory proposed to be included within the city limits; but, as we shall hold that the second objection is well taken, it will not be necessary that we discuss or decide the first. The act of February 26th provided three methods by which outside territory might be brought within the corporate limits of an existing city, town, or village. By the first meth-

od, a petition of a majority of the legal voters of the territory proposed to be annexed, addressed to the legislative authority of the municipal incorporation, was sufficient authority for the passage of an ordinance declaring the annexation. By the second method, if the owner of land adjacent to a municipal incorporation lays it off as an addition to the city, town, or village, the whole tract thereafter becomes a part of the incorporation, *ipso facto*, for all purposes. By neither of the above methods is any record of the new corporate boundaries made with the board of county commissioners or the secretary of state. But under the third method, however, the element of consent on the part of the outside parties, being neither present nor presumed, an entirely different course is prescribed. The council or board of trustees must first, by ordinance, request the board of county commissioners to call an election, and 25 residents and freeholders (not necessarily electors) of the territory proposed to be annexed must join in preferring the request, which, although it is thus mildly denominated, by the terms of the act operates as a command which the board cannot refuse to obey. But the commissioners, from that point in the proceedings, take entire charge of the latter; a majority of the whole number of the votes cast of qualified electors within and without the municipality determines the question of annexation; the county pays the expenses of the election; and thus a record of the new boundaries is made with the commissioners, but not with the secretary of state. Section 10 of the act would seem to make it applicable only to cities having a population of 10,000 or upwards. Thus stood the law until March 27th, when the second act, the title of which has been given, was approved, and, under its emergency clause went into immediate effect. Section 9 of this latter act commences with these words: "The boundaries of any municipal corporation may be altered, and new territory included therein, after proceedings had as required in this section;" and follows with a complete method of proceeding on that subject. It is to be regretted, however, that the legislature did not add to the above-quoted sentence the words "and not otherwise," or other equivalent words, so that what we believe to have been its real intent might have been fully and exactly expressed. Without quoting from the act, we note the following points of difference between it and the former act, which are so radical as that, in our view, they seem to create a new system for extending boundaries, which precludes the existence of any other in the legislative mind. In this act there is no restrictive operation to cities of 10,000. The moving cause of action in the premises is a petition of one-fifth or more of the electors of the municipality, which being received, the council must submit the question of annexation to electors within and without. The votes must be canvassed separately by the council, and there must be a majority of each body of electors for the annexation to carry it. An abstract of the vote must be trans-

mitted to the secretary of state, where all other matters pertaining to incorporations, both public and private, are filed of record; and last, but by no means least of all, the newly-annexed territory can never be charged with any of the indebtedness of the old corporation.

It was suggested in argument that, inasmuch as no mention is made in the title of this act of the enlargement or consolidation of municipal corporations, sections 9 and 10 are void, by section 19, art. 1, of the constitution. But we think that the term "incorporation," which is used, is certainly broad enough to include these proceedings, which are analogous to the supplemental articles of a private corporation increasing its capital stock. See the discussion of the subject of "Titles of Statutes" under similar constitutional limitations in Cooley, Const. Lim. (5th Ed.) 170 et seq.

Likewise we cannot agree that this act was not intended to affect municipal incorporations existing at the time of its approval. Under its express terms, certain corporations attempted to be organized under the void act of February 2, 1888, are mentioned and provided for; and it is the law of all existing corporations, in so far as they are given the authority to adopt its provisions as to government and classification. One thing is certain, that if the act of February 26th is the only law authorizing the extension of corporate limits, and if its operation is limited to cities of 10,000 and upwards, then there are only three cities in the state at this time which can enlarge their boundaries, unless they first become reincorporated under the act of March 27th, since there are only three which have a population of 10,000.

The principal contention, however, on the part of the applicants for the writ, was that the two acts at most embrace the same subject-matter, and being so, and having been passed at the same session of the legislature, they ought to be construed as parts of one act, and so that both might stand; and, if the circumstances were such as to admit of following that course, we should certainly follow it, for the rules of construction in cases of this kind are too well known not to be observed. But two statutes thus placed must not necessarily conflict, and if they do the later one must prevail; and whenever the later statute is so framed as that its provisions would or might, in a given case, make the result of action under it substantially different from the result of action under a former statute on the same subject, the later and the former are in conflict, and the later will be taken to prescribe the only rule which is to be accepted as governing the case provided for, and to repeal the earlier law by implication. End. Interp. St. § 200. We have noted the difference in the procedure under these two acts. Now, the practical difference in the result of action under each may be thus illustrated: Suppose that the commissioners in this instance had not declined to act, but had proceeded to call the election as requested, and suppose that the electors of the city, 5,000 in number, had voted unanimously for the an-

nexation, and the electors of the outside territory, 2,000 in number, had voted against it. A majority of the 7,000 electors would have carried the proposition for annexation. But had the election been held under the act of March 27th, with precisely the same vote cast, annexation would have been defeated for want of a majority of the outside electors favoring it. In the one case the vote of the outside elector would count for nothing, while in the other his vote would have equal weight to that of his inside neighbor. Or suppose that, while the election ordered by the commissioners was pending, enemies of the annexation proposition residing within the city, to the number of one-fifth or more of the electors, believing that, although annexation would be carried under the first act, it would be defeated under the second, because a majority of both city and suburban voters could not be had, had presented their petition to the council for an election under the second act. The requirement of section 9, that the council proceed according to the prayer of the petition, seems to be mandatory, and it must call, provide for, and hold the election as demanded, and the consequent confusion may be better imagined than described. These possibilities confirm us in our view, taken coldly from the bare legal aspect of these two laws, that they cannot stand together, and we therefore hold that the action of the commissioners in refusing to act was their proper course. The judgment of the court below is reversed, with directions to dismiss the application for the writ of mandate. Costs to plaintiff in error.

ANDERS, C. J., and DUNBAR and SCOTT, JJ., concur.

HOYT, J., (*dissenting*.) As the judgment of this court is final, and as the particular questions presented are not of general interest, excepting as to the holding of this court as to the particular statute in question, it would be profitless for me to enter into a lengthy discussion of the reasons that compel me to dissent from the conclusion of the majority of the court in this cause. I shall therefore content myself with saying that, as the two acts in question were passed at the same session of the legislature, and therefore should be construed as a single act, I think that they can stand together. In the first act the legislature had provided three distinct methods for enlarging the boundaries of cities, and I think it consistent to hold that in the other act they intended to provide a fourth method of accomplishing the same purpose.

*In re HAVIRD.*

(*Supreme Court of Idaho. Feb. 28, 1890.*)

EFFECT OF REVERSAL—DE FACTO SHERIFF—FRAUDULENT RECORD—MANDAMUS.

1. A suit was brought under Act Idaho, Jan. 30, 1885, to contest the election of a sheriff who had received a certificate of election from the canvassing board of the county. On appeal to the supreme court the act was declared unconstitutional, and the judgment reversed. *Held*, the effect of such reversal was to declare the suit a nul-

lity, and it should have been dismissed by the court below.

3. Though Code Idaho, § 380, forbids the county commissioners to issue warrants for the salary of an office during the pendency of a suit to contest an election thereto, a person who is in possession of the office of sheriff, and performing the duties thereof, under a certificate of election issued by the canvassing board, is entitled to the fees and expenses of the office; and on application a writ of *mandamus* will issue to compel the commissioners to issue warrants therefor.

8. An entry on the records of the supreme court cannot be attacked, on the ground of fraud, on an objection to its introduction as evidence. Its validity can only be questioned upon allegations of fraud fully and fairly made, and issue positively tendered.

On application for writ of *mandamus*.

J. W. Huston and John S. Gray, for C. C. Havird. Geo. Ainslie, for John Gorman. H. W. Duntun, for Boise County.

SWEET, J. Cary C. Havird was a candidate for sheriff at the regular election in Boise county held in November, 1886. He was declared elected to said office by the canvassing board of said county, and in due time received a certificate accordingly. Within the time prescribed by law, John Gorman, the opposing candidate for sheriff at said election, commenced a proceeding under an act of the territorial legislative assembly approved January 30, 1885, in which he contested the right and title of said Havird to said office. The cause was heard by the district judge in and for said county, as by said act provided, and a judgment was rendered in favor of the applicant herein. John Gorman, the intervenor in this action, moved for a new trial, which motion was by said judge overruled; and from the order overruling said motion said Gorman appealed to the supreme court of the territory. The cause came on for hearing before said court at its January, 1889, term, and on the 11th day of March, 1889, the opinion of the court was rendered by Mr. Justice BERRY;<sup>1</sup> the court, by said opinion, declaring the act under which the trial before the judge in said Boise county was held to be unconstitutional and void, and by reason thereof caused to be entered in the records of this court an order reversing the judgment rendered by the judge of said district. On the 18th day of the same month the judgment of the court as rendered on the 11th was amended on motion of counsel for the respondent, and, by this amended judgment, it was ordered that the action be dismissed; the substance of said order being that the word "dismissed" was substituted for the word "reversed." On the following day an entry appears in the record setting forth that Chief Justice WEIR and Justice LOGAN, two of the members of said court, having reconsidered the action of the court as entered of March 18th, ordered that the motion to amend the original entry of March 11th be denied, and that the word "reversed" should stand as the judgment of the court in place of the word "dismissed."

The matter comes up at this time on an application by Cary C. Havird for a writ

of mandate commanding the county commissioners of said Boise county to order the issuing of warrants, payable to the order of said Havird, as compensation for services rendered as aforesaid, in the form of salary, and for fees and expenses allowed by law. The commissioners answer the order to show cause by stating that the title to the office is involved in an action now pending in the district court in and for that county, and that, under section 380 of the statute, the said board is prohibited from ordering any warrants drawn in payment of salary during the pendency of an action over the title of the office. John Gorman, the intervenor, avers that the action is still pending in the court below, and that, while such action is pending, he is an interested party, and invokes section 380 of the statute to show that this court is without authority to issue said writ. The allegations contained in the pleadings cover a much wider range of investigation. Indeed, under the complaint and answer, it might be possible to try the entire case, as it is averred on the one hand that one party was elected, and, on the other hand, the election of the first party is denied, and the election of the second party averred. A greater portion of these declarations *pro* and *con* are *res adjudicata*, and will not be considered by this court. The only question here presented is the *status* of the case after the decision rendered by the supreme court at its last session.

What purports to be the record of the court, particularly the entry of March 19, 1889, is not regular upon its face, and in terms states that the action therein taken is the result of a conclusion reached by two of the members of the court; but it is not declared to be the action of the court by the court, and, from its very appearance, would perhaps suggest that any person interested would be justified in seeking to investigate its character. The intervenor, as well as the board of county commissioners, in answering plaintiff's application in the matter now at bar, rely upon the entry made on March 19th, and upon the *remittitur* sent down by the clerk of this court to the court below, as justifying the position taken by them, which is that the action over the title to said office is still pending in said Boise county. Unquestionably the *remittitur* so states. It is before us; and, although the entry of March 19th does not declare that the conclusion therein mentioned was reached by the court, the *remittitur* was to the effect that such was the order, not of two of the justices, but of the court. Counsel for plaintiff offer to show that the entry of March 19th is not a record of this court. They contend that that entry was made out of term-time, after the court had adjourned, upon the order, not of the court, but of two of its individual members. If this statement were true, it would not only not be a record, but it would be a false entry in a record, and must result in very serious consequences to those who made it.

The plaintiff introduced those entries in the record appearing as of March 11th

<sup>1</sup>Publication delayed by failure to receive copy. For opinion, see 25 Pac. Rep. 294.

and March 18th, and there rested. When the intervenor and defendant offer to introduce the entry of March 19th, plaintiff objects, and offers to prove by parol evidence the irregularities above set forth. Defendant and intervenor contend that the record of the court is conclusive, and that it cannot be assailed, and numerous authorities are cited in support of the proposition. On general principles, this court will not question the doctrine. It is a fact, however, that no instrument is sacred if in any manner tainted with fraud. A judicial record cannot be assailed, but this is a different proposition from denying the existence or validity of a record. In other words, the record, once established, is unassailable, and, as the honest record of the court, is absolutely unquestionable. In *Lowry v. McMillan*, 49 Amer. Dec. 503, the court uses this language: "A record is entitled to great sanctity in the law, but then it must be an honest record. It is in vain to talk of the danger of altering or explaining a record by parol. Everything imbued with fraud must give way before credible sworn testimony." Note 5, p. 170, of *Bigelow on Fraud*, reiterates this doctrine, and there distinctly states that the question of fraud may be raised so long as it was not a question involved in the trial of the cause; in other words, if it in any manner tampered with the rights of the parties, the jurisdiction of the court, or the correctness of the proceeding, at such time or in such manner as that the interested party was not able to be heard to protect himself. The general principle, therefore, is that a judicial record cannot be contradicted by parol evidence. It is an equally well-known, indeed an elementary, principle, that no instrument, no record, no document, is valid, or can exist, in the face of fraud, corruption, or dishonesty. But, in the matter at bar, is the applicant in position to assail the record? We think not. Without attempting to specify how such a record may be assailed, and in what form the allegations should be made to admit of the introduction of parol evidence to contradict the record, it is sufficient to say that to entitle the plaintiff to offer parol evidence in proof of so serious a charge, and of a fraud so serious in its character, and so far-reaching in its effect, the allegation must be fully and fairly made, and the issue clearly and positively tendered. In this case, and under the allegations of the complaint, the entry of the 19th of March cannot be assailed.

This court is called upon, then, to settle the *status* of this case upon all of its records here, the effect of the action of this court a year ago, and the rights of the parties under it. The opinion of the court as rendered last March, duly filed on the 11th of said month, and these various entries, will be used to guide us in reaching a conclusion in the matter at bar.

The opinion declares that the act of the legislature under which the contested election case was tried was unconstitutional and void. To say that the act is unconstitutional and void, and that the proceedings under it may be valid, is an absurdity too patent to be discussed. This court reversed the court below. Reversed

what? Reversed its decision? No. It simply declared that there was nothing to decide; that the act under which they were proceeding was in itself void, and, as a matter of course, the proceedings themselves could not possess more validity than the act under which they proceeded. Then, why should it be sent back? Sent back for another trial under an unconstitutional act? But this discussion may be ended by declaring that when the supreme court held the act of January 30, 1885, to be null and void, the *Case of Gorman v. Havird* no longer existed, and as a legal entity, so far as its having any possible effect upon either of the parties to the suit is concerned, never had existed.

We now pass to the record. We find an entry on the 11th of March declaring that the judgment of the lower court is reversed; another, on the 18th, to the effect that it should be dismissed; and on the 19th two of the judges, personally, have reconsidered what the court did on the 18th, and restored the action of the 11th, or at least attempted so to do. Perhaps it is as well to pass this record with this statement; for, whether it be a true record or not, it is entitled to but little consideration, and the more it is studied the more doubt it creates as to how the opinions of the court were decided, and how that particular decision was announced. It amounts to but a quibble, at best. The one entry declares that the court below shall proceed as it may deem best; and the other, that the action shall be dismissed. The opinion of this court was certified down to the court below; and, no matter what the court below may have thought, there was but one thing for it to do, and that was to dismiss the action. And this brings us down to the next point in the matter, or to the next quibble presented, namely, whether this court should send the case back to be dismissed by the judge of the district, or whether this court should order it dismissed. It is a distinction without a difference. When the supreme court thus clearly indicated the invalidity of the law, and the inevitable *status* of the case under it, the applicant should have had his money, and the expense of this litigation ended. The case having been returned, however, we find that it has been continued from time to time; and the plaintiff is still carrying on the expense of conducting the executive business of the county without pay, and, judging of the future by the past, without prospect of ever having any, or without any probability of ever reaching a settlement of the legal questions involved.

Let there be no misunderstanding about the conclusion reached this time. The case ought to have been dismissed. It was the intention of the supreme court a year ago that it should be dismissed; and the retention of the case in court, and its continuance, did not, and does not, afford the plaintiff not only a speedy and adequate remedy at law, but affords him no remedy at all. Under such a condition of affairs, he was authorized to appear before this court, and declare that he had no speedy and adequate remedy at law, and invoke the extraordinary powers given



this court to secure to him the rights and privileges guarantied him by law. Let it not be understood that the intervenor or the commissioners are in any manner at fault. They were bound by the *remittitur* sent down to them; and, unless the judge saw fit to act in accordance with the implied order of the court, these parties had no alternative but to await the remedy or the relief that time would bring. The intervenor, Gorman, is but exercising the right of a citizen in contesting this election; and, until the act under which he was proceeding was declared unconstitutional and void, he was pursuing methods prescribed by law. It is no wonder that, under the conflicting entries in the records of this court, and the *remittitur* sent down, both counsel and client were at a loss to know what steps to take, or in what manner to proceed.

We now pass to the question of fees and salary claimed by plaintiff, and the distinction, if any there be, as to the amount due on account of salary, and the amount due by law, and allowed by the board, for expenses and fees. In the absence of a statute on the subject, plaintiff would be entitled to receive both the salary and the fees pertaining to the office of sheriff, for the reason that, being in possession of the certificate declaring him duly elected, and having qualified as provided by law, he would be presumed to be entitled to all of the fees and emoluments of the office; and, if the title to the fees were subsequently declared to belong to another, the person subsequently declared elected would be entitled to sue the *de facto* officer for all fees and emoluments received by him during the time he was in office. Even then, however, the *de facto* officer would be entitled to receive the necessary expenses incurred by him in earning the fees and emoluments received. These principles are laid down in the case of *Mayfield v. Moore*, 5 Amer. Rep. 52, and *Auditors v. Benoit*, 4 Amer. Rep. 382. Our statute, by section 380 of the Code, preserves the salary to which the *de jure* officer is entitled by forbidding the issuance of the warrant during the pendency of the suit. As before stated, were it not for this decision, plaintiff would be entitled to receive the salary attached to the office of sheriff of his county by virtue of his *prima facie* right to exercise the duties of the office, and, naturally, to receive the compensation therefor. But we do not think that this section applies to that portion of the sheriff's bill or bills which have been allowed by the board on account of his expenses. For instance, plaintiff was allowed by the board of commissioners, for boarding prisoners, \$692.25; for jailer's fees, \$1,302; for transportation of prisoners, \$156.15; and other items of like character. He is entitled to this money even if the intervenor were finally to recover the title of the office. It is due for money expended; and Mr. Gorman, never having expended the money, would not be entitled to it, either from the county or from plaintiff. In other words, the plaintiff, in possession of his certificate of election, and all other *indicia* of office, made necessary expenditures out of his own pocket on behalf of the county. There

can be no question of his right to receive that money, and it should have been paid to him long ago. It was proper enough to withhold the \$2,978 on account of salary during the pendency of the action inaugurated to test the title of the office; but, when that action was disposed of by the highest court in the territory, there was no longer any reason for withholding the payment of the salary. It is true that, under the *remittitur* sent down from this court, this action may seem like a hardship against Gorman. It is, unquestionably, an unfortunate condition of affairs for both; for, as will be seen by glancing at the history of this case, not only has the plaintiff been denied a speedy and adequate remedy, but the intervenor seems to be without remedy at all. The condition of the record, the continuance of the case, and the numerous awkward circumstances with which the entire transaction is surrounded, seem to have been reached without the co-operation, or even knowledge, of the intervenor or his counsel, while it is perfectly plain that the county commissioners would not know what to do, and could be safe only in doing nothing.

In accordance with the decision heretofore rendered, the judgment of the court is that the action which by the *remittitur* before us appears to be now pending in the lower court should be dismissed, and that a writ of mandate forthwith issue, under the seal of the clerk of this court, directing the defendants, the county commissioners of said Boise county, to order the issuing of a warrant or warrants, in the name of plaintiff herein, for the amounts heretofore allowed by said board during the time specified on account of fees and expenses, and that, immediately upon the dismissal of said action by said district court, a writ of mandate shall issue, under the seal of the clerk of this court, commanding said commissioners to order the issuing of a warrant or warrants, in the name of plaintiff herein, for the amount due him as salary for the time specified, and that a copy hereof be certified to said district court.

BEATTY, C. J., and BERRY, J., concurring.

ON APPLICATION FOR LEAVE TO APPEAL TO THE SUPREME COURT OF THE UNITED STATES.

(March 5, 1890.)

A writ of mandate is given or withheld in the sound discretion of the court, but the exercise of this discretion is subject to review. In the matter of *Havird v. County Commissioners*, (Gorman, intervenor,) the court ordered the issuing of the writ. The intervenor has applied for permission to appeal to the supreme court of the United States. The appeal is not so much desired on the ground of questioning the exercise of discretion by this court as for the purpose of reviewing the decision rendered by the court a year ago upon the constitutionality of the act under which the case was tried. The writ was granted in the matter at bar by virtue of the decision rendered a year ago, and the intervenor declares that that decision was

wrong, and expects the supreme court of the United States to so hold. We are of the opinion that when this matter is presented to the supreme court of the United States, it will simply inquire as to whether this court abused its discretion in ordering the writ, but will refuse to review the decision of a year ago upon the constitutionality of the act, and that the appeal would, therefore, be dismissed. We are also of the opinion that, if the supreme court of the United States did review the decision of a year since, and reverse the judgment of the supreme court of this territory as to the constitutionality of the act, and by reason thereof a new trial had, and Gorman should recover the title to the office in question, that still Havird would be entitled to his fees and expenses. As the *de facto* officer, and in possession of all the *indicia* of office, we do not entertain in the slightest doubt as to Havird's rights in this matter, and that Gorman's action against Havird must be for the profits only. But the intervenor contends that we are wrong, and asks that we grant him an appeal to the supreme court of the United States; and we are not disposed to deny it. If Havird were a mere usurper of the office, he would not then be entitled to receive anything. His right, however, to receive his expenses as a *de facto* officer shows clearly the line drawn between a mere usurper and a person in possession of a certificate duly certifying his election. We feel that, in granting this appeal, we are trespassing seriously upon the rights of Havird to receive forthwith the money which he has expended in the interests of the county, and which, in any event, he is entitled to recover. Perhaps the appeal ought not to be granted, under such circumstances. Still, we do not feel like refusing to any petitioner at the bar the privilege of being heard by the highest court in the land, if, by any construction of the statute, it may be held that he is entitled to the writ. It is ordered, therefore, that the appeal may be had.

#### BACHMAN V. O'REILLEY.

(Supreme Court of Colorado. April 25, 1890.)

ATTORNEY AND CLIENT—PLEADING AND PRACTICE  
—EVIDENCE.

1. In an action by an attorney for his fee, where no issue is raised by the pleadings on the point of plaintiff's right to practice law, evidence that he was not licensed to practice in the state at the time the services were rendered is inadmissible.

2. In such case plaintiff does not have to show, in order to recover, that he was admitted to the bar at the time he performed the services.

3. Evidence by attorneys in good standing and in active practice is admissible to prove the value of the services.

Appeal from district court, Arapahoe county.

P. L. Palmer, for appellant. H. B. O'Reilly, in pro. per. J. Warner Mills, George Simmonds, and John H. Gabriel, for appellant on motion for rehearing.

HAYT, J. At the March, 1884, term of the district court of Elbert county, appellant, Frederick Bachman, was convicted

of the crime of grand larceny, and sentenced to confinement in the state penitentiary. Bachman thereupon sued out a writ of error for the purpose of having the proceedings of the trial court reviewed by this court. To prosecute said writ of error appellant employed appellee in his professional capacity as an attorney. Appellee, in pursuance of such employment, prepared and filed in this court a motion supported by affidavits, and procured the advancement of the case upon the docket here. Thereafter he prosecuted the case to final determination. As a result of the proceeding, the judgment of the court below was reversed by this court. See *Bachman v. People*, 8 Colo. 472, 9 Pac. Rep. 42. The present action grew out of a disagreement between appellant and appellee in reference to the latter's compensation for services rendered in prosecuting said writ of error; the claim of appellee being that, when he was first retained in said cause, it was distinctly understood and agreed by and between appellee and appellant that for the former's professional services in said cause he was to receive and be paid a retainer of \$250, which was to be in full compensation, unless successful in this court, in which event he was to receive such other and further compensation as his services should be reasonably worth, and that the services were reasonably worth the sum of \$5,000. Appellant claims, on the contrary, that it was distinctly understood and agreed between the parties that the said sum of \$250 was to be in full for all services in the cause, including a retrial of the case in the district court, should such retrial become necessary, in the event of a reversal of the judgment of conviction by the appellate court. It is conceded that \$250 was in fact paid by appellant to appellee about the time the latter was employed in the case; and it is further conceded that, in addition to this payment, appellee had at different times, between the date of his employment and the bringing of the present suit, received divers sums of money from appellant, amounting in the aggregate to something over \$200. Appellant claims that this money was loaned appellee, and asks for judgment against him for the same, while appellee claims that a part was advanced for the necessary expenses incurred in prosecuting the writ of error; the balance to be applied in payment *pro tanto* for his services. The trial resulted in a verdict for appellee in the sum of \$2,000. A motion for a new trial having been filed and overruled, the court rendered judgment upon the verdict. Appellant, having duly reserved his exceptions at the trial, brings the case here for review.

Upon the trial the court refused to permit appellant to introduce evidence tending to show that appellee had not been regularly licensed to practice law in this state until after a part of the services for which appellant sought compensation had been rendered, and the action of the court in rejecting such evidence is made the basis of the first assignment of error to which our attention is called by counsel. Under our statute, an unlicensed person is prohibited from practicing law in the courts

of record of this state in any case in which he is not concerned as a party, and if such an unauthorized person renders service to another, in violation of the statute, he will not be permitted to recover any compensation therefor. *Hittson v. Browne*, 3 Colo. 304. This being the law, the testimony offered should have been admitted, unless appellant was precluded by the pleadings from raising the issue thus sought to be raised. Turning to the pleadings, we find it alleged in the complaint "that on or about October 1, 1884, plaintiff was retained by defendant as his attorney and counselor at law, in his behalf to prosecute," etc. The defendant in his answer "admits \* \* \* that about October 1, 1884, in a certain case before the supreme court of Colorado, on a writ of error to the district court of Elbert county, \* \* \* he employed plaintiff as his attorney at law in said case." Again he avers that "at Denver, on or about October 1, 1884, he employed the plaintiff as his attorney at law to prosecute," etc.; and also alleges "that thereupon said plaintiff entered upon said services, acting as such attorney at law as aforesaid." No issue upon the legal qualifications of the plaintiff to act as an attorney and counselor at law having been raised by the pleadings, the trial court properly excluded the evidence. When the objection to the admission of this evidence was first made in the court below, defendant, upon a proper showing, might have been allowed to amend his answer, so as to permit the introduction of the testimony; but, no application to amend having been made, he is not now in a position to complain of the ruling excluding the evidence. *Weeks, Attys. 562; Pom. Rem. § 708.*

Upon the trial, the witnesses Yonley, Markham, Harman, Bentley, and Felker were each permitted to testify, against objection, concerning the value of the services rendered by plaintiff, and this is assigned for error. The objection made to the introduction of the testimony in each instance was based upon the claim that the competency of the witnesses to form an opinion as to the value of the services was not shown. Counsel in argument say: "No gentlemen of the Denver bar are better known as able attorneys than these, but, from a perusal of the evidence of each of them, it will be discovered that none of them had had any experience in criminal practice in this state." An examination of the record shows that the latter statement of counsel is not sustained by the evidence; on the contrary, it discloses that nearly all of said attorneys had more or less experience in the criminal practice in this state, while at least one of them (Judge Markham) had, as district attorney for a number of years in the most populous judicial district in the state, an experience in the criminal practice that falls to the lot of but few attorneys. It was not necessary, however, to render the opinion of the witnesses competent, to show that they had had any particular experience in the criminal practice; the fact that the witnesses were attorneys in good standing, and engaged in the active practice of their profession, was sufficient to

entitle their opinions to be given in evidence. The weight to be given to such opinions was for the jury to determine, and, as an aid to such determination, it was proper for them to be informed as to the experience or lack of experience in the criminal practice of those giving such opinions, but the admissibility of the evidence was in no manner dependent upon such matters. *Lawson, Exp. Ev. 12, 67; Allis v. Day*, 14 Minn. 516, (Gil. 388); *University v. Parkinson*, 14 Kan. 180; *Halaska v. Cotshausen*, 52 Wis. 624, 9 N. W. Rep. 401; *Harnett v. Garvey*, 66 N. Y. 641.

What we have already said in support of the ruling rejecting evidence of the disqualification of O'Reilly to act as an attorney, applies also to the refusal of the court to instruct the jury, at appellant's request, that, to entitle the plaintiff to recover in this action, they must find from the evidence that he had been admitted to the bar of the state, and was a member of the bar of the state of Colorado, at the time he performed the services for the value of which he was seeking to recover, the plaintiff's right to practice law not being in issue under the pleadings. In reference to the amount and value of the services rendered, plaintiff testified that he had been engaged in the active practice of law since 1869 to the time of the trial; that he spent nearly a month in making an examination of the record in the case; that he examined every adjudication of this court bearing on the case, or the law of the case, to see if it were possible to discover some legal determination favorable to Bachman; that he examined the digests and text-books for adjudications in every state and territory, the United States digests, the American Decisions and American Reports, the criminal reports and text-books; that he went twice to Kiowa, in Elbert county, to familiarize himself with the location where the crime was alleged to have been committed. In addition to this labor, the witness stated that upon every question of fact he had conferences with Bachman, lasting oftentimes all day and far into the night; that he procured an order advancing the case upon the docket of this court, upon motions supported by affidavits, and finally made an oral argument in the supreme court to supplement his printed brief. The witness also testified that, owing to certain idiosyncrasies of his client, his labors were very much increased. That he had devoted his life to the legal profession, and nothing else, and that he gave to Bachman's Case nearly one solid year of hard work; and as a result succeeded in securing the reversal of the judgment and verdict against his client, upon the evidence. The weight to be given to this and other testimony in the case was a question for the jury to determine. This case appears to have been carefully tried by the court below upon the issues made, and submitted to the jury under proper instructions. If the jury had accepted the defendant's theory of the contract, a verdict in his favor would, without doubt, have been returned by the jury; but, the jury having accepted the version of the contract given by plaintiff and his witnesses upon the

stand, it is not for this court to interfere. Perceiving no error in the record, the judgment must be affirmed.

Rehearing denied.

(14 Colo. 438)

**DIAMOND TUNNEL GOLD & SILVER MIN. Co.**  
*et al. v. FAULKNER et al.*

(*Supreme Court of Colorado. April 25, 1890.*)

**APPEAL—PRACTICE—PARTIES.**

1. A joint appeal taken by several defendants, against one of whom only judgment was rendered, and who alone was entitled to appeal under Sess. Laws Colo. 1889, p. 77, providing that appeals may be taken from final judgments for more than \$100, must be dismissed as to all.

2. The appellee does not waive his right to have the appeal dismissed by asserting in his motion as an additional reason therefor that the purported transcript is scandalous and irregular, and cannot be treated as a transcript under the rules of the court.

Appeal from district court, Clear Creek county.

A judgment for \$900 was rendered against the Diamond Tunnel Gold & Silver Mining Company, but there was no judgment for money against any of the other defendants. A joint appeal was prayed and allowed.

*W. T. Hughes*, for appellants. *Morrison & Fillins*, for appellees.

**HAYT, J.** By the law governing appeals to this court, in force at the time this appeal was taken, it is provided that "appeals to the supreme court from the district, county, and superior courts shall be allowed in all cases where the judgment or decree appealed from be final, and shall amount, exclusive of costs, to the sum of one hundred dollars, or relate to a franchise or freehold." Sess. Laws 1889, p. 77. The motion to dismiss the appeal is based principally upon the ground that as to said appellants, other than the Diamond Company, there was no final judgment or decree against them upon which an appeal would lie; that is to say, there was no final judgment or decree against such appellants or either of them, amounting to the sum of \$100, exclusive of costs, or relating to a franchise or freehold. Appellee contends that, as the appeal is joint, it must be dismissed upon this motion unless all the defendants were entitled to an appeal. In support of this position the following decisions of this court are cited: *Andre v. Jones*, 1 Colo. 489; *Fuller v. Placer Co.*, 5 Colo. 123. In the first of the above cases Jones had recovered judgment against two defendants, who prayed and were allowed a joint appeal. Within the time given for such appeal, one of the defendants only filed the required bond, the other defendant not joining in the appeal. Upon the case reaching this court, a motion to dismiss the appeal was sustained, the court holding that, while the defendants might have prayed joint and several appeals, they did not do so, but both united in the only appeal which was prayed, and that such a joint appeal could not be prosecuted by one alone. In the subsequent case of *Fuller v. Placer Co.*, supra, the case of *Andre v. Jones* was expressly affirmed, and it was further held that the statute of 1879, authorizing one of several

defendants to remove a case to this court by appeal, and permitting him, in such case, to use the names of all the defendants if deemed necessary, did not affect the rule that a joint appeal by all the defendants must be prosecuted by all. Applying the doctrine of these cases to the case at bar, it is clear that under the order of the court below, allowing a joint appeal, the appeal could not properly have been taken by a portion only of the defendants. It is equally clear from the statute that the defendants Woodward, Gay, and Watkins were neither of them entitled to take an appeal, as an appeal will not lie from a judgment for costs only. A review in such case can only be had upon a writ of error. The appeal must therefore be dismissed as to them, and if the company should be allowed to proceed in their absence it would be permitting a joint appeal by two or more to be prosecuted by one only. This, as we have seen, cannot be allowed without interfering with the long-established practice of this court. This rule grows out of the liability upon the appeal-bond. The sureties upon the bond in this case have not obligated themselves to answer for the result of an appeal to be prosecuted by the corporation only, and appellees are therefore entitled to have the appeal dismissed, unless they have waived their right to insist upon this motion. *Brooks v. Jacksonville*, 1 Scam. 568; *Curry v. Hinman*, 3 Gilman, 90; *Orton v. Tilden*, 110 Ind. 131, 10 N. E. Rep. 936.

A waiver is claimed in this case because of the third reason assigned by appellees in support of the motion to dismiss the appeal, which is as follows: "(8) The instrument, purporting to be a transcript of the record, is so scandalous, irregular, and informal that it cannot be treated as such transcript, as is required by the rules of this court." It is difficult to see how this can be treated as a waiver. It is but another reason advanced in support of the motion to dismiss the appeal, and a party cannot be held to have waived that which he has been at all times insisting upon, and to which he otherwise appears to be entitled, simply because he advances a further reason therefor, which may not be considered good. As the appeal must be dismissed for the reasons already given, it is not necessary to consider other objections.

(14 Colo. 539)

**WILSON et al. v. HAWTHORNE.**

(*Supreme Court of Colorado. June 20, 1890.*)

**SUIT ON JUDGMENT—PLEADING.**

1. Every material allegation of a complaint or answer, not controverted, must, for the purposes of the action, be taken as true.

2. A judgment rendered without obtaining jurisdiction of the person may be impeached by a proceeding in equity, or by answer to an action, where equitable defenses are allowable.

3. An allegation of merits should be made in a complaint or answer denying the validity of a judgment as an earnest of good faith; but such allegation is not essential or traversable.

4. The rigid rule in common-law actions that a joint plea insufficient as to one defendant is insufficient as to all is not applicable to an equitable defense, under the Colorado Code of Procedure. *Quere*, whether a judgment rendered against several parties may be maintained against those over

whom jurisdiction was regularly obtained, when set aside as to others for want of jurisdiction.  
(*Syllabus by the Court.*)

Appeal from district court, Clear Creek county.

W. T. Hughes, for appellants.

ELLIOTT, J. From the abstract of record in this case it appears that the action was begun by appellee as plaintiff in the county court in 1885 to recover the balance due upon a certain other judgment rendered in his favor in the same court in 1878. To the complaint appellants, as defendants, filed an answer containing certain denials, and also a further equitable defense or cross-complaint verified. The cross-complaint is in the nature of a bill in equity to impeach a judgment for want of jurisdiction. Its allegations are affirmative both in form and substance. They are to the effect that the judgment sued upon was rendered by the county court of Clear Creek county upon an appeal from a justice's court; that no summons was served upon Henry Wilson from the justice's court; that he did not appear in that court, did not unite in the appeal to the county court, and never appeared in the action, either in person or by attorney, and, further, that the entry of the appearance of Henry Wilson by the county court was unauthorized; that Henry Wilson was not served with process, and did not appear in person in the case at any time; that the attorney for David R. Wilson was without authority to appear for Henry, and in fact appeared for David R. alone, so that the judgment of the county court was void for want of jurisdiction; and that the county court, though duly requested in apt time by motion supported by affidavits to amend the record so as to show that said Henry Wilson was not subject to its jurisdiction, refused so to do. Upon these and other pertinent and amendatory allegations added by leave of the court excusing delay in not sooner seeking relief from the judgment sued upon, defendants demanded "that the said judgment be vacated and annulled, and that the plaintiff be enjoined from further proceedings thereon." From the abstract of the record before us it further appears that a demurrer upon general grounds, and also upon the ground that the matters set forth in the cross-complaint were barred by the statute of limitations, was interposed, and sustained by the county court; that thereupon an appeal was taken to the district court of Clear Creek county, in which court the demurrer to the cross-complaint was overruled, and leave and ample time were given to plaintiff to answer the same. After these recitals the abstract of record contains the following statement: "December 23, 1886, no answer to the cross-complaint having been filed, the cause came on for trial upon the allegations of the cross-complaint and its amendments. After hearing the evidence, consisting of record exemplifications, the court adjudged the cross-complaint and its amendments insufficient, and dismissed the same." The defendants bring this appeal. No part of the evidence or of the record exemplifications ap-

pear in the abstract of record. The only error assigned is that "the court erred in dismissing the cross-complaint and refusing the relief prayed for." This appeal is governed by the act of 1885, (Sess. Laws, 350.) Section 16 of said act provides that "the cause shall be submitted to the supreme court upon the printed abstract of record and amended abstracts, as herein-after provided, and no transcript of record in writing shall be filed, and no costs shall be taxed therefor except as herein provided." In construing this section of the statute, this court, in the case of South Boulder Ditch & Reservoir Co. v. Community Ditch & Reservoir Co., 8 Colo. 429, 8 Pac. Rep. 919, said: "The review of the case is had upon the printed abstracts." The same rule was announced in *Halsey v. Darling*, 13 Colo. 1, 21 Pac. Rep. 919. By overruling the demurrer, the district court adjudged the equitable defense or cross-complaint sufficient in law to bar the plaintiff of his action, at least as to one of the defendants. The plaintiff having failed to answer or reply to the cross-complaint, every material allegation thereof must, "for the purposes of this action, be taken as true." This rule of pleading is expressly declared by the Code of Civil Procedure of this state, and is sustained by the general current of authority. Code Colo. § 71; Pom. Rem. § 617; *Crater v. McCormick*, 4 Colo. 196; *Tucker v. Parks*, 7 Colo. 62, 1 Pac. Rep. 427; *Silvey v. Neary*, 69 Cal. 97; *Fergus v. Tinkham*, 38 Ill. 407. It follows from the foregoing that, unless there was fatal error in overruling the demurrer to the cross-complaint,—that is, unless said cross-complaint is wholly insufficient, both in form and substance, for any purpose whatever,—the action of the court in dismissing the same for insufficiency as to both defendants cannot be sustained. It becomes necessary, therefore, to consider whether the equitable defense or cross-complaint as pleaded is fatally defective, or whether it is sufficient in substance as an answer to the plaintiff's action upon the original judgment, either in whole or in part. Though the authorities are somewhat conflicting upon questions of this kind, we think that the better doctrine is that a judgment rendered without obtaining jurisdiction of the person may be impeached and set aside by a proceeding in equity for that purpose; that in such proceeding the recitals of the record will not be taken to import absolute verity; and also that an action brought upon a judgment pronounced without obtaining jurisdiction of the person of the defendant may be defeated by a proper answer, under a system of procedure allowing equitable defenses to be interposed in all civil actions. To warrant such relief, the contradiction of the record must be clearly established; but we need not discuss the kind or quantum of evidence required, since, in this case, no issue was taken on the cross-complaint. Code Colo. §§ 59, 60; Blies. Code Pl. § 847; *Freem. Judgm.* § 495; *Marr v. Wetzel*, 3 Colo. 2; *Great Western Min. Co. v. Woodmas of Alston Min. Co.*, 12 Colo. 46, 20 Pac. Rep. 771; *Thompson v. Whitman*, 18 Wall. 457; *Ridgeway v. Bank*, 11 Humph. 523.

In determining whether or not the cross-complaint as pleaded is sufficient, it becomes necessary, also, to consider whether a judgment rendered without due process of law, and without jurisdiction over the person, may be relieved against without any showing of merits by the party seeking such relief. Here, again, the authorities are in conflict. The cross-complaint in this action contains no allegation that the defendant Henry Wilson was not liable in the original action equally with the defendant David R. Had the demurrer been specially interposed and sustained for the want of such averment, the ruling would not have been erroneous. The jurisdiction of equity should not be invoked except by a complaint alleging that real injustice has been or is likely to be done. But we are not prepared to say that such averment is essential or traversable. The showing of merits should not be required to the extent of compelling a party against whom a judgment has been obtained, without jurisdiction over his person, to come into a court of equity, and assume the burden of disproving his liability. On the contrary, a party thus circumstanced is entitled to the maintenance of his right to defend against such supposed liability in an action wherein his adversary must assume the burden of proof. This distinction is important in all cases, and in many may be absolutely controlling. The allegation of merits, though not traversable, may very properly be required as an earnest of good faith from the party seeking relief from a supposed unauthorized judgment; and as a rule, under our system, such pleading may be required to be verified. If a pleading be demurred to for want of such averment, it may be dismissed, unless amended; but in this case the absence of the averment, not having been made a ground of demurrer, did not justify the dismissal of the cross-complaint. *Freem. Judgm.* § 498; *Bell v. Williams*, 1 Head, 229; *Ryan v. Boyd*, 33 Ark. 778; *Crawford v. White*, 17 Iowa, 560.

In view of a retrial of this action, it is desirable that it should be now determined whether or not the equitable defense or cross-complaint can be made available in favor of the defendant David R. Wilson, as well as the defendant Henry. The authorities are divided upon questions of this character. It has been frequently asserted that a judgment is an entirety, and if void against one defendant is void against all. On the other hand, it has been held that a judgment rendered against several parties, part of whom were not subject to the jurisdiction of the court, may nevertheless be maintained against those over whom jurisdiction was regularly obtained. But in cases of the latter class the validity of the judgment seems to depend upon the circumstances of the particular case, such as the form of the judgment, the consideration upon which it was founded, the relation of the parties defendant to each other, statutory provisions, the mode in which relief is sought, and the like. See case of *St. John v. Holmes*, 32 Amer. Dec. 603, together with note and cases appended thereto. From the abstract of the record before us it does

not appear that the original judgment was in any manner challenged upon this particular ground; and the abstract is not sufficiently specific to enable us to determine the question with safety, so we shall not express an opinion upon the matter. But in this connection it is proper to observe that if it should be determined on a retrial that the matters contained in the equitable defense are sufficient as to Henry Wilson, but not as to David R., the fact that Henry pleaded the defense jointly with David, instead of pleading separately, will not defeat Henry's right to protection against the original judgment. The rigid rule in common-law actions announced in *Deitsch v. Wiggins*, 1 Colo. 299, that a joint plea, insufficient as to one defendant, is insufficient as to all, is not properly applicable to an answer in chancery, or to an equitable defense of this kind, under the liberal provisions of our Code of Procedure, especially after a demurrer, not interposed upon such ground, has been overruled, and the privilege of amendment passed by. Code Colo. §§ 59, 70, 77, 443; *Story, Eq. Pl.* §§ 443, 692; *Huggins v. Building Co.*, 2 Atk. 44. The plaintiff not having made answer or reply to the cross-complaint, his action should have been dismissed, at least as to the defendant Henry Wilson, unless said defendant desired to have the case heard for the purpose of obtaining the affirmative relief sought by the cross-complaint. The judgment of the district court is reversed, and the cause remanded.

HUNT *et al.* v. EUREKA GULCH MIN. CO.  
(*Supreme Court of Colorado.* June 13, 1890.)

APPLICATIONS FOR LAND PATENTS—ADVERSE CLAIMS—TIME OF FILING.

1. An action in support of an adverse claim filed by the parties in possession of certain mining premises against the applicant in the United States land-office, for a patent for the same premises, is brought under Rev. St. U. S. § 2326, providing that, when an adverse claim is filed, the proceedings relative to the issuance of the patent shall be stayed until the controversy is settled by a court of competent jurisdiction; and such action cannot be maintained under Civil Code Colo., § 257, providing that any person in possession of land may bring an action against any adverse claimant to have his title determined.

2. The adverse claim must be filed within 60 days after the commencement of the publication of the notice of application for the patent, as required by Rev. St. U. S. § 2323, and the action cannot be maintained when the adverse claim is not filed until 62 days after the commencement of such publication, though it runs for a period of 63 days, 10 weekly insertions being necessary to cover the 60 days of publication required by the statute.

Commissioners' decision. Appeal from district court, San Juan county.

Civil Code, § 257, provides that an action may be brought by any person in possession of real property against any person who claims an estate or interest therein adverse to him for the purpose of determining such adverse claim or estate. Rev. St. U. S. § 2326, provides that, where an adverse claim to the issuance of a patent for mining lands is filed during the period of publication of notice of application for the patent, all proceedings shall be stayed un-

til the controversy is settled by a court of competent jurisdiction.

*Hudson & Slaymaker*, for appellants.  
*Montague & Fitch* and *Samuel Slessenger*, for appellee.

RICHMOND, C. By the record in this case it appears that the appellee, defendant below, on the 26th day of October, 1885, filed its application for a United States patent for a certain mining claim, particularly described in the complaint, called "No Name Lode," under the provisions of sections 2325, 2326, Rev. St. U. S. pp. 426, 427; that notice of the application, by direction of the register and receiver of the United States land-office at Durango, Colo., was published in the *Animas Forks Pioneer*, and that the notice first appeared in the issue of said newspaper on the 31st day of October, 1885, and appeared in each and every weekly issue of said newspaper thereafter, up to and including the 2d day of January, 1886; that on the 1st day of January, 1886, appellants, plaintiffs below, filed their adverse to the application of appellee for a patent, and thereafter, on the 27th day of January, 1886, instituted this action to support such adverse filing. The cause was tried to the court, and the court found that the adverse claim was not filed within the time allowed by law for filing adverse claims, and therefore dismissed the action, at plaintiffs' cost. To reverse this action this appeal is prosecuted.

The question for our determination is, did the plaintiffs file their adverse claim within the time allowed by law? If not, can they maintain their action? In the brief and argument appellants take the position that, whether an adverse claim be filed in the land-office or not, still they are entitled to maintain their suit under section 257 of the Civil Code. The complaint in this case clearly shows the cause of action which the pleader intended to state. No one can read it and fail to conclude that the suit was brought upon an adverse filing, to contest defendant's application for patent to the premises in controversy, and that the purpose of the pleading was to put in issue and try the questions which by section 2326, Rev. St. U. S., are submitted to courts for adjudication. The language of the complaint is that they "were the owners of and in possession of certain mining premises situate, lying, and being in Eureka mining district in the county of San Juan, Colo.; \* \* \* that the said premises comprise all of that certain lode mining claim that is known and recorded as the 'Nameless Lode;' that the defendant claims an estate or interest in and to said premises, and all thereof, adverse to that of plaintiffs; that defendant has made application at the United States land-office at Durango, Colo., for a patent for all of said premises, claiming in said application to be the owner of said premises under the name of the 'No Name Lode;' that the application for the patent is still pending, and that the plaintiffs on the 1st day of January, 1886, to protect their title and right of possession in and to said premises, filed in the United States land-office at Durango,

Colo., their protest and adverse claim against the issuing of a patent for said premises to defendant or other person; that this suit is begun in support of the said adverse claim of the plaintiffs." The above is all of the complaint necessary for us to recite to indicate unmistakably the purpose and object of the action. To permit the plaintiff, after the trial of the cause, to assume altogether another and a different object, would be in violation of every rule of pleading. The allegations in the complaint determine the character and object of the action. *Becker v. Pugh*, 9 Colo. 589, 13 Pac. Rep. 906; *Mining Co. v. Kirtley*, 12 Colo. 410, 21 Pac. Rep. 492.

The plaintiffs having elected to proceed under the provisions of the section above referred to, the next and only remaining inquiry is, did they bring themselves within the provisions of those sections? It is admitted by the complaint and in the argument of appellants that the appellee made its application for the patent on the 26th day of October, 1885, and that, pursuant to the order of the register and receiver of the United States land-office, notice of this application was published on the 31st day of October, 1885, and that the appellants did not locate the claim and file the adverse until the 1st day of January, 1886. Section 2325 provides that, upon filing an application for a patent for land, the register of the land-office "shall publish a notice that such application has been made, for the period of 60 days, in a newspaper to be by him designated as published nearest to such claim, and he shall also post such notice in his office for the same period \* \* \* At the expiration of the sixty days of publication, the claimant shall file his affidavit \* \* \* in a conspicuous place on the claim during such period of publication. If no adverse claim shall have been filed with the register and the receiver of the proper land-office, at the expiration of the sixty days of publication it shall be assumed that the applicant is entitled to a patent upon the payment to the proper officer of \$5 per acre, and that no adverse claim exists, and thereafter no objection from third parties to the issuance of the patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter."

In *Wight v. Dubois*, 21 Fed. Rep. 693, Judge BREWER, adopting the construction of these provisions announced by Judge HALLETT in the same case, sums up in brief his conclusions, (page 696,) as follows: "(1) The government, as a landowner, offers its lands for sale upon certain prescribed conditions, compliance with which is a matter of settlement between the owner and the purchaser alone, and with which no stranger to the title can interfere. (2) Publication of notice is process bringing all adverse claimants into court, and, if no adverse claims are presented, it is conclusively presumed that none exist, and that no third parties have any rights or equities in the land. (3) Thereafter the only right or privilege remaining to any third parties is that of protest or objection filed with the land department, and cognizable only there;



if sustained by the department, the proceedings had by the applicant are set aside; if overruled, the protestant or objector is without further right or remedy."

Accepting the above conclusions of the learned judges as being the correct interpretation of the statute, it follows that, unless the appellants have brought themselves within the provision of the law by filing their adverse claim within the 60 days provided for the publication of notice, the action of the court in dismissing the complaint must be sustained. It is contended by appellants that because this notice was published first on the 31st day of October, 1885, and last on the 2d day of January, 1886, and their adverse claim was filed on January 1, 1886, the adverse was duly filed within the period of time prescribed by law. In other words, appellants claim that they have 62 days within which to file their adverse. This very question has received the consideration of the honorable secretary of the interior in *Miner v. Marriott*, 10 Copps, Land Own. 339. He held that, notwithstanding the fact that the regulations of the department require 10 weekly publications of such notice, making 63 days between the first and last publication, yet, nevertheless, the adverse claim must be filed within 60 days, as provided by the statute. In arriving at this conclusion, the honorable secretary says that "nine issues of a weekly paper would not cover the required period. It is true that the tenth insertion carries the publication 8 days beyond the legally required 60 days, yet for the purpose of meeting the requirement of law 10 insertions are in fact necessary, since the continuity for 60 days can be preserved only by the tenth publication, which falls on the sixty-third day after the first. It is also true that the applicant cannot proceed to complete his entry until after the tenth publication, but this is because it is essential as proof of 60 days' publication. These reasons do not apply to an adverse claimant, and his acts are not controlled thereby. He has the plain letter of the law for his guide. His course is clear, and his duty plain. He has 60 days, on any one of which he may file his adverse claim; if he fails to file within the 60 days of publication prescribed by the law, he is barred. Before either party can recover in an 'adverse' mining suit, he must show a compliance with the statutes, state and federal, and local miners' rules and regulations relating to the location of mining claims." *Becker v. Pugh*, supra.

We are not without authority in our own court to support the conclusions of the court below. In *Mining Co. v. Kirtley*, supra, this court held that "an allegation in the complaint, in an action for the recovery of possession of a mining claim, that the action is brought in support of adverse claims, must be regarded as determining the character and object of the action, viz., to establish plaintiff's right to possession by reason of a valid location thereof under the adverse claims in support of which the action is brought, and to stay defendant's proceedings under his application for a patent until the right under his adverse claims may be adjudi-

cated. It therefore becomes a material question whether the requirements of the statute in relation to filing such claims have been complied with, and an allegation in the answer that defendant's right to a patent was not adversely by a claim under which plaintiff claims the right of possession of the premises in controversy presents a good defense." Quoting further from this opinion, at page 415, (21 Pac. Rep. 494,) after citing the statute, the court says: "By these provisions of the statute, the filing of an adverse claim is made the first step to be taken in proceedings for determining the right of possession and title under a valid location for the purpose of establishing the right to a patent, and upon taking this step the issuance of a patent is stayed until such right has been determined, or has been waived by the party filing such adverse claim. That a party who commences an action under the statute to determine such right of possession must stand or fall by the rights which he has asserted in his adverse claim seems evident from the requirement of the statute that the nature, boundaries, and extent of such adverse claim must be shown by the adverse claim filed." In the *Eureka Case*, 4 Sawy. 302, Justice FIELD uses this language: "When one is seeking a patent for his mining location, and gives proper notice of the fact as therein prescribed, any other claimant of an unpatented location objecting to the patent of the claim, either on account of its extent or form, or because of asserted prior location, must come forward with his objections, and present them, or he will afterwards be precluded from objecting to the issue of the patent." Appellants cite in support of their position *Decker v. Myles*, 4 Colo. 558. The conclusion of the court in that case was based upon a section of law which required a notice to be published once a week for three consecutive weeks; consequently it is not in point. Other cases cited are not upon similar provisions; therefore do not apply. The number of publications is not provided for by the provisions of the United States law. By no system of computation can we arrive at any other conclusion than that the full time required by the statute had expired before plaintiff's adverse claim was filed. "A distinction, however, is made between statutes requiring publication for a certain period of time in what manner soever such period is denominated, and those requiring the insertion of the notice a certain number of times in a newspaper, where the continuance of the publication will be determined by the number of regular issues within a given time." *Wade*, Notice, § 1077. The time for filing an adverse can no more be extended than can be the time for commencing action after filing such adverse, and it cannot be said that the plat and notice required to be posted on the claim must remain so posted for a longer period than 60 days. The publication is made by posting a notice in the office of the register and receiver, upon the claim, and publishing in a newspaper for the period of 60 days. Failure to do either would not be a compliance with the statute, but, as in this case, doing all

in the manner directed will defeat an adverse claimant, who fails to file the adverse within the period of 60 days. Our conclusion, therefore, is that, the plaintiffs having failed to file their adverse in the United States land-office within the time prescribed by the statute, the court was justified in dismissing the complaint. The judgment should be affirmed.

PATTISON and REED, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is affirmed.

HAYT, J., having presided at the trial below, did not participate in this decision.

BROOKS *et al.* v. PEOPLE.

(Supreme Court of Colorado. June 18, 1890.)

CONSTITUTIONAL LAW—SUBJECT IN TITLE OF ACT  
—PLACE OF IMPRISONMENT.

1. Gen. St. Colo. § 2594, which provides that "all persons who shall hereafter be convicted, \* \* \* where the punishment is imprisonment for a period of time exceeding six months, shall be imprisoned in the penitentiary," is void under Const. Colo. art. 5, § 21, as the subject is not clearly expressed in the title of the act in which it occurs, namely, "An act to provide for the maintenance, government, and police of the penitentiary, also the mode of appointing officers, and fixing the salary of the same, and to repeal several acts relating thereto."

2. A person convicted of conspiracy to defraud, under Gen. St. Colo. 1888, § 811, which does not prescribe the place of imprisonment, was illegally sentenced to confinement in the penitentiary instead of the county jail, since, where criminal statutes admit of two constructions, that is to be preferred which is most favorable to defendant.

Error to criminal court, Pueblo county.

The record in this case shows that the plaintiffs in error were jointly indicted in the criminal court of Pueblo county for conspiracy to defraud the Washington Life Insurance Company, and that to such indictment they each entered a plea of guilty; that upon such plea the court sentenced the defendants to imprisonment in the state penitentiary for a term of two years each, which sentence they are now undergoing. The errors assigned all go to the jurisdiction of the court, upon such plea of guilty, to sentence to imprisonment in the penitentiary.

*Charles & Smith*, for plaintiffs in error.  
*S. W. Jones*, Atty. Gen., and *H. Riddell*, for the People.

HAYT, J., (after stating the facts as above.) The statute under which the indictment in this case is framed reads as follows: "If any two or more persons shall conspire or agree, falsely and maliciously, to charge or indict, or cause or procure to be charged or indicted, any person for any criminal offense, or shall agree, conspire, or co-operate to do, or to aid in doing, any other unlawful act, each of the persons so offending shall on conviction be fined in any sum not exceeding one thousand dollars, and imprisoned not less than three months nor exceeding two years." Section 811, Gen. St. 1888. In this state, two places are resorted to for the

confinement of offenders against the state laws, to-wit, the state penitentiary, and the county jail of the proper county. The penitentiary has long been recognized as the proper place for the incarceration of those convicted of the graver offenses only, while the county jails have been utilized for the confinement of those convicted of minor offenses, and confinement in the penitentiary has always been regarded as more severe than confinement in a county jail, on account of the disgrace and reproach attached to confinement in an institution thus set apart as a place for the incarceration of the more depraved and infamous classes of offenders; and under our constitution the test by which to determine whether an offense less than capital shall be deemed a felony or a misdemeanor is made to depend upon whether the same is punishable by imprisonment in the penitentiary or in the county jail. And by statute the consequences resulting from a conviction of a felony are made much more serious than those arising from a conviction of a misdemeanor. Article 18, § 4, Const.; sections 943, 944, Gen. St. The number of peremptory challenges to which a defendant may be entitled in a given case is also made to depend upon whether the charge preferred against him amounts to a felony, or is a misdemeanor only. It will thus be seen that the distinction between the two grades of offenses is important, for many reasons. It will be noticed that the statute upon which this prosecution is based is silent in reference to the place of confinement; and, unless some other act can be found making the offense a felony, it is clear that a conviction will only authorize a confinement in that institution considered the less penal, to-wit, the county jail. This is in accordance with a fundamental rule governing the construction of criminal statutes, which requires that, in case the statute admits equally of two constructions, that which is the more favorable to the defendant is to be preferred; and when the statute is silent as to the place of imprisonment, there being county jails for persons convicted of misdemeanors, and a penitentiary for those guilty of higher crimes, the former, rendering the punishment less severe, must be selected. *Horner v. State*, 1 Or. 269; *St. Louis v. Goebel*, 32 Mo. 295; *End. Interp. St.* 456.

In imposing the sentence in the case at bar, the criminal court, no doubt, had in mind the following provision, to be found in section 2594 of the General Statutes of this state: "All persons who shall hereafter be convicted of any crime under the laws of this state, or have been heretofore convicted under the laws of this state, or of the territory of Colorado, where the punishment is imprisonment for a period of time exceeding six months, shall be imprisoned in the penitentiary; and all courts in which such conviction shall be had, shall give judgment accordingly." An examination of our statutes will show that many offenses may fall within the terms of the above provision; for, while it is undoubtedly true that the place of confinement, whether in the penitentiary or the county jail, is usually specified in our Crim-

inal Code in connection with the offense, in some instances, where a term of imprisonment exceeding six months may be imposed for crime, the Criminal Code is silent in reference to the place of incarceration. Among other cases in which this silence is noticeable, the following may be mentioned: Section 799, fixing imprisonment for resisting an officer, in certain instances, for a term not exceeding one year; and the same section authorizes like imprisonment for any wanton beating of any person by an officer under color of such officer's commission. Section 854 authorizes a sentence of confinement, for a term not exceeding 12 months, in case of a conviction for procuring liquor for an habitual drunkard, knowing him to be such. Section 866 prohibits the emitting of any bill of credit, or any instrument of writing to be used as a general circulating medium in lieu of money, without a special leave from the legislative assembly, and fixes the punishment for the violation thereof by fine not exceeding \$500, or imprisonment not exceeding one year. Section 898 makes it an offense punishable by a fine of not exceeding \$1,000, or imprisonment not exceeding one year, or both, for any employe of a telegraph company, or any other person, to willfully divulge the contents of any telegram. By section 910 a fine or imprisonment of not more than one year is provided for disturbing land marks or location stakes. And by section 917 it is provided that, if any person shall maliciously use the name of another, without his authority, in advertising any property or business upon any natural scenery, that he shall, on conviction, be punished by a fine, or imprisonment not to exceed one year. If, therefore, the provisions in reference to the place of confinement to be found in section 2594 of the General Statutes is in force, it has the effect of raising many offenses to the grade of felonies that would otherwise be held to be misdemeanors, and punished only as such.

We are constrained to hold, however, that the provision quoted from section 2594 was never constitutionally enacted by the legislature. The following is the title to the act in which said section is to be found: "An act to provide for the maintenance, government, and police of the penitentiary, also the mode of appointing officers, and fixing the salary of the same, and to repeal several acts relating thereto." It requires no argument to show that a provision making certain offenses felonies, punishable by confinement in the penitentiary, that otherwise would be considered and punished as misdemeanors, deals with a subject not clearly expressed in the foregoing title, and that such legislation falls within the inhibition of section 21, art. 5, of our state constitution, and is therefore void. This constitutional provision has recently received such a full consideration from this court in *Re Breene*, ante, 3, (decided at this term,) that we shall rest content with quoting the following from the opinion in that case: "The matter covered by legislation is to be 'clearly,' not 'dubiously' or 'obscurely,' indicated by the title. Its relation to the subject must not rest upon a

merely possible or doubtful inference. The connection must be so obvious as that ingenious reasoning, aided by superior rhetoric, will not be necessary to reveal it. Such connection should be within the comprehension of the ordinary intellect, as well as the trained legal mind." The provision changing the place of confinement of persons convicted of crimes, in certain instances, from the county jail to the state penitentiary, and thereby raising the grade of many offenses from misdemeanors to felonies, is certainly not in any way indicated by the title of the act in which it is found. If it has any relation whatever to the subject, it must be that portion expressed in the clause, "the maintenance, government, and police of the penitentiary;" and, if such connection be supposed, it will be found to rest upon inference so doubtful in character as to require the most artful reasoning to reveal it to the understanding of the average intellect. We are, therefore, of the opinion that the constitutionality of the act cannot be maintained. Consequently the authority of the criminal court to sentence the defendants to the state penitentiary must be determined by the terms of section 811, defining indictable conspiracies, without reference to the provisions of said section 2594. By said section 811, authority to fine and imprison persons found guilty of such conspiracies is expressly given, but the act is silent as to the place of confinement. Under such circumstances the court was only authorized to sentence the defendants to confinement in the county jail of the proper county. Therefore the present judgment, requiring the defendants to be confined in the penitentiary, must be reversed.

It is urged in argument that, as the error is in the sentence only, this court has no power, under existing statutes, either to pronounce the proper sentence, or to remand the cause for the purpose of having the correction made by the trial court. We deem it, however, unnecessary to determine these questions in this case.

As the defendant Sarah J. Brooks has recently been pardoned by the executive, no further order in reference to her is necessary. As the defendant B. Herbert Brooks has already served one year in the penitentiary under the judgment of the court below, we think he has been punished sufficiently, and he will, therefore, be discharged. Reversed.

#### WENDLING CATTLE & LAND CO. v. WOODBURN.

(Supreme Court of Colorado. June 13, 1890.)

##### REVIEW—WEIGHT OF EVIDENCE.

Where the evidence was conflicting, and the findings of the trial court were not manifestly against the weight thereof, the judgment will not be disturbed.

Commissioners' decision. Appeal from superior court of Denver.

T. D. W. Youley and I. N. Stevens, for appellant. Coe & Freeman, for appellee.

RICHMOND, C. In this action, plaintiff, appellee herein, seeks to recover the sum

of \$15,000, with interest thereon from the 1st day of October, 1886, balance due as purchase price of an undivided one-half interest in certain cattle, horses, ranch, water-rights, and improvements. The complaint alleges that on or about the 9th day of April, A. D. 1886, the plaintiff sold and delivered to the defendant all his undivided one-half interest in and to all of the cattle branded O. K. and I O U, and all horses branded O. K. on the left hip, also his interest in and to the O. K. ranch, in Mora county, N. M., with all water-rights and improvements thereon, at an agreed price of \$30,000; that defendant promised to pay therefor the sum of \$15,000 on the 1st day of July, A. D. 1886, and \$15,000 on the 1st day of October, A. D. 1886; that defendant paid the sum of \$15,000 on the 1st day of July; and that, although plaintiff demanded on the 1st of October, 1886, the further sum of \$15,000, defendant refused and failed to pay the same. By the answer to this complaint, defendant alleges that the sole and only consideration of the said \$30,000 was a certain contract entered into between the plaintiff and defendant on the 9th day of April, 1886, wherein and whereby, in consideration of the sum of \$30,000, \$15,000 thereof to be paid by defendant to said plaintiff on the 1st day of July, 1886, and the balance of said sum of \$30,000 to be paid October 1, 1886, the plaintiff agreed to sell and deliver his undivided one-half interest in all cattle bearing the O. K. and the I O U brands, and all horses branded O. K. on the left hip, then belonging to the firm of Maulding & Woodburn, of Mora county, N. M., also the ranch known as the "O. K. Ranch," situate in said county, New Mexico, together with two or more claims of water-rights; that said first installment of \$15,000 was duly paid; and that it was further understood and agreed between the parties that the plaintiff should, on or before the maturity of payment of the last \$15,000, execute and deliver to defendant a deed for said ranch and water-rights, and that the said cattle should number at least as many as 1,500, and said horses should number at least 18 head, and that said plaintiff would, on or before the maturity of the said last \$15,000, furnish to said defendant the tally of said cattle, and would, on or before the maturity of the said last payment, deliver to the defendant the number of 1,500 head of cattle, upon the said ranch; that the plaintiff has not made or executed the deed of conveyance or other title to the ranch and water-rights, but has wholly refused to deliver said tally, and did not deliver to the defendant 1,500 head of cattle, but only delivered 1,000 head. Plaintiff replies, specifically denying the matters contained in the answer.

The sole issue presented in the court below was whether or not the plaintiff had contracted to make the deed of conveyance of the ranch, with the water-rights, and to deliver 1,500 or more head of cattle, and 18 head of horses, and to tally the cattle before the last payment. The cause was tried to the court, and the findings of the court were favorable to the plaintiff. Upon the findings, judgment was rendered

in favor of plaintiff and against defendant for the sum of \$15,000 and \$375 interest. To reverse this judgment, defendant prosecutes this appeal. The arguments of both parties are addressed exclusively to the issue as above set forth, and appellant urges that the evidence does not support the findings. The plaintiff contends that, at the time of the contract of purchase, he sold the cattle upon the range by the brands, and only such interest as he had in the ranch and water-rights, which was that of a squatter's interest.

It is wholly unnecessary for us to incorporate into this opinion a lengthy abstract of the testimony. The rule of this court is: "Where the evidence is conflicting, and the findings of the trial court are not manifestly against the weight of the evidence, the judgment will not be disturbed." *Ullman v. McCormic*, 12 Colo. 553, 21 Pac. Rep. 716. A careful review of the evidence satisfies us that there was sufficient proof to warrant the findings of the court. On the part of plaintiff, written and oral proof was introduced. The first exhibit is in the figures and words following: "Denver, Colo., April 14, 1886. It is hereby agreed by and between T. F. Maulding and the Wendling Cattle and Land Co. that T. F. Maulding shall purchase for said company, of John K. Woodburn, his (Woodburn's) undivided half interest in the Maulding & Woodburn Cattle and Ranch Property, situated in Mora, New Mexico, including all of said Woodburn's said interest in the O. K. brand, at a cost not exceeding thirty thousand dollars, and on the following terms, to-wit, fifteen thousand dollars to be paid by the said Wendling Cattle & Land Company on the first day of July, 1886, and fifteen thousand on the first day of October, 1886. T. F. MAULDING. By E. F. LAMB, President of Wendling Cattle & Land Company. [Corporate seal of the Wendling Cattle and Land Company.] Attest: S. S. SMYTHE, Secretary." Maulding testifies that, in pursuance of the above paper, he purchased Woodburn's undivided one-half interest for \$30,000, and agreed to pay, as that article states, \$15,000 on the 1st day of July, and \$15,000 on the 1st day of October, and that Woodburn turned over all of his interest in cattle of the O. K. and I O U brands, and all horses and ranches, executing a bill of sale therefor, and that he was satisfied at the time of the purchase that he received between 1,500 and 2,000 head of cattle, and 18 horses and 2 mules, and that the ranches were turned over to the company, since which time, and up to the present day, the defendant company has been in the possession of them; that, at the time of the purchase, he understood the character of the plaintiff's claim to the ranches, and it appears from his testimony that no agreement was entered into whereby plaintiff contracted to make deeds, or to deliver any precise number of cattle, or to tally the cattle. The bill of sale is in words and figures as follows: "Pinon Ranch, April 20, 1886. This is to certify that I have this day bargained, sold, and delivered to the Wendling Land and Cattle Company, of Colorado, for and in consideration of the sum of thir-

ty thousand (\$0,000) dollars, one-half payable July 1st, 1886, and the bal. payable October 1st, 1886, all of my undivided half interest in all cattle bearing O. K. and I O U brands, and all horses branded O. K. on left hip, now belonging to the firm of Maulding and Woodburn, of Mora Co., New Mex., also the ranch known as the 'O. K. Ranch,' situated about 14 miles from Wagon Mound, Mora Co., N. M., together with two more claims of permanent water, situate on same arroyo just below said ranch. JOHN K. WOODBURN." Maulding was the agent of the company to negotiate and complete this purchase. He was the manager of the company's interests in New Mexico, and his contract of purchase was subsequently ratified by the payment of the first \$15,000, and taking possession of the stock and ranches. No claim of the nature embraced in the answer appears to have been spoken of to plaintiff until after October 10, 1886. This is evidenced by president Lamb's letter of date September 20, 1886, to plaintiff, and is supported by the testimony of the plaintiff, and by circumstances of a corroborative character testified to by witnesses on the part of the defendant. Our conclusion is, the judgment should be affirmed.

PATTISON and REED, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is affirmed.

#### GULDAGER V. ROCKWELL.

(Supreme Court of Colorado. June 18, 1890.)

#### ACCORD AND SATISFACTION—RECEIPT—EVIDENCE.

In a suit by a widow for damages for causing the death of her husband, defendant, having pleaded accord and satisfaction, produced a paper signed by the parties, which, after reciting that defendant had bought certain horses and mules of plaintiff, surrendered certain notes of her deceased husband, and paid her certain moneys, states that these are "in full demands of every name and nature whatsoever from one party to the other." Plaintiff testified that at the time of signing the paper she knew she had a claim on account of the death of her husband, and intended to bring suit upon it, but did not mention it then because she did not want to. *Held*, a verdict was properly directed for defendant.

Commissioners' decision. Error to district court, Arapahoe county.

*F. A. Williams*, for plaintiff in error. *L. C. Rockwell*, pro se.

RICHMOND, C. In this action plaintiff in error seeks to recover from defendant in error damages for negligence, resulting in the death of her husband while in the employ of the defendant in error. The complaint, as amended, contains the usual and necessary averments, to which the defendant in error answers, setting up three defenses: *First*. A general denial. *Second*. Contributory negligence. *Third*. Accord and satisfaction. The second and third defenses are specifically denied in the reply of plaintiff in error. The cause was tried to a jury, and after all the evidence had been submitted on the part of both plaintiff and defendant the court instructed the jury that they should find for the defend-

ant. The main, and, indeed, the only, contention of plaintiff in error necessary for us to consider is whether the court erred in instructing the jury to return a verdict in favor of defendant. It appears that plaintiff in error's husband received the injury which resulted in death, and for which she seeks to recover damages, on the 8th day of January, 1883, and that this action was not instituted until the 1st day of June, 1886. In the trial of this cause, and in support of the defense of accord and satisfaction, the defendant introduced the following instrument of writing: "This is to certify that Mrs. Andrew Guldager and L. C. Rockwell have this 26th day of April, inst., had a full and final settlement, in which said Rockwell takes the mules and horses at \$350 cash, and surrenders to Mrs. Guldager two notes of Andrew Guldager, one for \$300, dated March 28th, 1881, due on or before one year after date, and another note due March 28th, 1882, for \$30, due on demand, which notes and interest amounted, on the 28th of March, 1883, to \$363, and Rockwell has also paid her two hundred and eighty-seven dollars and thirty-four one-hundredths (\$287.34) cash, which is in full demands of every name and nature whatsoever from one party to the other. April 26, 1883. L. C. ROCKWELL. MARY GULDAGER." Mrs. Guldager, in rebuttal, testifies: "I made no claim of Rockwell on account of the death of my husband. Did not mention it, because I did not want to. Did not consult anybody in regard to it until I returned to Denver. I knew all the time that I had a claim against him, and when I made this settlement, and signed the receipt, I expected to bring this suit. I did not say anything to Rockwell about it." The action of the court was based upon the fact that plaintiff in error admitted that when she signed the receipt she had full knowledge of the demand sued upon, and at the time of the execution of the written instrument for settlement she said nothing about it, and intended to bring this action. The plaintiff in error insists that it was the duty of the court to submit the cause of action to the jury, and contends that, where there is any evidence in support of a fact in issue, it must be submitted to the jury.

We cannot agree with this position. It is the peculiar province of the court to determine all questions of law arising before it, and the undoubted right of the jury to find all matters of fact when evidence legally sufficient for that purpose is submitted for their consideration, and the legal sufficiency is a question of law, of which the court is the exclusive judge. It is true, authorities can be cited in support of the doctrine that where there is any evidence, however slight, tending to support a material issue, the case must go to the jury, since they are the exclusive judges of the weight of the evidence. This doctrine, however, is denied in all the courts of England, as well as in the American federal courts, and in many of the courts of the American states. In 2 *Thomp. Trials*, § 2249, the author says: "The old rule is likewise exploded in several of the states whose courts are now in the constant hab-

it of ordering nonsuits against the consent of the plaintiff, of giving peremptory instructions to the jury to find for one party or the other, or of sustaining demurrers to the evidence in cases where there is confessedly some evidence supporting a material issue. \* \* \* Where the facts are undisputed or admitted, the only questions for decision are questions of law. In such a case it only remains for the judge to apply the law to the facts, and to decide whether they constitute a cause of action or defense. But where the facts are disputed, and the evidence in respect to them is conflicting, such is not the case." Id. § 2262. "The day has gone by when courts will refuse to enter a judgment of nonsuit upon motion of defendant, when the plaintiff has failed to introduce sufficient evidence in a case, tried by a jury, to support a verdict for the plaintiff, and in a case tried to the court to warrant a finding and judgment in favor of the plaintiff." *Tripp v. Fiske*, 4 Colo. 25; *Behrens v. Railway Co.*, 5 Colo. 400; *Schwenke v. Railroad Co.*, 12 Colo. 341, 21 Pac. Rep. 43. "It is proper for the court to grant a nonsuit, or direct a verdict for the defendant, where the issues involved in an action are negligence on part of the defendant, and contributory negligence on part of the plaintiff, when the evidence, considered in its most favorable light in behalf of the plaintiff, does not tend to show the defendant guilty of the negligence alleged against him, or when the evidence, thus considered, shows the plaintiff guilty of negligence which contributed to the alleged injury, and without which it would not have happened." *Lord v. Refining Co.*, 12 Colo. 390, 21 Pac. Rep. 148. In this case the plaintiff in error admitted that she knew she had a right of action against defendant in error; that she intended at some subsequent period to bring suit against him. Nevertheless, in the face of this knowledge, she made a settlement with the defendant in error, and signed the paper above recited, in which she admits the receipt of \$287.34 cash in full of demands of every name and nature whatsoever due from the defendant to her. The terms of the contract of settlement, taken by themselves, are susceptible of no other construction than that every claim which she and the defendant were cognizant of at the time of the settlement was fully and completely passed upon and settled on the 26th day of April, 1883, from which date, until the institution of this action, she never mentioned the fact that she had a claim against the defendant in error; never gave him any opportunity of settling such claim; and, indeed, so far as the record discloses, never, directly or indirectly, intimated that she had this right of action, or that she had intended to commence this suit. Treating this paper as a receipt, there can be no doubt that the plaintiff in error was at liberty to introduce evidence to show that she had signed it through mistake, or that it was obtained by fraud or misrepresentations on the part of the defendant in error. Although a written receipt may be contradicted, yet all the authorities acknowledge that it is evidence of the highest and most

satisfactory character, and to do away with its force the testimony should be convincing, and not left to mere impressions, and the burden of proof rests on the party attempting the explanation. This the plaintiff wholly failed to do. The term "all demands" is recognized in the books as being one of the most comprehensive that can be used. It may, it is true, be limited by other parts of the contract in which it is used: "But proving existing facts to aid interpretation is a different thing from proving mental intentions of parties." *Henry v. Henry*, 11 Ind. 236.

A careful examination of the entire record in this case fails to disclose any claim on the part of plaintiff in error that she accepted the paper through mistake, or upon misrepresentations made by the defendant in error, or that any fraud was practiced upon her. On the contrary, she asserts that she knew what she was doing. To destroy the effect of a receipt, such circumstances may be shown at law as would lead a court of equity to set aside a contract; such as fraud, mistake, or surprise. A receipt executed with a full knowledge of all the circumstances, and without mistake or surprise on the one part, or fraud or imposition on the other, is a good defense to a claim. *Fuller v. Crittenden*, 23 Amer. Dec. 364; *Bonnell v. Chamberlin*, 26 Conn. 487. Plaintiff's conduct in accepting money paid at the time, taking up the notes of her husband, surrendering the property, and executing the release in full of all demands, and accepting a release from the defendant in error in full of all demands against her and the estate of her husband, amounts to something more than an execution of a mere receipt. It is a contract executed upon due consideration. Plaintiff in error executed this agreement with full knowledge of the facts. The inference is fair that, when the paper was signed, she knew that defendant understood the transaction to be a complete settlement and discharge of all matters of difference which existed between them. It is true that the claim for damages sought to be enforced in this action was not mentioned by the parties. And it is contended that the minds of the parties never met, so far as this particular demand is concerned. Plaintiff, however, executed an instrument which declared that the parties had had a full and final settlement, and acknowledged the receipt of a sum of money in full of all demands whatsoever. The money was paid by defendant pursuant to the settlement, of which the written instrument was the evidence, and in compliance with its terms. It was received by plaintiff as the performance, on the part of defendant, of a contract which he understood to be a final discharge and satisfaction of all demands. Defendant understood the contract just as it reads. Plaintiff must be deemed to have understood its tenor and legal effect. Having contracted to settle all demands, the contract having been fully executed, she cannot now be heard to say that she did not settle all demands, but that, on the contrary, she reserved the particular demand in question. It is stated in 2 Greenl. Ev. § 28a, in the following language:

"The facts in respect to the arrangement or accord between the parties being ascertained, their effect is purely a question of law, and is not to be submitted to the jury. Thus, where A. and B. having mutual causes of action in tort, and meeting for the purpose of adjusting the demands of B. only, it was insisted by the latter that A. should pay him therefor a sum of money, and give him a receipt in full of all demands, which was accordingly done, but nothing was said about A.'s cause of action, it was held that this was a good accord and satisfaction of the demand of A. against B." *Vedder v. Vedder*, 1 Denio, 257; *Donohue v. Woodbury*, 6 Cnsh. 148; *McDaniels v. President*, 29 Vt. 230. The paper in question being a contract entered into by plaintiff deliberately, and with full knowledge of her rights, being sufficient in its terms to comprehend the claim in question, having been entered into for the purpose of settling all matters of difference, and being so fully understood by both parties, it is clear that its effect cannot be avoided except upon the ground of fraud or mistake. As there was no evidence upon which either fraud or mistake could be predicated, the court below properly held that the contract constituted a bar to the action. The judgment should be affirmed.

PATTISON and REED, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is affirmed.

WILLIAMS *et al.* v. CARPENTER.

(*Supreme Court of Colorado*. June 13, 1890.)

SPECIFIC PERFORMANCE.

1. C., who had acquired land by foreclosure of a trust-deed from defendant W., agreed to sell it to plaintiff on condition of a certain payment to C.'s credit at a bank. C. left with his attorney a deed to be delivered to plaintiff, together with the trust-deed and the note secured thereby, on plaintiff's making the payment to the bank. Plaintiff made the payment, and C. drew the money, and used it. C.'s attorney then refused to deliver the papers until a claim made by defendant J. on defendant W. should be settled. By agreement of plaintiff and defendant J., the papers were turned over to the latter to be held a reasonable time to enable him to make a settlement with W.; it being expressly agreed that, on payment to defendant J. of his claim on defendant W. in case the latter should be found indebted to him, the papers should be turned over to plaintiff. For two years said defendants made no attempt to settle. It appeared that W. was not indebted to J. The papers were put in the possession and under the control of defendant A. by defendant J., both of whom were insolvent, and refused to deliver the papers. *Held*, that plaintiff's right to the papers could be enforced by a suit in equity.

2. It is no defense to such suit that plaintiff's agreement with C. was not in writing, as the latter was the only one entitled to make the objection.

Appeal from superior court of Denver.

This suit was instituted by appellee, as plaintiff, against appellants and one Alfred J. Ware, as defendants. The gist of the complaint is that Jerome B. Chaffee, having acquired title to an undivided one-fourth interest in and to certain mining properties in this state through the fore-

closure of a trust-deed made by defendant Ware, to secure the payment of his note of \$2,000 and interest to appellant Joseph Williams and two others, on the 14th of July, 1885, agreed to sell the same to the appellee, Carpenter, on condition that he paid or deposited \$2,500 to the credit of said Chaffee in the First National Bank of Denver on or before August 14, 1885; that said Chaffee, on the same day, made a quitclaim deed of the premises, and placed it in the hands of his attorney, L. B. France, instructing him to deliver it, together with Ware's trust-deed and note, to appellee, upon compliance with the conditions of payment: that appellee made the deposit of \$2,500 to the credit of said Chaffee in said bank upon the 14th day of August, 1885, and that afterwards Chaffee drew out the money so deposited, and appropriated the same to his own use; that appellant received from said bank a certificate showing such deposit, and exhibited the same to France, and demanded the deed and other papers; that France refused to deliver them until a claim made by Williams upon Ware should be settled, and thereupon appellee agreed with the defendant Joseph Williams that the deed of Chaffee and the trust-deed and note should be turned over by said France to Joseph Williams, to be held by the latter a reasonable time to enable Williams to effect a settlement with Ware of certain controversies then existing between them; that the papers were delivered by France to Williams in pursuance of said agreement, and that Williams accepted and retained the same "upon the express condition that the same should be turned over to the plaintiff upon the payment to him, the said Williams, of his claim or demand upon said Ware, in case it should appear that the said Ware was indebted to the said Williams." It is also averred that neither Williams nor Ware have made any effort to effect a settlement, although often requested so to do by appellee, but have allowed an unreasonable time to elapse since the notes and deeds were so deposited with Williams without any attempt at such settlement; that Ware was not at the time of said deposit, and is not now, indebted to Williams; that said Williams claims that the papers are now held by the defendant Anna Williams, and that both said defendants refuse to deliver them to plaintiff, although often requested so to do; that they, and each of them, are insolvent, and unable to respond in damages to the appellee for wrongfully withholding the delivery of the papers; and that Chaffee has died since they went into the hands of Williams. The defendant Ware made default. The defendants Joseph and Anna Williams joined in an answer, denying the agreement set out in the complaint, and alleging that at the date of Ware's note appellants Joseph Williams, Charles S. Abbott, and John Sanderson were mining on the premises under a license from Ware, the sole owner of the properties, and that Ware, being pressed for money to save the same from a forced sale, applied to Williams for a loan of \$2,000, offering to him as an inducement one-fourth of the proceeds of a sale of the whole property, when



the same could be sold, in consideration of which Williams loaned the \$2,000, taking Ware's note and the trust-deed on one-fourth interest in the properties; that Williams assigned the same to Jerome B. Chaffee, from whom he had borrowed the \$2,000, as his security for the money. It is also alleged that Chaffee held the title derived through the foreclosure for the benefit of Williams in accordance with the arrangement made with Ware at the time of the loan, and that this was one of the conditions of the sale by Chaffee to appellee. Defendants further aver that the payment or deposit of \$2,500 and the settlement of said Williams' claim were to be made within 30 days from the 14th day of July, 1885, and that the quitclaim deed of Chaffee was left with his attorney, L. B. France, to be delivered to the appellee only upon condition that the payment or deposit and settlement were made within said 30 days; that appellee did not pay or deposit the said \$2,500, nor settle the claim of said Williams, within the 30 days; that after the 30 days appellee demanded the deed and papers of France, who refused to deliver them, for the reason that Williams' claim had not been satisfied; that thereafter France, with the consent of appellee, turned the papers over to Williams to be held by him as his own security for the satisfaction of his claim under the arrangement with Ware; that his claim has not been satisfied or released; and that the appellant Anna Williams holds the papers as a marriage gift from Joseph Williams of his interest in the properties. Upon these issues the case was tried to the court. As the result of such trial, the issues were found in favor of appellee, and judgment was entered accordingly, requiring the defendants Joseph and Anna Williams to immediately surrender and deliver up to the plaintiff the said deed of Chaffee and the note of Ware which were then in the possession of and under the control of the defendant Anna Williams. Judgment was also given the plaintiff for costs, and an order made that execution issue therefor. Appellants bring the case here for review upon appeal.

*J. A. Bentley*, for appellants. *M. B. Carpenter* and *C. W. Wright*, for appellee.

HAYT, J., (after stating the facts as above.) It is contended by appellant that if upon the facts stated in the complaint appellee is entitled to any relief whatever, it is not the relief decreed by the court below. As we understand his position, it is that if appellee is entitled to the deed of his property, his action should have been in the nature of replevin, rather than the equitable action pursued in this case. Since this case was decided below, the cause of *Henderson v. Johns*, 13 Colo. 280, 22 Pac. Rep. 461, has been determined by this court. It was there held that the remedy at law which defeats an action in equity must be full, adequate, and complete, and that equity will, at the suit of persons legally entitled to them, decree the delivery of deeds and other instruments in writing, since damages are inadequate, and the legal actions for the recovery of possession are incomplete. In the case at bar

the insolvency of each of the defendants is alleged and proved. Under our practice, an action for claim and delivery is substituted for the common-law action of replevin, and the judgment must be for the return of the property, or, in the alternative, for the value thereof, in case a delivery cannot be had. Under the circumstances disclosed in this case, the alternative judgment provided for by statute would be of no avail. The practice in equity of compelling the delivery to the lawful owners of deeds and other written instruments of title rests upon sound reason, and is well supported by authority. 1 Pom. Eq. Jur. § 184 et seq., and cases cited. In section 185 the writer says: "Where the final relief is substantially a recovery of chattels, the jurisdiction embraces suits to compel the restoration or delivery of possession of specific chattels of such a peculiar, uncommon, or unique character that they cannot be replaced by means of money, and are not susceptible of being compensated for by any practicable or certain measure of damages, and in respect of which the legal actions of replevin, detinue, or trover do not furnish a complete remedy. This particular exercise of the jurisdiction extends, for a like reason, to suits to compel the delivery of deeds, muniments of title, and other written instruments, the value of which cannot, with any reasonable certainty, be estimated in money." If plaintiff has shown a clear right to the deed in controversy, we think his right of recovery cannot be defeated, for the reason that he has resorted to an action in the nature of a suit in equity, and not an action at law.

This brings us to the consideration of the merits of the case. The court below found that the allegations of the complaint were established by the evidence, and that the matters set up by way of defense were not proven. These findings seem to be fully supported by the evidence. It is said, however, that the agreement between Carpenter and Chaffee was in reference to an interest in lands, and therefore void, for the reason that it was not in writing. Under the circumstances, this is a matter of no consequence. Chaffee, the only party entitled to make this objection, did not interpose any objection to the delivery of the deed for this reason, and the only objection made to such delivery by Mr. France, the attorney and agent of Mr. Chaffee, grew out of the claim advanced by Chaffee's friend Williams. Whether or not France should have refused to deliver the deed for this reason is unimportant, as this claim of Williams' was arranged satisfactorily to both Williams and Carpenter; and thereupon France delivered the deed to Williams with the express understanding and agreement that Williams was to hold the same only for the purpose of effecting a settlement with Ware, when the deed was to be delivered to appellee. At the time of the trial, although more than two years had elapsed since the papers were delivered by France to Williams, the latter had made no effort to effect a settlement with Ware. In addition to this, the evidence shows, and the court below found, that Ware was

not indebted to Williams. Under these circumstances, we think the decree of the court below was right, and should be sustained.

The heirs at law of Chaffee are in no way interested in this controversy, and were certainly not necessary parties to the suit. Chaffee, in his life-time, parted with his entire interest in the property, and received the consideration therefor. *Great West. Min. Co. v. Woodmas of Alston Min. Co.*, 12 Colo. 46-65, 20 Pac. Rep. 771. The judgment must be affirmed.

(14 Colo. 441)

**ROBERTSON V. O'RILEY et al.**

(*Supreme Court of Colorado. June 18, 1890.*)

**APPEAL—NOTICE—WAIVER.**

*Sees. Laws Colo. 1885, p. 159*, provides that, if an appeal from the county court to the district court is not taken on the same day on which judgment is rendered, the appellant shall, within five days after the appeal is taken, serve notice thereof upon the appellee, and that if such notice is not given the appellee may have the judgment of the county court affirmed, or the appeal dismissed. *Held*, that the appearance of an appellee in the district court for the purpose of having the cause set for trial, and of arguing a motion for a continuance, constituted a waiver of such notice.

Commissioners' decision. Error to district court, Pitkin county.

*Edward T. Taylor, Porter Plumb, and J. W. Taylor*, for plaintiff in error. *Downing & Franklin*, for defendants in error.

**RICHMOND, C.** This was an action originally commenced in the county court of Pitkin county by O'Riley and Babcock, plaintiffs below, and judgment obtained therein against Robertson, defendant below, for the sum of \$792. Some time thereafter, defendant perfected an appeal to the district court. On the 19th of July, 1886, plaintiffs filed a motion in the district court to affirm the judgment of the county court, which motion was granted. Thereupon defendant prosecuted this writ of error. The record in this case shows that the appeal had been taken from the county court to the district court, transcript of record filed, and, at a regular term succeeding the appeal, plaintiffs and defendant appeared by their attorneys, and that at the February term, 1886, of the district court, at the request of J. M. Downing, attorney for plaintiffs, the cause was regularly set for trial, and thereafter, during that term, the defendant filed a motion for a continuance thereof until the next term of court; that said motion was during said term regularly heard by the court, and on the hearing thereof the defendant appeared by Plumb & Moore, his attorneys, and the plaintiffs appeared by Downing & Franklin, their attorneys; that said motion of continuance was allowed until July term, A. D. 1886; that on the 18th day of July, 1886, being one of the regular term days of said July term, said action was again regularly set for trial; and that thereafter plaintiffs submitted their motion to affirm said judgment because the appellants had failed to serve upon the appellees or their attorneys a notice of the appeal having been taken, as provided by section 4 of an act relating to appeals from

county courts to district courts. *Sees. Laws 1885, p. 159.*

There are but two assignments of error: *First*, the court erred in sustaining the motion of the plaintiffs, filed July 19, 1886, to affirm the judgment of the county court in this action; *second*, the court erred in rendering judgment for said plaintiffs without first giving the defendant an opportunity to try the issue joined in said action by a regular trial in said district court. Both errors can be considered together.

The section of the Session Laws referred to reads as follows: "If the appeal be not taken on the same day on which the judgment is rendered, the appellant shall serve the appellee, or his attorney of record, within five days after the appeal is taken, with a notice, in writing, stating that an appeal has been taken from the judgment therein specified, which notice shall be served by delivering a copy thereof to such appellee, or his attorney of record. If the appellant fail to give notice of his appeal when such notice is required, the appellee may, at any time before such notice is actually served, and after the time when it should have been served, have the judgment of the county court affirmed, or the appeal dismissed, at his option." The language of this section is simple, and easily understood. Under it the unsuccessful party in the county court has a right of appeal, which may be taken on the same day on which judgment is rendered, or may be taken at some subsequent period of time. But, when taken on any day other than the day on which the judgment is rendered, it is incumbent upon him to serve the appellee or his attorney of record, within five days after the appeal is taken, with a notice, in writing, stating that an appeal has been taken from the judgment therein specified; and in case he shall fail to give such notice the appellee is entitled to appear in the district court, and have the judgment of the county court affirmed, or the appeal dismissed. It is admitted that the appeal was not prayed on the day on which the judgment was rendered, but was taken within the time prescribed by the statute, and that no notice was served upon the appellee or his attorney. It is contended that the appearance of the appellee, and the setting of the cause for trial, participating in the motion for continuance, and at a subsequent term appearing and setting the cause for trial, was a waiver of the service of notice required by the section referred to. The right of appeal from the county court to a district court is unquestioned. If the appeal was not perfected, the district court would have acquired no jurisdiction to affirm the judgment of the county court. Consequently, it is apparent that the jurisdiction of the district court over the subject-matter of the action in no way depends upon the service of the notice upon the opposite party; that it confers upon the opposite party a privilege of a personal character, which he may exercise at his option, of dismissing the appeal, or affirming the judgment,—a privilege which he waives when he enters a general appearance in the cause, and participates in

the action of the court in setting the same for trial *de novo*. There can be no question but that, had the attorney appeared at the first term after the appeal had been taken, and then and there interposed his motion for dismissal or affirmation of the judgment, the court would have been warranted in granting such motion. This has been recently determined by this court in the case of *Hunt v. Arkell*, 13 Colo. 543, 22 Pac. Rep. 826, and also in *Law v. Nelson*, 14 Colo. —, ante, 2. It would be useless to cite the innumerable authorities in support of the proposition that plaintiffs' appearance in the district court for the purpose of having the cause set for trial, and arguing the motion for a continuance, was a general appearance, and that, by so appearing, they waived the personal privilege of having the judgment affirmed for want of service of notice of the appeal. Their right to have the appeal dismissed, or judgment affirmed, depended entirely upon the want of service of such notice. Their appearance, so made, waived the notice, and deprived them of the right to make the motion.

Counsel argue that the legislature evidently intended that this provision requiring notice of appeal to be served should be rigidly enforced. "It doubtless required the service of such notice as one of the steps to be taken by appellant in the due prosecution of his appeal." This position is not tenable. The appeal is fully prosecuted, and taken without notice. Else, as has heretofore been said, the district court could by no method obtain jurisdiction to affirm the judgment.

Both parties to this action undoubtedly overlooked the provisions of the section under discussion; the one to a period of time when it was too late for him to invoke the privileges conferred, and the other to a period of time within which he was liable to lose his right to a trial *de novo* in the district court. While it is true that this court has not hitherto passed directly upon the question here involved, it is nevertheless clear that plaintiffs waived their right to the notice of the appeal by a general appearance in the cause in the district court for a purpose other than the enforcement of their statutory privilege of having the judgment affirmed, or the appeal dismissed. Hence the district court erred in affirming the judgment of the county court. The judgment should be reversed, and the cause remanded for further proceedings.

PATTISON and REED, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is reversed, and the cause remanded.

#### STRAAT v. BLANCHARD.

(Supreme Court of Colorado. June 20, 1890.)

##### APPEAL—NOTICE—BOND—DISMISSAL.

1. An appeal is taken, within the meaning of section 4 of the act of 1885, relating to appeals from county to district courts, when the appeal-bond is filed and approved.

2. If appellee gives written notice to appellant that he will apply for dismissal of the appeal, or

affirmance of the judgment, under said act, and follows it up with diligence, a subsequent notice by appellant that the appeal has been taken will not be allowed to defeat the statutory rights of appellee.

HAYT, J., dissenting.  
(Syllabus by the Court.)

Appeal from district court, Lake county.  
*J. E. Havens*, for appellant. *J. B. Blissell*  
and *A. T. Gunnell*, for appellee.

ELLIOTT, J. The uncontroverted facts appearing of record in this case may be summarized as follows: On August 27, 1887, judgment was rendered by the Lake county court; and on the same day, in open court, appellant gave notice of appeal to the district court. On September 3d, by agreement of parties, the court allowed appellant 20 days in which to file his appeal-bond. On September 22d the appeal-bond was filed and approved in the clerk's office of the county court. On September 29th the transcript of the case was filed in the clerk's office of the district court. On September 30th, counsel for appellee served appellant with written notice that they would on October 3d move the district court to "affirm the judgment heretofore rendered in said cause, for the reason that no notice of an appeal has been served on the plaintiff or his attorneys, as by law required." On the same day, September 30th, but not until after the foregoing notice had been served, counsel for appellant served appellee with notice that the appeal in said cause had been "taken and perfected." On October 3, 1887, the motion of appellee, being submitted to the district court, was, upon due consideration, sustained, and the judgment of the county court affirmed. To reverse this judgment, this appeal is prosecuted.

The questions presented by this appeal involve the further consideration of the act relating to appeals from county to district courts. Sess. Laws 1885, p. 158. In *Hunt v. Arkell*, 13 Colo. 543, 22 Pac. Rep. 826, and in *Law v. Nelson*, ante, 2, (decided at this term,) section 4 of said act has been construed in relation to the facts and circumstances of those cases. In those cases, it was contended that the appeal should be considered "taken," so as to dispense with the written notice, when the record shows that the appeal was prayed and allowed on the same day on which judgment was rendered. In this case the contention is that the appeal should not be considered taken until the transcript from the county court is actually filed in the district court. Hence, it is argued that the five days in which appellant had to serve the written notice under the statute did not begin to run until September 29th. In other words, that no notice was required to be given, so long as some act remained to be performed in connection with the taking of the appeal. A brief consideration of the object of the statute will show that the contention of appellant in this case is as untenable as in the former cases. The object of the statute was to mitigate the evil of dilatory appeals. It does not follow, because an appeal is prayed and allowed, that the same will be taken or perfected. The filing and ap-

proval of the appeal-bond suspends the rights of the prevailing party in the county court, and gives the district court jurisdiction. Hence the notice is required to be given, not before, but immediately after, the filing and approval of the bond; that is, when the appeal begins to operate adversely to appellee, so that he can without delay take such steps as he deems proper to dispose of the appeal. To hold that the notice need not be given until the transcript be filed in the district court would be to perpetuate and augment the very evil which the statute was designed to remedy. We see no reason to doubt the correctness of the former decisions that the time when the appeal is to be considered taken, within the meaning of section 4 of the act, is when the appeal-bond is approved and filed.

It is further contended by counsel for appellant that, since notice in writing, stating that the appeal had been taken, was actually served upon appellee before he obtained the judgment of affirmance, he was not entitled, according to the literal terms of the statute, to have such judgment rendered. If the statute be thus construed, the consequences would be that no appellee would be able to assert his rights thereunder, unless allowed to do so without giving notice; for the reason that every appellant, upon receiving notice of the intended application for judgment of affirmance or dismissal, would be able to give the written notice required by section 4 before the judgment of affirmance or dismissal could be rendered. Such a construction would nullify the statute altogether, or it would involve the absurdity that a judgment of affirmance or dismissal, obtained *ex parte*, is less vulnerable than one rendered upon due notice. The statute under consideration does not require the previous filing of a written application to dismiss the appeal or to affirm the judgment; but the Code does require the previous service of a written notice of such application. *Cates v. Mack*, 6 Colo. 401. Hence, if appellee gives such notice and follows it up with diligence, a subsequent notice by appellant that the appeal has been taken will not be allowed to defeat the statutory rights of appellee; but his application will be regarded as having been made when he took the first necessary step, by the service of the notice to that end. The statute may be a harsh one, as counsel say, but an appeal is the creature of positive law. It is a special privilege, subject to statutory regulations; and those who invoke the benefit of the statute must strictly and diligently pursue its requirements, or they cannot enjoy the privilege. *Vigilantibus, et non dormientibus, servat lex*. The judgment of the district court is affirmed.

HAYT, J., (*dissenting*.) The district court, upon appeal, affirmed the judgment of the county court upon motion, without giving appellant any opportunity to have his case heard upon its merits. Ought such action to be sustained? This is the sole question presented for our determination upon this record. It is conceded that no authority can be found in support of

the action of the district court, unless it grows out of the following section of the statute relating to appeals to that court from the county court: "Sec. 4. If the appeal be not taken on the same day on which the judgment is rendered, the appellant shall serve the appellee, or his attorney of record, within five days after the appeal is taken, with a notice, in writing, stating that an appeal has been taken from the judgment therein specified, which notice shall be served by delivering a copy thereof to such appellee, or his attorney of record. If the appellant fail to give notice of his appeal when such notice is required, the appellee may, at any time before such notice is actually served, and after the time when it should have been served, have the judgment of the county court affirmed, or the appeal dismissed, at his option." *Sess. Laws 1885*, p. 159. In this case the notice of the appeal had been actually served before any steps were taken in the district court by appellee for the purpose of having the judgment affirmed. Hence, it is clear that, by the literal terms of the act, appellee was not entitled to the judgment of affirmance. It is claimed, however, that appellee was within the spirit of the provision. The statute is a harsh one, penal in character, and ought not, in my judgment, to be thus extended by construction. Appellee is not required to give notice of his intention to take an appeal. The notice must be to the effect "that an appeal has been taken from the judgment therein specified." From this it is apparent that the giving of notice is not a necessary step in perfecting the appeal. The appeal was perfected when the appeal-bond was approved and filed. This has been repeatedly announced by this court. The jurisdiction of the district court to affirm the judgment can only be maintained upon the theory that the appeal had been perfected. Therefore, the rule requiring statutes providing for appeals to be strictly construed against the appellant has no application. The appeal in this case having been properly perfected, appellee, before he was entitled to have the judgment affirmed, or the appeal dismissed, for failure to give the required notice, must show his right to such a judgment affirmatively, and ask that it be entered. The court cannot act *sua sponte*. The failure of notice must be shown by affidavit, unless waived; and appellee must, in some appropriate way, give notice to the court of his intention to take advantage of the statute. If he proceeds without doing this, his right is thereby waived. *Robertson v. O'Riley*, 14 Colo. —, ante, 560. He must also indicate to the court his election as to whether he will have the appeal dismissed, or the judgment affirmed. In the case of *Law v. Nelson*, ante, 2, the action of the court was based upon a written motion supported by affidavit; and the convenience of such a practice is apparent. Until appellee signifies his intention to avail himself of the statute by filing a motion or affidavit, or in some way invoking action of the court in his favor, appellee should be allowed to serve his notice of appeal, and thereby prevent summary action of the court

against him. By the terms of the act, appellee's right to have the appeal dismissed or the judgment affirmed, at his election, is made to depend upon his moving in the matter before the notice of the appeal has been served upon him. The appellant is not only given five days in which to serve such notice, but he may do so at any time before appellee becomes an actor, and signifies his intention to claim the benefit of the statute. The written notice of motion provided by the Code has, I think, always been construed to require notice simply of the time set for the hearing of the motion; and appellee ought not to be allowed to cut off appellant's right to give notice of the appeal, and thereby deprive him of an opportunity to have his case tried upon its merits, by anything short of an application or notice made or filed with the court. No good reason is perceived why a notice given out of court, by appellee, of his intention to make such an application at a future time, should operate to preclude appellant from giving notice of the appeal, and subject him to the penalty of the statute. By permitting appellants to give the notice of appeal at any time before steps have been actually instituted in the district court for the purpose of having the appeal dismissed, or the judgment affirmed, full force and effect is given to the statute. In this state, county judges are not required to be learned in the law. In fact, these offices are not infrequently filled by those who have never been admitted to the bar. And no strained construction should be placed upon the statute that will result in preventing a review by appellate courts of the merits of cases determined before these tribunals. The conclusion reached by the majority of the court, in my judgment, is not warranted by the language of the act, and ought not to be upheld.

#### TODD V. DEMEREE.

(*Supreme Court of Colorado. June 18, 1890.*)

##### APPEAL—REVIEW—WEIGHT OF EVIDENCE.

In determining the correctness of a verdict on the evidence, weight should be given the fact that on two previous trials the finding had been the same.

Commissioners' decision. Appeal from district court, Douglas county.

*Browne & Putnam*, for appellant. *William Dillon and Markham & Dillon*, for appellee.

REED, C. Appellee brought suit against the appellant to recover damages for an alleged breach of contract. The parties entered into a written contract on May 1, 1885, whereby it was agreed that appellee was to occupy a farm of the appellant for one year, raise the crops for a certain share, care for and milk the cows, make butter, of which he was to have one-half, and was to have one-third of the pigs and calves born on the place during the year. It appears from the evidence that appellee put in some crops, nearly 30 acres; that he tended and cared for the crops, milked the cows, and made the butter (which was divided as made) until about the 1st of July, some two months after he entered

upon the property, when trouble arose between the parties, and appellant caused a written notice to be served upon the appellee ordering him to vacate and leave the premises, which he did, leaving and abandoning the place. He received no share of the crops when matured, nor increase from hogs and cows. The suit was first brought before a justice of the peace, where plaintiff obtained a judgment for \$182. An appeal was taken to the county court, the case tried to a jury, resulting in a verdict for plaintiff for \$75, which was set aside, and a new trial granted. The case was then taken by change of venue to the district court, tried to a jury, where a verdict of \$82 in favor of plaintiff was found, and judgment entered for that amount, from which this appeal was taken. The appeal having been taken under the act of 1885, this court can only examine and review such parts of the record as are brought up in the abstract, there being two,—one by the appellant, and one, called "an amended abstract," brought up by appellee. Sufficient appears to show that the testimony was very voluminous, and upon some questions quite contradictory and confused. From it the jury were warranted in finding that the plaintiff had violated his contract of lease, and terminated the tenancy of appellee, and that appellee was entitled to compensation; and the fact that upon two previous trials the finding had been the same should not be disregarded in determining the correctness of the verdict upon the evidence. Neither under the facts as found nor the circumstances as shown by the evidence can the amount of damages allowed by the jury be considered excessive. It is assigned for error that the court improperly admitted and excluded testimony, and that the instructions of the court were erroneous. A careful examination of the abstracts fails to disclose any error to the prejudice of appellant, either in the admission or rejection of evidence. Certain portions of the charge to the jury, if taken alone, might be open to objection and criticism; but taken as a whole it was substantially correct, and was fully as favorable to appellant as was warranted by the circumstances and facts. We think the judgment should be affirmed.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is affirmed.

#### BOARD OF COUNTY COMMISSIONERS OF PUEBLO COUNTY V. WILSON.

(*Supreme Court of Colorado. June 18, 1890.*)

##### TAXATION—REMEDIES.

1. Gen. St. Colo. c. 94, § 23, provides that horses and cattle running at large, and not being worked, shall in all cases be returned and assessed in the county in which they are being herded and kept on the 1st day of May in each year. Section 24 provides that every assessor shall assess all personal property situate or being in his county on the 1st day of May. Held, that cattle and horses purchased outside of the state by residents, and driven into the state for purposes of pasturage, in October of a certain year, are not liable for the taxes of such year, notwithstanding the provision of section 23, that

when any stock is driven into a county for the purpose of grazing therein, at any time previous to the last day of December in any year, it shall be liable for all taxes leviable in that county for that year, the same as if it had been in the county at the time of the annual assessment.

2. One who appeals from an assessment of taxes to the board of county commissioners, under Gen. St. c. 94, § 62, on the ground that the taxes are illegal, is not thereby precluded from resorting to the courts to test the validity of such taxes.

Commissioners' decision. Appeal from district court, Arapahoe county.

*C. J. Hart*, for appellant. *Patterson & Thomas*, for appellee.

REED, C. In this case there is no controversy in regard to the facts; the questions presented are purely those of law. In September, 1884, appellee purchased in the state of Kansas 6,853 head of cattle and 700 horses, which were driven into the county of Pueblo, arriving about October 1st, and pastured until January 1, 1885. On the 27th day of January, 1885, the treasurer of the county notified appellee that he had assessed such stock for taxes for the year 1884, under section 23, c. 94, Gen. St.; that such taxes amounted to \$3,199.16, and if not paid by February 1, 1885, he would be compelled to proceed under the law to collect the same. From this assessment appellee appealed to the board of county commissioners, claiming that the number of cattle and valuation *per capita* of both cattle and horses were too great. Upon a hearing, the number of cattle was greatly reduced, and the valuation of the stock to such an extent that the amount of the taxes was reduced to \$1,227.33; which sum was paid by appellee under a written protest, alleging that the assessment was made irregularly, and without lawful authority. This suit was brought to recover the money so paid, with the interest. The cattle and horses had not been regularly assessed for taxes for the year 1884 in any other county of the state, and appellee had not paid taxes on the property for the year 1884 in any county in the state. The answer admits substantially the facts stated in the complaint, and for a defense sets out the appeal from the assessment of the treasurer to the board of county commissioners, and avers that the finding of the county commissioners on the appeal was final and conclusive as to appellee. Trial was had to the court without a jury. The court found in favor of appellee, and rendered judgment for the amount of money paid, with the interest. The part of section 23, c. 94, Gen. St., under which the assessment in this case was made, is as follows: "When any stock is driven into a county for the purpose of grazing therein, at any time previous to the last day of December in any year, it shall be liable to be assessed for all taxes leviable in that county for that year the same as if it had been in the county at the time of the annual assessment; and it shall be lawful for the proper officers to assess and collect the same at any time after the usual time of assessment and collection: provided, that such stock has not been regularly assessed in some other county of the state for that year; and it shall be the

duty of the county assessor, when required by the person having such stock in charge, to give a certificate of assessment, stating the number, kind, and value of stock assessed, and such certificate shall be sufficient evidence of a legal assessment of such stock for that year."

The other sections of the statute necessary to be considered in this case are: "Sec. 22. All personal property shall be listed in the county where it shall be on the first day of May of the then current year; but if the owner resides out of the state, or fails to return his property to the assessor, it shall be listed and taxed where it may then be: provided, that horses, mules, cattle, and sheep running at large, and not being worked, shall in all cases be returned and assessed in the county in which they are being herded or kept on the first day of May in each year." "Sec. 24. Every assessor shall assess all personal property situate or being in his county on the first day of May in each year. \* \* \* Sec. 26. It shall be the duty of every person owning or having charge of property in this state subject to taxation to make out and deliver to the assessor, on or before the twentieth day of May in each year, a correct list of the same, as required by law. \* \* \* Sec. 46. If by any means any property, real or personal, shall be omitted in the assessment of any year or series of years, and not put upon the assessor's book, the same, when discovered, shall be assessed by the assessor for the time being, and placed upon his book before the same is returned to the county clerk. \* \* \* Sec. 97. When the treasurer of any county, after the tax-list is committed to him, ascertains that any real estate, horses, mules, asses, cattle, sheep, goats, swine, or other personal property then in his county are omitted from the tax-list, and has reason to believe that such personal property has not been taxed in any other county for that year, he shall forthwith proceed to list, value, and assess said property in the same manner that the assessor or county clerk might have done, and shall enter such assessment in his tax-book, following the levies made and delivered to him by the clerk, and such entries shall be designated as additional assessments, and the taxes so levied and assessed by the treasurer shall be as valid for all purposes as if the assessment had been made by the assessor, anything in this act to the contrary notwithstanding."

Sections 22 and 24 are clear and unequivocal. The 1st day of May of each and every year is fixed as the date for the assessment of all personal property, and all personal property is to be by the latter section assessed as of that date. The liability of the property to taxation depends upon its *status* at that time, and particularly so in the class of personal property assessed in this instance. The language of section 22 is: "Provided, that horses, mules, cattle, and sheep, running at large and not being worked, shall in all cases be returned and assessed in the county in which they are being herded or kept on the first day of May in each year." The statutes of different states differ as to

the date, some taking one date, some another; but in every instance the statutory date fixed is taken as the criterion to determine what personal property is taxable, and to whom it should be taxed. Some arbitrary rule of date has been found necessary, and although, perhaps, in many instances, working hardship and inequality, to some extent, in taxation, it has been found the best regulation that could be established by law. In *Shaw v. Dennis*, 5 Gilman, 418, it is said by the court: "In the imposition of taxes, exact and critical justice and equality are absolutely unattainable. \* \* \* The proposition is Utopian. The legislature must adopt some practical system." This practical system, adopted in every state, is the one above indicated, fixing a definite time in each year when property shall be listed for taxation. In *Cooley on Taxation* (1st Ed. 261) it is said: "Every person is therefore to be taxed for the year upon his personalty estimated as of the time of the assessment, and every parcel of land according to its value at that time. Subsequent changes cannot be noticed until another assessment." See *Hunnewell v. Cass Co.*, 22 Wall. 477; *People v. Kohl*, 40 Cal. 127; *State v. Hardin*, 34 N. J. Law, 79; *Harman v. New Marlborough*, 9 Cush. 525; *Field v. City of Boston*, 10 Cush. 65; *Clark v. Norton*, 49 N. Y. 243; *Overing v. Foote*, 65 N. Y. 263; *State v. Jersey City*, 44 N. J. Law, 156; *De Arman v. Williams*, 93 Mo. 158, 5 S. W. Rep. 904.

Under the authorities above cited, we are clearly of the opinion that section 23, relied upon by appellant as the authority supposed to warrant the proceeding of the county treasurer in the assessment, cannot be construed to sustain the action of the county. In order to render the personal property (in this case cattle and horses) liable for taxes for the year 1884, it must have been *in esse* as property within the state, and have become a part of the mass of personal property subject to the jurisdiction of the state on the 1st day of May of that year. The most ancient well-defined rule for the examination and construction of statutes is that of Lord Coke: "The best expositor of all letters patent and acts of parliament are the letters patent and the acts of parliament themselves, by construing and comparing all the parts of them together." In *Com. v. Duane*, 1 Bin. 601, it was said "that, in construing any part of a law, the whole must be considered; the different parts reflect light on each other; and, if possible, such a construction is to be made as will avoid any contradiction or inconsistency." In *Com. v. Alger*, 7 Cush. 53, that, "in putting a construction upon any statute, every part shall be regarded, and it shall be so expounded, if practicable, as to give some effect to every part of it." In *Attorney General v. Railroad Co.*, 2 Mich. 138, it is said: "It is a cardinal rule that, in the construction of a statute, effect is to be given, if possible, to every clause and section of it; and it is the duty of courts, as far as practicable, so to reconcile the different provisions as to make the whole act consistent and harmonious."

By applying these well-settled rules of

construction to the statute in question, and holding, as we must, that the subsequent sections were intended to refer to and be controlled by section 22, and that the horses and cattle referred to in section 23 and subsequent sections, for the purpose of taxation, were those that were in the state and properly subject to taxation on the 1st day of May of each year, we obviously reach and adopt the intention of the legislature, and harmonize the different provisions so as to enable all to stand; but if we adopt the construction of the twenty-third section contended for by appellant, and hold the section to include for purposes of taxation cattle and horses purchased abroad and driven into the state and county by residents of the state between the 1st day of May and the last day of December of each year, we render section 23 void and inoperative for violating the provisions of the constitution, and the fundamental principle of equality in taxation that must underlie every system of taxation to render it constitutional and operative. When, as in this case, it is by its terms applicable to one class only of personal property brought into the state between those dates, and exonerates all other personal property brought into the state from the burden of taxation, the discrimination is so obvious that its unconstitutionality is at once apparent.

There is another view of the law equally fatal to the construction sought by appellant. The money and credits of appellee were properly subject to taxation on the 1st day of May of that year, and he was required to return them to the assessor under oath, which he presumably did. Four months after, he changes the character of his personalty by investing the money in cattle in an adjacent state, which are driven into this state and again taxed, amounting to double taxation of the same business capital for the same year. It is needless to say that such results cannot be tolerated, and that the legislature neither intended nor contemplated them. The language of section 23 is: "When any stock is driven into a county for the purpose of grazing therein at any time previous to the last day of December in any year, it shall be liable to be assessed: \* \* \* provided, that such stock has not been regularly assessed in some other county of the state for that year." The words "regularly assessed" would fairly indicate that the legislature in this section had in view the former section, and intended to restrict the right to assess the stock that was regularly assessable on the 1st day of May to prevent evasion of the payment of taxes by parties who might dishonestly fail to return the stock, and shift it from place to place, with intention of defrauding counties and the state. The section does not in terms make cattle and horses purchased in another state, and brought in before the last day of December, liable to tax. Such construction can only be by inference or implication from the language used. The legislature of the state of Kansas in 1881 passed an act subjecting cattle and horses driven into that state between the 1st day of March and the 1st day of December to



taxation; the first of March being in that state the date of the annual assessment. In *Graham v. Commissioners*, 31 Kan. 478, 2 Pac. Rep. 549, the court, by BREWER, J., declared the statute invalid, and "a departure from the constitutional rule of uniformity in matters of taxation,"—a conclusion we should be compelled to adopt in regard to section 23, should we adopt the construction insisted upon by appellant. There is no general statutory provision for taxing personal property brought into the state between the first of May and the last of December. By the construction sought for this section, only a particular kind or class of personal property is sought to be taxed, while all other kinds are exonerated,—a clear and palpable violation of a fundamental constitutional principle. We cannot see how appellant can derive any aid from sections 46 and 97. They in direct terms apply to property omitted from the assessment roll, obviously referable directly to property that was in the state, and legally liable to taxation, at the annual assessment on May 1st. Appellant contends in argument that appellee, by availing himself of appeal to the board of county commissioners, allowed by section 62, was concluded by its decision, and could not resort to the courts. We do not think this position tenable. If the right to tax the property was unquestioned, and the only questions were those of valuation and amount of tax, we might hold their action conclusive; but, as no such question is raised, we do not find a decision on that point necessary. But where, as in this case, the questions raised are those of the construction and validity of statutes, and the legality of any tax imposed, they must of necessity be determined in the courts. The boards of county commissioners are not by the constitution invested with judicial power to pass upon the validity of a tax, nor could any such determination by them be deemed final and conclusive. The judgment of the district court should be affirmed.

RICHMOND and BISSELL, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is affirmed.

ELLIOTT, J., having presided at the trial below, did not participate in this decision.

#### GILPIN V. ADAMS.

(*Supreme Court of Colorado*. June 13, 1890.)

#### STATUTE OF LIMITATIONS—PLEADING—LEASE—CONSIDERATION.

1. Plaintiff joined in one count several causes of action for moneys expended for the use of defendant, for services performed as agent, for the use of property by defendant, etc.; each particular item being definitely set forth. *Held*, that the statute of limitations could have been pleaded to each or all of the items, and that, therefore, defendant could not object to a dismissal, after the commencement of the trial, of some of the items, on the ground that, if the action had originally been brought on the items retained, he could have pleaded the statute, especially as he made no application to amend his answer by interposing such plea.

2. A lease of land to plaintiff provided that, in consideration thereof, plaintiff would construct and maintain fences, construct irrigating ditches, plant trees, erect certain buildings, pay taxes, and generally keep the premises in good repair. *Held*, that the lease showed an ample consideration for the privilege exercised by plaintiff of grazing a large amount of stock upon the land.

Commissioners' decision. Appeal from district court, Rio Grande county.

Markham & Dillon and W. M. Maguire, for appellant. John L. Jerome, for appellee.

RICHMOND, C. In this action, plaintiff below, appellee here, sought to recover for moneys paid out and expended by plaintiff for the use of defendant, and for services performed by plaintiff as agent in and about the management of certain property known as the "Bacca Grant," and for services in and about the mining property of the defendant on said grant, and the leasing of the same, and for the use of horses furnished by the plaintiff for the use of defendant, at his request, and for interest upon divers sums of money advanced by the plaintiff for the use of the defendant, at his request. The form of the complaint is in the nature of a declaration upon consolidated common counts. After the impaneling of the jury, plaintiff made application to be allowed to dismiss without prejudice all the items of account described in the complaint, except the items for money paid out and expended, and for services as agent from November 1, 1878, to August 1, 1883. This application was granted, and thereafter the cause was tried to a jury, and verdict rendered in favor of plaintiff for the sum of \$8,055.55. Six thousand seven hundred and fifty dollars was allowed plaintiff for services, and, \$1,305.55 for moneys advanced and expended. Motion for a new trial was interposed, whereupon the court intimated that, unless the plaintiff remitted the sum of \$1,305.55, a new trial would be granted. The intimation of the court was acted upon. Thereafter, judgment was rendered upon the verdict for the sum of \$6,750.

Fourteen errors are assigned, eight of which are to the admission of evidence over the objections of defendant. The others are addressed to alleged errors in overruling appellant's motion for a nonsuit, and motion for a new trial, and permitting the appellee to remit so much of the amount embraced in the verdict as related to moneys expended, and that the verdict was contrary to the evidence. But one error specifically assigned is discussed in the brief of appellant. Counsel for appellant confine their discussion to two points: *First*. That the verdict was clearly contrary to the evidence. Therefore a new trial should have been granted. *Second*. That after the commencement of the trial the court permitted the appellant to dismiss without prejudice as to all of the items declared upon except two.

We will discuss the second point first, although we are not prepared to admit that this point is entitled to consideration in this court. No exceptions were taken at the time the court permitted the plaintiff to dismiss the action upon the various items referred to, nor is it specifically as-

signed for error. It is claimed, however, that it was embraced in the application for a new trial, and that, inasmuch as exceptions were reserved to the action of the court in overruling the motion for a new trial, it is a legitimate subject for discussion on appeal. While not conceding this claim of appellant, we will, however, determine the question. Appellant contends that striking out the various items from the complaint changed the character of the action, and prevented the defendant from pleading as he would have pleaded if the action had been brought originally on the two items only,—that of service performed, and money expended; that, as the suit was originally brought, it was on a book-account, and consisted of more than 30 items, running through a series of years from 1878 to 1886; and that, the last item of the account being within the statute of limitations, the defendant was not at liberty to plead the statute, whereas, if the action had been brought for salary for services only, the defendant could have so pleaded. The complaint does not set out a claim upon a book-account, nor does the record contain the itemized statement referred to in the appellant's argument; and it nowhere appears in the record that at the time of the application, and granting of the same, appellant then and there made application to amend his answer by interposing the plea of the statute of limitations. If, as he says, the plea could have been and would have been interposed, had the action been confined to a claim for services, we see no reason why, to this particular item, he might not, upon application, have so amended his answer as to interpose the statute; nor can we agree with the position taken by appellant, that he could not in the first instance, by answer, have raised the question of limitation to the claim for services. Several causes of action were joined in one count. To this form of complaint no objections were made, and each particular item was as definitely set forth as though the complaint had contained as many particular causes of action as there were items; and the statute of limitations could have been pleaded to each or all of the items so distinctly enumerated in the complaint. *Schillo v. McEwen*, 90 Ill. 77. When several counts are thus used, the defendant may, according to the nature of his defense, demur to the whole, or plead a single plea applying to the whole, or may demur to one count and plead to another, or plead a separate plea to each count; and in the two latter cases the result may be a corresponding severance in the subsequent pleadings, and the production of several issues. But, whether one or more issues be produced, if the decision, whether in law or in fact, be in the plaintiff's favor as to any one or more counts, he is entitled to judgment *pro tanto*, though he fail as to the remainder. *Steph. Pl.* 257, 258. Several causes of action may be joined in one count, and it will not be necessary to prove all the causes alleged. Recovery may be had *pro tanto*. *Puter. Pl. & Pr.* 69. We deem it too late for the plaintiff now to insist on the right to interpose the

statute of limitations. Upon proper showing the court would and could, under the Code, have permitted, in the furtherance of justice, an amendment to his answer; and inasmuch as it was in his power to plead the statute, in the first instance, to the particular item for which recovery was had, we do not think that he should now be permitted to complain.

As to the first point, the main contention of appellant is that Adams had a lease of this grant, or a portion of it, upon which he grazed a large amount of stock, and for which privilege he paid no compensation. The lease which was executed between the parties does not support the argument. By the terms of that lease, it appears that a certain portion of the Bacca grant was leased to plaintiff, and that, in consideration of the lease of the premises, plaintiff agreed to construct and maintain a good and substantial fence, with double posts of cedar or pitch pine, not less than seven and one-half feet long, around the entire tract of ground, which was to be completed within a year from the 1st of November, 1878; that he would pay all taxes then due, and all taxes thereafter levied upon the premises during the lease; that he would construct with all due diligence an irrigating ditch upon the premises, sufficient and capable of irrigating all of the bottom-lands practically capable of irrigation; that he would plant one or more rows of cotton-wood or other shade trees along the north line of the fence to be constructed, and that he would construct lateral ditches for the purpose of irrigating lands lying along the various creeks on the said grant; that he would build and maintain in good repair upon the premises an adobe brick dwelling of not less than four rooms, and such barns, granaries, corrals, and other outhouses and inclosures, as may be needed from time to time during the continuance of the lease; and further, that he should construct bridges, where they were necessary, over the creeks and streams of water for irrigating ditches, where the roads crossed them, and should keep all the improvements so constructed by him in good order and repair during the continuance of the lease, and at the expiration thereof yield the possession of the same to the party of the first part in like good order and condition, and the said improvements were then to be and become the property of the party of the said first part. It was further provided by the lease that all the timber and mining lands comprised within the grant were reserved from the operation of the lease to the uninterrupted use and disposal of the party of the first part, and provided, further, that the party of the second part should have the care and custody of the mining and timber lands, and keep trespassers therefrom, and should be permitted to use so much timber as he desires for fencing and building purposes and repairs, for fuel, and such other purposes necessary for the maintenance and improvement of the premises. This, it seems to us, was ample consideration for the privilege of occupying the land, and grazing stock thereon. But, in addition to the plaintiff be-

coming the tenant of defendant, he was employed by the defendant in and about the mining premises situated on the grant, in securing a recognition of the defendant's title by a large number of persons occupying certain portions of the tract, and in securing such persons, engaged in mining thereon, to take from the defendant a lease of the premises. Indeed, the evidence discloses the fact to be that plaintiff had general control of the entire tract of land. No complaint, it seems, was ever made to his conduct or acts as agent; and all of such acts as such agent were recognized by the defendant. The testimony establishes the employment of appellee by appellant, and an agreement to pay him reasonable compensation for such services. At least, from all the testimony, such was the conclusion of the jury; and, no definite sum having been agreed upon, they were justified in determining, under the complaint and proof, what such services were reasonably worth. *Mattocks v. Lyman*, 16 Vt. 113; *Wood, Mast. & Serv.* § 100.

To our mind, there was sufficient evidence to warrant the jury in finding for the plaintiff, and, from all the evidence, we are not prepared to say that the amount of the verdict as compensation was in excess of the actual services rendered. The judgment should be affirmed.

PATTISON and REED, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is affirmed.

HAYT, J., not sitting.

#### KARCHER v. PEARCE.

(*Supreme Court of Colorado.* June 13, 1890.)

##### CHANGE OF VENUE—PREJUDICE OF JUDGE.

It is no ground for a change of venue in a civil case that the judge had formerly represented the people in a criminal prosecution against defendant, and had been counsel for the plaintiff in a civil suit against him.

Commissioners' decision. Appeal from Douglas county court.

*Brown & Putnam*, for appellant. *J. A. Bentley* and *J. W. Farrell*, for appellee.

RICHMOND, C. This action was originally brought before a justice of the peace, and thereafter appealed to the county court, where the appellant, defendant below, filed an application for a change of venue, which application was based upon the following affidavit: "John B. Karcher makes oath and says that he has just grounds to fear and does fear, that he cannot and will not receive a fair trial in said county court, wherein said cause is now pending, because the honorable AMOS G. WEBSTER, judge of said county court, was attorney for the people (and is prejudiced against the affiant) in a certain prosecution against affiant before CHARLES E. LOWELL, justice of the peace in said county, in the year 1886, and appeared against this affiant in the trial thereof; and also that the said judge was counsel for one Clay in certain litigation between

him and this affiant during the past few months, and before his election as judge of said court. Wherefore, affiant prays for change of venue in pursuance of the statute in such cases made and provided." The application for a change of venue was denied. Thereafter, defendant and his attorney withdrew their further appearance in the case. The court thereupon heard the testimony of the witnesses in behalf of the plaintiff, and rendered judgment against the defendant for the sum of \$252.44, to reverse which judgment appellant prosecutes this appeal.

The sole ground relied upon by appellant is error of the court in overruling the motion for change of venue. The affidavit states no statutory grounds for a change of venue, and is wholly insufficient to warrant this court in interfering with the ruling of the court, under the discretion vested therein by the statute touching applications of this character. Do *Walt v. Hartzell*, 7 Colo. 602, 4 Pac. Rep. 1201. The mere fact that an attorney, in his professional capacity, formerly prosecuted an individual in a civil or criminal action, creates no presumption that such attorney is prejudiced against such individual in any other matter. The judgment should be affirmed.

PATTISON and REED, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is affirmed.

#### DE MARES v. GILPIN *et al.*

(*Supreme Court of Colorado.* June 13, 1890.)

##### EQUITY—LACHES—TRUSTS—LIMITATIONS.

1. Plaintiff claimed an undivided half interest in a tract of land originally granted by the Mexican government to her father and the ancestor of one B. Under Act Cong. July 22, 1854, providing for the appointment of a surveyor general to investigate claims to land arising under Mexican laws, B., as the sole owner of the whole of said tract, applied for and obtained an approval of the grant; and subsequently, as sole owner, he applied for and obtained a confirmation by congress of the grant. The acts of approval and confirmation were of record. Held that, in the absence of any contract by B. to convey to plaintiff, and of disability to sue, the failure of the latter, from and after such act of confirmation, to prosecute her claim to said land, on the theory that B. was chargeable with a resulting trust in her favor, was imputable to her as laches.

2. In an action by plaintiff to recover her alleged half interest, the complaint was demurrable in that it did not show that defendants, who derived title from B., were not *bona fide* purchasers with notice of plaintiff's claim.

3. The laws of the state where the land was situated making coverture no obstacle to a suit by the wife, the failure of plaintiff, a married woman, to sue in such state for the land, is not excused by the fact that she resides in another state, whose laws subject her to the control of her husband.

Commissioners' decision. Appeal from district court, Arapahoe county.

*J. C. Stallenp* and *Wells, McNeal & Taylor*, for appellant. *Markham & Dillon* and *Bela M. Hughes*, for appellees.

REED, C. This was a proceeding in equity brought by Benigna Lee De Mares

against William Gilpin, William J. Palmer, and several others, to recover an undivided half interest in a large body of land, alleged to be some 200,000 acres, in the county of Costilla. The amended complaint was filed September 2, 1882. After the institution of the suit, the plaintiff died; and her surviving husband, Vicente De Mares, was substituted in her stead. It is stated in the complaint that plaintiff, was the sole heir of Stephen Louis Lee, born in Taos, N. M., in April, 1830, married to Joseph Pley in 1841, and after his death married, in 1877, to the present plaintiff, Vicente De Mares; that, in the years 1843 and 1844, her father, Stephen Louis Lee, and Narciso Beaubien, obtained from the Mexican government a grant of land, including the land in controversy; that her father and Beaubien both died on the same day, —January 19, 1847,—each seized of one-half of the land; that she, as sole heir, entered into and held possession of one-half the grant, and was in possession at the time of the execution of the treaty of Guadalupe Hidalgo, February 22, 1848. From all that appears, this condition of affairs continued until after the passage by congress of the act approved July 22, 1854, entitled "An act to establish the offices of surveyor general of New Mexico, etc., and for other purposes," when Charles Beaubien, son of original grantee, Narciso Beaubien, as sole claimant, applied to William Pelham, surveyor general of New Mexico, to have the grant surveyed and approved, which was done in the year 1856; that subsequently Charles Beaubien, as sole owner, applied to congress to have the grant confirmed to him, which was done by an act approved June 21, 1860. Plaintiff then states, on information and belief, that on or about the 4th day of May, 1848, her husband, Joseph Pley, claiming to be the administrator of the estate of her father by an appointment from the prefect court of the county of Taos, N. M., at the instance and at the solicitation of Charles Beaubien, in consideration of the release of a large indebtedness owing from Pley to him and for goods, chattels, and lands conveyed to Pley, made, executed, and delivered to Beaubien a deed of the undivided one-half of the entire grant; that such deed was fraudulent and void; that no order or decree of the prefect court, or any other court, was made, authorizing or empowering him to make a sale and conveyance; and that the prefect court had no authority to make such a decree. Also, that it is pretended and claimed that on January 27, 1858, plaintiff, her husband Joseph Pley, and her mother, Maria de la Luz Tafoya, made and executed a deed to one Ceran St. Vrain of their undivided one-half of the granted land; that such deed, if any, was a forgery, and was never executed or acknowledged by her mother or herself; that neither the deed pretended to have been made by Pley as administrator to Charles Beaubien, nor the pretended deed of plaintiff, her mother, and Pley, to St. Vrain were recorded in the county of Taos, N. M., nor in the county of Costilla, in this state, until one year before the institution of this suit; that plaintiff, until one year before bringing suit, was not informed in

regard to the pretended execution of the deeds, or of either of them, or of the fact that Beaubien, St. Vrain, or defendants denied her title, or claimed the right to exclusive possession of the land; and that Beaubien, St. Vrain, and defendants, and each of them, until one year before bringing suit, fraudulently concealed from the plaintiff knowledge of the pretended execution and existence of the two deeds, and avers that if Beaubien, St. Vrain, defendants or any of them, have at any time taken exclusive possession of the grant, or any part of it, it was at such remote distance from her residence that the fact was concealed from her. It is stated that, at about the time the land was granted, her father and Narciso Beaubien entered into possession of the granted lands, "and erected thereon divers dwellings, stables, store-houses, and other buildings, and inclosed divers large tracts of the said land, and from thence until the decease of the said Stephen Louis Lee and Narciso Beaubien \* \* \* they, in person, and by their tenants and servants, cultivated divers large tracts of said grant, and were in the actual occupation of the whole thereof," and that, after the death of her father, she entered into the possession of the undivided one-half of such grant as a tenant in common with the heirs of Narciso Beaubien, and remained in the possession until the treaty of Guadalupe Hidalgo, and that, at all times from and after the death of her father until the time of the approval by the surveyor general, she was in the actual occupancy and possession of the land jointly with heirs of Beaubien. Further avers that she was a Mexican, unacquainted with the English language, unable to read or write, and unfamiliar with business; that, at the time of the pretended conveyance by Pley, she was a married woman, and a minor, "and ever since, except for a short period, hath been and still is a married woman, and, by the laws, usages, and customs of New Mexico, \* \* \* under the control, power, and authority of her husband;" and that, by reason of the premises, Beaubien, St. Vrain, and defendants have been able to conceal from her their pretended claims to the property.

A demurrer containing 24 special supposed grounds was filed. The grounds of demurrer, for the purpose of this discussion, may be grouped as follows: (1) A general want of equity, which may be considered as embracing all the causes or grounds; (2) laches or neglect on the part of the plaintiff; (3) a failure to connect defendants in any way with the alleged frauds by which Beaubien and St. Vrain attempted to divest her of title; (4) a failure to charge defendants, or any of them, with knowledge of the frauds by which it is claimed Beaubien and St. Vrain obtained the ostensible title. The demurrer was sustained, and a decree entered dismissing the bill, from which an appeal was taken.

It is contended that Charles Beaubien became the trustee of plaintiff. It is said in the complaint that, although the approval and confirmation were to him, and in his own name and behalf, "the con-

firmation inured to the benefit of the plaintiff to the extent of one undivided half part of the said donation or grant of lands." It is not claimed that the trust was created by any direct conveyance or act of the plaintiff or an ancestor. It is not claimed that there was an express trust. The trust, if any, was an implied or resulting trust by operation of law growing out of the alleged relation of the parties to the subject-matter of the controversy. 1 Greenl. Cruise, 381; Dyer v. Dyer, 2 Cox, 92; Wallace v. Duffield, 2 Serg. & R. 521. The distinction between express and resulting trusts is important, and the rule of law in regard to notice differs materially in the two.

1. In regard to the supposed laches and negligence of plaintiff in asserting her alleged rights, and, for the present, leaving entirely out of the discussion the two alleged fraudulent deeds,—the one from Pley to Beaubien, and that of plaintiff, her mother and husband, to St. Vrain,—we find that Charles Beaubien, some time prior to December 30, 1856, applied to the surveyor general to have the grant surveyed and approved under the act of congress of July 22, 1854, and on that date, December 30, 1856, the grant was approved; that subsequently he applied to congress to have the title to the grant confirmed, which was done under the act of congress, approved June 21, 1860. The applications for approval and confirmation were both made by Beaubien as sole owner. There is no allegation of any contract or agreement whereby any supposed rights of plaintiff were to be recognized and protected, and that Beaubien should take the entire title, one-half in trust for her, and afterwards convey. The acts of approval and confirmation were both open, public, and notorious acts, of which she was bound to take notice, and, in the absence of contract, an assertion of the entire title in himself, to her exclusion, and a denial of any title in her, or of any trust in himself. "A legislative confirmation of a claim to land is a recognition of the validity of such claim, and operates as effectually as a grant or quitclaim deed from the government." *Langdeau v. Hanes*, 21 Wall. 530. "A confirmation is the conveyance of an estate or right that one hath in or unto lands or tenements to another, that hath the possession thereof, or some estate therein, whereby a voidable estate is made sure and unavoidable, or whereby a particular estate is increased and enlarged." *Shep. Touch.* 311. By section 8 of the act of congress for the appointment of the surveyor general for the territory of New Mexico, it is enacted "that it shall be the duty of the surveyor general, under such instructions as may be given by the secretary of the interior, to ascertain the origin, nature, character, and extent of all claims to lands under the laws, usages, and customs of Spain and Mexico, and for this purpose may issue notices, summon witnesses, administer oaths, and do and perform all other necessary acts in the premises. He shall make a full report on all such claims as originated before the session of the territory to the United States by the treaty of Guadalupe Hidalgo of 1848, denoting

the various grades of title, with his decision as to the validity or invalidity of each of the same under the laws, usages, and customs of the country before its cession to the United States. \* \* \* which report shall be laid before congress for such action thereon as may be deemed just and proper, with a view to confirm *bona fide* grants," etc. 10 St. at Large, 309. It will be observed that, under the statute, such proceedings must be open, notorious, and of record in the office of the surveyor general. After report, the finding to be in the office of the secretary of the interior until action taken by congress; then, embodied in the public statutes. These public acts and records, and the assertion of entire title by Beaubien to her exclusion, were those of which she was bound to take notice. Ignorance of them is not alleged, nor is any excuse given for her neglect to intervene and assert her rights. In equity, where it is alleged there was fraudulent concealment of important facts affecting the rights of a party, laches or neglect can only be imputed from the time of the discovery of the fraud. In *Story, Eq. Jur.* § 1521a, it is said: "In general, it may be said that the rule of courts of equity is that the cause of action or suit arises when, and as soon as, the party has a right to apply to a court of equity for relief. In cases of fraud or mistake, it will begin to run from the time of the discovery of such fraud or mistake, and not before." See, also, *Imperial Gas-Light & Coke Co. v. London Gas-Light Co.*, 10 Exch. 39; *Miller v. Miller*, L. R. 8 Eq. 499; *Brooksbank v. Smith*, 2 Younge & C. 58; *Ferris v. Henderson*, 12 Pa. St. 49. In *Philippl v. Philippe*, 115 U. S. 156, 5 Sup. Ct. Rep. 1181, after stating the rule as above, it is said: "It must be borne in mind that this rule is subject to the qualification that when the trust is repudiated by clear and unequivocal words and acts of the trustee, who claims to hold the trust property as his own, and such repudiation and claim are brought to the notice of the beneficiary in such manner that he is called upon to assert his equitable rights, the statute of limitations will begin to run from the time such repudiation and claim came to the knowledge of the beneficiary." See, to same point, *Gratz v. Prevost*, 6 Wheat. 481; *Oliver v. Platt*, 3 How. 333; *Badger v. Badger*, 2 Wall. 87; *Bright v. Legerton*, 2 De Gex, F. & J. 606; *Wedderburn v. Wedderburn*, 4 Mylne & C. 41. In *Nettles v. Nettles*, 67 Ala. 599, cited with approval in 115 U. S. 157, 5 Sup. Ct. Rep. 1184, it is said: "It is true, as a general rule, that when the relation of trustee and *cestui que trust* is uniformly admitted to exist, and there is no assertion of adverse claim or ownership by the trustee, lapse of time can constitute no bar to relief; but where the trust relation is repudiated, \* \* \* or the acts of the parties, or other circumstances, give rise to presumptions unfavorable to its continuance, in all such cases a court of equity will refuse relief on the ground of lapse of time." This being the rule in the case of express trusts created by the parties, and admitted to exist, it must certainly apply with much greater force in a case of resulting trust, resulting from the

operation of law, which only becomes fixed by decree of court. In *Martin v. Smith*, 1 Dill. 85, it is said: The fraud intended by the section which shall arrest the run of the statute must be one that is secret and concealed, and not one that is patent and known. The law in regard to notice is well defined both in England and the United States. In *Kennedy v. Green*, 3 Mylne & K. 722, it is said: "Whatever is notice enough to excite attention, and put the party on his guard, and call for inquiry, is also notice of everything to which it is afterwards found that such inquiry might have led." When a person has sufficient information to lead him to a fact, he shall be deemed conversant of it. In *Angell on Limitations*, (section 187, and note,) it is said: "The presumption is that if a party affected by any fraudulent transaction or management might, with ordinary care and attention, have seasonably detected it, he seasonably had actual knowledge of it." See *Nudd v. Hamblin*, 8 Allen, 180; *Cole v. McGlathry*, 9 Me. 131; *McKown v. Whitmore*, 31 Me. 448. In *Wood v. Carpenter*, 101 U. S. 143, after a careful survey of the authorities, it is said: "Concealment by mere silence is not enough. There must be some trick or contrivance intended to exclude suspicion and prevent inquiry. There must be reasonable diligence, and the means of knowledge are the same thing in effect as knowledge itself. The circumstances of the discovery must be fully stated and proved, and the delay which has occurred must be shown to be consistent with the requisite diligence." See, also, on this point, *Case of Broderick's Will*, 21 Wall. 509-520; *Bowman v. Wathen*, 1 How. 194; *Carr v. Hillton*, 1 Curt. 393; *Manning v. San Jacinto Tin Co.*, 7 Sawy. 430, 9 Fed. Rep. 726; *Beckford v. Wade*, 17 Ves. 88; *Sugd. Vend.* 1052.

Applying these well-established rules of law to the complaint in this case, we must conclude—*First*, that the acts of Charles Beaubien in applying for and securing an approval of the grant in 1856, applying for and obtaining a confirmation of title in 1860, both in his own name as sole owner, to the exclusion of the plaintiff, were public and notorious acts, which, from their nature, could not be concealed if such attempt had been made, of which plaintiff was bound to take notice; *second*, that, without an agreement to convey, such acts were a public denial and contradiction of the supposed trust, and an assertion of the entire title in himself,—consequently, that she had full notice of his intention to exclude her, and hold adversely. And this conclusion is reached regardless of the fact of her knowledge, or want of knowledge, of the alleged fraudulent deeds. Hence it follows that negligence and laches can be imputed to her from and after the year 1856,—certainly, after confirmation in 1860,—unless she was resting under some legal disability, (which we shall notice hereafter,) and that the statute of limitation commenced to run at least as early as June, 1860, if not nearly three years before that time.

We are also of the opinion that the complaint is defective for want of allegations of acts of ownership, possession, manage-

ment, and control of the property from and after the approval and the confirmation of the grant. The allegations are that up to that time she asserted and exercised her rights as owner; and although there were numerous buildings, improvements, and large tracts of cultivated land in the occupation of servants and tenants, from all that appears in the complaint, she apparently withdrew from all management, did not participate in the rents, income, or profits, or pay taxes. The legal inference from the facts would be, of a full knowledge on her part of the denial of her interest, and an acquiescence in the title asserted by Beaubien to her exclusion. So far as appears from the complaint, from 1856 to the time of bringing suit,—a period of over 20 years,—plaintiff was evicted, and remained out of possession,—in no way participated in the management of the property from and after 1856,—with record knowledge that Beaubien claimed to be sole owner from and after June, 1860, with actual knowledge given by public statute that the government had confirmed the grant to him as sole and exclusive owner, and, with the strongest motives that could prompt a person to action, remained idle when an effort should have been made. If frauds existed, proper diligence could not have failed to expose them. The case as made is stale, and a court of equity should not interfere. Our statute is a bar; and, in the absence of a statute of limitations, it has been held in England, in the federal courts, and in many of the states, that after a lapse of 20 years after a suit might have been instituted, without the commencement of proceedings, where there has been no admission or recognition of a trust, a presumption of settlement would arise, operating as a positive bar.

2. Neither Beaubien nor St. Vrain, who were charged in connection with Pley, deceased, as participating in the alleged frauds, are made parties. The defendants, so far as is shown in the complaint, were *bona fide* purchasers, without any knowledge whatever of the alleged frauds, or the claim of plaintiff now asserted. For this reason, also, the complaint was demurrable. Where, as in this case, there is no express trust created by the parties, and no record where the trust, if any, is a resulting trust by operation of law. Where there was no actual adverse and notorious possession, nor acts of ownership, by the claimant, and the grantee claimed direct from the government, actual notice to grantees of an existing trust must be alleged and proved; otherwise, they would take the property divested of the trust, if one existed. If a trustee be in the actual possession of the estate, and conveys for a valuable consideration to a purchaser who has no notice of the trust, such purchaser will be entitled to hold the estate against the *cestui que trust*, because confidence in the person is still deemed necessary to a trust; and it is a rule in equity that an innocent person shall not, in general, have his title impeached. 1 Perry, Trusts, § 346; 2 Story, Eq. Jur. § 1264; 1 Greenl. Cruise, 449; *Jones v. Powles*, 3 Mylne & K. 597; 2 Bl.

Comm. 337; 3 Mass. Supp. 578; Bumpus v. Platner, 1 Johns. Ch. 219; Jackson v. Henry, 10 Johns. 185; Wade, Notice, § 61.

3. The pleader in the complaint, to excuse the neglect of plaintiff, alleges that plaintiff is "a Mexican woman, wholly unacquainted with the English language, unable to read or write, and unfamiliar with business; that, at the time of the pretended execution of the conveyance aforesaid of the said Joseph Pley unto the said Charles Beaubien, plaintiff was an infant, and was then and ever since, except for a short period of time, hath been, and still is, a married woman, and by the laws, usages, and customs of New Mexico, wherein plaintiff during all the time aforesaid resided, and still resides, under the control, power, and authority of her husband; and, by reason of the aforesaid premises, said Beaubien, St. Vrain, and the defendants aforesaid have been enabled to have concealed from plaintiff their pretended claims in and to her said interest in the said grant of lands." The circumstances and conditions stated may have rendered it more easy to perpetrate frauds upon her, and conceal them. The laws, customs, and usages of New Mexico may be such as to place a wife under the authority and control of a husband, and place her under a legal disability in that territory. The land having been in Colorado since its organization as a territory, in 1861, and her rights in regard to the land necessarily determinable under the laws of Colorado, the peculiar laws, usages, and customs of New Mexico cannot satisfactorily be alleged as a disability to excuse negligence here, where coverture does not create a disability in the wife. In the Case of Broderick's Will, 21 Wall. 503, it was alleged in the complaint that plaintiff had never resided in California or the United States, and never heard, or had an opportunity of hearing, of Broderick's death, or the events connected with the probate of the will, until more than eight years after its being filed for probate; that they were illiterate, and lived in a remote and secluded region in Australia, etc. In the opinion of the court, it is said, at page 519: "Their plea is that they lived in a remote and secluded region, far from means of information, and never heard of Broderick's death, or of the sale of his property, or of any events connected with the settlement of his estate until many years after these events had transpired. Parties cannot thus, by their seclusion from the means of information, claim exemption from the laws that control human affairs, and set up a right to open up all the transactions of the past. The world must move on; and those who claim an interest in persons or things must be charged with knowledge of their status and condition, and of the vicissitudes to which they are subject. This is the foundation of all judicial proceedings *in rem*. The fact that two of the complainants are married women does not take them out of the operation of the statute of limitations of California." It is evident that plaintiff labored under no legal disability to prevent the enforcement of her rights in Colorado, and the facts

stated in the complaint are insufficient to excuse the negligence of the plaintiff in instituting a suit. The judgment of the district court should be affirmed.

RICHMOND and PATTISON, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is affirmed.

ELLIOTT, J., having presided at the trial below, did not participate in this decision.

DANIELS *et al.* v. KNIGHT CARPET CO. *et al.*  
(Supreme Court of Colorado. May 23, 1890.)

CONTRACT—CONSTRUCTION—APPEAL.

1. Appellants purchased a stock of carpets and curtains under a written contract, by the terms of which, among other things, they were to pay their vendors, during certain years, a stated sum for each month; that they should encounter in the curtain and carpet business "no greater competition than" that of certain firms named, "whose stock of goods should not exceed \$5,000 in value." Held, in an action on the contract, that appellants were not liable for such sum for months during which other persons competed with them, whose stocks aggregated \$12,000 in value, though such competitors were what is termed "second-hand dealers."

2. An appellee who fails to avail himself of the right given by Act Colo. 1885, (relating to appeals,) to file an amended abstract, showing such additions and amendments to the abstract of appellant as he deems necessary to a full understanding of the questions presented, cannot afterwards urge that appellant's abstract is imperfect and unfair.

Appeal from district court, Arapahoe county.

The contract sued upon in this case reads as follows: "This agreement made and entered into this 22d day of November, in the year of our Lord one thousand eight hundred and eighty-four, by and between J. G. Knight, F. A. Knight, and G. P. Atmore, copartners as the Knight Carpet Company, all of the county of Arapahoe and state of Colorado, parties of the first part, and W. B. Daniels, W. G. Fisher, and T. B. Croke, copartners as Daniels & Fisher, and Mrs. H. H. Cordes and Philip Feldhauser, Jr., copartners as Cordes & Feldhauser, all of the county of Arapahoe and state of Colorado, parties of the second part, witnesseth that the said first parties, for and in consideration of the sums of money and agreement hereinafter mentioned, and the further sum of one dollar in hand paid to said first parties by said second parties, the receipt of which is hereby confessed and acknowledged, do hereby sell, convey, transfer, and set over unto the said parties of the second part, and their assigns, their entire stock of merchandise, located at Nos. 368 and 370 Arapahoe street, Denver, Colorado, embracing carpets, rugs, matting, oil-cloth, linoleums, window-shades, and fixtures, lace curtains, upholstery goods, trimmings, and all such goods as are owned and offered for sale by said first parties; also all store fixtures of every kind and description whatsoever, and comprising in part the following: One office, one safe, one desk, one large counter, one large up-



right case, two tables, one shade-rack, one horse, wagon, and harness, one sewing-machine, one house scale, and all shelving, awnings, gas-fixtures, truck, work-benches, and tools, chairs, etc. It being understood and agreed, and it is hereby agreed between the parties hereto, that the said first parties shall and will make a true and correct inventory of all said goods and merchandise and store fixtures; that said goods and merchandise shall be invoiced at the prices which were paid for the same kinds or brands of goods in the eastern markets on July 1, 1884, according to the eastern manufacturers' or dealers' bills to said first parties for said goods or merchandise, with actual cost of transportation added, and that the price to be paid to said first parties by said second parties for said store fixtures as above is to be the sum of seven hundred dollars. It is further agreed between the parties hereto that the said second parties shall pay to the said first parties the sum of five thousand dollars for their good-will in trade, and their agreement not to enter into or engage in the business of buying and selling carpets, rugs, curtains, upholstery goods and trimmings, or any such goods as are usually kept for sale in carpet and curtain houses, between the 1st day of Jan., A. D. 1885, and the 1st day of Jan., A. D. 1886, at any point or place within the limits of Arapahoe county, either directly or indirectly, as a firm or as individuals, or in any way whatsoever, except it is provided that if the said first parties shall engage in the furniture trade, within the limits of said Arapahoe county, at any time during the continuance of this contract, it shall be their right and privilege to handle and deal in such upholstery goods as are used by other furniture dealers in Denver, Colorado, for the covering of furniture. It is further agreed between the parties hereto that in consideration of said first parties remaining out of said carpet and curtain business during the years 1886 and 1887, and the sum of one dollar to said second parties in hand paid by said first parties, the said second parties agree to pay the said first parties, on the last day of each month during the said years A. D. 1886 and 1887, the sum of \$416.66; provided, however, that if any party or parties, or firm or firms, other than Daniels & Fisher, Cordes & Feldhauser, and Hart Brothers, shall commence or engage in said carpet and curtain business in the city of Denver, Colorado, at any time during the years A. D. 1886 and 1887, then, and in that event, said second parties may at once cease and discontinue to pay to said first parties, on the last day of each month, as above, the said sum of \$416.66, except it is understood and agreed that if not more than one party other than the above-named Daniels & Fisher, Cordes & Feldhauser, and Hart Brothers shall engage in said carpet and curtain business during said years A. D. 1886 and 1887, and that said one party will confine himself or herself, as the case may be, to a stock of goods not exceeding in value the sum of five thousand dollars, then, and in that case, the said second party shall continue to pay to said first parties the said

sum of \$416.66 monthly, as provided above. It is agreed that if the said second parties fail to pay to the said first parties the sum of \$416.66 monthly, as provided above, for any of the reasons herein mentioned, then, and in that event, it shall be the right and privilege of said first parties to resume said carpet and curtain business, in which case this contract shall and will become null and void. It is understood and agreed that if any party or parties shall engage in said carpet and curtain business, at any time during the years 1886 or 1887, in such a way as to relieve the second parties hereto from paying to the first parties hereto the said sum of \$416.66 monthly, and that any such party or parties so engaged in said business shall cease and discontinue said carpet and curtain business at any time before the expiration of this contract, and if said first parties shall not have engaged in said business in the mean time, under the provisions of this contract, in which case this contract becomes null and void, as before herein provided, then, and in that event, the said second parties shall resume the payment to said first parties of the sum of \$416.66 monthly from the time of the discontinuance of said business by said parties, as herein specified; the intention of that part of this agreement which relates to the years A. D. 1886 and 1887 being that said second parties shall pay to said first parties the said sum of \$416.66 for each month in said years A. D. 1886 and 1887 as they (the said second parties) shall encounter in said business no greater competition than said Hart Brothers and one other party, whose stock of said goods shall not exceed five thousand dollars in value. The said second parties agree to pay to said first parties the full price of their goods, merchandise, and fixtures, in accordance with invoice to be made, as above specified, which invoice shall be completed and payments made on or before the 31st day of December, 1884, in lawful money of the United States, on which last-mentioned date the said first parties agree to turn over to said second parties their entire carpet and curtain business, and vacate the same unto the said second parties. It is agreed that the usual cash discounts on the different kinds and classes of goods shall be allowed to said second parties by the first parties, in computing the cost of said goods and merchandise, as above specified. It is understood that the partnership agreement between Daniels & Fisher and T. B. Croke expires on the 1st day of July, A. D. 1886, and it is agreed that, should the said Croke fail to renew his present interest, or to secure any other interest, in the firm of Daniels & Fisher July 1st, A. D. 1886, it shall not affect the force and virtue of this contract as between the other parties interested herein. It is further agreed that, should the death of any of the parties of the second part occur, causing the dissolution of either of the firms of Daniels & Fisher or Cordes & Feldhauser, then, and in that event, this contract becomes null and void; but it is expressly understood and agreed that, in any event, the said first parties shall not resume said carpet

and curtain business during the year A. D. 1885. Witness our hands and seals the day and year first above written." The stock of merchandise was soon after invoiced and the sale fully consummated, the parties of the second part taking possession of the property and paying therefor. The sum of \$5,000 was also paid for the good-will of the parties of the first part, and as a consideration for their remaining out of the business until the 1st day of January, A. D. 1885. The said parties of the first part, not having re-engaged in the carpet and curtain business up to the 1st day of the following month of March, at that time demanded payment from the parties of the second part of the sum of \$416.66 for the preceding months of January and February, under the contract. Appellants refused to comply with this demand, claiming a release from the monthly payments because other parties had engaged in the carpet and curtain business in said city to such an extent as to discharge them from any further payment to appellees under the contract. Appellees took issue upon this claim. The cause was tried to the court without the intervention of a jury, and a judgment rendered in favor of appellees for the sum of \$942.27, this being the amount claimed for the months of January and February, with interest to the time of the trial. Exceptions having been duly reserved at the trial, the case is brought here for review.

*Patterson & Thomas*, for appellants.  
*C. H. Hughes, Jr.*, for appellees on rehearing.

HAYT, J. The only question presented for our determination in this case grows out of the proviso contained in the contract, to the effect that appellant shall be discharged from liability for the monthly payments immediately upon the happening of certain conditions in reference to competition. The contract may be briefly summarized as follows: *First.* It provides for the sale of the entire stock in trade of the Knight Carpet Company to appellants, at cost, and the sale of the store fixtures for the sum of \$700. *Second.* For the payment of \$5,000 to appellees for their good-will in trade, and their agreement not to engage in the carpet or curtain business within Arapahoe county before the 1st day of January, 1886. *Third.* An agreement to pay appellees the sum of \$416.66 per month during the years 1886 and 1887, subject to the following conditions: (a) Appellees not to engage in the business during the time; (b) if no person other than appellants, Hart Bros., and one other, whose capital should not exceed five thousand dollars, shall engage in this business during the time, and if appellants should fail to make the monthly payments because of others engaging in the business, then appellees might, at their option, resume the curtain and carpet business; (c) if any party or parties should engage in said business during said years in such a way as to relieve appellants from making the monthly payments, and thereafter discontinue such business, then the monthly payments were to be renewed, if appellees had not in the mean

time engaged in the carpet and curtain business. The agreement in reference to the payment of the \$416.66 per month is finally stated in the contract as follows: "The intention of that part of this contract which relates to the years A. D. 1886 and 1887 being that said second parties shall pay to said first parties the said sum of \$416.66 for each month in said years A. D. 1886 and 1887 as they (the said second parties) shall encounter in said business no greater competition than said Hart Brothers, and one other party, whose stock of said goods shall not exceed five thousand dollars in value." By the express terms of the written agreement appellant's liability for the payment of the \$416.66 per month was made to depend upon the condition that they should encounter no greater competition in the carpet and curtain business than said Hart Bros., and one other party, whose stock of said goods should not be more than \$5,000 in value, while the testimony shows that besides the stock carried by Hart Bros. there were other dealers engaged in the carpet and curtain business during those months, whose combined stock amounted to about \$12,000.

We are not embarrassed in this case by any conflict in the evidence. The undisputed facts are that at all times during the months of January and February, 1886, the following persons, in addition to Daniels & Fisher, Cordes & Feldhauser, and Hart Bros., were engaged in the carpet and curtain business in the city of Denver, to-wit: David McCall, with a stock valued at over \$3,500; William Gadsby, with a stock of about \$500; A. J. Arfsten, with a stock valued at between \$3,000 and \$4,000; G. W. Gildersleeve, who carried a stock of \$500 or \$600; Pat Casey, with a stock of about \$3,000. In addition to these there were several other dealers, carrying stocks of curtains and carpets, ranging in value from \$200 and \$500 each. The learned judge who tried the case below was of the opinion that these parties, although dealing in new carpets and curtains, and purchasing from first hands in large quantities, should not be considered in competition with appellants for the reason that they were what is commonly termed "second-hand dealers." It was the undoubted right of the parties in making the contract to have made an exception for such dealers in the written instrument. They did not do so, however, and for the court to undertake to vary the terms of the written instrument so as to exclude such dealers would be equivalent to writing into the contract something not put there by the parties. The law will neither make, nor permit to be made, for parties a different contract from that which they have had made for themselves, and a court cannot, by construction, defeat the express stipulation of the parties. These principles are well settled. 2 Pars. Cont. 497, 560. This contract is clear and unambiguous. The moment appellants met with greater competition in the city of Denver than that encountered from Hart Bros., and one other party, whose stock of carpets and curtains it was agreed should not exceed in value the

sum of \$5,000, their liability to pay the sum of \$416.66 monthly, or any other amount, ceased. It makes no difference by whom or in what manner the stores were opened, or under what name the business should be conducted, whenever they were compelled to encounter greater competition than that specified, they were released from liability by the express terms of the written instrument. It is unnecessary to consider the other assignments of error. The judgment must be reversed, and the cause remanded.

ON PETITION FOR REHEARING.

(July 2, 1890.)

PER CURIAM. This appeal was taken under the act of 1885, and the court relied upon appellant's abstract of record for the matters of fact stated in the opinion. If counsel for appellees claimed that this abstract was imperfect or unfair, he was at liberty, under the statute, to file an amended abstract, showing such additions and amendments as he deemed necessary to a full understanding of the questions presented for decision. Failing in this, the court is not at liberty to extend its investigation beyond the abstract of record for the purpose of determining the questions presented. *Hurd v. McClellan*, 18 Colo. 7, 21 Pac. Rep. 903. The other matters presented upon this petition are covered by the original opinion in the cause, and we see no reason to change the views therein expressed. The rehearing will be denied.

SCHWANBECK, Auditor, v. PEOPLE ex rel. SMITH.

(Supreme Court of Colorado. June 30, 1890.)

MANDAMUS—TO STATE AUDITOR.

Act Colo. April 19, 1889, provided for the construction of a wagon road, that the governor, the state engineer, and the chairman of the county commissioners of a certain county should be a board for the laying out and constructing of such road, and that, upon the presentation of a certificate of said board that the road was completed according to contract, the auditor should draw warrants in payment of the amount due on the contract. A petition by the contractor, to compel the auditor to issue warrants to him under the act, contained no averment that the board, properly convened for that purpose, had decided that the road was built in accordance with the contract. The certificate of approval of the work, set out in the petition, was signed by only one member of the board, though its terms indicated that the signer had been delegated power to act by the other members, and the names of the latter were attached to a voucher of indebtedness to the contractor. *Held*, that the petition should be dismissed.

Commissioners' decision. Error to district court, Arapahoe county.

This is a petition filed in the name of the people by the relator, Smith, against Louis B. Schwanbeck, the auditor of the state, whereby the petitioner seeks to compel the auditor to issue to him a warrant upon the public treasury for a certain amount of money. In general, the petition alleges that on April 19, 1889, the legislature passed an act providing for the construction of a wagon road through Bear River canon, between Steamboat Springs and Hayden, in Routt county. The act appro-

priated the money necessary for the building of the road, and the act itself was approved. The petition set up generally that the governor, the state engineer, and chairman of the board of county commissioners were constituted a board to see that the road was surveyed and laid out, and, after proper advertisement for bids, to let a contract for its construction. The petitioner further set up his performance of the work under the contract as made by the board, and attempted to set out a presentation to the auditor of such a certificate as the statute required. The certificate was in the following words: "To whom it may concern, and to the board of construction on the Canon road below Steamboat Springs, Routt Co., Colo.: It was heretofore agreed that I, the undersigned, should inspect and accept said road, which I hereby certify that I did this day and date, and in my judgment the road is in compliance with the contract, and that S. L. Smith has completed said contract. S. H. THORPE, Chairman Board Const." To strengthen that certificate, or as a part of it, the petitioner likewise set up the following paper, in the nature of a bill audited or a voucher:

"To S. L. Smith, Dr.

1890.	Dollars.	Cents.
As per itemized bill attached to contract for construction of state wagon road through Bear River canon, as authorized by H. B. 134, approved April 19, 1889.	4,000	00

"Approved January 6, 1890.

"J. P. MAXWELL, State Engineer.

"By JOHN S. TITCOMB,

"Deputy State Engineer.

"Pay from Bear River road fund.

"JOB A. COOPER, Governor.

"Received of the auditor of the state of Colorado, warrant No. —, in payment of the above account.

"[Sign here.] \_\_\_\_\_."

No other certificate of any sort was alleged to have been presented. Upon this petition a writ of *mandamus* was prayed to compel the auditor to issue the warrant. An answer was presented in which the substantial defense set up was the failure on the part of the relator to complete his work, and to obtain and present the certificate required by the statute. Subsequently the relator filed a demurrer to the answer, and the cause came on for hearing upon those issues. The statute under which the writ was applied for is known as "House Bill 134," and found on page 435, *SESS. LAWS 1889*. Section 2 is as follows: "Sec. 2. The governor and the state engineer of this state, with the chairman of the board of county commissioners of Routt county, shall be, and are hereby made, a board for the purpose of laying out and constructing such wagon road." "Sec. 7. Upon the completion of said road according to contract, and upon the presentation of a certificate of said board to that effect, the auditor of state is hereby authorized to draw warrants for the amount appropriated by section one of this act, or so much thereof as may be necessary, for the purpose of paying the amount due on said contract."

S. W. Jones, Atty. Gen., and H. Riddle,

for plaintiff in error. *Rucker & Titcomb*, for defendant in error.

BISSELL, C. That an action will lie against a public officer for a failure to discharge a statutory duty, or for a neglect or a refusal to exercise a proper authority, cannot be doubted. To sustain the suit, the plaintiff must present a petition which sets up a full and technical compliance with all the requirements of the enactment from which his rights are derived, and it must be maintained by full proof. He must show that he has been damaged by the disregard of the obligation, and that he has strictly and in apt time performed whatever conditions precedent are prescribed by the statute. The act under consideration, and to which the relator must look for the ascertainment of his rights, creates a board to carry out the object and purposes of the act, viz., to supervise and control the construction of the road provided for. The members of this board are the governor, the state engineer, and the chairman of the board of county commissioners of Routt county. Whatever power was conferred by the legislature was conferred upon the three persons named as a body, and to them, as such, was delegated whatever of power was given. From this it is evident that whatever action they take must be taken by them as a board. They are given by the act full power to determine what route the road shall cover; for what price, within the limits of the appropriation made by the act, it shall be built; to receive the bids, and decide whether the road has been completed according to the terms of the contract under which it was built. These being the express powers conferred upon the board by the terms of the act, it is clear that the board was invested with what are called judicial powers, i. e., powers to decide upon the due performance of the work for which they had contracted on behalf of the state. It is perfectly well settled that where a statute creates a board, and gives to that board power to decide any matter, the board must act as a board, although a binding effect would be given to a decision by a majority, where they all convened to discharge the duty imposed on them. Should the majority assume to do the business of the board in the absence of the other members, their action would not be good under the law, unless the majority were, by the enactment from which they derived their power, expressly authorized to act. *Crocker v. Crane*, 21 Wend. 211; *Ex parte Rogers*, 7 Cow. 526; *Merchant v. North*, 10 Ohio St. 251; *Sedg. St. Law*, (2d Ed.) 331.

Such being the law, it is apparent that no such collective action was averred in the petition as gave to the relator any right to proceed against the auditor upon his refusal to issue a warrant. It is always true that, in an application for a *mandamus* against a public officer, the relator must show a good case upon the face of his petition; failing to do this, he would not be entitled to the writ, even though no answer whatsoever had been made to the application. The petition contains no averment that the board, properly con-

vened for the purpose, had decided that the work was completed according to the contract as let. This the petitioner must both allege and prove. The decision of that matter rested with the board, and he must either show their determination, or sufficient legal reasons for his failure. He did neither. The failure of the relator to comply with the requirements of section 7 of the act is equally fatal to his recovery. In that section the auditor is authorized to draw a warrant upon the treasury when he receives from the one who demands it a certificate of the board that the work has been duly completed. His power under the act is dependent upon the receipt of that certificate. He is authorized to act only on its presentation. There can be given to him in the discharge of his official duty in the premises no other sufficient evidence that the warrant has been earned, and that anybody is entitled to it. This certificate must be, on its face and by its terms, the act of the board which the statute has created. The auditor, under our system, is an officer charged with the duty of protecting the public treasury from unauthorized drafts upon it. How far he may go in defense of the public funds need not be determined. That he may require all the evidence prescribed by the statute, complete in all its formal and essential particulars, there is no doubt. He could not do less, and properly discharge his official duty. According to the averments of the petition, no such certificate was presented, nor was one ever given to the auditor. The certificate set up was signed by Thorpe as chairman of the board of county commissioners of Routt county. It recites the individual judgment and the individual action of the member signing it. It is true that its terms indicate that the board sought to delegate to this one member the power to act. But this does not cure the difficulty. One member was powerless to discharge the duty imposed upon the board, or to exercise the power given to the whole body. The board, or a majority of it, were equally powerless to confer upon him the right to act in the premises. The presentation of the statutory certificate is a condition precedent. Without an averment that such a certificate was executed by the board as such, and presented to the auditor, the relator is without rights in the premises. The voucher which is afterwards set up in the relator's petition is not the certificate required by the statute, nor can it properly be treated as such. It might perhaps be said, with some show of reason, that it tended to establish the relator's claim to the extent of \$4,000, and to show that he had earned that amount of money; but by no possibility of construction or intentment can it be held to be a certificate executed by the board, or by two members of it, to the effect that the road was completed according to the contract as made. It is needless to discuss the question whether it is within the power of any member of the board to act by deputy, where the board is specially created by statute. This question is expressly left undecided in this opinion. It is equally

unnecessary to discuss the force and effect of the governor's signature to the voucher. The signature was not to a certificate as designated and required by the statute, but was a direction as to the fund from which the bill to which it was attached should be paid. In no manner can it be said to be attached to the sort of a paper which the relator must produce. It is probably true that, had it been operative to give the relator any rights, the legal effect of it would not have been lost by the erasure. This, however, is unessential, in the view which has been taken of the statutory requirements and the relator's rights. The judgment of the court below should be reversed, and the cause remanded, with directions to dismiss the petition.

RICHMOND and REED, CC., concurring.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment of the court below is reversed, and the cause remanded, with directions to dismiss the petition.

#### CALIFORNIA INS. CO. v. GRACEY.

(Supreme Court of Colorado. June 30, 1890.)

##### FIRE POLICY—PROOF OF LOSS—AGENT.

1. A condition in a fire policy that a loss shall be paid "sixty days after due notice and proof of the same, made by the assured, are received at the office of the company," is waived by an absolute denial on the part of the company of any liability, and the assured need not wait 60 days before suing therefor.

2. Where a special agent and adjuster of an insurance company, pending negotiations after loss, confers with assured and her attorney concerning the proofs thereof, and employs an attorney to assist in the investigation of the loss, and seeks to secure a cancellation of her claim on the repayment of the premium, and, without informing her of the existence of any limitation on his authority to bind his principal, positively refuses to pay the claim, the company will be estopped to deny the agent's authority to bind it.

3. Where a complaint is defective in failing to allege a waiver of a condition in a policy that the loss should not be payable until 60 days after proof thereof, an amendment curing that defect does not state a new cause of action.

4. A verdict, so far as it amounts to a finding upon a fact in dispute, will not be disturbed, as unsupported by evidence, where it appears that four witnesses testified to the fact, and two only denied it.

Appeal from district court, Arapahoe county.

Mrs. Gracey, appellee, entered into a contract of insurance with the California Insurance Company, appellant, covering furniture and other personal property belonging to and used by her in keeping in a boarding house in the city of Denver. The building, together with the personal property insured, were afterwards destroyed by fire. Notice of the loss was duly given to appellant, and proof thereof was attempted to be made. Neither the amount claimed, nor any part thereof, was paid; and the present suit was instituted to collect the same.

J. W. Horner, for appellant. O. E. Le Fevre, for appellee.

HELM, C. J., (after stating the facts as above.) It is stated by counsel for appel-

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lant that the question for adjudication in this court is, was the suit prematurely brought? The contract of insurance provides that the sum due, in case of loss, shall be "paid sixty days after due notice and proof of the same, made by the assured, is received at the office of this company." By the pleadings and briefs, it is admitted that in the present case the 60 days thus provided for after proof of loss did not elapse before the suit was brought. But the amended complaint and the replication contain averments intended to show that appellant, by its conduct, waived the right to insist upon compliance with this condition of the contract. It is therein asserted that appellant, through its agent, denied all liability, and positively refused to make payment, declaring that appellee would have to bring her suit therefor. The position is strenuously relied on that, in view of this fact, appellee was not bound to wait the 60 days, or any other particular length of time, before instituting her suit. In response, it is asserted—*First*, that the agent did not positively and absolutely refuse payment of the claim, or tell appellee that she would have to bring suit therefor; *second*, that the agent was wholly without any authority to bind the company by such declarations, even if made; and, *third*, that, as a matter of law, such a refusal by the company itself would not entitle appellee to sue before the expiration of the 60 days. These positions will be considered, though not in the strict order of their statement.

We must hold that the averments of the complaint and replication in this regard are fairly sustained by the proofs. The weight of evidence is decidedly against appellant. Four witnesses besides appellee testify that Pratt, the agent alluded to, made the assertions substantially as averred; that he said, in substance, the company would not pay the loss, because appellee had designedly burned the property, and, if she wished compensation, she must institute her suit; while but two witnesses (Pratt himself, and Horner, the attorney employed to assist Pratt) deny the making of such statements. The verdict, in so far as it rests upon this conclusion of fact, cannot be disturbed. The stipulation allowing 60 days for payment of the claim is valid, and therefore binding. Unless waived, a suit brought within that time must be abated. But this provision is purely a matter of contract between the parties. It is not even, as in Iowa and Ohio, made a statutory right. Being a matter of contract alone, and for appellant's benefit, undoubtedly appellant could waive it. By an unqualified denial of liability, and refusal to pay the claim, especially when, as in the present case, predicated upon the ground that the assured has, by criminal conduct, forfeited his right thereto, such waiver, in our judgment, takes place. The object of the provision is twofold: *First*, to enable the company to investigate the causes of loss, and verify the proofs thereof submitted; and, *second*, to give the company opportunity for making financial arrangements to discharge its obligation. The denial of liability, and absolute refusal, imply satis-

faction with the investigations already made, and information already obtained, while, since payment is in no event to be made, preparation therefor becomes a matter of no importance whatever. We shall not prolong this discussion by pointing out objections to the supposed analogy in law and fact between the denial of liability under consideration, and the premature refusal to pay a promissory note, the same not being due. It would be unreasonable, to say the least, for us to hold that, under such circumstances as are here presented, the assured is nevertheless bound by the clause in question, and must wait the expiration of the 60 days before commencing suit. Such is not the law. *Insurance Co. v. Maguire*, 51 Ill. 342; *Cobb v. Insurance Co.*, 11 Kan. 93. Insurance policies uniformly contain the provision that the assured shall, in accordance with certain prescribed regulations, give notice and make proof of loss. It is universally held, we believe, that the absolute refusal of a company to pay the loss in any event constitutes a waiver of the right to insist upon compliance with such provisions. *Insurance Co. v. Manning*, 3 Colo. 224; *Insurance Co. v. Smith*, Id. 422, and cases cited; *Cobb v. Insurance Co.*, supra, and cases cited. If the company may thus waive notice and proof of loss altogether, it would be absurd to say that, nevertheless, suit cannot be brought until the expiration of 60 days after such notice and proof have been received at its office. The rule of waiver as to notice and proof would in such case be a mockery, because the assured could not institute legal proceedings until 60 days after he had given the notice and furnished the proof, though both had been previously waived.

But, as already stated, appellant insists that in this respect the act of Pratt was not the act of the company; that his declarations were made without authority, and therefore the company was not bound thereby. According to the testimony of Pratt himself, and of Bromwell, president of the company, Pratt was at the time of these negotiations a special agent and adjuster of losses for the appellant company; but it was his duty, under verbal instructions, to report in all cases the result of his investigations to the company; and he could not upon his own responsibility promise or refuse payment of losses claimed to have been suffered. This testimony is not contradicted; and hence it may be assumed as proven that, under his private verbal instructions, Pratt did not have authority to make the declarations upon which appellee relies. The matter, therefore, for present consideration is narrowed to the question, is the company estopped from setting up and relying as a defense upon this want of authority on the part of its agent? Pratt was the company's accredited representative in all matters connected with the adjustment of losses. He investigated the causes of loss, advised with the assured concerning proofs thereof, determined, if he chose so to do, the amount of loss, and assisted to a greater or less extent in the settlement. Unless he saw fit to so expressly state, there was nothing to indicate his want of

authority to agree or decline, in behalf of the company, to pay the loss. In the present case, he conferred with appellee and her attorney in relation to the proofs, and the payment of the amount called for by the policy. It would seem that he employed an attorney on behalf of the company to assist him in conducting the investigation and accompanying negotiations. Together with this attorney, he interviewed appellee, and proposed that she cancel her claim against the company under the policy upon reimbursement of the premium paid by her. As a foundation for that proposition, he and the attorney assured her that they had strong evidence against her of the crime of arson in connection with the fire,—a charge unsupported by proofs at the trial. They did not notify her or her attorney of any limitation whatever upon Pratt's authority in the premises. According to the preponderance of evidence, nothing was said about referring the question of payment to the company. On the contrary, Pratt, speaking, as she supposed, for the company, positively refused to pay her any of the indemnity provided for in the policy. The declarations in question were made directly in connection with the business he was authorized to transact, and to all appearances were fairly within the scope of his agency.

Is it possible the appellee's recovery in this matter is to be controlled by the secret, verbal limitation upon Pratt's authority, of which she had no notice or knowledge? If this be true, then such companies may avoid just liability in many cases by giving their agents secret instructions that are inconsistent with the apparent power and authority vested in and exercised by them. We are of the opinion that, under the circumstances of the present case, the company should not be permitted to deny responsibility for the acts and declarations in question. "Where an insurance company has appointed an agent, known and recognized as such, and he, by his acts, known and acquiesced in by them, induces the public to believe he is vested with all the power and authority necessary for him to do the act, and nothing to the contrary is shown or pretended at the time of doing the act, public policy, the safety of the people, demand the company should be liable for such of his acts as appear on their face to be usual and proper in and about the business in which the agent is engaged." *Insurance Co. v. Maguire*, supra; *Insurance Co. v. Fahrenkrug*, 68 Ill. 463. The power of insurance agents "may be limited by the companies, but parties dealing with them as to matters within the real or apparent scope of their agency are not affected by such limitations unless they have notice of the same." *Rivara v. Insurance Co.*, 62 Miss. 720.

The amended complaint was defective because it showed suit begun within less than 60 days after proof of loss, but did not aver matters constituting a waiver of the 60-day provision of the contract. The second amended complaint cured that defect. This was not pleading a new cause of action, as contended by appellant. It

was perfecting the statement of the original cause of action by the addition of essential averments. The cause of action remained the same, viz., an action at law upon the contract of insurance to recover the sum claimed by virtue of its provisions.

It is unnecessary for us to consume time discussing the objections to the charge. It was in harmony with the law as above stated, and was in some respects even more liberal to appellant than the law required. The judgment is affirmed.

#### PLEYTE v. PLEYTE.

(*Supreme Court of Colorado. June 30, 1890.*)

COURTS—ABOLITION—CLERICAL ERRORS IN RECORD—AMENDMENT.

1. The legislature of Colorado, on abolishing the superior court, and providing for the transfer of all business pending therein to the district court, impliedly authorized any and all proceedings before the district court, relating to causes from the superior court, which the superior court itself, if still in existence, might entertain; and the district court may amend the record of a case tried in the superior court which, by a clerical error, recites that plaintiff waived a jury trial, on its being clearly shown that such was not the fact.

2. Code Civil Proc. Colo. § 75, which permits a court, in certain cases, to relieve a party from a judgment, order, or other proceeding, where he applies for the relief within six months after the adjournment of the term at which such judgment, order, or proceeding was taken, does not deprive the court of its inherent right to correct a clerical mistake in the record of a cause at the instance of a party who had not discovered the error until after the expiration of six months from the rendition of judgment.

3. Where, after a writ of error has been docketed in the supreme court, a clerical mistake is discovered in the record of the lower court, which may materially affect the rights of the parties, and which the lower court expressly found to exist, but which it declined to correct because it erroneously supposed that it lacked the authority so to do, the supreme court will order the correction to be made in that court on the findings of the lower court.

Error to district court, Arapahoe county.

On motion for leave to file a supplemental transcript. For opinion on former appeal from the action of the trial court in declining to amend its record, see 23 Pac. Rep. 1007. Code Civil Proc. Colo. § 75, provides that a court "may, upon such terms as may be just, and upon payment of costs, relieve a party or his legal representatives from a judgment, order, or other proceeding taken against him through mistake, inadvertence, surprise, or excusable neglect; and when, for any cause satisfactory to the court, or the judge at chambers, the party aggrieved has been unable to apply for the relief sought during the term at which such judgment, order, or proceeding complained of was taken, the court or judge at chambers, in vacating may grant the relief upon application made within a reasonable time, not exceeding six months after the adjournment of the term."

*Sullivan & May and Coe & Freeman*, for plaintiff in error. *Patterson & Thomas*, for defendant in error.

HELM, C. J. Subsequent to the issue of the present writ of error, defendant in er-

ror, by leave of court, filed a supplemental transcript of record. Plaintiff in error then for the first time, as it is alleged, became aware of the following record recital, which appears in the supplemental transcript: "Thereupon, this cause comes on for trial before the court upon defendant's cross-complaint; neither party desiring a jury." She asserted the fact to be that she demanded a jury, and at no time, by word or act, waived the same, but that the court denied her the privilege, and therefore that the recital in question is false, and the true action taken is not recorded. Further proceedings in this court were suspended so that she might procure a correction of the record. The superior court of Denver, in which the cause was tried had in the mean time ceased to exist; and its records had been transferred, in pursuance of law, to the district court of Arapahoe county. Application to the latter court resulted in a denial of the amendment. The court expressly found, however, that the facts were as claimed by petitioner; that she did demand a jury, and did not waive her right thereto; and that the petition was presented at once upon discovery of the clerical mistake in recording the proceedings. But it held, nevertheless, that, as a matter of law, it could not permit the amendment of the record to correspond with the fact. Exception being duly taken to the judgment dismissing the petition, a transcript of the proceedings in connection therewith is now presented for filing in this court as a supplemental record. Notice of the present application has been served on opposing counsel, and arguments are filed by both parties. It is agreed that we may at this time consider and pass upon the correctness of the rulings made in this supplemental proceeding by the district court, as well as upon the technical objections against filing the supplemental transcript here.

The general practice pursued by plaintiff in error in the premises has received the sanction of this court. See opinion upon a former motion in this controversy, 23 Pac. Rep. 1007, and cases there cited. The statute, in abolishing superior courts, provided for the transfer of all business pending therein to the district courts. This statute does not in words authorize the latter court to amend or correct the records of the former; but the authority given over such causes, proceedings, and records is broad, and, in our judgment, fairly comprehends the power in question. Besides, as we shall presently see, authority to correct clerical mistakes in their records is inherent in courts, and not necessarily dependent upon legislative enactment. The fact that the record was made by another tribunal would induce great circumspection and caution in the premises; and unless, in a proper manner and by proper proofs, the mistake or defect were clearly shown, no correction would be allowed. But we are satisfied that the legislative design in the premises was to authorize any and all proceedings before the district court, relating to causes from the superior court, which the superior court itself, if still in



existence, might entertain. No greater danger exists in such cases than in the case where a judge is called upon to correct or amend a record entry made under direction of his predecessor in office.

Courts of review hesitate about interfering where the trial court, exercising its legal discretion, denies such applications as the one before us on the merits. But we do not here encounter this embarrassment. The application in the present case was not denied because of any insufficiency or imperfection of proof. On the contrary, the court expressly found, as already stated, that the clerical mistake in question had been made, and in so finding determined also what the record should have recited. That court further declared that there was no negligence or delay in presenting a petition to correct the mistake after discovery thereof. We think the application should have been allowed. The reason given by the learned judge for his denial thereof—that because the relief was not asked within six months after adjournment of the term, as provided in section 75 of the Code of Civil Procedure, the court was without jurisdiction to grant the request—is not good. That provision was not intended to control such matters as are here presented. It affects judicial action, and does not deal with mere clerical mistakes. It provides a remedy whereby judgments, orders, and other judicial proceedings can, under certain specified circumstances, be amended or set aside. Courts may correct the clerical misprisions of their clerks or other officers, when properly brought to their attention. Seldom, if ever, does the lapse of the term or expiration of six months, or any other period, in and of itself deprive them of the authority to correct these mistakes in accordance with the fact. "All courts have inherent power to correct clerical errors at any time." *Freem. Judgm.* § 71, and cases cited. Nor, according to the modern and more liberal rule, is the proof required to justify such amendments limited to any particular or specific kind. "At the hearing, such evidence is received as would be competent in any other investigation." *Id.* § 72, and cases cited. The learned author, in the section last above mentioned, quotes with approval the rule laid down by this court upon the subject under consideration in *Doane v. Glenn*, 1 Colo. 456. See, also, *Wolfley v. Mining Co.*, 3 Colo. 296; *Knox v. McFerran*, 4 Colo. 348.

Having arrived at the foregoing conclusion, we are confronted with a situation anomalous, to say the least. The action of the district court in refusing to amend the record was error. Ordinarily, all proceedings, including those subsequent to final judgment, are reviewed by this court at the same time, and a single opinion is promulgated, covering the entire case. But, without some further affirmative action, such procedure might in the present case produce the grossest injustice. The review here would take place upon a false record, and the result might be a judgment differing radically from one predicated upon a truthful record. Justice evidently demands that an order of reversal be entered as to these proceedings, and that

they be remanded to the court below with directions to retry the matters involved according to the views above announced, or that the judgment or order of the district court in this behalf be ignored, and the proper order be here entered upon the findings of fact there made.

Counsel, in resisting the application now before us, base their objections entirely upon legal grounds. They have not disputed the correctness of the findings of fact made by the district court. So far as at present appears, both parties admit that the evidence before that court fully justified these findings. The findings themselves, together with all the proceedings, are presented to us in the form of a duly certified and authenticated transcript. Upon reflection, we have concluded that the ends of justice will be best subserved by entering here the judgment upon the findings that should have been pronounced below. The power to do this on final hearings, though rarely exercised, is expressly conferred by statute; and we have no doubt of our right to assume it in the present case. It is, accordingly, so ordered. The application for leave to file the supplemental transcript is allowed.

#### DE STAFFORD V. GARTLEY.

(*Supreme Court of Colorado.* June 30, 1890.)

#### ATTACHMENT—SUFFICIENCY OF AFFIDAVIT—INJURIES TO STOCK.

1. Gen. St. Colo. c. 25, § 223, gives treble damages against one who maliciously injures stock or drives it from the usual range, and also authorizes the owner to proceed by attachment. Code Civil Proc. Colo. § 96, prescribes that in a writ of attachment the amount "shall be stated in conformity with the affidavit." *Held* that, in a suit for treble damages, a motion to dismiss the attachment because the affidavit averred the actual damage, \$500, and the writ issued for treble damages, was properly denied.

2. The fact that the actual damage as proved at the trial was less than the amount specified in the affidavit did not invalidate the attachment.

Commissioners' decision. Appeal from district court, Douglas county.

*Wm. Dillon*, for appellant. *J. W. Farwell* and *J. A. Bentley*, for appellee.

RICHMOND, C. This action was brought in the district court of Douglas county to recover damages for willful and malicious injury of appellee's cattle, and also for the unlawful, forcible, willful, and malicious driving of certain neat cattle of appellee from their usual range, by appellant. By the complaint the plaintiff charges the defendant with several distinct offenses of malicious injury, whereby he claims that he has been actually damaged to the extent of \$500, and prays judgment for the sum of \$1,500. June 29, 1886, plaintiff sued out a writ of attachment, and, in support of the issuance of said attachment, filed an affidavit, which, omitting the formal parts, is in words and figures as follows: "The plaintiff above named, Edward T. Gartley, of said county, being duly sworn, doth depose and say that he is the plaintiff, and that the above-named Edward De Stafford, against whom said plaintiff, Edward T. Gartley, is about to sue out an attachment, is indebted to him in a

sum of money, to-wit, the sum of \$500, and that such demand is due and is just, and that said defendant conceals himself so that process of law cannot be served on him, and that said defendant is guilty of unlawfully, willfully, and maliciously injuring several of plaintiff's animals, and affiant knows of the defendant having shot two cows and one heifer, and driven them from their usual range, to the great vexation; trouble, and damage of affiant, mentally and pecuniary, and said animals being then and there affiant's property." In connection with this, plaintiff filed an attachment bond in the penal sum of \$1,500. Thereafter, defendant moved to dissolve the attachment upon the ground that the writ was improperly issued, for reasons appearing on the face of the papers and proceedings in the action. Motion was heard in chambers, and on the 10th day of September, 1886, the judge made an order directing the plaintiff to file a bond, conditioned according to law, in the sum of \$3,000, being double the amount named in the said attachment writ, and, upon failure to file said bond within 10 days, the levy under such writ should stand discharged and released, and the said writ thereupon be returned in accordance with this order. In addition to the motion to dissolve, defendant filed an affidavit traversing the allegation of the plaintiff's affidavit, wherein it is alleged that he concealed himself so that process of law could not be served upon him. Thereafter, on the 5th day of January, 1887, at a special term of said court in said county of Douglas, the motion to discharge the attachment in the action was renewed, which motion was denied. From the abstract of record, we learn that, at the hearing of the motion to dissolve the attachment, it was not claimed or suggested by defendant or his attorney that the writ of attachment could not legally issue in the cause; but, when the jury was called to try the issues joined by the complaint, answer, and replication herein, counsel for defendant demanded that the issues joined by affidavit for attachment and traverse thereof should be first tried. Whereupon the court suggested that a trial of the main issues of the case would necessarily determine the issue raised by said affidavit of traverse; and with this the attorney for defendant said they were content. None of the evidence is embraced in the abstract or transcript. The appeal is from the order of the court, which, under the above arrangement, was entered at the rendition of judgment, refusing to dissolve the attachment; and the only error relied upon or discussed by appellant is that the plaintiff's affidavit for the attachment was insufficient.

Section 223, c. 25, Gen. St. 1883, provides as follows: "If any person shall willfully and maliciously kill, cripple, or injure any horse, mare, or gelding, or any bull, cow, steer, heifer, or calf, or any mule or sheep, by poisoning or other means, or shall maliciously run down, or drive from its usual range, any animal above mentioned, or shall maliciously scatter or drive from their usual range any flock or herd of sheep, or any herd or band of neat cattle,

horses, or mules, or any of the animals above mentioned \* \* \* such person so offending shall be deemed guilty of a misdemeanor." Section 224 provides: "Every person guilty of an offense above herein mentioned shall in all cases be liable to any party injured thereby in three times the amount of the actual injury done by the commission of such offense, whether the offender be convicted on any criminal prosecution or not; and the person or persons instituting such proceeding shall have the right to proceed by attachment." Subdivision 4, § 92, Code Civil Proc., provides for an attachment when "the defendant conceals himself \* \* \* so that process of law cannot be served upon him." From the foregoing, it will be observed that the attachment writ in this case was issued upon an affidavit embracing the grounds enumerated in section 223, Gen. St., and subdivision 4, § 92, Code. The contention of appellant is that the affidavit only avers an indebtedness of \$500, whereas the attachment writ is issued for the sum of \$1,500; and he cites section 96, Code Civil Proc., wherein it is provided that "the writ shall be directed to the sheriff of any county in which property of such defendant may be, and require him to serve a copy of the writ on the defendant, and to attach and safely keep all the property of such defendant within his county, not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand, the amount of which shall be stated in conformity with the affidavit." It appears that the writ of attachment was in excess of the amount specified in the affidavit, but equal to the amount claimed by plaintiff in his complaint. The appellee insists that the motion to dissolve is in general terms, and does not point out a single reason in support thereof. From the record in the case, it would appear that the principal reason urged upon the hearing of the motion was the insufficiency of the bond; it not being for double the amount of the sum claimed, and for which the writ was issued. This insufficiency, however, was subsequently overcome by a compliance with the order of the court. For the purposes of this case, it is admitted that the attachment could legally issue under the provisions of section 223; and it is fair to assume that, had the discrepancy in the amount mentioned in the affidavit and writ been called to the attention of the court below or appellee, appellee would, by permission of the court, have so amended the affidavit as to meet the objection here urged upon our attention. The court observed the defect in the bond, and gave permission, under the statute, to amend. The affidavit, under the Code, could have been amended, as well as the bond. *Freeborn v. Glazer*, 10 Cal. 337. The affidavit set out the actual damages supposed to have been suffered, which the court, after proof made, and verdict returned, could have tripled, under the statute, in rendering the final judgment; and, while it might have been in better form to have averred in the affidavit a liability to the extent of \$1,500, it cannot be said that the error in thus omitting the amount claimed

by plaintiff under the statute affected the substantial rights of the parties. The issue between the parties was precisely such as it would have been if the affidavit had contained a direct allegation of an indebtedness to the extent of \$1,500. Where the defendant appears, and denies the allegations of a defective affidavit, and tries it as if it were legal in its terms, and goes into a trial of the issue, made by himself, as to the ground of the attachment, thereby getting all the benefit that he could have had if the affidavit had been in strict conformity to law, and the result of the trial be adverse to him, he cannot obtain a reversal of the judgment because of the defect in the affidavit. *Ryon v. Bean's Adm'r*, 2 Metc. (Ky.) 187; *Drake*, Attachm. § 112.

Besides the foregoing objection, appellant now relies, also, upon the fact that the sum specified in the affidavit as the actual damage eventually proved to be excessive; but this is no reason why the attachment should have been dissolved, or a reversal should now take place. The action arose out of alleged malicious injury to stock by shooting and otherwise, and malicious injury by driving stock from its usual range. For obvious reasons, it might be impossible to estimate in advance, correctly, the extent of such injuries. Plaintiff could not in the present action be held responsible for an honest error in computing the approximate damages suffered. It does not necessarily follow, however, that, if a creditor knowingly and willfully overstates the amount of his claim in the attachment affidavit, for the purpose of procuring an excessive levy, and thus injuring and annoying his debtor, the latter would be remediless. But it is deemed unnecessary, at the present time, to further consider this particular question. The evidence not being embraced in the abstract or transcript, we are unable to determine that the court was not warranted in the conclusion that both reasons stated in the affidavit for suing out the writ were amply sustained. By going to trial upon the issues joined by the affidavit for attachment and traverse, we think defendant waived the right to be now heard upon the question of formal defects in the affidavit for attachment. The order of the court in refusing to dissolve the attachment, and judgment thereon, should be affirmed.

REED and PATTISON, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment of the court below is affirmed.

#### BOETTCHER v. COLORADO NAT. BANK.

(Supreme Court of Colorado. June 30, 1890.)

BANK-CHECKS—EQUITABLE ASSIGNMENT—AMENDMENT—MOTION TO STRIKE.

1. In a suit against a bank for the amount of certain checks drawn by a firm of millers in plaintiff's favor, and which, although there were moneys to the drawer's credit, were refused payment because the bank retained such moneys for the discharge of a debt about to fall due to itself, an allegation that such moneys were the proceeds of wheat sold to the drawers by plaintiff, and were deposited for the payment of such checks,

and for no other purpose, was not sufficient to charge the bank as a trustee, in the absence of an averment that it was a party to the agreement, or had notice thereof.

2. Where an amendment, made four years after a reversal, was ordered stricken from the complaint on the ground that it added a new and distinct cause of action, the reviewing court, without determining whether the ground stated was sufficient, will not reverse the order, when it appears that the amendment did not state facts sufficient to constitute a cause of action.

3. The holder or payee of a check cannot in his own name maintain an action against the drawee, when the check has not been accepted. *ELLIOTT, J.*, dissenting.

Commissioners' decision. Appeal district court, Arapahoe county.

*Wells, McNeal & Taylor*, for appellant. *J. Q. Charles*, for appellee.

REED, C. On the 28th day of January, 1878, Shackleton & Brinker were partners engaged in business, and keeping a general account with the appellee, and on that date drew their check payable to appellant five days after date, for \$472.49; on January 31st, a second check for \$453.25, payable six days after date, and one for \$37.62, payable on presentation. The first check matured February 2d, the second check, February 5th, the third, due at sight, was presented February 2d. The checks were deposited by appellant for collection with the Union Bank of Greeley, and were forwarded by that bank to appellee. On the 2d day of February there was with appellee, to the credit of Shackleton & Brinker, \$371.64, and a further deposit was made of \$473. On the 5th of February another deposit of \$214.34 was made, making the amount to their credit on that date (after deducting an item of interest due the bank) \$1,058.39. On January 31st Mr. Shackleton died, leaving Mr. Brinker surviving partner. The three checks were received by appellee from the Union Bank, the first on January 30th, the second on February 1st, the third on February 2d. On February 2d, when the check of January 28th was due, and the sight check was presented, there was not sufficient money to pay both, and neither was paid, but the checks were retained by the appellee. On the 5th of February, when the other time check became due, there was not sufficient money to pay the three, and none were paid. The checks were returned to the Union Bank, and the bank notified of the death of Mr. Shackleton, but with no statement of want of money to meet them. It had also been ascertained by appellee that the firm of Shackleton & Brinker was insolvent, but this fact was not communicated to the Union Bank at the time of the return of the checks. At the time of the presentation of the checks appellee held a note of Shackleton & Brinker for \$1,200 and interest, that matured on February 7th, and on that date the money of Shackleton & Brinker, (\$1,058.39,) standing to their credit in the bank, was applied by the appellee upon the note. On the same day appellant and his attorney presented the checks to appellee, and demanded payment, which was refused; and on the next day, February 8th, Mr. Brinker, by a written instrument, assigned to appellant all

the moneys of Shackleton & Brinker in appellee bank. The assignment was presented to appellee, payment of the money demanded and refused, and suit was afterwards instituted upon the checks by appellant, resulting in a judgment in his favor. An appeal was taken to this court, and the judgment reversed. See *Bank v. Boettcher*, 5 Colo. 185, where this court held—*First*, that “the holder or payee of the check cannot in his own name maintain an action against the drawee, unless the check had been accepted;” *second*, that, “to warrant the inference of acceptance from conduct, \* \* \* that the circumstances must clearly indicate such an intention on the part of the drawee;” *third*, that “mere detention does not constitute an implied acceptance, and a conditional acceptance is not enforceable until complete fulfilment of the condition.” The opinion of the court closes as follows: “We are of opinion that the judgment cannot be sustained on the ground of an implied promise, on the present testimony, either upon the authority cited or upon principle. As further testimony affecting the conduct of the appellee may be produced upon another trial, the judgment will be reversed, and the cause remanded.”

Three or four years afterwards, the complaint was amended by adding to each of the original statements of the cause of action the words, “that the said defendant, with intent to accept said checks and pay the same out of the moneys so deposited, detained said checks until February 5, A. D. 1878;” and a fifth and additional count or statement of the cause of action was added, in which, after stating the facts of the case as above, it is alleged, in effect, that Shackleton & Brinker were millers, and purchased large quantities of wheat from appellant to be made into flour, the wheat to be paid for from the proceeds of the flour, and that they made the checks against such proceeds; that appellee at first, intending to pay the checks, kept them until February 5th; that appellee owned and held a certain promissory note of Shackleton & Brinker, which was about to mature; that Shackleton & Brinker, and also Brinker, were insolvent, which fact was known to appellee, and that it also knew appellant was not informed of the fact; that appellee, with the intention of applying the money in its possession to the payment of the note and defraud the plaintiff, detained the checks until February 5th, and then returned them, with directions to correspond with Shackleton & Brinker, without giving any information in regard to the insolvency of the firm, or the existence of the promissory note; that the moneys held by appellee were the proceeds of the wheat sold by appellant to Shackleton & Brinker, and were deposited for the payment of the checks, and for no other purpose; that all the moneys, by reason of the premises, were in equity appropriated to the payment of the checks, and were held by the bank in trust for that purpose; praying judgment for the sum of \$1,363.36, with interest, “or, if it shall appear the said checks are not accepted, that an account be taken of the moneys in the hands

of the defendant liable for the payment of the sum, and for a decree that plaintiff is entitled in equity to have the moneys, to the amount of the checks, to be applied to the payment thereof.”

The appellee moved the court to strike out the new statement or count; which motion was sustained, and the clause stricken out. The answer to the remaining complaint was full and complete. Trial was had to a jury upon the issues under the pleadings, the facts established, in the judgment of the court, being substantially the same as upon the former trial. At the close of the testimony the court, in accordance with the opinion of this court, ordered a verdict for the defendant, (appellee.) So far as the questions presented on this appeal were involved in and determined upon the former appeal, that case must be considered as conclusive of this. The questions had not previously been settled judicially in this state; the decisions in other courts were conflicting; the questions were carefully considered; the conclusions reached were based upon the decisions of the federal courts and those of several important commercial states. Where the decisions, especially upon the law of commercial paper, are conflicting, it may be considered safe to adopt the conclusions of the federal courts; and it is far better that this branch of the law should be settled definitely than that it be allowed to remain in a fluctuating and uncertain condition.

It will be observed by the language used in the concluding paragraph of the opinion that the cause was remanded to allow further testimony to be introduced in regard to the conduct of appellee in the premises. After an unreasonable delay of three or four years, unexplained, counsel applied for leave to amend the complaint, which appears to have been granted, though upon what grounds we are not advised. The granting of leave to amend pleadings being, however, under our practice, so greatly in the discretion of the court, it will be presumed the discretion was properly exercised. The additions made to the original statements of the supposed cause of action may be considered as legitimate amendments. But the question presented for determination in this case is, did the court err in striking out the fifth count or statement, which purported to be entirely new? It is contended in argument that the matter set up in the new count was a new, separate, and distinct cause of action; that it could not be added to or substituted for the other cause of action, at this stage of the proceeding, under our system of practice. The original cause of action was purely legal. An attempt was made in this count to procure purely equitable relief; but whether it was a proper amendment we do not think it necessary to now determine. True, the motion to strike was based upon the fact that it was not an amendment, but a new and different cause of action; but the action of the court was not necessarily confined to the cause assigned in the motion. If it was insufficient, did not contain facts sufficient to constitute a cause of action, was lack-

ing in essential allegations, the court was warranted in disregarding it. In it the chancery powers of the court were invoked, and it was asked to find and declare the bank to be a trustee, to administer a specific trust for the benefit of the appellant. The equitable case attempted to be made by this count falls far short for want of the material allegations necessary to constitute the appellee a trustee. Admitting the course of business between appellant and Shackleton & Brinker to have been as stated, and appellant by the course of trade or by an agreement equitably entitled to the proceeds of the wheat for its payment, such fact could not affect appellee unless it was a party to such contract, or at least had knowledge of it. Appellee could only be made liable in equity, as trustee, by the allegation and proof of a contract creating a trust to which it was a party, or which, after due notice of its trusteeship, it failed to repudiate. 3 Pom. Eq. Jur. §§ 1237, 1284; Harrison v. Wright, 100 Ind. 524; Hopkinson v. Forster, L. R. 19 Eq. 74; Creveling v. Bank, 46 N. J. Law, 255; Chapman v. White, 6 N. Y. 417; Rosenthal v. Bank, 17 Blatchf. 318.

The paragraph stricken out contained no allegation that appellee was a party to any such contract, or even knew of such a course of business, or the arrangement or equities alleged to have existed between appellant and Shackleton & Brinker, or knew that the money deposited by Shackleton & Brinker was the proceeds of flour made from the wheat furnished by appellant. The deposit by Shackleton & Brinker was a general deposit to their credit. To constitute it a trust fund for the purpose indicated, it should, either by express agreement, or by circumstances indicative of the intent to make it such, have been given the character of a special deposit. "The simple deposit of money on account is a general deposit, and transfers the ownership of the money to the bank. The ordinary relation existing between a bank and its customer, if not complicated by any further transaction than that of the depositing and withdrawing moneys by the customer from time to time, is simply that of debtor and creditor, at common law. \* \* \* So soon as the money has been handed over to the bank, and the credit given to the payer, it is at once the proper money of the bank; it enters into the general fund and capital, and is undistinguishable therefrom. Thereafter the depositor has only a debt owing him from the bank,—a chose in action,—not any specific money, or a right to any specific money." 2 Morse, Bank, § 568; Marine Bank v. Fulton Bank, 2 Wall. 252; Thompson v. Riggs, 5 Wall. 663; Bank v. Millard, 10 Wall. 152; Aetna Nat. Bank v. Fourth Nat. Bank, 46 N. Y. 82; Carr v. Bank, 107 Mass. 45; Dana v. Bank, 95 Mass. 445. "A deposit is not special unless made so by agreement or directions of the depositor, or by such circumstances as being inclosed in a box, or other matter indicative of intent not to make a general deposit, or unless made in a particular capacity which indicates such intent." 2 Morse, Bank, § 568*b*; Brahm v. Adkins, 77 Ill. 263; Neely v. Rood, 64 Mich. 134, 19 N. W. Rep. 920.

It is the more common practice to challenge such defects by demurrer, but legislative authority to do so by motion is not wanting. Section 60, Civil Code. And, under all the circumstances of this case, we do not feel justified in disturbing the action of the court below.

It has already been found by this court that the detention of the checks by appellee did not of itself amount to an acceptance. It has frequently been held, both in England and the United States, that, without an acceptance or specific promise to pay, there was no privity between the payee and the bank, so that the former could maintain a suit against the latter, and the rule is the same in equity as at law. Foley v. Hill, 2 H. L. Cas. 28; Creveling v. Bank, *supra*; Bank v. Millard, *supra*; Attorney General v. Insurance Co., 71 N. Y. 325; Christmas v. Russell, 14 Wall. 84; Lunt v. Bank, 49 Barb. 227; Loyd v. McCaffrey, 46 Pa. St. 410; Aetna Nat. Bank v. Fourth Nat. Bank, *supra*. We advise that the judgment of the district court be affirmed.

RICHMOND, C., concurs.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment of the district court is affirmed.

ELLIOTT, J., (*dissenting*.) Upon the second trial of this cause at  *nisi prius* I endeavored to follow the opinion of this court reversing the first judgment, as reported in 5 Colo. 185. It is a familiar rule that on this appeal such former opinion is to be regarded as the law governing the case, so far as the matters involved in the litigation remain unchanged. Lee v. Stahl, 13 Colo. 174, 22 Pac. Rep. 436. If, on this appeal, the court had affirmed the last judgment of the district court simply upon the ground of following "the law of the case," I should have refrained altogether from participating in the decision; but I feel constrained to dissent from a general reaffirmance of the doctrine announced, (Bank v. Boettcher, 5 Colo., *supra*.) because the same appears manifestly at variance with the decision of this court in Lehow v. Simonton, 3 Colo. 346, and contrary to sound principles and the better authorities relating to the obligation of banks to pay the checks of their depositors. The opinion in Lehow v. Simonton declares, in effect, that, where two parties enter into a simple contract for the benefit of a third, the third party, though a stranger to the consideration, may maintain an action for a breach of such contract, notwithstanding there may be want of privity between himself and the promisor. As the arrangement between a bank and its depositor is a matter of simple contract, the Lehow-Simonton Case would seem to be a complete answer to the objection that there is a want of privity between the check-holder and the bank, as stated in Bank v. Millard, 10 Wall. 152. But I must not be understood as conceding that there is a want of privity between the bank and *bona fide* check-holders upon presentation of their checks for payment in the usual course of busi-

ness. According to the system of modern banking, when a general deposit is made, the implied, if not the express, promise by the bank to the depositor is that the bank will pay the depositor's checks, in sums to suit his convenience, in the order of their presentation, to the extent of the deposit; and this promise is held out to the community as an inducement to patronage and public confidence, for the benefit of all who have occasion to receive the checks of the depositor in the usual course of business. Hence when a bank, having sufficient funds of a depositor to pay his checks, refuses to make such payment upon proper presentation, it would seem that the check-holder must have a right of action directly against the bank for the violation of the promise made for his benefit. The reasons in support of this view are numerous and most convincing. I shall not undertake to elaborate them, preferring, under the circumstances in which this opinion is prepared, to quote from standard authorities and cite leading judicial decisions in support of the view announced in this opinion.

In *Daniel on Negotiable Instruments* (volume 2, p. 653 et seq.) we find the following: "The objection to the check-holder's suing the bank, on the ground that there is no privity between him and the bank, seems to us utterly untenable. It is true there is no privity before the presentment of the check, but by that very act they are brought in privity, and the check-holder's right to sue the bank completed. The sole motive often, if not generally, inducing the depositor to place his funds in bank, is the desire to have them in safety, where they may be checked on at convenience. The bank receives its reward in the use of the money, and in the business attracted in checking it out; and it is the universal understanding between banks and depositors, arising from the customs of trade, that the check of the latter is to be paid upon presentment. The United States supreme court so declares in a recent opinion, though as yet it has not followed that declaration to its logical sequence. The drawer of the check makes the deposit, and draws the check with this understanding. The bank receives the money with the like understanding, and so the holder receives the check; and the mutual understanding of the parties, although they have not individually concerted together, creates an implied privity, and completes the contract between them. \* \* \* As an acceptance of a bill may be implied, so may the acceptance of a check; and, as a promise to accept will operate as an acceptance to the holder who takes a bill on the faith thereof, so should it be as to a check. Now, by the very act of drawing a check, the drawer communicates to the payee the fact that the bank holds that amount to his credit which it has agreed to pay on his check. By receiving the deposit, the bank has impliedly so agreed; and the holder receiving the check in reliance on this condition of things should be sustained, provided the drawer has not deceived him by drawing without funds to meet the check. \* \* \* It is no answer to these views to say that the

holder of a bill cannot sue the drawee unless it be accepted. The drawee of a bill does not receive money to be paid out on checks. And the distinction between the bank or banker on whom the check is drawn and the ordinary drawee of a bill is the very gist of the distinction between the rights of the holders of the different instruments."

In *Morse on Banks and Banking* (3d Ed. § 493 et seq.) the learned author says: "The most numerous body of decisions sustains the view that a check is neither a legal or an equitable assignment as between drawer and payee, nor a sufficient foundation for any action by the holder against the bank. \* \* \* Another class of cases affirm that a check is an assignment as between drawer and payee, \* \* \* and that, upon presentment, the bank is brought into privity with the holder, and is liable to him for improper refusal to pay. \* \* \* Upon this side we find a goodly array of authorities, and all the advanced, clear, independent thought and reasoning. \* \* \* The plain common sense of the holder's rights would seem to be \* \* \* that, as between the bank and the holder, presentment for payment works a transfer of the fund. If the unincumbered funds in its possession are sufficient, and this fact is within the knowledge attainable by the bank with reasonable diligence, it is the duty of the bank to pay the check. It is bad faith on its part, or negligence, not to do it, and the check-holder is directly injured by its wrongful conduct. What more does the law require as the basis for a right of action? \* \* \* Legal analogies are plenty and forcible. B. writes: 'I promise to pay D. or order \$100 on demand.' D. orders the money paid to H. It is perfectly clear that H. can sue B. If he refuses to pay according to his promise. B. has in fact promised to pay H., for he engaged to pay to whomsoever D. should order, and H. is D.'s order. Now, a bank receiving \$100 on general deposit impliedly promises (by the universal understanding of trade, as ascertained in innumerable and unbroken decisions) to pay that money to the depositor, or such persons, and in such amounts, as he may order. Where, then, is the difference between the position of the holder of a check and the indorsee of a note? The amount is fixed in the note from the start. In the check, however, B. only says you must not go beyond your deposit, but you may fill in the check for a less amount if you wish, and I will pay it. That is a promise to pay the amount of a properly drawn check, just as truly as a note is a promise to pay the amount named in it. As soon as the check is drawn and presented, the promise takes effect on the definite amount. The only other difference is that one promise is in writing, and the other verbal or tacit; but this can make no substantial difference, except as opening the door to the fraud of a depositor who draws more than one check against the same money; and this can never affect the bank, as its promise and duty are only to pay checks as they are presented. It is a general rule of law that, if a promise is made by B. to D.

for the benefit of H., the latter can sue B. for the breach. From this principle also results, as a corollary, the right of a check-holder to sue the bank. Suppose the drawer falls after the bank's refusal to pay the holder, and he loses half the amount of it, or suppose, after refusal, the drawer checks out the money himself, and absconds, or is found to be utterly worthless; the holder loses the whole value of the check by reason of conduct on the part of the bank which all the cases agree in condemning as wrongful and contrary to its duty. What must we think of a system of law that claims as one of its fundamental maxims, 'Wherever there is a right there is a remedy,' and proclaims that for every injury the law will give redress, and yet denies the right of the check-holder to sue the drawee? We hope that it will not be many years before it will cease to be possible to find this blot on the common law. No amount of deciding in the United States supreme court, nor in any other chamber of wisdom, can make the unjust just; and as surely as the Dred Scott decision is dead, so surely will the decision in *National Bank of the Republic v. Millard* die with the judges who rendered it." See notes and cases cited by the author in connection with the foregoing.

In *Story on Promissory Notes* (section 489) the eminent author says: "Checks have many resemblances to bills of exchange, and are, in many respects, governed by the same rules and principles as the latter. But *nullum simile est idem*; and their nature, obligation, and character are in some respects different from those of common bills of exchange. The circumstances in which they principally differ from bills of exchange, or at least from bills of exchange in ordinary use and circulation, are: (1) They are always drawn on a bank or on bankers, and are payable immediately on presentment, without any days of grace. (2) They require no acceptance, as distinct from prompt payment. (3) They are always supposed to be drawn upon a previous deposit of funds, and are an absolute appropriation of so much money in the hands of the bank or bankers to the holder of the check."

Mr. Justice SHARSWOOD of the supreme court of Pennsylvania, in his notes to *Byles on Bills*, (pages 21, 22,) says: "A bill of exchange is not an equitable assignment or appropriation, but the cases treat a check on a banker as such; and if the holder is a holder for value, as to whom the drawer cannot revoke rightfully the power which he holds, coupled with an interest, why should not the banker, upon distinct claim and notice, be held bound by the equity?"

The views of the text-writers as above stated are based upon strong and well-reasoned opinions from the highest courts of several states, squarely and emphatically declaring the liability of banks and bankers to the *bona fide* check-holders of their depositors. *Munn v. Burch*, 25 Ill. 35; *Roberts v. Austin*, 26 Iowa, 323; *Lester v. Given*, 8 Bush. 357; and *Fogarties v. Bank*, 12 Rich. Law, 518,—are leading cases upon the question. Other decisions, tending in

the same direction, are referred to in the notes to *Daniel's* and *Morse's* works, *supra*. It is not my purpose on this occasion to attempt a citation and analysis of the many authorities bearing upon this question. From the weight and strength of the authorities already quoted, it will readily be perceived why I cannot approve the doctrine that banks and bankers may wrongfully refuse to pay their depositors' checks without incurring any liability to *bona fide* check-holders. Hence I regret that certain portions of the opinion prepared by Mr. Commissioner REED should have been promulgated without a thorough re-examination of the question. It seems to me exceedingly unfortunate that the opinions of this court should be arrayed on the wrong side of such an important question of commercial law. It is most desirable that upon this question, as upon others, our decisions should be ranked with those of "advanced, clear, independent thought and reasoning."

#### WASATCH MIN. CO. v. CRESCENT MIN. CO.

(Supreme Court of Utah. July 12, 1890.)

#### CONSTRUCTION OF CONTRACT—JUDGMENT—EVIDENCE.

1. Plaintiff, while in litigation in regard to a mining claim, sold the same to defendant, which gave a mortgage for the price, agreeing to pay at the end of a year, but, if the litigation was not then determined, to pay the money into court on a recognized order, to be paid to plaintiff if it were finally successful, and to be returned to defendant if not. The litigation was still pending at the end of the year. *Held*, defendant was bound to pay the money into court, and cannot excuse a failure to do so on the ground that plaintiff failed to procure the order therefor, and is liable for interest from the time it should have paid.

2. Defendant claims that plaintiff, by mistake or fraud, failed to convey the most valuable of the ground bargained for, and that plaintiff cannot foreclose the mortgage until further conveyances are made. To support this claim it offers a decree in a suit brought by it against plaintiff for a reformation of the deed, which decree was in its favor, and vested in it the title to the property left out. *Held*, such decree is evidence only on the theory of *res adjudicata*, and as such it shows that defendant has got all it bargained for, and the defense fails.

Appeal from third district court; T. J. ANDERSON, Judge.

*Baskin & Van Horne* and *John M. Zane*, for appellant. *W. H. Dickson* and *J. G. Sutherland*, for respondent.

BLACKBURN, J. This suit is brought to foreclose a mortgage made by appellant to respondent. Respondent and Jennings were in litigation about certain mining claims, in reference to the ownership thereof, and appellant wished to buy the property in controversy of the respondent; and a bargain was made with it for the sale of the property for a large sum of money, and appellant gave a mortgage to secure the payment of the money, and went into possession. It was stipulated in the mortgage deed that the money was to be paid within one year from the date thereof, but, if the litigation for the ownership of the property was not ended within that time, the mortgagor was to pay the money into court on a recognized order thereof,



where the litigation was pending, to be paid at the end of said litigation to the respondent, if it should be successful, but if not it was to be returned to appellant. At the end of the year the litigation was still undetermined, and no order was made by the court for the payment of the money into court, nor any steps taken by either the respondent or appellant to have such order made; nor did the appellant offer to pay the money, or notify the respondent that it was ready and willing to pay said money into court if such order was made. After the expiration of the year the respondent brought this suit to foreclose the mortgage. The appellant answered the complaint, and set up as a defense that it was not in default, because the respondent had not procured the order to be made to pay into court the money, and further, that the respondent had fraudulently left out of the deed made to appellant, of the property sold, a part, and the most valuable part, of the same, so that the appellant did not get in the deed the property bargained for, and therefore it ought not to pay the mortgage until the full property was conveyed. Also the record shows that appellant commenced a suit against respondent to compel it to reform said deed, and convey to the appellant the territory left out of it.

The court below decreed in favor of appellant, and that the title to the property left out of the deed be absolutely vested in appellant. The respondent appealed to this court, and the decree was affirmed. 19 Pac. Rep. 198. Thereupon the respondent appealed to the supreme court of the United States, which appeal is still pending, but gave no *supersedeas* bond. In the case now before the court, the district court decreed the foreclosure of the mortgage for the amount thereof, and the interest accruing thereon since the same became due, and an attorney's fee of \$1,000, and that the mortgaged property be sold as in such decree provided, and that out of the proceeds thereon the mortgage debt, with the interest, be paid into court in the case still pending between the respondent and Jennings, and the attorney's fee and cost be paid to the respondents; and from this decree this appeal is taken.

The appellant contends this decree is wrong, and ought to be reversed, because (1) it was not in default in not paying the money into court as the mortgage stipulated; for it was not a party to the suit, and could not volunteer, and procure an order to be made. But it could have gone, as was its duty, to the respondent, and offered to pay the money into court, and the respondent could, and no doubt would, have procured the order; and, if it did not, then the failure of appellant to pay the money into court would not have put it in default. We do not think the decree should be reversed on this account.

(2) The appellant contends that the respondent, either by mistake or fraud, failed to convey in the deed made for the mining claims purchased, for the purchase money for which the mortgage was given, the most valuable of the ground bar-

gained for, and therefore the consideration for the mortgage has failed in part, and that the respondent is not entitled to have its mortgage foreclosed until the title to that ground is conveyed to the appellant, and that this is fully proved by the decree in the case of the appellant against the respondent. This decree is the only evidence in the record of the fraud or mistake claimed in the deed, and is competent evidence only on the theory that it is *res adjudicata* between the parties. The decree vests this ground in the appellant as against the respondent; and, if it is *res adjudicata* as against the respondent, although appealed from, it is also against the appellant, and it has gotten all it contends for, and cannot complain. Again, if this decree is confirmed, it has the property; and, if the appellant finally fails, in that case it is an adjudication that it got in the deed all it bargained for, and it must pay off the mortgage. It also went into the possession of the ground left out of the deed, and has profitably worked it ever since. So we cannot see that it has ground of complaint on this account.

(3) Another contention of the appellant is that the decree allowed interest on the mortgage, because—*First*, the mortgage does not provide for interest, and the money, if it had been deposited in court as provided for in the mortgage, would not have drawn interest, and the contingency had not yet happened that entitled the respondent to have the money; and, *second*, the appellant was not in default in not depositing the money, because the respondent did not procure the order required for the deposit of the money. This third reason we have already, in this opinion, considered. At common law, no interest was allowed in debts overdue, unless there was an express or implied contract to pay interest. *Madison Co. v. Bartlett*, 1 Scam. 70. It was the duty of the appellant to pay the money into court according to the provisions of the mortgage, and it was not its concern whether the money would draw interest or not; and, again, it had the use of the money wrongfully, and ought not to object to paying interest on it. This mortgage does not provide for the payment of interest, but it fixes the time when the money is to be paid. This rule of the common law does not obtain in America, and interest is allowed on debts overdue even if there is no statute providing for interest. *Wood v. Robbins*, 11 Mass. 504. And the question has been settled in this territory in favor of the allowance of interest on debts overdue. *Godbe v. Young*, 1 Utah, 55, 15 Wall. 562.

We think, therefore, interest was properly allowed on the indebtedness from the time it was the duty of the appellant to deposit the money in court. But we think the decree, under the circumstances of this case, should have allowed the appellant a reasonable time in which to pay the money, say 30 days, before the property was ordered to be advertised for sale. Also, the decree ought to have provided that the money be paid into court in this case, instead of the case of the respondent against Jennings, until an order should

be obtained in that case for the deposit of the money. The decree of the court below should be modified in accordance with these views, and the respondent should pay the costs of this court.

HENDERSON, J., concurs.

#### TERRITORY V. AH LIM.

(Supreme Court of Washington. Feb. 28, 1890.)

##### CONSTITUTIONAL LAW—OPIUM SMOKING.

Laws Wash. T. 1883, p. 30, (amendatory of Code Wash. T. 1881, c. 149, § 2073,) providing that "any person or persons who shall smoke or inhale opium \* \* \* shall be deemed guilty of a misdemeanor," is not unconstitutional as being in violation of the inalienable rights of individuals to life, liberty, and pursuit of happiness.

SCOTT and STILES, JJ., dissenting.

Appeal from district court, King county.  
*Humes & Andrews*, for appellant. *Stratton & Fenton*, for the Territory.

DUNBAR, J. The defendant was indicted at the August term of the district court for King county for the crime of smoking opium as follows, to-wit: (omitting the formal part of the indictment:) "The said Ah Lim, on the 27th day of September, A. D. 1889, in the county of King, in the district aforesaid, then and there being, did then and there, willfully and unlawfully, smoke opium, by then and there burning said opium, and inhaling the fumes thereof through an instrument commonly known as an 'opium pipe,' contrary to the form of the statute,"<sup>1</sup> etc. To this indictment the defendant interposed a demurrer specifying several grounds, but the one relied upon by defendant, and the one to be considered here, is that the statute upon which the indictment is based is unconstitutional, as being in violation of the inalienable rights to life, liberty, and pursuit of happiness, and that it involves a deprivation of liberty and property, through a limitation upon the means and ways of enjoyment, without due process of law.

The duty of passing upon the constitutionality of a law should be approached by the court with the utmost caution, and demands the most solemn, thoughtful, and painstaking consideration, and in view of the consequences to society from the annulling of laws made by the representatives of the people, and presumed to have been enacted in response to the express desire of the people, it becomes the gravest question with which courts have to deal; and we believe it has been the uniform conviction of the courts that they ought not, and cannot, in justice to a co-ordinate department of the state government, declare a law to be void without a strong and earnest conviction, divested of all reasonable doubt, of its invalidity. The following quotation from an opinion rendered by Chief Justice MARSHALL in the case of *Fletcher v. Peck*, 6 Cranch, 87, commends itself to our approbation as resting upon sound principles of propriety and right. Said the judge: "The question

whether a law be void for its repugnancy to the constitution is at all times a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case. The court, when impelled by a duty to render such a judgment, would be unworthy of its station could it be unmindful of the solemn obligations which that station imposes. But it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void."

The organic act extends the power of the territorial legislature to all rightful subjects of legislation; and, when once we concede the rightfulness of the subject, the extent and character of the legislation on that subject cannot be called in question by the court. It has a right to take a comprehensive view in determining the necessity of the law, and the character of the purpose to be accomplished by it. This is the especial function of the legislature, and, in the investigation of legislative power, courts have nothing to do with questions of policy or expediency; for, as a learned author says: "The constitution has created the legislative and the judicial departments,—the one to make the law, the other to construe and administer it. It may be mischievous in its effects, burdensome upon the people, conflict with our conceptions of natural right, abstract justice, or pure morality, and of doubtful propriety, in numerous respects, and yet we would not be justified to hold that it was not within the scope of legislative authority for such reason; and, has as been well said by Mr. Cooley in his work on Constitutional Limitations, it must be evident to any one that the power to declare a legislative enactment void is one which the judge, conscious of the fallibility of human judgment, will shrink from exercising in any case where he can conscientiously, and with due regard to duty and official oath, decline the responsibility. Page 192. The legislative and judicial are co-ordinate departments of the government, of equal dignity. Each is alike supreme in the exercise of its proper functions, and cannot, directly or indirectly, while acting within the limit of its authority, be subjected to the control or supervision of the other without an unwarrantable assumption by that other power which by the constitution is not conferred upon it." Of course, we do not pretend to argue that it is a responsibility which can at all times be obviated or avoided; but we insist that it must always be done with great caution, and circumspection. Indeed, so weighty have the courts felt this responsibility that many courts have adopted a rule that they will not decide a legislative act to be unconstitutional by a majority of a bare quorum of the judges only. Many courts have held that, before it can be pronounced unconstitutional, some particular prohibition must be pointed out. In the case of *Bertholf v. O'Reilly*, 74 N. Y. 511, Justice ANDREWS, in rendering the opinion of the court, says: "The question whether the act under consideration is a valid exercise of legislative power is to be determined solely by reference to constitu-

<sup>1</sup> The statute is given in the dissenting opinion.

tional limitations and prohibitions. The legislative power has no other limitation. If an act can stand when brought to the test of the constitution, the question of its validity is at an end; and neither the executive nor judicial department of the government can refuse to recognize or enforce it. The theory that laws may be declared void when deemed to be opposed to natural justice and equity, although they do not violate any constitutional provision, has some support in the *dicta* of learned judges, but has not been approved, so far as we know, by any authoritative adjudication, and is repudiated by numerous authorities. \* \* \* No law can be pronounced invalid for the reason, simply, that it violates our notions of justice, is oppressive and unfair in its operation, or because, in the opinion of some or all of the citizens of the state, it is not justified by public necessity, or designed to promote the public welfare." The remedy for unjust or unwise legislation, not obnoxious to constitutional objections, is to be found in a change by the people of their representatives according to the methods provided by the constitution. Again, in *People v. West*, 108 N. Y. 293, 12 N. E. Rep. 610, the court says: "The power of the legislature to define and declare public offenses is unlimited, except in so far as it is restrained by constitutional provisions and guaranties. A legislative act is presumptively valid; and whoever questions its validity must be able to point to some limitation or restriction, or to some guaranty in the constitution of the state or the United States, which it violates, before its operation can be stayed or the court be called upon to pronounce it void. \* \* \* The unnecessary multiplication of mere statutory offenses is undoubtedly an evil, and the general interests are best promoted by allowing the largest practicable liberty of individual action; but, nevertheless, the justice and wisdom of penal legislation, and its extent, within constitutional limits, is a matter resting in the judgment of the legislative branch of the government, with which courts cannot interfere."

Whether or not the main current of decisions flows in the exact direction taken by the court in the New York cases, we are satisfied that the doctrine is well established that the power of the legislature cannot be restrained by the courts upon considerations of policy or supposed natural equity. Were this power, however, given to the courts, the law, instead of being administered and decided upon uniform principles, would be decided according to the particular bent or inclination of mind of the ruling judge. What would appeal to one judge as natural equity would not be so received by another; and the different views of what constitutes a natural equity would only be equalled in number by the number of judges on the bench, each judge following his own ideas of abstract right, not limited to any well-defined path of investigation, but controlled and impelled only by his personal ideas of what ought or ought not to be allowed in a particular case,—pointed in no definite direction, but drifting aimlessly,

like mariners at sea under a clouded sky, with neither compass nor log. "Of late years, it has been much the fashion," says Judge BELL in *Com. v. McWilliams*, 11 Pa. St. 61, 70, "to impeach the action of the legislative bodies as unconstitutional when it happens not to accord with a party's notion of propriety and abstract right." But, says the court in *Davis v. State*, 8 Lea, 378, "whether a statute is 'contrary to the genius of a free people' is a question for the legislature, and not the judge. It cannot be annulled upon supposed natural equity, the inherent rights of freemen, or any general and vague interpretation of a provision of the constitution beyond its plain and obvious import." The judiciary could not set aside a law, free from conflict with the constitution, because it seemed unjust. It could only interfere by overstepping the limits of its sphere, by appropriating to itself a power beyond its province, and by setting an example which other organs of the government might not beslow to follow. It is its peculiar duty to keep the first lines of the constitution clear, and not to stretch its power in order to correct legislative or executive abuses. Every branch of the government, the judicial included, does injustice for which there is no remedy, because everything human is imperfect. The legislative power "may be unwisely exercised or abused, yet it is a power intrusted by the constitution to the legislature, which, while exercised within the scope of the grant, is subject alone to their discretion; with which the judicial tribunals have no right to interfere because, in their judgment, the action of the legislature is contrary to the principles of natural justice." *Williams v. Cammack*, 27 Miss. 209.

In the case at bar, no special constitutional limitation or inhibition is pointed out with which the law in question is in conflict; but it is contended by the defense that the right of liberty, and pursuit of happiness, is violated by the prohibition of any act which does not involve direct and immediate injury to another. Counsel for appellant says in his brief that the parent may be compelled to send the child to school so many months in the year; the state may prescribe his studies, and may tax the people to the verge of bankruptcy to mould the infant's mind to their liking; but this right, he urges, is on the ground that the child is the ward of the state, and that such jurisdiction ceases when it becomes of age. It is difficult to see how the question of inalienable rights can be affected by age, when the law prescribes the age at which the ward arrives at his majority, and the time at which the inalienable rights attach. Doubtless the true theory on which compulsory education is sustained is that the state has an interest in the intellectual condition of each of its citizens, recognising the fact that society is but an aggregation of individuals, and that the moral or intellectual plane of society is elevated or degraded in proportion to the plane occupied by its individual members, and that the education is not compelled for the benefit of the child during its minority, or for its exclusive benefit after its majority. The state has

an undisputed right to, and does, provide gymnasium attachments to its schools, and prescribes calisthenic exercises for the muscular development of school children. The object to be attained is not for the exclusive benefit of the child. The state has an interest in the health of its citizens, and has a right to see to it that its citizens are self-supporting. It is burdened with taxation to build and maintain jails and penitentiaries for the safe-keeping of its criminals, and to protect its law-abiding subjects from their ravages. It is taxed to maintain insane asylums for the safe-keeping and care of those who become insane through vicious habits or otherwise. It is compelled to maintain hospitals for its sick, and poor-houses for the indigent and helpless; and surely it ought to have no small interest in, and no small control over, the moral, mental, and physical condition of its citizens. If the state concludes that a given habit is detrimental to either the moral, mental, or physical well-being of one of its citizens, to such an extent that it is liable to become a burden upon society, it has an undoubted right to restrain the citizen from the commission of that act; and fair and equitable consideration of the rights of other citizens make it not only its right, but its duty, to restrain him. If a man willfully cuts off his hand, or maims himself in such a way that he is liable to become a public charge, no one will doubt the right of the state to punish him; and if he smokes opium, thereby destroying his intellect, and shattering his nerves, it is difficult to see why a limitation of power should be imposed upon the state in such a case. But it is urged by the defense that a moderate use of opium, or that the moderate use of an opium pipe, is not deleterious, and consequently cannot be prohibited. We answer that this is a question of fact, which can only be inquired into by the legislature. Smoking opium is a recognized evil in this country. It is a matter of general information that it is an insidious and dangerous vice, a loathsome, disgusting, and degrading habit, that is becoming dangerously common with the youth of the country, and that its usual concomitants are imbecility, pauperism, and crime. It has been regarded as a proper subject of legislation in every western state; and it is admitted by counsel in defense, in the argument of this case, that the statute in relation to the suppression of joints kept for the purpose of smoking opium was constitutional and right.

Granted that this is a proper subject for legislative enactment and control, no limit can be placed on the legislative discretion. It is for the legislature to place on foot the inquiry as to just in what degree the use is injurious, to collate all the information, and to make all the needful and necessary calculations. These are questions of fact, with which the court cannot deal. The constitutionality of laws is not thus to be determined.

Some criticism has been made on the fact that the statute did not declare in its title the purpose for which it was enacted. This is not necessary for the validity of a penal statute, and does not affect the con-

stitutionality of its provisions. *People v. West*, 106 N. Y. 297, 12 N. E. Rep. 610.

It is common to indulge in a great deal of loose talk about natural rights and liberties, as if these were terms of well-defined and unchangeable meaning. There is no such thing as an absolute or unqualified right or liberty guaranteed to any member of society. Natural rights and liberties of a subject are relative expressions, and have relative or changeable meanings. What would be a right of liberty in one state of society would be an undue license in another. The natural rights of the subject, or his rightful exercise of liberty in the pursuit of happiness, depends largely upon the amount of protection which he receives from the government. Governments, in their earlier existence, afforded but little protection to their subjects. Consequently the subject had a right to pursue his happiness without much regard to the rights of the government. The reciprocal relations were not large. He yielded up but little, and received but little. If he was strong enough to buffet successfully with the world, all well and good. If not, he must live on the charity of individuals, or die, neglected, on the highway. But now all civilized governments make provisions for their unfortunates, and progress in this direction has been wonderful even since noted sages like Blackstone lectured upon the inalienable rights of man. Not only is the protection of individual property becoming more secure, but the vicious are restrained and controlled, and the indigent and unfortunate are maintained, at the expense of the government, in comfort and decency; and the natural liberties and rights of the subject must yield up something to each one of these burdens which advancing civilization is imposing upon the state. It is not an encroachment upon the time-honored rights of the individual, but it is simply an adjustment of the relative rights and responsibilities incident to the changing condition of society.

Our conclusion is that the law in question involves no inalienable right. It may be radical, injudicious, and wrong; but, as we have before indicated, these are questions solely for legislative investigation and discretion, and, as has been said by Judge Story: "Judges should regard it as their duty to interpret laws, and not to wander off into speculations upon their policy." The judgment of the court below is affirmed.

ANDERS, C. J., and HOYT, J., concur.

SCOTT, J., (*dissenting*.) I cannot agree with the decision rendered in this case. That part of the act upon which the indictment is founded is, in my opinion, void. It is as follows: "Any person or persons who shall smoke or inhale opium \* \* \* shall be deemed guilty of a misdemeanor," etc. *Sess. Laws 1883*, p. 30. It is amendatory of section 2073 of chapter 149 of the Code of 1881. The chapter is entitled, "Smoking and Inhaling Opium," and apparently was mainly intended to prohibit the keeping of resorts for the smoking of opium, and to this extent was

a legitimate exercise of police powers. The purpose for which the amendment was adopted is not declared either in the entitling, or in the body of the act, and cannot easily be arrived at. The acts prohibited therein have no reference to the keeping of a resort. The only other legislation we have found upon this subject is contained in the act approved November 6, 1877, which amends section 13 of an act approved November 12, 1875, entitled "An act defining nuisances and securing remedies." The chapter in the Code does not refer in any way to this act. All these laws were passed by our various legislatures while we were under a territorial form of government.

The offense charged in this case cannot be held to be a nuisance, for it relates purely to the private action or conduct of the individual, and must not be confounded with those acts which directly affect the public. It is thought that the act in question is *sui generis*; that there is none other of a similar nature in force in this country, or one that has ever been sustained by the courts since we became an independent nation, although there may be occasional instances somewhat closely allied to it. Legislation, however, has ordinarily been confined to those cases where the act of the person directly and clearly affected the public in some manner. But here a single inhalation of opium, even by a person in the seclusion of his own house, away from the sight, and without the knowledge of any other person, constitutes a criminal offense under this statute; and this regardless of the actual effect of the particular act upon the individual, whether beneficial or injurious. It is urged that there could be no conviction in such a case, for the want of proof. But the difficulty or impossibility of conviction could not affect the criminality of the act; also, the evidence might sometimes be furnished by the admission or confession of the guilty party, if in no other way. It is admitted that this law can only be sustained upon some one or more of the following grounds, viz.: That smoking or inhaling opium injures the health of the individual, and in this way weakens the state; that it tends to the increase of pauperism; that it destroys the moral sentiment, and leads to the commission of crime. In other words, that it has an injurious effect upon the individual, and consequently results indirectly in an injury to the community. And it is claimed that we must presume that the legislature had some one or more of these objects in view in enacting the law, although there is nothing upon the face of the act to indicate the legislative intention. This is going to a very great and dangerous extent to sustain legislation in this most important branch of our social structure.

In the case of *People v. West*, 106 N. Y. 293, 12 N. E. Rep. 610, in rendering its opinion, the court said: "It is not necessary to the validity of a penal statute that the legislature should declare on the face of the statute the policy or purpose for which it was enacted." The statement was apparently not necessary in the de-

cision of that case; and it is a noticeable fact, in this connection, that in all the cases cited the purposes of the acts were declared either in the entitling or in the body thereof, and were placed upon some one of the grounds mentioned, as affecting the health or safety of the public. The act in question, in *People v. West*, was entitled "An act to prevent deception in the sale of dairy products, and to preserve the public health." In the case of *Bertholf v. O'Reilly*, 74 N. Y. 509, which involved the validity of an act making the owner of real estate, whereon he permitted intoxicating liquors to be sold, liable to damages for injuries resulting to individuals drinking it, the act declared its purposes to be "the suppression of intemperance, pauperism, and crime." In *Slaughter-House Cases*, 16 Wall. 36, involving an act granting to a corporation the exclusive right to maintain slaughter-houses within the limits of a certain prescribed district, and prohibiting all other persons from building, keeping, or having such houses therein, the act was entitled "An act to protect the public health." There may be no good reason for requiring the purpose of the law to be stated upon its face in those cases wherein the injurious effect of the act prohibited thereby is demonstrated by the act itself, like the cutting off of the hand; but there is a substantial difference between such a case and those cases wherein the result of the act, as to its being harmful, is doubtful or not apparent, and perhaps, occasionally, having an opposite effect in the same or different individuals. In such cases, at least, the object or purpose should be expressed. In all the cases above cited, the prohibited act directly affected and concerned the public, not simply through any primary effect upon the particular person, and therefore do not apply with much force to the present case. Section 1924 of the organic act would seem to require that the object of the law should have been more fully expressed in the title, although it may be doubtful as to whether it is within the reason there given. The object must have been to serve some public purpose in one of the ways mentioned if it is valid, not merely to prevent the smoking of opium. That was only the means by which the final end or object was to be attained. See *Harland v. Territory*, 3 Wash. T. 145.<sup>1</sup> There is no good reason why the legislature should not fairly declare the object or purpose of all such laws limiting the personal conduct of the citizen, at least where the direct or primary effect is upon himself only; and there are many good reasons why it should be required. Unless the legislature has, as it is claimed it does have, the absolute, uncontrolled right to determine that the effect of any personal act it chooses to prohibit is injurious to the particular citizen, —and this is untenable,—then the authority cited, stating that it is not necessary to declare the purpose of the act upon its face, (*People v. West*,) is not applicable here, as an entirely different case is presented. Limiting the scope of the act to

<sup>1</sup> 13 Pac. Rep. 453.

cases where injury results would not merely be declaring its purpose, but would be so framing the act as to keep within the legislative province; for, clearly, where there is no resulting injury, there is no right to restrain, if laws restraining the personal conduct can be sustained at all where the act forbidden does not affect the public except through injury to the particular individual, and thereby, possibly, injuring the community in some one of the ways specified. Certainly, any idea of carrying such laws to a great extent would be calculated for an advanced public sentiment. However, if the act in question declared that no man should willfully injure himself by smoking or inhaling opium, thereby limiting its scope to such cases where injury resulted, there would be strong, and I think valid, reasons for sustaining it, upon some one or more of the grounds mentioned. Every act of the individual which has a direct tendency to render him unfit to perform the duties he owes to society is a rightful subject of legislation. The principle is a just and legal one. A man has no right to do that which will render himself an imbecile or a pauper. Society has an interest in the promotion and preservation of the bodily, mental, and moral health of each individual citizen; and laws tending to such results should be upheld in all reasonable ways. But because it is true that personal acts are rightful subjects of legislation to the extent where they clearly interfere with the reciprocal rights of others, and their control is generally recognized as being within the police powers of the state, or because they may be a rightful subject of legislation to that further extent, where they merely result in injury to the individual, and thus less directly to the state, which, however, has not as yet been very generally, if at all, recognized heretofore in this nation, it cannot be that every self-regarding act of the person which the legislature may choose to prohibit upon the ground that it is injurious to the individual, and thereby to the state, must be allowed to stand unquestioned through the courts, or that the courts have no duty to perform in the premises, as to determining whether the legislature has exceeded the limit of its legitimate powers under the constitution, unless a particular, specific constitutional provision can be shown which has been violated.

It is the one great principle of our form of government, expressed throughout that soul-inspiring document, our national constitution, that the individual right of self-control is not to be limited, only to that extent which is necessary to promote the general welfare; and these are not only questions of natural right but of constitutional right as well. It is none the less a constitutional guaranty because general in its nature, or implied in the bill of rights, or because each particular act wherein the will of the citizen should not be interfered with is not pointedly and specifically guaranteed. Such particularity would be impossible. When one becomes a member of society, he necessarily parts with some rights or privileges which as an individual, not affected by his relations to others,

he might retain. A body politic is a social compact by which the whole people covenant with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good. This does not confer power upon the whole people to control rights which are purely and exclusively private; but it does authorize the establishing of laws requiring each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another. This is the very essence of government. See *Munn v. Illinois*, 94 U. S. 114.

It is contended here that the legislature, being the sole and absolute judge of the effect upon the individual of the act forbidden, has decided every act of smoking or inhaling opium to be injurious to the person so doing, no matter how long or how short the duration, or how great or how small the quantity, or under what conditions or circumstances the same might have been used, and that there is no right of appeal to the courts in this particular. Such a construction of the law makes the legislature the sole judge of the constitutionality of its own acts of this character. There must be a right of review or control, to some extent, in the courts. Each citizen is entitled to the protection of all the branches of the government. A declaration by the legislature as to what the law shall be is not necessarily a conclusion reached by the state. The legislature is not the state, although a very important or essential part of it. The power to protect the rights of the citizen from the wrongful effect of such legislation is peculiarly adapted to, and within the province of, the judicial branch of the government, and can be exercised in one of two ways. Either the scope of such legislation should be limited to those instances where injury results as a matter of fact, and resorting to a trial in court to prove that fact in each individual instance; or if this would render an enforcement of the law impracticable, and a few must suffer for the public good by being prevented from regulating their own personal conduct in some matters beneficial or not harmful to them, in order that another class may be prevented from like actions, which to such persons would be harmful, then by recognizing a discretionary power in the legislature to prohibit such acts entirely, and at the same time recognizing the duty of the courts to correct abuses thereof when the act prohibited should have no real relation or tendency to produce any of the results sought to be avoided. To declare any private act or omission of the citizen to be crime, which does not result in any injury to the person, and could not possibly affect society under any other possible view except the last one, would be an unwarranted infringement of individual rights, and therefore unconstitutional. Individual desires are too sacred to be ruthlessly violated where only acts are involved which purely appertain to the person, and which do not clearly result in an injury to society, unless, possibly, thus rendered necessary in order to prevent others from like actions, which to them are injurious.

A great principle is involved in this character of legislation. Suppose the legislature had forbidden the use of opium in any manner. If the unqualified right to prohibit its use in one way exists, this carries with it the right to prohibit its use entirely. Substitute any other substance, whether commonly used as medicine, food, or drink, and still such a statute must be upheld, if the courts have no right of review. It is no answer to say that the legislature would do nothing unreasonable. No man knows as to this. The question is, has it the arbitrary power and right? Neither is it a sufficient answer to say that an appeal may be had to a subsequent legislature for redress; that where such laws are wrongfully passed the remedy must be sought in this way; and that until another legislature is convened, the citizen must tamely submit to, and obey, the restrictions and commands of every conceivable law relating to his personal conduct that, through some possible legislative caprice or inadvertence, might find its way upon the statute-books, before the question could be again submitted to another legislature, and its constitutionality again be tried by it, as that is virtually what the question would be. If it tended to promote the public welfare in any of the ways specified, it would be constitutional; and, if it did not do so, it would then be unconstitutional and void. And under such a view the legislature must decide this.

Because the right to a trial in the courts as to the fact of injury resulting from the act in the particular case would complicate matters, and render it difficult to convict, affords no reason for taking away or denying the right, unless its effect would be to practically nullify the law; and not even in that case unless there is some other safeguard that must be held sufficient under the circumstances, such as limiting the action of the legislature to those matters wherein the injurious effects of the prohibited act would be clearly apparent in the great majority of cases. It is better that there should be difficulties in the way of conviction, rather than that the citizen should be arbitrarily and needlessly deprived of his right to regulate his own personal conduct in matters that purely appertain to himself, or that his constitutional guaranty of life, liberty, and the pursuit of happiness should be violated. Laws that are enacted in response to a general public sentiment are easily capable of enforcement; and otherwise, in a representative form of government, where the will of the majority is supposed to control, laws which do not receive the popular support ought not to have been enacted, and under such circumstances not as great harm results if they should practically fall in their execution, and become dead letters upon the statute-books.

Whichever view is taken of the duty of the courts in the premises—whether to hold such laws must be limited to instances where injury results to the particular person, or otherwise—the act in question should be held void. It is altogether too sweeping in its terms. I make no question but that the habit of smoking opium may

be repulsive and degrading; that its effect would be to shatter the nerves, and destroy the intellect; and that it may tend to the increase of pauperism and crime. But there is a vast difference between the commission of a single act and a confirmed habit. There is a distinction to be recognized between the use and abuse of any article or substance. It is also a well-known fact that opium, in its different forms, is frequently administered as a medicine, and with beneficial results; and, while it may not be customary to administer it by way of inhalation, yet the legislature should not arbitrarily prevent its use in such a manner. If this act must be held valid, it is hard to conceive of any legislative action affecting the personal conduct or privileges of the individual citizen that must not be upheld. We have been cited to no law, which has been sustained, that goes to the extent that this one does. It has no reference to the manufacture or sale of the substance. It is not based upon any pernicious example that the commission of the act might be to others. The prohibited act cannot affect the public in any way except through the primary personal injury to the individual, if it occasions him any injury. It looks like a new and extreme step, under our government, in the field of legislation, if it really was passed for any of the purposes upon which that character of legislation can be sustained, if at all. An act somewhat similar to it was held void in *Re Ah Jow*, 29 Fed. Rep. 181.

In former times, laws were sometimes passed limiting individual conduct in ways that are now considered ridiculous, such as regarding the number of courses permissible at dinner, the length of pikes that might be worn on the shoes, etc. But these were founded on the pique or whims of an exacting and tyrannical aristocracy rather than on reason, or, as in the case of the Connecticut Blue Laws, upon views of propriety or religion that do not now obtain with anything like the former degree of strictness. Judge Cooley, in his admirable work on Constitutional Limitations, at page 885, says: "In former times, sumptuary laws were sometimes passed, and they were even deemed essential in republics to restrain the luxury so fatal to that species of government. But the ideas which suggested such laws are now exploded, utterly, and no one would seriously attempt to justify them in the present age. The right of every man to do what he will with his own, not interfering with the reciprocal right of others, is accepted among the fundamentals of our law. The instances of attempt to interfere with it have not been numerous since the early colonial days. A notable instance of an attempt to substitute the legislative judgment for that of the proprietor, regarding the manner in which he should use and employ his property, may be mentioned. In the state of Kentucky, at an early day, an act was passed to compel the owners of wild lands to make certain improvements upon them within a specified time; and it declared them forfeited to the state in case the statute was not complied with. It would be difficult to



frame, consistently with the general principles of free government, a plausible argument in support of such a statute. It was not an exercise of the right of eminent domain, for that appropriates property to some specific public use on making compensation. It was not taxation, for that is simply an apportionment of the burden of supporting the government. It was not a police regulation, for that could not go beyond preventing an improper use of the land with reference to the due exercise of rights and enjoyment of legal privileges by others. It was purely and simply a law to forfeit a man's property if he failed to improve it according to a standard which the legislature had prescribed. To such a power, if possessed by the government, there could be no limit but the legislative discretion; and, if defensible on principle, then a law which should authorize the officer to enter a man's dwelling, and seize and confiscate his furniture if it fell below, or his food if it exceeded, an established legal standard, would be equally so. But, in a free country, such laws, when mentioned, are condemned instinctively." This statute, referred to, was subsequently declared unconstitutional in *Gaines v. Buford*, 1 Dana, 484, as appears in the note in said work. In *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. Rep. 273, which was a case arising under the prohibitory liquor laws of that state, the court in its opinion discussed the question, somewhat, as to whether the state could prohibit a man from manufacturing liquor for his own personal use, and concluded it could do so if it affected the rights and interests of the community. As to where the power rested to decide as to this, the court said: "But by whom, or by what authority, is it to be determined whether the manufacture of particular articles of drink, either for general use or for the personal use of the maker, will injuriously affect the public? Power to determine such questions so as to bind all must exist somewhere, else society will be at the mercy of the few, who, regarding only their own appetites or passions, may be willing to imperil the peace and security of the many, provided only they are permitted to do as they please. Under our system that power is lodged with the legislative branch of the government. It belongs to that department to exert what are known as the 'police powers of the state,' and to determine primarily what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety. It does not at all follow that every statute enacted ostensibly for the promotion of these ends is to be accepted as a legitimate exertion of the police powers of the state. There are, of necessity, limits beyond which legislation cannot rightfully go. While every possible presumption is to be indulged in favor of the validity of a statute, \* \* \* the courts must obey the constitution rather than the law-making department of government, and must, upon their own responsibility, determine whether, in any particular case, these limits have been passed." Here a discretionary power in the legislature is distinctly recognized,

and also a final revisory or restraining power in the courts to correct what may appear to be abuses. The court further said, quoting partly from *Marbury v. Madison*, 1 Cranch, 137: "To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may at any time be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty, indeed, are under a solemn duty, to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the constitution."

From the best investigation I have been able to give this subject, I am forced to the conclusion that the judgment of the court below should have been reversed, and the defendant discharged.

STILES, J., concurs with SCOTT, J.

DEMARTIN V. DEMARTIN *et al.* (No. 12,514.)  
(*Supreme Court of California.* July 30, 1890.)

HOMESTEAD—VALUE—BURDEN OF PROOF.

1. Under Insolvent Act Cal. § 60, which makes it the duty of the insolvency court to exempt and set apart a homestead for the benefit of the insolvent, the value of which is limited to \$5,000 by Civil Code, § 1260, the burden of proof is on the creditors to show that the value of the homestead which the insolvent petitions to have set apart to him exceeds that amount.

2. A party having the burden of proof and offering no evidence is not prejudiced by the court's failure to make findings of fact.

Commissioners' decision. Department 1. Appeal from superior court, Del Norte county; JAMES E. MURPHY, Judge.

Petition by Louis Demartin, an insolvent, to have a homestead set apart to him. The petition was granted, and Josephine Demartin and another, two of his creditors, appeal.

*Sawyer & Burnett* and *L. F. Cooper*, for appellants. *Lucas & Miller*, for respondent.

BELCHER, C. C. This is an appeal from an order setting apart a homestead to an insolvent debtor. The facts are these: On the 22d day of October, 1887, Louis Demartin filed his petition in insolvency, and on the same day he was adjudged to be an insolvent debtor, and a time was appointed for his creditors to meet and prove their debts, and choose an assignee of his estate. Annexed to the petition were the requisite schedules and inventory, in which a portion of the real property was described as petitioner's homestead, and the value thereof was placed at \$5,000. On

the 5th of November following, he presented to the court another petition asking to have the property described as a homestead set apart as such for his use and benefit. This petition stated that the petitioner had executed, acknowledged, and filed for record a declaration of homestead, in proper form, on the premises which he asked to have set apart, and that at the time of so doing he was and ever since had been residing thereon with his family, and that the same did not exceed in value the sum of \$5,000. On the 7th of November the attorney for two of the creditors of the insolvent filed his affidavit (giving the reasons why it was made by him) setting forth that Demartin filed his declaration of homestead on the 29th day of September, 1887; that he filed his petition in insolvency on the 22d day of October; that he petitioned the court to have said homestead set apart to him on the 5th day of November; and that, as affiant was informed and believed, the value of the premises selected as a homestead was from \$8,000 to \$10,000; and praying the court, before setting the same apart, to appoint three persons to appraise the value thereof, and return their appraisement to the court. On the 10th of November the court set the matter for hearing on the next day at 10 o'clock A. M. At the time set for the hearing the attorney for the objecting creditors did not appear, and thereupon, on motion of counsel for the petitioner, no evidence being offered by him, and there being nothing before the court except the papers before mentioned, an order was made and entered setting apart for the use and benefit of the petitioner as a homestead all of the premises described in his petition.

1. It is claimed for appellants that the order was erroneous, and should be reversed, because no evidence was offered on behalf of respondent showing that he had ever filed a declaration of homestead on the premises claimed, or was ever residing thereon, or that the value thereof did not exceed \$5,000; and it is said that the burden was upon him to establish by competent proof all these facts before an order could properly be made setting apart to him the premises as a homestead. But there was no denial that he had filed a properly executed declaration, and was residing with his family on the premises at the time of doing so. These facts were, therefore, admitted, and it was not necessary to introduce in evidence the declaration or any proof of residence. The question then only remains, where was the burden of proof as to value? The Civil Code provides that homesteads may be selected and claimed of not exceeding \$5,000 in value by any head of a family, (section 1260,) and that from and after the time the declaration is filed for record the premises therein described constitute a homestead. Section 1265. A homestead may be selected of greater value than \$5,000, and the excess in value does not invalidate the selection. *Ham v. Bank*, 62 Cal. 125; *Lubbock v. McMann*, 82 Cal. 230, 22 Pac. Rep. 1145. The excess in value, if there be any, is subject to the claims of creditors, but it can be taken only in the manner provided by

statute for its admeasurement and application. Civil Code, §§ 1245, 1246; *Waggle v. Worthy*, 74 Cal. 268, 15 Pac. Rep. 881. When an execution creditor claims that the value of the homestead exceeds the sum of \$5,000, and seeks to subject the excess to the payment of his debt, the burden is upon him to prove, among other things, that there is an excess, before the court can take any action. Civil Code, § 1249; *Stone v. McCann*, 79 Cal. 460, 21 Pac. Rep. 863. The insolvent act (section 60) makes it the duty of the court having jurisdiction of the insolvency proceedings to exempt and set apart for the use and benefit of the insolvent a homestead in the manner provided in section 1465 of the Code of Civil Procedure. By the section referred to it is provided that the court "may," on its own motion, or on petition therefor, set apart for the use of the surviving husband or wife the homestead selected, designated, and recorded, provided such homestead was selected from the common property or from the separate property of the persons selecting or joining in the selection of the same. And it has been held that whenever a proper application is made for the setting apart of a homestead, the word "may" is to be construed as "shall," and the court has no discretion to refuse the application. *Estate of Ballentine*, 45 Cal. 696; *Tyrrell v. Baldwin*, 78 Cal. 476, 21 Pac. Rep. 116. Under the circumstances appearing here, we think the burden was upon the objecting creditors to show that the value of the premises asked to be set apart as a homestead exceeded the limit of exemption, and that in the absence of any such proof the court was justified in making the order complained of.

2. It appears from the bill of exceptions that no findings were made by the court, and that they were not waived by the appellants. And it is claimed that issues of fact were raised, upon which findings were necessary, and that for the want of them the order should be reversed. But, waiving the question as to whether findings are ever necessary in support of an order like that involved here, the rule is, as said in *Monterey Co. v. Cushing*, 83 Cal. 510, 23 Pac. Rep. 700: "If no direct evidence be introduced upon any issue, the finding should be against the party who had the burden of proof." And in *People v. Center*, 66 Cal. 564, 5 Pac. Rep. 263, and 6 Pac. Rep. 481, it is said: "When the court fails to find on a material issue the judgment will not be reversed if the finding omitted must have been adverse to the appellant;" citing *Hutchings v. Castle*, 48 Cal. 162, and *McCourtney v. Fortune*, 57 Cal. 617. And this rule has been approved and followed in subsequent cases. See *Murphy v. Bennett*, 68 Cal. 528, 9 Pac. Rep. 738; and *Senter v. Senter*, 70 Cal. 620, 11 Pac. Rep. 782.

As the burden of proof was on the appellants, and no proof was offered by them, it is evident that they were in no way prejudiced by the failure to find, and the order cannot be reversed on that ground. It follows that the order appealed from should be affirmed.

We concur: VANCELF, C.; FOOTE, C.

**PER CURIAM.** For the reasons given in the foregoing opinion, the order appealed from is affirmed.

85 Cal. 76

**DEMARTIN v. DEMARTIN et al.** (No. 12,745.)  
(*Supreme Court of California*. July 30, 1890.)

**INSOLVENCY—DISCHARGE.**

1. Insolvent Act Cal. § 49, which provides that no discharge shall be granted if the debtor shall have sworn falsely in relation to any material fact concerning his estate or his debts, imposes no penalty for an unintentional and innocent mistake; and the fact that in his verified schedule of liabilities a debtor in good faith understated the amount due one of his creditors, and likewise omitted a small item from his verified inventory of assets, by neither of which errors were his creditors prejudiced, will not prevent his discharge.

2. The pendency of an appeal in the supreme court from an order setting off the insolvent's homestead does not prevent his discharge, as this is not one of the grounds enumerated by the insolvent act on which the creditors may oppose such discharge.

Commissioners' decision. Department 1. Appeal from superior court, Del Norte county; **JAMES E. MURPHY**, Judge.

Application by Louis Demartin, an insolvent debtor, for a discharge. The application was granted, and Josephine Demartin and another, two of his creditors, appeal.

*Sawyer & Burnett* and *L. F. Cooper*, for appellants. *Lucas & Miller*, for respondent.

**BELCHER, C. C.** This is an appeal from an order granting an insolvent debtor discharge from his debts. On the 22d day of October, 1887, the respondent, Louis Demartin, commenced proceedings in voluntary insolvency, and was adjudged to be an insolvent debtor. On the 4th of February following he applied to the court for a discharge from his debts, and the proper notice was given to his creditors to appear and show cause why a discharge should not be granted. The appellants, two of the creditors, appeared and opposed a discharge. As grounds of opposition they specified—*First*, that the respondent had sworn falsely in the affidavit annexed to his petition, schedule, and inventory, in this: that he stated, in the schedule of his debts and liabilities, his indebtedness to the appellants to be \$4,588.40, when in fact it was \$5,588.40; and in this: that he wholly omitted from the inventory of his assets an indebtedness of \$172.23 then due him from certain parties in the city of San Francisco; *second*, that respondent had been guilty of fraud, contrary to the true intent of the insolvent act, in this: that on the 20th day of September, 1887, he filed and caused to be recorded a declaration of homestead on a tract of land then owned by him, which was of the value of \$15,000, and on the 11th day of November, 1887, the court, against the objections of appellants, and without hearing any evidence, set the whole tract apart to him as a homestead; from which order an appeal had been taken to, and was still pending in, the supreme court. See ante, 594. The respondent filed an answer to the specifications of objection admitting

the errors set up in the first specification, and averring that they arose from mistake and inadvertence, and denying that the property selected by him as a homestead and set apart as such by the court, as stated in the second specification, was of any greater value at the time of the selection than \$5,000. He also interposed a general demurrer to the second specification, and the appellants interposed a like demurrer to the answer. The court sustained the demurrer of respondent, and overruled that of appellants. The case was then tried, and as a result the court found that respondent was indebted to appellants in the sum of \$5,588.40, instead of \$4,588.40, as set forth in his schedule, but "that such discrepancy occurred by mistake, and was not made with intent to defraud any of the creditors of the said insolvent." The court also found that at the time of filing the petition and inventory there was owing to the insolvent the sum of \$172.23, which was not included in the inventory, but "that the same was omitted therefrom through inadvertence and mistake, and not with any intent to defraud any of the creditors of the said insolvent," and that the insolvent had since received and paid the same to the assignee. As a conclusion of law it was held that the petitioner was entitled to a discharge from his debts, and a discharge was accordingly granted to him in the form prescribed by the statute.

1. It is not claimed that the findings of fact were not justified by the evidence, and it must therefore be conclusively assumed that the omissions complained of were mere mistakes made without any fraudulent intent or purpose. It is, however, argued that the court erred as matter of law, under the provisions of section 49 of the insolvent act, in granting the discharge. We do not think the argument sound. The section referred to provides: "No discharge shall be granted, or if granted shall be valid, if the debtor shall have sworn falsely in his affidavit annexed to his petition, schedule, or inventory \* \* \* in relation to any material fact concerning his estate or his debts, \* \* \* or has been guilty of fraud contrary to the true intent of this act," etc. It could not have been intended by this language to impose the penalty declared for an unintentional and innocent mistake. The words "have sworn falsely" necessarily import a willful act done with a fraudulent intent, and from which the element of fraud cannot be eliminated. *Dean v. Grimes*, 72 Cal. 446, 14 Pac. Rep. 178. Besides, under the circumstances shown, how can it be said that the false swearing was in relation to any material fact? The appellants presented and proved their debt without any objection, and it was allowed for the full amount claimed by them. And the omitted \$172.23, when received by the insolvent, was promptly paid over by him to the assignee. See *Smith v. His Creditors*, 59 Cal. 267.

2. It is urged that the court erred in sustaining the demurrer to the second ground of opposition; and in support of this position it is said "the 'second ground' alleged, besides fraud in procuring the homestead

set aside, that an appeal from the order was pending," and counsel "submit that so much of the second ground of opposition as sets up the pendency of the appeal from the order setting apart the homestead is a good ground against a general demurrer." We fail to see any merit in this argument. The statute provides that at any time after the expiration of three months from the adjudication of insolvency the debtor may apply to the court for a discharge from his debts, and the grounds upon which a discharge may be opposed are enumerated. Insolvent Act, §§ 48, 49. It also makes it the duty of the court to set apart for the use and benefit of the insolvent a homestead, and if for any reason the order is claimed to be erroneous an appeal therefrom is allowed. Sections 60, 67. But the order setting apart a homestead, and the appeal therefrom, are not among the enumerated grounds of opposition. Nor do we see any reason why they should be so treated. The discharge of an insolvent in no way jeopardizes the rights of creditors to appropriate the excess in value of the homestead, if there be an excess, since, if the appeal is sustained and the order reversed, the matter goes back for further adjudication. In our opinion the rulings of the court were proper, and we therefore advise that the order appealed from be affirmed.

We concur: VANCLIEF, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

(84 Cal. 646)

MAYER v. SALAZAR. (No. 12,722.)

(Supreme Court of California. July 8, 1890.)

#### FALSE REPRESENTATIONS.

Under Civil Code Cal. § 1572, subd. 2, defining actual fraud committed by one party to a contract, with intent to induce another party to enter into the contract, as "the positive assertion, in a manner not warranted by the information of the party making it, of that which is not true, though he believed it to be true," a finding that defendant, by false and fraudulent representations as to soundness, induced plaintiff to purchase a horse from him, is supported by evidence that the representations were in fact not true, and that defendant made them without reasonable grounds for believing them to be true.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; WALTER H. LEVY, Judge.

Sidney V. Smith, for appellant. F. W. Reynegom and Jarboe, Harrison & Goodfellow, for appellee.

BELCHER, C. C. The plaintiff and defendant exchanged horses, and this action was brought to recover damages for the false and fraudulent representations alleged to have been made by the defendant as to the soundness of his horse, whereby the plaintiff was induced to make the exchange. The court below gave judgment for the plaintiff, from which, and from an order denying a new trial, the defendant appeals.

The court, after finding that the horse of the defendant was unsound at the time

of the exchange, further found as follows: "(2) That defendant, knowing his said horse was unsound, caused the animal to appear sound, and concealed and suppressed the true condition of the horse, and represented to plaintiff that said horse was sound, and thereby \* \* \* induced the plaintiff to exchange his said mare for said horse. (3) That defendant, with intent to deceive and defraud the plaintiff, and with full knowledge that said horse was unsound, and unfit for any use by the plaintiff, did represent at the time of making said exchange that said horse was sound; and that plaintiff, relying on defendant's said representations, did then exchange and deliver his said mare for said horse." It is claimed for the appellant that these findings were not justified by the evidence, because there was no sufficient proof that he knew his horse was unsound at the time of the trade; and it is said that, in such an action, it is necessary for the plaintiff to prove "not only the falsity of the representations in point of fact, but that the defendant, at the time the representations were made, had knowledge of their falsity, or made them without reasonable grounds for believing their truth."

The testimony was conflicting upon most of the issues raised, but it was proved for the plaintiff that the horse was spavined and unsound. Dr. Jacobson, a veterinary surgeon, testified that he saw the horse shortly after the exchange, and that "he then had a bone spavin. A horse couldn't throw out such a spavin in less than three to five or six months. A horse goes lame from the time he gets the hurt that causes the spavin." And again, in rebuttal, the same witness testified: "I should judge that it would take about three to six months to develop,—for such a spavin as was on this horse to develop. The horse must have been lame from the time of getting the injury which caused the spavin to form. The horse might travel during this time without any lameness, but a drive of thirty-five miles would be liable to make him very lame after standing still for a little time." And on cross-examination he was asked, "Do all horses go lame that have spavins?" and answered, "Yes, sir." The plaintiff testified that defendant came to him one day, and said "he had a very fine horse he would like to trade." That subsequently defendant asked him to go to the stable where the horse was kept, and see him. That he went to the stable, and, when the horse was brought out of the stall, he remarked: "Well, the horse is a little lame. What is the matter with him?" and defendant replied that the horse was all right, and perfectly sound, but that he had been out to grass, and was rather soft,—had been driven 50 miles from the Mission San Jose the day before, and was a little stiff, but would be over his stiffness in a day or two. That the witness saw the horse again, when he was still lame, and said: "The horse is lame. What will be done?" And the defendant replied: "He will get over it in a day or two," and "you can take my word the horse is sound." That, when the written contract of exchange was

brought to him to be signed, he said, "I like to have title and soundness guaranteed;" and defendant said: "What is the good of it? My lawyer made it out, and you can take my word, as a gentleman, that the horse is sound." That the witness took the defendant's word, and made the trade, but that the horse continued so lame that he could not be driven, and was never of any use to him. If this testimony was true,—and most of it was confirmed by other witnesses,—then it is evident that, when the defendant made the representations complained of, he had knowledge of their falsity, or made them without reasonable grounds for believing their truth. This being so, the findings cannot be disturbed for want of evidence to support them. One of the Code definitions of actual fraud committed by a party to a contract, with intent to induce another party to enter into the contract, is as follows: "The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true." Civil Code, § 1572, subd. 2.

A case very similar to this was presented in *Litchfield v. Hutchinson*, 117 Mass. 195. There the plaintiff had purchased a horse from the defendant, and at the trial he introduced evidence tending to show that he was induced to make the purchase by false representations made by the defendant as to the soundness of the horse. The defendant testified that he made no representations whatever, and that he had worked the horse almost every day for three or four weeks, and did not observe any lameness, or know that he was unsound. The appellate court, by MORTON, J., said: "This is an action of tort, in which the plaintiff alleges that he was induced to buy a horse of the defendant by representations made by him that the horse was sound, and that the horse was in fact unsound and lame, all of which the defendant well knew. To sustain such an action, it is necessary for the plaintiff to prove that the defendant made false representations, which were material, with a view to induce the plaintiff to purchase, and that the plaintiff was thereby induced to purchase. But it is not always necessary to prove that the defendant knew that the facts stated by him were false. If he states, as of his own knowledge, material facts susceptible of knowledge, which are false, it is a fraud which renders him liable to the party who relies and acts upon the statement as true; and it is no defense that he believed the facts to be true. The falsity and fraud consist in representing that he knows the facts to be true of his own knowledge, when he has not such knowledge. \* \* \* If the defect in the horse was one which might have been known by reasonable examination, it was a matter susceptible of knowledge; and a representation by the defendant, made as of his own knowledge, that such defect did not exist, would, if false, be a fraud for which he would be liable to the plaintiff, if made with a view to induce him to purchase, and if relied on by him." The law thus declared is evidently in harmony with the provisions of the Code above

cited, and we therefore advise that the judgment and order appealed from be affirmed.

We concur: VANCLIEF, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

(84 Cal. 655)

*Ex parte* ARMSTRONG. (No. 20,720.)

(*Supreme Court of California*. July 8, 1890.)

JUSTICES OF THE PEACE—NUMBER.

Code Civil Proc. Cal. § 103, which provides, among other things, that there shall be one justice of the peace in every city having 10,000, and not more than 20,000, inhabitants, does not by implication repeal a provision for two justices in the town of Berkeley, made by its charter, which was granted by special act before the adoption of the present constitution, although said town has a population of less than 10,000.

*Habeas corpus*.

Application for the release of one imprisoned by process issued by WILLIAM J. WALKER, a justice of the peace in the town of Berkeley, Alameda county.

A. M. Armstrong and D. E. Alexander, for petitioner.

PER CURIAM. The charter of the town of Berkeley was granted by special act of the legislature, before the adoption of the present constitution. It provided for the election of two justices of the peace for the municipality. The only question in this case is whether or not this provision of the charter has been repealed by the adoption of the constitution, and the general legislation had under it. It is conceded that there is no such repeal in express terms. We think there is none by necessary implication. Justices' courts in municipalities are inferior courts, which may be created by act of the legislature; and the fact that the legislature, in the general judiciary article of the Code of Civil Procedure, has provided for the number of justices in cities of over 10,000 inhabitants, but said nothing about the number in municipalities of a less population, shows that it was not the intention of the legislature to interfere, by that act, with existing charters of municipalities of the latter class. The provisions of the general law for the incorporation of municipalities on this subject differ for the different classes of such corporations, and apply to them only when they have surrendered or abandoned their old charters, and elected to incorporate under such general law. Writ discharged, and prisoner remanded.

(84 Cal. 585)

VAN BIBBER v. HILTON *et al.* (No. 12,858.)  
(*Supreme Court of California*. July 18, 1890.)

RIPIARIAN RIGHTS—CROSS-COMPLAINT.

In an action by a riparian owner to enjoin riparian owners above him from diverting the waters of a stream, defendants may file a cross-complaint to enjoin plaintiff from drawing off the water so as to prevent it from irrigating their land, as it would do in its natural flow, under Code Civil Proc. Cal. § 442, giving a defendant seeking affirmative relief affecting the property to which the action relates the right to file a cross-

complaint. Overruling *Heilbron v. Canal Co.*, 17 Pac. Rep. 988.

In bank.

On rehearing. For decision in department, see ante, 308. Code Civil Proc. Cal. § 442, provides: "Whenever the defendant seeks affirmative relief against any party relating to or defending upon the contract or transaction upon which the action is brought, or affecting the property to which the action relates, he may, in addition to his answer, file at the same time—or, by permission of the court, subsequently—a cross-complaint," etc.

*Spencer & Raker*, for appellants. *Goodwin & Jenks*, for respondent.

PER CURIAM. Rehearing denied. The decision of the department is in conflict with an expression used by the court in bank, in *Heilbron v. Canal Co.*, 76 Cal. 15, 17 Pac. Rep. 933, where it says "the action is one in tort, and no affirmative relief could be granted." But the expression so used in the case cited is in conflict with the express provisions of section 442, Code Civil Proc., if construed as meaning that in no case of an action for tort a cross-complaint would be proper, or affirmative relief be granted. There are many cases of that kind, where a cross-complaint might be proper, and affirmative relief be granted. The expression so used in *Heilbron v. Canal Co.* stands alone, and is not supported by any of the other cases cited, and, our attention now being called to it, it is overruled. This expression was not necessary to the decision in that case.

35 Cal. 26

*Ex parte CASEY.* (No. 20,721.)

(*Supreme Court of California.* July 21, 1890.)

CRIMINAL LAW—TRIAL—SENTENCE.

Under Pen. Code Cal. § 19, making a misdemeanor punishable by imprisonment not exceeding six months, or by a fine not exceeding \$500, or by both, and section 1205, providing that a judgment that defendant pay a fine may also direct that he be imprisoned until the fine be satisfied, specifying the extent of the imprisonment, which must not exceed one day for every dollar of the fine, the court may impose a fine of \$500, with the alternative that in default of payment defendant be imprisoned at the rate of one day for each dollar of the fine.

In chambers. On *habeas corpus*.  
*Carroll Cook*, for petitioner.

Fox, J. The prisoner was convicted of misdemeanor in the police court of the city and county of San Francisco, and fined \$500, "and in default of payment of said fine to be imprisoned in the county jail of the city and county of San Francisco, state of California, at the rate of one day for each \$1 of such fine until said fine is satisfied." It is conceded that the offense of which the prisoner was convicted is punishable by imprisonment in the county jail not exceeding six months, or by a fine not exceeding \$500, or by both. Pen. Code, § 19. In this case the court imposed the fine only, with the alternative of imprisonment in case of default in pay-

ment of the fine, not exceeding one day for each dollar of such fine, unless the same was satisfied. Under this judgment the prisoner has been in jail six months, and it is claimed that he is now entitled to be discharged; it being insisted on his behalf that the court had no jurisdiction to impose such a fine, or make such an apportionment thereof as would extend the period of imprisonment for non-payment thereof beyond the period of six months,—the maximum term of imprisonment which the court could have imposed if it had selected that mode of punishment. *Ex parte Wadleigh*, 82 Cal. 518, 23 Pac. Rep. 190, and *Ex parte Rosenheim*, 83 Cal. 388, 23 Pac. Rep. 372, are relied upon in support of this contention. All that was determined in *Ex parte Wadleigh* was that a prisoner is entitled to his discharge from the state-prison when he has served out the term prescribed by the judgment of imprisonment, less the credits which have been allowed him under the law, and that a judgment imposing imprisonment in the state-prison in default of the payment of a fine is void, affirming in the latter regard the decision in *Ex parte Arras*, 78 Cal. 304, 20 Pac. Rep. 683. In *Ex parte Rosenheim* the court held that where the court by its judgment imposed both imprisonment and fine it could not add a further imprisonment in default of the payment of the fine, holding that the intention of the legislature to make imprisonment for the collection of fine, or in default of payment of fine, applicable to such cases, "is not clearly, and with certainty, expressed in the language used" in section 1205 of the Penal Code. But it is clearly expressed in that section that where the judgment is for fine only it may also direct that the defendant be imprisoned until the fine be satisfied, specifying the extent of the imprisonment, which must not exceed one day for every dollar of the fine. There is nothing here or elsewhere in the statute to limit the extent of such imprisonment to the maximum of the period which might have been imposed if imprisonment alone had been adopted as the means of punishment; and properly so, for so far as the law is concerned the defendant may avoid imprisonment entirely, or secure his discharge at any time, by payment of the fine, or such part of it as remains due after deducting the specified *per diem* for the number of days he may have remained in prison. *Ex parte Kelly*, 28 Cal. 414. Again, it being conceded, and that being the express provision of the statute, that the court had jurisdiction to impose a fine of \$500, it had full power to apportion the imprisonment for non-payment at the rate of one day for each dollar of such fine, under section 1446, Pen. Code, in relation to proceedings in justices' and police courts. In *Ex parte Wadleigh* the prisoner was discharged because the legislature had not in terms authorized the imprisonment in default of payment of the fine. In this case it has, in express terms, in at least two separate sections, made such provision. Writ discharged and prisoner remanded.

(87 Cal. 40)

**SPAULDING v. NORTH SAN FRANCISCO HOMESTEAD & RAILROAD ASSOCIATION.** (No. 12,685.)

(Supreme Court of California. July 8, 1890.)

**PETITION FOR STREET GRADING—PRESUMPTION OF REGULARITY.**

1. St. Cal. 1871-72, p. 804, provides that certain street grading cannot be ordered by the supervisors unless a majority of the frontage of lots petition therefor. Certain grading was done upon a petition from which it did not certainly appear whether the petitioner owned a majority of the frontage or not. *Held* that, since the board must necessarily have passed upon the sufficiency of the petition before ordering the work done, it was properly presumed to be sufficient, and testimony to the contrary was rightly excluded.

2. The act further provides that the board shall publish notice of its intention to order the work done, and that lot-owners who feel aggrieved by the proposed improvement shall file a remonstrance, which shall be passed upon by the board, and its decision shall be conclusive. *Held*, that one who failed to file such remonstrance was concluded by the decision, and could not attack it by way of defense to a suit to collect the assessment for the improvement.

3. Where a contract was made for doing the work for 50 cents per yard, but afterwards, without the contractor's request, the board published a new notice of intention, which resulted in a new contract with him to do the same work at 60 cents per yard, for which action no reason appears, it must be presumed that the board acted regularly, and that for some defect in the proceedings the new contract was necessary.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco. **WALTER H. LEVY, Judge.**

Action by N. W. Spaulding against the North San Francisco Homestead & Railroad Association.

*E. J. Pringle* and *D. H. Whittemore*, for appellant. *W. H. H. Hart*, (*J. M. Wood*, of counsel,) for respondent.

**GIBSON, C.** Defendant appeals from a judgment rendered in an action brought by plaintiff as the assignee of one J. S. Dyer, a street contractor, to recover an assessment for \$323.91 for grading Lombard street from Broderick street to the west line of Lyon street, in San Francisco, which had been levied upon a lot designated as No. 10 on the diagram attached to and made part of the assessment, and also from an order denying a new trial.

By section 4 of the act of April 1, 1872, (St. 1871-72, p. 804,) pursuant to which the street was graded, it is provided that no work of the character mentioned can be ordered by the board of supervisors, "unless the majority of the frontage of the lots and land fronting on the work proposed to be done and described in said resolution, or which is to be made liable for such grading, except public property, shall have been represented by the owners thereof, or by their agents, in a petition to the said board of supervisors, stating that they are the owners and in possession or agents of the lots named in the petition, and also requesting that such improvement or street work shall be done." At the trial, after plaintiff had rested his case, defendant introduced the petition of F. Weisenborn, upon which the board of supervisors had ordered the grading, and

upon which the contract therefor had been made with plaintiff's assignor, and then called the petitioner as a witness, and offered to prove by him that he was not the owner nor in the possession of more than one-half of the land fronting on Lombard street at the time he signed the petition and presented it to the board of supervisors. This offer the court ruled out, and the appellant claims that the court committed error in so doing. The petition on its face shows that the petitioner is the owner of the entire frontage on each side of Lombard street, between Baker and Lyons streets, and 137½ feet on the latter street south from its junction with Lombard street, and the same distance north on the same street from the junction of the last-mentioned streets; that there are six 50-vara lots fronting on Lombard street, between Baker and Broderick streets, and that the crossing formed by Baker and Lombard streets had been graded. The frontage of petitioner on Lombard street is not shown in feet, nor is it shown that one of the 50-vara lots is public property (a school lot) that should for that reason be excluded from the computation of frontage. Now, while the failure to show these two facts makes the petition uncertain, on its face, as to whether the petitioner is the owner of a majority of the frontage to be affected or not, it does not make it appear that the petitioner is not the owner of more than one-half of the frontage to be affected by the proposed improvement, for if it did the petition would be fatally defective. The statement that he is the owner of two lots, being the entire frontage on both sides of one of the two blocks he seeks to have graded, and 137½ feet north and the same distance south on Lyon street from its junction with Lombard street, is not inconsistent with the fact that he is the owner of a majority of the whole frontage, but, on the contrary, is consistent with it. Hence the petition was sufficient for the board of supervisors to act upon and ascertain whether it should be granted or not. In exercising the jurisdiction thus obtained, and in granting the petition, the board of supervisors must necessarily have found that the petitioner was the owner of a majority of the frontage to be affected by the proposed improvement. Even if, as seemingly suggested by counsel for appellant, the act referred to does not provide in express terms for any determination of the matter of a petition, clearly, where a board is empowered to receive a petition and is invested with discretion in regard to the subject-matter, it has the implied power to determine whether it shall be granted or not. The law makes it the duty of the board, upon receiving a proper petition for the grading of a street, to publish a resolution of its intention to perform the work, and thereafter make an order that it shall be done. Can it be reasonably contended that, if a petition sufficient upon its face should pray for the grading of a street already graded, the board would have to perform the idle ceremony of publishing a resolution of intention to perform the work and order the same to be done, regardless of



the falsity of the apparent necessity of the grading shown by the petition? Assuredly not. To determine the necessity for the work requires the exercise of judgment on the part of the board, and, in order to properly reach the consideration of this fact, it would first have to determine whether the petition were sufficient or not.

The amount of frontage owned or possessed by the petitioner being, then, one of the jurisdictional facts that the board had to pass upon, its determination of the same in favor of the petitioner is and was conclusive against the collateral attack of appellant at the trial. *People v. Hagar*, 52 Cal. 171. And by the terms of the act itself it was intended to be conclusive, unless objected to in the manner provided for in section 4 of the act, which is as follows: "All owners of lands or lots, or portions of lots, who may feel aggrieved or have objection to the ordering of the work described in said notice, \* \* \* shall file with the clerk of the board of supervisors a petition or remonstrance, wherein they shall set forth in what respect they feel aggrieved; \* \* \* which petition or remonstrance shall be passed upon by said board of supervisors, and their decision thereon shall be final and conclusive." This provision is intended to enable parties in interest to reach any irregularity or defect in the petition itself, or matter connected with the granting of it, and to be their only remedy. There is no evidence here that appellant ever availed itself of the opportunity thus given to be heard. It therefore waived all objections to the form of and the granting of the petition. In *Jennings v. Le Breton*, 80 Cal. 9, 21 Pac. Rep. 1127, in applying a similar provision in section 12 of the same act, providing for an appeal to the board of supervisors respecting the acts of the superintendent of streets, it was held that an appeal to the board was the only remedy for any grievance caused by the official acts of the superintendent of streets, and that a failure to appeal was a waiver of all objections thereto. See cases there cited. The statute under consideration provides for the publication of a notice of intention, in the form of a resolution, to make the proposed improvement, after receiving a sufficient petition therefor, and for a hearing upon the same at the instance of any person in interest who may feel himself aggrieved. This, we are convinced, presents a different case from that of *Mulligan v. Smith*, 59 Cal. 206, affirmed in *Kahn v. Board*, 79 Cal. 388, 21 Pac. Rep. 849. There it was held that the petition presented to the mayor of San Francisco for the opening of Montgomery avenue in said city, under the special act of April 1, 1872, (St. 1871-72, p. 911,) was invalid, and the mayor had no authority, under the act, to pass upon it; and that the approval by the county court of the report of the board of public works based upon the petition was of no effect, because the petition was insufficient, and the act did not provide for notice of a hearing to the parties in interest, in relation to it, at the

time the report was to be considered, nor at any prior or other time. The appellant also urges that, as that portion of Lombard street sought to be improved was divided into two separate portions by the crossing of Baker street, which had previously been graded, the board of supervisors could not, under section 3 of the statute, order two separate and distinct portions of a street thus divided to be done as one piece of work. By that section the board of supervisors are authorized to order the whole or any portion of a street graded. It is obvious that two blocks on a street may embrace the whole, or only a portion of it; and we do not think that because the Baker-Street crossing had been previously graded, which it is conceded could be done separately, the two blocks divided by such work could not be included in one petition, resolution of intention, order, contract, and assessment.

Dyer, the assignor of plaintiff, entered into his first contract, based upon regular proceedings, to do the grading for 50 cents per cubic yard, but before the expiration of the time within which he was required to commence the work under this contract pursuant to section 6, and within two days after the contract had been entered into, and without any request on the part of Dyer to be relieved from the contract, the board of supervisors passed and published another resolution of intention, which resulted in a second contract with the same Dyer, to perform the work at 60 cents per cubic yard, under which contract he performed the work. On these facts the appellant bases his remaining objection, viz.: That while the first contract remained in force the board of supervisors had no power to let the second contract. Consequently no recovery can be had for work performed under it. The reason why the board of supervisors saw fit to consider the first contract of no effect, and to let the second one, does not appear. It was treated by both the board of supervisors and Dyer as having been extinguished. Nothing was done under it. The contents of the first contract are not before us, and although assuming the proceedings which led up to it to have been regular, still, for some substantial defect or other in the contract itself, the board of supervisors may properly have deemed it necessary to renew the proceedings and obtain bids over again, which resulted in another contract with the same person, who was a competitive bidder for the work. This being probable, we must presume that the board acted regularly in effecting the second contract, and that a valid and sufficient reason existed for such action. Code Civil Proc. § 1963, subd. 15.

For these reasons, we think the judgment and order should be affirmed.

We concur: FOOTE, C.; VANCLIEF, C.

PER CURIAM. For reasons given in the foregoing opinion, the judgment and order are affirmed.

87 Cal. 78

*Ex parte WILLIAMS.* (No. 20,724.)

(Supreme Court of California. July 24, 1890.)

COLLATERAL PROCEEDING—JURISDICTION—SEN-  
TENCE.

1. Where the judgment that the prisoner be confined in the house of correction shows on its face that the court found the prisoner to be under 25 years old, or is silent on the subject, neither the finding nor the presumption that she was under 25 years old (the court having no authority to commit one older than that) can be questioned on *habeas corpus*.

2. Under St. Cal. 1877-78, p. 953, authorizing the city criminal court or the municipal criminal court of the city and county of San Francisco, in any case where a prisoner might be sentenced to the county jail or the state-prison, instead thereof to commit the prisoner to the house of correction, such person not being over 25 years old, and Const. Cal. art. 22, § 3, abolishing said courts, and article 6, § 5, vesting jurisdiction in cases amounting to felony in the superior court, the latter court has authority to commit to the house of correction in felony cases.

In bank. On *habeas corpus*.

N. S. Wirt, for petitioner. James D. Page, for respondent.

Fox, J. Lizzie Williams, on whose behalf this proceeding was taken, was convicted in the superior court of the city and county of San Francisco of grand larceny, and on the 18th day of October, 1889, was by the court committed to the house of correction for the period of two years, where she has ever since been and now is confined in pursuance of said judgment and commitment.

1. The first point made on this hearing is that the prisoner was over 25 years of age at the time of the pronouncing of the judgment, by reason whereof the court had no jurisdiction to sentence her to confinement in the house of correction. Whether a prisoner is or is not over 25 years of age is a question of fact to be determined by the court giving the judgment, at or before the time of pronouncing the same. If it should appear affirmatively from the record that the court found the prisoner to be over 25 years of age, then we should be compelled to hold, on the face of the record, that a judgment of confinement in the house of correction was void. What we should deem it our duty to do with the prisoner in such case, there being a valid conviction but no judgment, it will be sufficient to determine when the question arises; it does not arise in this case. If the record was silent on the subject of age, it being a case where written findings are not required, the presumption would be that the court had done its duty, and found the fact to be such as to warrant the judgment given. In this case a certified copy of the judgment is brought up and offered in evidence, and it appears upon the face thereof that the court found the prisoner to be under the age of 25 years. Whether the finding be evidenced by the record or by the presumption of law, its correctness cannot be inquired into in this court upon *habeas corpus*. If the court erred in its finding, the error can only be reviewed upon appeal, the evidence and the rulings of the court being brought up on bill of exceptions.

2. The next point insisted upon is that

no court, except the police court, has jurisdiction to sentence any person to confinement in the house of correction. This point is not well taken. Before the adoption of the present constitution by the act entitled "An act in relation to the house of correction of the city and county of San Francisco," (St. 1877-78, p. 953,) the city criminal court, or the municipal criminal court of the city and county, was authorized in any case, where a prisoner upon conviction might be sentenced to imprisonment in the county jail or in the state-prison, instead thereof to sentence such person to imprisonment in the house of correction: provided that no person should be so sent to the house of correction who was over 25 years of age. Upon the adoption of the constitution, by section 3, art. 22, thereof, all the courts of the state theretofore existing, except justices' and police courts, were abolished, but the power of the state, through the judicial department of its government, to punish for public offenses, was not thereby lost. All the laws of the state as to the measure and mode of punishment not inconsistent with the constitution, and as to what should constitute public offenses, remained in full force; jurisdiction to administer them being by proper constitutional and legislative enactment transferred to the new courts established by or under the constitution. By article 6, § 5, jurisdiction in all cases amounting to felony (of which this is one) was vested in the superior court. By operation of the constitution itself, therefore, the superior court became vested with jurisdiction in all cases of felony, and succeeded to all other courts which theretofore had possessed jurisdiction in such cases. As the laws prescribing the mode and measure of punishment of felonies were not changed by the constitution, it was the duty and within the power of the superior court to administer those laws in the same manner and to the same extent as other courts theretofore had jurisdiction to do. For cases pending, in order that there should be no abatement or loss of jurisdiction, it was deemed necessary to provide for the transfer of the causes, and the records thereof, from the old courts to the new, and this was done by section 3, art. 22, supra, and subsequently, and more in detail, by an act of the legislature passed for that special purpose, approved February 4, 1880. St. 1880, p. 2. By section 2 of that act it is expressly provided that the superior court shall for all purposes be the successor of (among others) the municipal criminal court and the city criminal court. It is claimed that this act, if construed as for any other purpose than to provide for the transfer of the records of and giving jurisdiction in pending cases, is void, because such other purpose is not expressed in the title of the act. It is unnecessary to discuss that contention here, for the reason, as we have already shown, that the constitution itself conferred the jurisdiction in all cases of felony, and it became the duty of the court upon which such jurisdiction was conferred to administer the laws as it found them until they were changed. See also *Shay v. Superior Court*,

57 Cal. 542, where it was expressly held that the superior court had succeeded "to all the powers and jurisdiction of the \* \* \* municipal criminal court."

3. It is further contended that even if the superior court once had power to sentence a defendant convicted of felony to confinement in the house of correction, it no longer has such power by reason of the provisions of the act of March 9, 1885, entitled "An act to provide for the commitment of persons convicted of crime to the house of correction." St. 1885, p. 84. A careful examination of that act, however, will show that it does not in any manner affect the question of the power of the court to commit to the house of correction upon conviction for felony. It relates only to cases of minor offenses, where the punishment may be imprisonment in the county jail, and its effect is, in such cases, to take off the limitation of age, and allow the court to send persons convicted of such offenses to the house of correction, without regard to age. Writ discharged, and prisoner remanded.

WE CONCUR: BEATTY, C. J.; SHARPSTEIN, J.; THORNTON, J.

(85 Cal. 333)

PEOPLE v. TOAL. (No. 20,610.)

(Supreme Court of California. Aug. 4, 1890.)

INFERIOR COURTS—ESTABLISHMENT—JUDGMENTS—  
COLLATERAL ATTACK.

1. Const. Cal. art. 6, § 1, provides that the legislature may establish inferior courts, whose jurisdiction and powers, under section 13, must be regulated "by law;" and sections 15 and 16 of article 4 provide that no law can be passed except by bill concurred in by both houses, and signed by the governor. *Held*, that Const. Cal. art. 11, § 8, which provides for the adoption of city charters by mere resolution of the legislature, without the approval of the governor, was not intended to supersede the above provisions of article 6 in relation to the establishment of inferior courts, and that the provisions of the charter of the city of Los Angeles, so adopted, establishing a police court, and defining its jurisdiction, are void. BEATTY, C. J., and PATTERSON, J., dissenting.

2. Where the bill of exceptions on appeal from a judgment of the police court of the city of Los Angeles recites that the court was established, and that the judge was elected and acted, under the city charter, it will not be assumed that the court may have been established by a general law.

3. One convicted of a crime may collaterally attack the existence of the court which assumed to try him.

In bank. On rehearing. See 23 Pac. Rep. 203.

Wm. T. Williams, Horace Bell, and Stephen M. White, for appellant. Geo. A. Johnson, Atty. Gen., and M. T. Owens, for the People.

WORKS, J. The appellant was convicted in the court below of an assault to commit murder. From the judgment, and an order denying him a new trial, he appeals. The judgment was reversed by this court, (23 Pac. Rep. 203,) and a rehearing granted. It was urged upon us in the petition for a rehearing that the effect of the decision was to oust the police judges of the city of Los Angeles from office without a hearing. Upon the second hearing the police

judges, as well as the attorneys in the case, and at least one *amicus curiæ*, were allowed to be heard, orally, and by printed briefs, and the subject seems to have been thoroughly exhausted. There are but two questions presented for our consideration by this second presentation of the case, viz.: (1) Was the police court of the city of Los Angeles attempted to be established by the new freeholders' charter of said city, a valid and existing court at the time the judge, or pretended judge, thereof committed the appellant for trial? (2) Can the question of the validity of said court be presented by the appellant in this way, or must the same be raised by a direct proceeding for that purpose? The point is made by the respondent that this court has already determined the first of these questions in the affirmative in the two cases of Brooks v. Fischer, 79 Cal. 173, 21 Pac. Rep. 653, and In re Strand, 21 Pac. Rep. 654. But the question now before us was neither presented nor considered in either of those cases. Brooks v. Fischer was brought to determine the general question whether or not the charter of the city was legally adopted. There was some doubt in the minds of counsel having that matter in charge whether the course taken in Brooks v. Fischer was the proper one to raise the question, and for that reason the application in Re Strand was made for the sole purpose of raising the same question, and none other was presented. This court regarded the remedy pursued in the former of these cases as the proper one, and decided the question raised in that case. Therefore, In re Strand was decided as presenting the same point, and the writ in that case was denied on the authority of the former one, and without further consideration. And in Brooks v. Fischer we were careful to say, in effect, that we were simply passing upon the general question as to the proper manner of adopting the charter, and not upon the question as to the validity of any of its provisions. Thus it was said: "It is contended by the petitioner that certain provisions of the charter are inconsistent with existing general laws, and particularly that it is in conflict with the general law with reference to the improvement of streets. It may be that certain of its provisions are inconsistent with present laws, and that so far it cannot be effective as against such laws; but this is a matter that it is unnecessary for us to determine. It is enough to say that the whole charter cannot be held to be invalid because of the fact that a few of its provisions may conflict with general statutes now in force." It must be seen, therefore, that nothing was decided in either of the cases referred to which precludes us, as an authority in point, or otherwise, from determining the question now before us, which is whether one of the provisions of the charter is invalid as in conflict with existing laws. These cases decided that the charter of Los Angeles, as a whole, was adopted in the proper manner, and nothing more.

1. The question now before us is whether an inferior court can be established by a mere resolution of the legislature not acted

upon by the governor because such court has been provided for in a charter adopted as provided by section 8, art. 11, of the constitution. Section 1, art. 6, of the constitution relates exclusively to the establishment of courts, and provides: "The judicial power of this state shall be vested in the senate sitting as a court of impeachment, in a supreme court, superior courts, justices of the peace, and such inferior courts as the legislature may establish in any incorporated city or town, or city and county." There may be "such inferior courts as the legislature may establish." The material question here is, how may the legislature establish these courts? Counsel for the appellant contend that it must be by a law regularly passed through the various stages required by the constitution, and approved by the governor, or passed as the law requires without his approval. On the other hand, it is contended by the respondent that the section of the constitution referred to does not provide how the legislature shall establish such courts, and therefore they may be established by the adoption of a charter of a city as provided by article 11, § 8, of the constitution. There are other sections of the constitution which throw some light upon this question, if it needs illumination. Section 13 of article 6 provides: "The legislature shall fix by law the jurisdiction of any inferior courts which may be established in pursuance of section 1 of this article, and shall fix by law the powers, duties, and responsibilities of the judges thereof." In this section the legislature is authorized to fix by law the jurisdiction of any inferior courts which may be established in pursuance of section 1 above quoted. There is no authority given to fix the jurisdiction, powers, duties, and responsibilities of inferior courts established in any other manner, and this must be done by law. Section 15 of article 4 provides how all laws shall be passed: "No law shall be passed except by bill. Nor shall any bill be put upon its final passage until the same, with the amendments thereto, shall have been printed for the use of the members. Nor shall any bill become a law unless the same be read on three several days in each house, unless, in case of urgency, two-thirds of the house where such bill may be pending shall, by a vote of ayes and noes, dispense with this provision. Any bill may originate in either house, but may be amended or rejected by the other; and on the final passage of all bills they shall be read at length, and the vote shall be by ayes and noes upon each bill separately, and shall be entered on the journal, and no bill shall become a law without the concurrence of a majority of the members elected to each house." And section 16 of the same article provides what shall be done after its passage before it shall become a law. It is too clear for argument that so far as the jurisdiction, powers, duties, and responsibilities of these inferior courts are concerned, they must, by the express terms of the constitution, be provided for and fixed by a bill regularly passed through the stages necessary to constitute it a law, as provided in sections 15, 16, art. 4, of the con-

stitution. If so, can it be said, with any degree of reason, that it was the intention of the framers of the constitution that such courts might be established by any less formal means, as, for example, by a resolution adopted by the two houses of the legislature after but one reading, and without any action on the part of the governor? We cannot think so. When it was provided that courts should be established by the legislature, it was undoubtedly meant that they should be established by the law-making power, including the governor, and by laws passed and approved as provided by other sections of the constitution. That such courts are properly established in this way has been decided by this court. *Ex parte Jordan*, 62 Cal. 464; *Ex parte Lloyd*, 78 Cal. 421, 20 Pac. Rep. 872. Section 8, art. 11, of the constitution, does not, and was not intended to, change or in any way alter the specific provisions relating to courts. The provision in that section that the charters authorized thereby to be framed and adopted must be "consistent with and subject to the constitution and laws of this state," makes it clear that nothing of the kind was intended. A provision in a charter adopted by mere resolution of approval, and not by law, establishing inferior courts, and giving them jurisdiction, is clearly in conflict with the constitutional provisions above referred to providing how courts shall be established and given jurisdiction. But it is urged upon us by one of the gentlemen who claims to be a police judge under this charter that dire consequences will result from a decision by us that this court was not legally established. The city of Los Angeles will be deprived of its police court, criminals will escape justice, and the gentlemen claiming to be judges of said court will be responsible for acts done by them as such judges without legal authority. We are too firmly convinced of the conclusion we have reached to be affected or influenced by the fear of consequences. Besides, in our judgment, the consequences likely to result from this decision cannot be so serious as to allow that courts of justice, however inferior, may be established in the informal and loose way contended for by the respondent. The city of Los Angeles is amply provided with inferior courts without its police court, and to be relieved of the unnecessary expense of maintaining it should not be seriously complained of. The criminals that will escape justice by the conclusion we have reached must be few in number, and the emoluments of the office to which they were not entitled will probably compensate the judges for all liabilities incurred by them by reason of having acted without authority of law.

2. But, conceding that the police court of Los Angeles was not legally established, it is further contended that the fact cannot avail the appellant in this case; that whether it was or not the pretended judge thereof was a *de facto* judge, and his right to the office, or his power and jurisdiction, cannot be questioned in this collateral way, but must be raised by a direct action for that purpose. We think

this point would be well taken if this were an attempt to test the right of some one to hold an existing office. *Hull v. Superior Court*, 63 Cal. 174-179; *Buckner v. Veuve*, Id. 304; *Fraser v. Freelon*, 53 Cal. 647. But the question presented here is not as to the right of a particular person to hold an existing office. There cannot be a *de facto* judge of a court that has no existence. We are very clear, therefore, that the appellant has the right to present the question on this appeal, and that it is our duty to determine it. And if such results are likely to follow as the respondent claims, it is better that it should be determined speedily. It cannot be claimed that the pretended judge who committed the appellant was elected to or claims to be holding any other office than the one attempted to be established by the resolution approving the charter of Los Angeles. The grounds upon which the appellant moved to set aside the information were as follows: "(1) That before the filing thereof the defendant had not been legally committed by a magistrate; (2) that the information herein purports to be filed upon a pretended examination of one L. Stanton, who falsely and illegally pretended to be a judge of a pretended police court of the city of Los Angeles; (3) that the said pretended police court of Los Angeles has no legal existence under the constitution and laws of this state; (4) that said L. Stanton is not, and was not at the time of said pretended examination of the defendant, a magistrate who had power or authority to examine the defendant in respect to the matter charged in this information." These objections raised not only the question as to the right of Stanton to hold the office, but as to the existence of the office, and the bill of exceptions shows his only claim to hold office was by virtue of the resolution referred to. It recites: "That theretofore, to-wit, on the 21st day of May, 1889, the said information was filed in department No. 1 of said court upon the defendant having been examined and held to answer by L. Stanton, Esq., judge of the police court of Los Angeles city, the said police court having been authorized by the legislature of said state, to-wit, senate resolution No. 2, approving the charter of the said city of Los Angeles, adopted January 31, 1889, and the said L. Stanton having been elected judge of said court under and by virtue of said charter, and was so acting by virtue of his said election." As against this statement in the bill of exceptions the claim of the respondent that he may have been judge of a police court established by a general law cannot be maintained. We cannot disregard the plain recitals in the bill of exceptions, and evade the real question in the case in the way suggested by counsel. Judgment and order reversed.

We concur: MCFARLAND, J.; SHARPSTEIN, J.; THORNTON, J.

Fox, J., (*concurring*.) In view of the recital from the bill of exceptions, above quoted by Mr. Justice WORKS, I am constrained to concur in the judgment. This Cal. Rep. 23-25 P.—36

is not a mere assertion or stipulation of counsel as to what the law is; but here it is certified by the court, as a fact in the cause, that the police court in which the defendant had his only preliminary examination is the police court authorized (established) "by senate resolution No. 2, approving the charter of the said city of Los Angeles," and that said Stanton was elected judge of said court, and was acting by virtue of such election. On facts so certified this court cannot do otherwise than hold that the police court of which said Stanton was acting as judge had no legal existence, and consequently that there could be no judge thereof, either *de jure* or *de facto*. While a municipal charter, framed, adopted, and approved as provided in article 11, § 8, of the constitution, is a law of the highest order,—one established by the people direct, and, by the authority of the constitution, "the organic law" of the municipality, superseding "any existing charter, and any amendments thereof, and all special laws inconsistent with such charter,—and is by the constitution itself protected from the encroachment of legislative enactment, it is valid law only so far as its provisions are kept within the limitations prescribed by the constitution. It is invalid whenever and in so far as it undertakes to establish courts of justice; for the same constitution which authorizes its adoption has prescribed that the judicial power of the state shall be vested in certain courts named in that instrument, "and in such inferior courts as the legislature may establish in any incorporated city or town, or city and county." Article 6, § 1. Thus it will be seen that it is not appointed for the people of municipalities to establish courts. These, where not established by the people through the constitution, can be established by the legislature only. It can establish them only by the passage of appropriate laws; and it can pass no law except by bill, and in the manner prescribed by article 4, §§ 15, 16, of the constitution.

BEATTY, C. J. I dissent. It would serve no useful purpose to enter upon an elaborate presentation of the views which have led me to a conclusion opposed to that of the court, but the point decided is so important that the occasion seems to justify a brief statement of the grounds upon which, in my opinion, that portion of the charter of Los Angeles establishing a police court should be held valid and operative. I think that the framers of the constitution, in adopting the provisions of section 8 of article 11, intended to confer upon cities the power to frame and adopt charters which should be whole and complete. A municipal court of some sort was generally, and I believe universally, a part of all city charters in California before, and has been since, the adoption of the new constitution. A municipal charter containing no provision for a municipal court would be very unusual, to say the least. And so firmly is this idea implanted in the popular and professional mind that of the seven or eight freeholders' charters that have been framed since the adoption of the new

constitution not one, I believe, has omitted to provide for a police court. When it is remembered that the boards of freeholders by whom these charters have been framed were largely composed of lawyers of recognized standing and ability, and when it is considered further that in all the litigation which has ensued concerning the rights and jurisdiction of the courts so established the point has been raised for the first time in this case that it is not competent by a freeholders' charter to create a police court, or endow it with any jurisdiction, it would certainly seem that the proposition ought not to be treated as too plain for argument. The objection to establishing an inferior court by means of a freeholders' charter is that such courts must be established by the legislature, (Const. art. 6, § 1,) and their jurisdiction and powers must be regulated by law, (Id. § 13,) and no law can be passed except by bill, (Id. art. 4, § 15.) If the constitution were perfectly consistent in the use of words, this argument would be infallible; but the constitution is not so consistent. At the same time that it says in the section last cited that no law shall be passed except by bill, it expressly provides in another section for the enactment of a particular kind of law by another method. Article 11, § 8. To make the constitution consistent and harmonious as a whole, verbal discrepancies must be disregarded. Section 15 of article 4 must be regarded as the rule for enacting statutes in general, and section 8 of article 11 as the exceptional method of enacting special city charters. Such charters are laws. Since they repeal laws, *i. e.*, pre-existing charters and all special laws inconsistent with them, it cannot be denied that they have the substance, force, and effect of law, and in the constitution itself they are given the name of laws. Can it not be said, then, that every requirement of the constitution is satisfied in the creation of a municipal court by such a charter? The legislature must approve the charter. Therefore, what the charter establishes the legislature establishes. The charter is a law. Therefore, the jurisdiction conferred by it is conferred by law. It is not suggested that any inconvenience has been occasioned or could arise from this view. It can scarcely be doubted that it accords with the actual intention of the framers of the constitution. It is certain that it comports with the general understanding hitherto prevailing, and, if I am not mistaken, it has been shown not to be in conflict with a fair construction of the terms of those provisions which are supposed to condemn it.

PATERSON, J. I concur in the views of the chief justice.

85 Cal. 55

HEARN v. KENNEDY *et al.* (No. 13,499.)  
(Supreme Court of California. July 28, 1890.)

NOTE SECURED ON HOMESTEAD—CLAIM AGAINST DECEDENT.

Under Code Civil Proc. Cal. § 1475, requiring all claims secured by liens or incumbrances on the homestead of a person deceased to be presented and allowed as other claims against the estate, a complaint, in an action on a note given by

defendant and her deceased husband, and secured on their homestead, which asks for a personal judgment and a sale of the mortgaged property, is bad on general demurrer, where it fails to allege that the claim had been presented for allowance. BEATTY, C. J., dissenting.

In bank. Appeal from superior court, Tehama county; PHIL W. KEYSER, Judge.

Code Civil Proc. § 1475, requires all claims secured by liens or incumbrances on the homestead of a person deceased to be presented and allowed as prescribed for other claims against the estate.

John F. Ellison, for appellant. Wm. Nagle, for respondent.

SHAUPSTEIN, J. Appeal from a judgment. The only question to be considered here is, was the demurrer to the complaint properly sustained? The complaint alleges that in 1875 the defendant Mary E. Kennedy and one Michael Kennedy were husband and wife. That in 1875 they filed a declaration of homestead upon certain lots in Red Bluff, Cal. The homestead was a valid one. That Michael Kennedy died in 1886, and the defendant Mary E. Kennedy was appointed the administratrix of his estate. That on the 13th day of February, 1888, the superior court of Tehama county, on the petition of the said Mary E. Kennedy, made an order setting aside the lots above referred to as a homestead to the defendant Mary E. Kennedy. That on the 12th day of October, 1882, said Mary E. Kennedy and her husband, Michael Kennedy, executed a joint and several note to the plaintiff for \$500, due five years after date, bearing interest at the rate of 10 per cent. per annum. That, to secure this note, the defendant Mary E. Kennedy and her husband, Michael Kennedy, executed and delivered to the plaintiff a mortgage covering the lots above described. The complaint does not allege that the claim of indebtedness upon which this suit was brought was ever presented to the administratrix for allowance. The complaint prays for a personal judgment against the defendant Mary E. Kennedy, and for a sale of the lots described in the mortgage. The defendant C. P. Braynard is made a defendant, because, it is alleged, he has or claims some interest in the mortgaged premises. Defendant demurred to the complaint on three grounds: (1) that there is a defect of parties plaintiff, in that the personal representative of the Kennedy estate should have been made a party defendant; (2) that several causes of action have been improperly united; and (3) that the complaint does not state facts sufficient to constitute a cause of action. The demurrer was sustained on the ground that the complaint does not state facts sufficient to constitute a cause of action. The complaint does not state that the claim secured by the mortgage was ever presented to the administratrix for allowance. In *Camp v. Grider*, 62 Cal. 20, where a husband died leaving a homestead incumbered by mortgage, which was executed by himself and wife, it was held that the mortgage could not be foreclosed unless the claim was presented for allowance against the estate of the decedent. In that case the note was not signed by the

wife. In *Association v. King*, 23 Pac. Rep. 376, both the note and mortgage were executed by the husband and wife jointly, and it was held that the mortgage could not be foreclosed without presenting the claim for allowance against the estate of the decedent. On the authority of these cases, the demurrer was properly sustained. The demurrer to the complaint was sustained on the 16th of July, 1889, and on the 27th of September, 1889, the plaintiff having failed to amend her complaint, judgment was rendered and entered in favor of defendant. Judgment affirmed.

We concur: FOX, J.; MCFARLAND, J.; THORNTON, J.

BEATTY, C. J., (*dissenting*.) On the authority of the cases cited, it seems to be settled that the plaintiff cannot foreclose her mortgage, but the facts alleged seem to be sufficient to entitle her to a personal judgment for the amount of the note. If so, the complaint was good against a general demurrer for want of facts.

(85 Cal. 50)

PAGE *et al.* v. BOARD OF SUPERVISORS OF LOS ANGELES COUNTY. (No. 13,251.)

(*Supreme Court of California*. July 28, 1890.)

MUNICIPAL CORPORATIONS—INCORPORATION.

Pol. Code Cal. p. 737, § 2, providing the steps to be taken for the incorporation of municipalities containing not less than 500 inhabitants, requires a petition to the board of supervisors signed "by at least 100 qualified electors of the county, residents within the limits of such proposed corporation," and that an election shall be ordered to decide on the matter of incorporation. Section 3 provides for canvassing the returns, and declaring the result. *Held*, that where, after the election, the board learned that only part of the 100 petitioners were *bona fide* residents, it could not be compelled to canvass the returns.

Department 1. Appeal from superior court, Los Angeles county; W. P. WADE, Judge.

Action by S. L. Page and others against the board of supervisors of Los Angeles county. Pol. Code, p. 737, § 2, providing the steps to be taken for the incorporation of municipalities containing not less than 500 inhabitants, requires that "a petition shall first be presented to the board of supervisors of such county, signed by at least 100 qualified electors of the county, residents within the limits of such proposed corporation." It also provides that an election shall be ordered to decide on the matter of incorporation. Section 3 provides that on the Monday after election the board shall canvass the returns, and declare the result.

Frank P. Kelly and Smith, Howard & Smith, (George H. Smith, of counsel,) for appellant. H. C. Carr, for respondents.

FOX, J. On the 2d day of July, 1888, a petition was presented to the board of supervisors of Los Angeles county, asking that certain territory be incorporated into a municipality, to be known as the "City of Alhambra," in pursuance to the provisions of the municipal incorporation act. St. 1883, p. 93; Pol. Code, p. 737. The petition described the proposed boundaries of the corporation, stated that the

population within those boundaries was about 850, and was signed by 106 persons claiming to be residents and electors within said territory. It was accompanied with proper proof of publication thereof, with the names of the signers, and of intention to present it at that time. The matter came on for hearing on the 7th of July, when a protest was filed regarding the establishment of the boundaries as described in the petition, and after some general discussion as to the boundaries, and the examination of witnesses as to population, the board having ascertained that the population of the district, as they seem to have agreed to bound it, was in excess of 500, a resolution was adopted giving notice of an election, submitting to the qualified voters within certain boundaries described in the resolution, but differing somewhat from those given in the petition, the question of whether or not they should become incorporated, and for the election of the officers thereof. The notice was in due and proper form, fixing the day of election for the 27th of July, and was duly published. Nothing was put upon the minutes of the board showing the result of its deliberations, the judgment or conclusion at which it had arrived on the question of the sufficiency of the petition or the notice, of the sufficiency of the number of its signers, or of their residence and competency to sign, or of its determination as to the boundaries, except the recitals as found in the resolution or order calling the election; and these make no reference to the petition, or the sufficiency thereof, the notice given of the application, the number, residence, or competency of the signers. In fact, so far as the minutes of the board show, there was no investigation as to whether the signers, or any of them, were residents or electors within the boundaries of the proposed municipality, as described in the notice of election. Notice of the election was duly published, and at the appointed time the election was held, and the returns thereof duly certified and returned to the board as required by law. The board met at the time fixed by law for the canvassing of such returns, but then, and ever since, refused to canvass said returns or take any further proceedings in the matter. The petition is by the parties claiming to have been elected trustees at that election, for a writ of mandate, to compel the board of supervisors to canvass the returns of that election, and declare the result. The board, by their answer, admit the allegations of the complaint, and then, for further answer, allege that on the 13th of August, 1883, upon information given to and protest filed with the board by divers good citizens of the town or locality of Alhambra against the counting or canvassing of said vote, that a great fraud had been perpetrated on the board, and that a large number of those persons who had petitioned for the incorporation of said Alhambra were not residents in or electors residing within the boundaries proposed to be incorporated under the name of Alhambra, and that as many as 26 of the 106 signers of said petition were not such residents or electors;



that the board then, for the first time, was informed of or discovered such fact, and proceeded to inquire concerning the same, and upon full investigation and the examination of sundry witnesses it ascertained that less than 100 in number of those who had signed the petition which was presented to the board resided within the boundaries of the territory proposed to be incorporated, or were electors within the same, and thereupon dismissed the entire proceedings with reference to said incorporation, without prejudice, and refused to canvass said vote. At the hearing it was stipulated as a fact that less than 100 of the signers of the petition were residents or electors within the territory proposed to be incorporated. The court below found the facts as alleged in the pleadings and conceded in said stipulation, and then found, as conclusions of law, that the act remaining to be done by the board of supervisors, after the coming in of the returns, was purely ministerial; and that the law neither requires nor authorizes any inquiry on the part of the board of supervisors, other than as to the apparent regularity of the returns they are to canvass, sufficient to assure them that the documents presented have been properly transmitted, and came from authorized election officers. And on such findings and conclusions of law the court gave judgment in favor of the plaintiffs, commanding that the writ issue requiring the board to canvass the returns and declare the result as the statute requires. From this judgment the defendant appeals.

We cannot accede to the conclusions of law reached by the court below. If the board of supervisors should find these returns regular on their face, and proceed to canvass the same and declare the result, as required by the judgment rendered herein, and that result was found in favor of the proposed incorporation, we should have the anomaly of a small community exercising the franchise of a municipal corporation, with all the expenses and obligations incident thereto, under the apparent license of the authorized agent of the state in that behalf, but in fact without any authority of law, for the want of jurisdiction in the agent to grant such license. Under the admitted facts in this case, and the decision of this court in *People v. City of Riverside*, 66 Cal. 288, 5 Pac. Rep. 350, the organization of the corporation would be absolutely void for the want of the proper number of signers qualified in the premises to the petition upon which the jurisdiction of the supervisors to act must be based. This jurisdiction is a matter without which every step of the board of supervisors is void, and into which the board not only has the right, but it is its duty, to inquire at every stage of its proceedings, to the end that its final action shall be valid and binding. The inquiry in this case was made late in the proceedings, but not too late for the board to avail itself of the result and prevent it from doing a void act,—that of declaring Alhambra to be a municipal corporation,—or to save the people of Alhambra from other and greater complications

and evils. There is nothing in the proposition that a favorable vote of the people will cure all preceding defects, and itself confer jurisdiction to issue the necessary certificate to exercise the municipal franchise. An election held without authority of law gives no title to office, (*People v. Church*, 6 Cal. 76; *People v. Mathewson*, 47 Cal. 442; *Kenfield v. Irwin*, 52 Cal. 164; *People v. Harvey*, 58 Cal. 337,) and in like manner such an election can give no title to a franchise. *Mandamus* will not lie to compel the secretary of state (the proper officer in such case) to certify the election of members of congress of which no notice was given to the voters. *People v. Thompson*, 67 Cal. 627, 9 Pac. Rep. 833. So *mandamus* will not lie to compel the board of supervisors to issue the certificate of municipal incorporation, when no notice was given of an election to determine whether the people would incorporate or not; and a notice given without authority of law is no notice. A notice given without jurisdiction is one given without authority of law. It follows from these conclusions that the judgment appealed from must be reversed, and the cause remanded, with instructions to the court below to dismiss the writ. So ordered.

We concur: BEATTY, C. J.; WORKS, J.; SHARPSTEIN, J.; THORNTON, J.

89 Cal. 89

GESSNER v. PALMATEER. (No. 13,468.)

(*Supreme Court of California*. July 28, 1890.)

#### ATTACHMENT—VENDOR'S LIEN.

Where one sells land conditioned that the deed shall not be given until full payment of price, and takes a note in part payment, the assignee of the note, in an action against the maker, is not, by reason of the vendor's lien which the payee had, prevented from attaching defendant's property, under Code Civil Proc. Cal. § 537, providing that an attachment may issue where the debt sued on is not secured by mortgage or lien.

In bank. Appeal from superior court, Los Angeles county; A. W. HURTON, Judge.

Action by J. M. Gessner against Aaron Palmateer. Code Civil Proc. § 537, provides that, in an action on a contract for the payment of money, plaintiff may have the property of defendant attached, where the debt is not secured by mortgage or lien.

*Winslow P. Hyatt*, for appellant. *Del Valle & Munday*, for respondent.

McFARLAND, J. This is an appeal from an order denying a motion to dissolve an attachment. The action is upon a negotiable promissory note given by defendant to one E. C. Webster, and by the latter assigned to plaintiff. The ground of the motion is that the note sued on was given to Webster in part payment for certain land purchased from him by defendant; that Webster had a vendor's lien as security for the payment of the note; that the lien passed to plaintiff by the assignment of the note; that the payment of the note was thus secured by a lien on real property, and that consequently a writ of attachment could not rightfully be issued. But a vendor's lien is a mere personal, unassignable privilege, and could not be

transferred to another person by a direct attempt to expressly assign the lien itself, and in the case at bar the lien certainly did not pass by the mere assignment of the promissory note. *Baum v. Grigsby*, 21 Cal. 178; *Porter v. Brooks*, 35 Cal. 199. The affidavit of defendant on motion to dissolve the attachment was no doubt intended to show (and we will assume that it does show) that on the purchase of the land no deed of conveyance passed, but that Webster was not to make such deed until the full payment of the purchase price; the character of the vendor's lien, therefore, being like the one involved in *Sparks v. Hess*, 15 Cal. 186. And appellant contends that there is a distinction between a vendor's lien before the legal title has passed and the one that exists after title has passed. There is some such distinction, but none that affects the question involved in the case at bar. Where title has not passed, the vendor has a more certain and valuable lien than where it has passed; because in the latter event the lien may be defeated by the vendee conveying to an innocent third person. He also has a variety of remedies. See discussion of the subject in *Sparks v. Hess*, supra. In *Porter v. Brooks*, supra, where the title had passed, and it appeared that the vendee had conveyed to a third party, it was held that the vendor's lien did not bar a writ of attachment, even though it did not appear that the third party was an innocent purchaser without notice. And Justice SAWYER, in an elaborate and learned concurring opinion, reaches the conclusion that the right of a vendor after title has been passed is too shadowy and inchoate to be recognized at all as a "lien" within the meaning of the attachment law. But the discussions on the subject will be found to relate to the right as between vendors and vendees, or the successors of vendees. We have been referred to no case in this state where a vendor's lien has been held to be of any value in the hands of any person other than the vendor himself. Order affirmed.

We concur: FOX, J.; SHARPSTEIN, J.; THORNTON, J.

35 Cal. 277

SCHURTZ v. KERKOW. (No. 13,543.)

(*Supreme Court of California*. Aug. 4, 1890.)

EVIDENCE—BOOKS OF ACCOUNT.

In an action by the manager of a saloon against the proprietor on a contract that plaintiff should receive half the profits for his services, the books are not the only evidence of the profits, and it is error to exclude the testimony of defendant as to his knowledge thereof.

In bank. Appeal from superior court, Los Angeles county; WILLIAM P. WADE, Judge.

*Gottschalk & Luckel*, for appellant. *Wells, Guthrie & Lee*, for respondent.

MCFARLAND, J. This is an action to recover for services rendered by plaintiff to defendant as manager of a certain restaurant and saloon, called the "Vienna Buffet," under a contract by which plaintiff was to have one-half of the net profits, to be computed monthly. The issue was as to

the amount of the profits between June 1 and September 1, 1888. Such amount was found to be \$2,550.55, for one-half of which, less certain payments, plaintiff had judgment. Defendant appeals from the judgment, and from an order denying a new trial.

1. The principal evidence for plaintiff, aside from parts of a cash-book, consisted of the testimony of one Blackman. He testified that he was an expert accountant; that he made an examination of the books of the Vienna Buffet; and that the examination showed the net profits of the business from June 1st to August 11th to be \$2,262.90. Upon cross-examination he said that, with the exception of some of the items in the cash-book, he did not personally examine the books; that his partner made the detailed examination of the books, and furnished the figures from which he (the witness) made the calculations; and that he had full confidence in the ability and honesty of his partner to furnish the figures from the books correctly. His partner was not examined as a witness, and defendant contends that the evidence does not justify the judgment, because the partner was not called to prove that the figures which he gave Blackman were correctly taken from the books. But defendant did not make any objection to the testimony of Blackman. He did not say that it was hearsay or inadmissible upon any other ground, and he did not move to strike it out. Moreover, the examination was made by Blackman at the request of defendant, and without the knowledge of plaintiff; and Blackman testifies that his statement was shown to defendant and plaintiff and "assented to," although in another part of his testimony he says that defendant disputed it "by saying those could not be the profits," by which we suppose he means that defendant did not deny that the figures were correctly taken from the books, but thought that the calculation must be wrong. Under these circumstances, no objection having been made to the testimony of Blackman, the court had the right to assume that the figures given to Blackman by his partner were correct. This point, therefore, furnishes no ground for a reversal of the judgment.

2. But the court erred, we think, materially in ruling out certain evidence offered by defendant. The court seems to have tried the case upon the erroneous theory that the books were the only evidence as to the profits of the business, and that none other should be received. One or two questions were asked defendant when on the witness stand which were, perhaps, properly objected to on the ground that they called for a conclusion of the witness; but to many questions that objection was not made, and could not have been properly made. For instance, the following questions were asked: "What were the daily expenses of the saloon? What were the profits in the saloon business, and what in the restaurant business, during that time? In what articles are the biggest profits in that business? Are you able, from your knowledge of this business of the Vienna Buffet, and your experience in

the saloon and restaurant business, to state what profits were on the restaurant business as carried on there, and the saloon business as carried on there, from June 2d to September 1st?" To all of these questions the objections were made that they were irrelevant, incompetent, and immaterial, and that the books were the best evidence; and the objections were sustained, except to the question last above stated, which was "taken subject to the objection," and to which the witness answered, "I am." (It does not appear that any ruling was made as to said last question.) Exceptions were taken to the rulings of the court on the questions, and to other similar rulings. While the books were admissible evidence on the issue of profits, they did not exclude other evidence. If the defendant or any other witness knew anything about those profits, he should have been allowed to tell it. Of course mere conclusions or opinions should be excluded. Judgment and order reversed, and cause remanded for a new trial.

We concur: WORKS, J.; FOX, J.; SHARPSTEIN, J.

85 Cal. 329

METZ v. CALIFORNIA SOUTH. R. CO. (No. 13,182.)

(*Supreme Court of California*. Aug. 4, 1890.)

LOSS OF BAGGAGE BY PASSENGER.

A man traveling alone, and carrying in his trunk for transportation a quantity of ladies' jewelry, cannot recover for the loss thereof against a common carrier.

In bank. Appeal from superior court, San Bernardino county; GIBSON, Judge.

C. W. C. Rowell, Chas. R. Redick, and A. Brunson, for appellant. A. W. Blair, for respondent.

SHARPSTEIN, J. This appeal is from a judgment rendered in favor of plaintiff and against defendant for the sum of \$357, and costs. The only question presented by the record is, do the findings support the judgment? The court finds that, at Kansas City, Mo., in January, 1888, the plaintiff engaged passage on the defendant's railroad to Colton in this state, bought a ticket, paid his fare, and checked his trunk, containing, among other things, one ladies' gold watch and chain of the value of \$150; one ladies' breastpin and ear-rings of the value of \$15; five ladies' gold rings of the value of \$25; one set ladies' small gold ear-rings of the value of \$5; two ladies' silver rings of the value of \$2; one ladies' gold bracelet of the value of \$25,—which the court found to be "proper articles of luggage and baggage for the plaintiff to carry as such." Defendant had no knowledge of said contents when it received and checked said trunk, and assumed no other obligation in relation thereto than such as was imposed by law under the facts above stated; that is, there was no special contract between the parties relating to said trunk and contents. When the trunk was delivered to plaintiff by defendant at Colton the articles above-named, together with other articles, the right to recover the value of

which is conceded by appellant, were missing, and were not, and never have been, delivered to plaintiff. The court further finds that all the articles so lost were carried in said trunk, not for trade, gift, or speculation, but for transportation. The value of these articles is included in the judgment recovered by plaintiff against defendant, and appellant insists that the judgment should be modified by deducting from it the value of said above-enumerated articles. And his contention is that said articles, or none of them, constituted what in law is defined to be "luggage," or "baggage."

Common carriers are required to receive and carry a reasonable amount of luggage for each passenger without charge. Civil Code, § 2180. "Luggage may consist of any article intended for the use of a passenger while traveling or for his personal equipment." Id. § 2191. Before the enactment of this Code courts acknowledged the difficulty of defining with accuracy what should be deemed luggage within the rule of the carrier's liability, and we think this provision of the Code has disincumbered the subject little, if any, of the difficulty which previously surrounded it. If we define the word "equipment" as Webster defines it, viz., "the act of equipping or being equipped, as for a voyage or expedition," it adds nothing to what had long before been understood as comprehended in the term "luggage." In *Railroad Co. v. Swift*, 12 Wall. 272, the court, speaking through Mr. Justice FIELD, said that the contract to carry "only implies an undertaking to transport such a limited quantity of articles as are ordinarily taken by travelers for their personal use and convenience, such quantity depending, of course, upon the station of the party, the object and length of his journey, and many other considerations." To the same effect is a decision of the queen's bench in *Macrow v. Railway Co.*, L. R. 6 Q. B. 621, where Chief Justice COCKBURN announced the true rule to be "that whatever the passenger takes with him for his personal use or convenience, according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities or to the ultimate purpose of the journey, must be considered as personal luggage." It is not found that the plaintiff carried those articles for his personal wear or convenience with reference to his immediate necessities or to the ultimate purpose of his journey, but it is found that he was carrying them for transportation; and it is found that they were proper articles of luggage and baggage for the plaintiff to carry as such. We are not prepared to hold that a gentleman traveling without a wife or other female companion would ordinarily, no matter what his rank or station in life might be, carry as baggage for his personal use or convenience a quantity of ladies' jewelry, or that if he did carry it, and it was lost, he could recover the value of it of a common carrier who had no knowledge of its being among the contents of a trunk which was being carried as luggage. In one case, *McGill v. Rowand*, 8 Pa. St. 451, the supreme court of Pennsylvania

held that where a man was traveling with his wife, whose jewelry was in a trunk which was being transported as baggage, and was lost, the husband was entitled to recover of the common carrier its value. In that case it might well have been held that the jewelry "was intended for the use of a passenger while traveling." The supreme court of the United States, in *Railroad Co. v. Fraloff*, 100 U. S. 24, says: "Whether articles of wearing apparel in any particular case constitute baggage, as that term is understood in the law, for which the carrier is responsible as insurer, depends upon the inquiry whether they are such in quantity and value as passengers under like circumstances ordinarily or usually carry for personal use when traveling." "The implied undertaking," says Mr. Angell, "of the proprietors of stage-coaches, railroads, and steam-boats, to carry in safety the baggage of passengers, is not unlimited, and cannot be extended beyond ordinary baggage, or such baggage as a traveler usually carries with him for his personal convenience." Ang. Carr. § 115. In *Pfister v. Railroad Co.*, 70 Cal. 169, 11 Pac. Rep. 686, this court had occasion to consider the provisions of the Code above cited, but the question in that case was whether a passenger was entitled to carry a large sum of money as baggage. It was held that he was not. But that decision in no way aids us in the solution of the question involved in this case. We are satisfied, however, in this case, that the findings do not support the judgment for more than \$135, the value of the articles lost other than those which we have enumerated above. It is therefore ordered that the judgment be modified by deducting therefrom all over \$135, and the plaintiff have judgment for that sum only, and that appellant recover the costs of its appeal.

We concur: MCFARLAND, J.; WORKS, J.; PATERSON, J.

88 Cal. 58

LATTIN *et al.* v. HAZARD. (No. 13,285.)  
(Supreme Court of California. July 28, 1890.)

A complaint for specific performance alleged that, in consideration of benefits to accrue from a steam dummy railroad which plaintiff's assignor agreed to build, defendant made a written contract to execute to him certain notes, and also a deed to five acres of land on the line of the proposed road, and deliver them to a certain bank in escrow, to be delivered to him if he completed the road in a time specified, otherwise to be returned; that said assignor built the road as agreed within the time limited; that afterwards he conveyed to plaintiff all his right to a deed of the land; and that plaintiff had demanded a deed therefor, which defendant refused to make. Held, a demurrer to the complaint was properly sustained, since it did not appear therefrom that defendant had not performed his contract by delivering the notes and deed to the bank, or to plaintiff's assignor.

Commissioners' decision. In bank. Appeal from superior court, Los Angeles county; WILLIAM P. WADE, Judge.

Action by Emma G. Lattin and B. C. Lattin against Henry T. Hazard.

P. W. Dooner and Dooner & Burdett, for appellants. O'Melveny & Henning, for respondent.

GIBSON, C. This is an appeal from a judgment entered upon plaintiffs' failure to amend their complaint after a general demurrer thereto had been sustained. It is alleged in the complaint that plaintiffs are husband and wife; that on March 9, 1887, at Los Angeles, the defendant and sundry other persons, as parties of the first part, and James McLaughlin, as the party of the second part, made and entered into a written agreement whereby the defendant Hazard and others, as parties of the first part, in consideration of the benefits to accrue to them, and desiring to have a steam dummy railroad extended westerly beyond the city limits of Los Angeles into and through the section of country in which their lands were located, and, to secure such an extension of said road, agreed to pay, transfer, and set over unto the party of the second part the sums of money and land aligning the road-way of said road by each subscribed; that H. T. Hazard on his part agreed to convey five acres of land, the same "to be in a compact, nearly square form, \* \* \* situated anywhere in the E. ¼ of the N. E. ¼ of section 24, township 1 S., range 14 W., San Bernardino meridian;" that the several amounts of money subscribed were to be evidenced by the several promissory notes of the parties who subscribed money, the notes to bear even date with the contract, and to be payable to the said McLaughlin, or order, at Los Angeles, six months after date, and bear interest at the rate of 10 per cent. per annum from maturity; and the subscriptions of the defendant and others of land were to be by their several grants of land contiguous to the line of said road-way, conveying a clear title in every case to said McLaughlin of the date of the contract, or 20 days thereafter, provided that the notes and deeds should remain in trust and escrow with the Farmers' & Merchants' Bank of the city of Los Angeles, as trustee, and should not be delivered to the said McLaughlin until the completion and operation of the said extension of the said railway, but upon the completion of said work they were to be delivered to the said second party absolutely; that the parties of the first part severally agreed that McLaughlin should have the right to locate the route of his road westerly from the intersection of Diamond street with the city boundary over certain described lands of the said first parties; that they, and each of them, over whose land the route extended, would by deed convey to McLaughlin a right of way not exceeding 80 feet in width, allowing any necessary additional space for curves, they reserving the right to dedicate the land along which the railway should be located for the purpose of a public street; that McLaughlin on his part agreed to extend and construct the road as desired, and commence such construction within 30 days from the date of the contract, and have the same ready for operation within six months from said date; and that, in the event of

his failure to do so, then the notes and deeds in escrow should be returned to the respective makers and grantors absolutely, provided, however, that in case insuperable obstacles should intervene during said six months, of which the bank holding the notes and deeds should be notified, said McLaughlin was to have the additional period of 60 days within which to complete the road; and that the said McLaughlin further agreed that the road should be well and substantially built and operated by a steam dummy for a period of not less than 10 years, and should have a carrying capacity and speed equal to the requirements of the section traversed and the business thereof; and that the rates of fare for a certain specified distance should not exceed 15 cents, and should not be raised for 10 years. It is further alleged upon information and belief that McLaughlin, within the time and in the manner required of him, fully performed said contract upon his part, and on January 10, 1888, and long prior thereto, became and was entitled to a conveyance from defendant of five acres of land adjoining the railroad at such place as McLaughlin might select; that on the 10th day of January, 1888, McLaughlin, by his deed of conveyance, sold and conveyed to plaintiff Emma G. Lattin, as her separate property, all his right, title, and interest in and to the land agreed to be conveyed to him by Hazard; that thereafter the said plaintiff demanded of the defendant a good and sufficient conveyance of five acres of land adjoining the road-way of the railroad on defendant's said larger tract, viz., E.  $\frac{1}{4}$  of N. E.  $\frac{1}{4}$ , section 24, township 1 S., range 14 W., San Bernardino meridian, but the defendant refused such conveyance; that after such refusal, she, the plaintiff, as she was entitled to do by said contract, selected by metes and bounds a certain tract of five acres within defendant's said larger tract, and aligning the road-way of said railroad, and thereupon demanded of defendant a sufficient conveyance of the same, which land he also refused to convey, or any other land whatever. Then follows a prayer for the conveyance of the five-acre tract selected by the plaintiff Emma G. Lattin; or, if that cannot be had, then for five acres aligning the railroad out of the same larger tract.

The demurrer was properly sustained. There is no allegation that Hazard failed or refused to place in escrow for McLaughlin a properly executed deed to five acres of land within the E.  $\frac{1}{4}$  of the N. E.  $\frac{1}{4}$  of section 24. The contract provided that the notes and deeds should be placed in escrow with the bank for McLaughlin on the date of the contract, or within 20 days thereafter, and were to be delivered to him upon the completion of the contract on his part. Now, in accordance with the presumption that private transactions have been fair and regular, (Code Civil Proc. § 1963, subd. 19,) we must presume that Hazard made his subscription available by placing his deed to five acres of land in escrow with the bank within the proper time. If he did this, then he was not in default when plaintiff Emma G. Lattin made her several demands upon

him for a deed; and he was justified in refusing to execute a deed to her to what might be an additional five acres of land. By the terms of the contract McLaughlin was required to commence the construction of the road within 30 days from March 9, 1887, the date of the contract, and complete such construction within six months thereafter, unless certain obstacles should intervene, in which case he was to have 60 days' additional time. It is alleged that he completed the construction within the time required. Therefore, assuming that he occupied all the time he was entitled to under the contract, he must have completed the construction on December 7, 1887, more than one month prior to the time he transferred his interest in the land in question to plaintiff Emma G. Lattin. And, for aught that appears to the contrary, McLaughlin may have obtained the deed from the bank before he transferred his interest to said plaintiff. If he did, then by his deed to her she acquired all that she was entitled to. If, however, the deed was placed in escrow, and McLaughlin did not obtain it before he conveyed to plaintiff, his conveyance to her would operate as an assignment of his right to the delivery of the deed as well as a transfer of his interest in the land, and she could have demanded the deed of the bank in order to make the transfer of the land to her effective. If, on the other hand, it had not been placed in the bank, it should have been so alleged in the complaint to show the necessity of demanding a deed of the defendant. Furthermore, the alleged refusals of the defendant are not inconsistent with the presumption that he complied with the contract by placing a deed to five acres in escrow. Consequently it cannot be inferred from the allegations respecting such refusals that the defendant is in default, so as to make the complaint good as against defendant's general demurrer, which could not reach facts defectively stated by way of inference or argument, but only the entire absence of the statement of an essential fact. We therefore advise that the judgment be affirmed.

We concur: HAYNE, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

85 Cal. 148

PRIETT *et al.* v. DE LA MONTANIA *et al.*  
(No. 11,531.)

(Supreme Court of California. July 31, 1890.)  
CITY TREASURER—ILLEGAL WARRANTS—LIABILITY  
ON BOND.

Where the treasurer of a city pays an illegal warrant, knowing it to be illegal, out of money set apart for the payment of the warrant substituted for it, whereby the fund out of which the latter is payable is exhausted, this is a misappropriation of funds for which the sureties on his official bond will be liable. Reversing 23 Pac. Rep. 171.

On rehearing. For former opinion, see 22 Pac. Rep. 171.

Mastick, Belcher & Mactic, for appellants. D. H. Whittemore, for respondents.

Fox, J. After a careful re-examination of this case in bank we are satisfied that, inasmuch as this court did decide in *Priett v. Hubert*, 62 Cal. 17, that the treasurer paid to Tibbey, on warrant No. 92, in "violation of his official duty, and with full knowledge that 92 represented the amount of damages allowed for the property to which the present plaintiff asserted a claim, and that he paid 92 with the money which he himself had set apart for the payment of 114, then on deposit with the county clerk to await the determination of this action," and that such payment was "no more a payment to Hunter than would have been a payment of the sum to a stranger, or an appropriation of it by the treasurer himself," which decision is *res adjudicata*, and has become the law of the case as to that payment, and, inasmuch as such payment was a misappropriation of the fund for which the sureties would be liable if the amount was not made good by the treasurer himself, and there is no proof that he ever did make it good, nor any proof or allegation that there was any misappropriation of the funds of the treasury during Hubert's second term in the office of treasurer,—there is no ground for disturbing the judgment of the court below in this case. It is therefore ordered that the judgment and order appealed from be affirmed.

We concur: BEATTY, C. J.; SHARPSTEIN, J.; THORNTON, J.; MCFARLAND, J.; PATERSON, J.

83 Cal. 110

BURKS v. DAVIES. (No. 13,513.)

(Supreme Court of California. July 30, 1890.)

VENDOR AND VENDEE—OPTIONS—FAILURE OF TITLE—RESCISSION.

Where one purchases an option on real estate for a sum which is to be forfeited in case the purchase of the land is not closed by a certain date, and the seller is not the owner of the whole title he contracts to convey, the purchaser, on learning of the defect, may rescind the contract and recover the amount paid, though the seller offers after notice of rescission to perfect his title, but fails to do so in time.

Appeal from superior court, Los Angeles county; W. P. WADK, Judge.

Haynes & Mitchell, for appellant. Smith, Winder & Smith, for respondent.

PATERSON, J. On August 8, 1887, the defendant executed and delivered to the plaintiff a contract, the material portions of which, so far as this case is concerned, are as follows: "Received of J. H. Burks, one thousand dollars, in purchase of option to buy the undivided one-third of [certain lands particularly described,] \* \* \* said option to be from this date to the 1st day of September next. \* \* \* In case said purchase is made during the time above mentioned, the amount this day received is to be deducted from first payment; but, in case the said purchase is not made in said time, then the amount this day received shall be forfeited, and no part of said option money is to be returned. Time is the essence of this contract." The court found that at the time of the transaction the plaintiff understood

that the defendant was the owner of an undivided one-third of the lands referred to in the agreement, and that the remaining two-thirds were owned by others, and, being desirous of purchasing the whole of the lands, had concluded an agreement with the other parties respecting their interest substantially the same as the one above referred to, of all of which defendant had actual notice; but, as a matter of fact, the defendant and the other parties referred to were not the owners of the entire tract of land. Five acres thereof were owned by George H. Smith. The court found that the defendant had notice at the time of the execution of the contract that Smith was the owner of the five acres, but neglected to communicate the fact to plaintiff, although he knew plaintiff was relying on his ability to purchase the whole of the land, and would not have entered into the contract had he known of the defect in the title. Prior to the 1st day of September plaintiff was notified by Smith of the latter's claim to the land, and, having satisfied himself that Smith's claim was well founded, he promptly rescinded the contract, and demanded repayment of the \$1,000 paid by him to the defendant. The plaintiff had judgment in the court below for \$1,000, and costs of suit, and defendant appealed.

It is said by Sugden, in his treatise on Vendors, that "where a person sells an interest, and it appears that the interest which he pretends to sell was not the true one, \* \* \* the purchaser may consider the contract at an end, and bring action for money had and received, to recover any sum of money which he may have paid in part performance of the agreement for sale." It is admitted by counsel for appellant that it is the duty of one who has made an unconditional agreement to sell land to perfect his title at once if he desires to hold the vendee to his bargain, but they claim "no such imperative duty rests upon one who has merely sold an option. His obligation to convey does not arise until the other party has notified him that he intends to purchase. \* \* \* A party need not own property in order to sell an option to purchase it. \* \* \* The plaintiff never could recover the \$1,000 unless he alleged and proved either that the defendant failed to convey after demand and tender of the purchase money, or else some facts which excused such demand and tender on his part." In *Goetz v. Walters*, 25 N. W. Rep. 404, the plaintiff had paid the defendant \$300 as earnest money and a portion of the purchase price, under a contract for the sale to him of a certain piece of property. It was agreed between the parties that if the title to the premises was good, and the property should not be taken on the terms named in the contract, the \$300 should be forfeited. The court said it made no difference whether the words "and it is agreed that if the title to said premises is not good" referred to the date of the contract or to the time for the execution of the conveyance. The court further said: "Assume that the words refer to the time for executing the conveyance.

Clearly that was to be executed whenever, within the time specified, to-wit, thirty days, the plaintiff should pay the \$300, and deliver the horse and buggy. Within that time it was for the plaintiff, and not the defendant, to determine when performance should be required. She could have called for a conveyance within an hour after the contract was executed, her right to do so being subject only to the condition that she make the payments. Upon such a call he would have been entitled to no more time than was reasonably necessary for the execution of the papers. He was bound to be prepared at all times within the thirty days to convey a good title, and, whenever within that time she should ascertain that he had no title, so that it was impossible for him to make a conveyance, she could at once avoid the contract without going to the useless trouble of tendering payment and calling on him to convey. The answer admits that she did so on May 15th. Thereupon it was the duty of defendant to repay to her the \$300." It has been held in England that "where a person takes upon himself to contract for the sale of an estate, and is not absolute owner of it, nor is it in his power by the ordinary course of law or equity to make himself so, though the owner offer to make the seller a title, yet equity will not force the buyer to take, for any seller ought to be a *bona fide* contractor, and it would lead to infinite mischief if an owner were permitted to speculate upon the sale of another's estate." *Tendring v. London*, 2 Eq. Cas. Abr. 680. It is a general rule in cases of failure of title, even where the vendor is not at fault, that the purchaser may rescind the contract, and recover any money paid by him as part of the purchase price. *Sanders v. Lansing*, 70 Cal. 429, 11 Pac. Rep. 702; *Marshall v. Caldwell*, 41 Cal. 614. In this case the vendor knew of the defect in his title at the time the contract was made, and made no attempt whatever to secure the title of Smith until after plaintiff had given him notice of rescission.

Under a contract for the sale of real estate the vendee is regarded as the equitable owner, and the vendor a trustee of the legal title for him. If the vendor has no title to the property the vendee is entitled to a rescission. Of course, there are cases in which the vendor is permitted to perfect his title, although he is unable strictly to comply with the terms of his contract. If, though he be not the absolute owner, it is in his power by the ordinary course of law or equity to make himself such owner, he will be permitted within a reasonable time to do so. *Pipkin v. James*, 1 Humph. 325. The defendant received plaintiff's notice of rescission on September 1st, and immediately informed him that he would procure Smith's title if he, the plaintiff, desired to purchase under his option, and thereupon the plaintiff said he would give him 24 hours to procure the title. Defendant, through O'Dea and Stillson, procured from Smith the following written offer: "Los Angeles, September 2, 1887. The Allen tract in lots 1 and 8, block 32, Hancock survey, containing a fraction less than five acres, \* \* \* \$1,500 per acre, half

cash, balance interest at 9 per cent. on contract, 12 per cent. on deed and mortgage. Will sell on above terms, unless option heretofore given is taken. GEORGE H. SMITH." On the following day, September 2d, plaintiff again called on defendant, and defendant notified him that if he desired to purchase under his option, he could have the whole of the land, and showed him the above offer, to which the plaintiff replied: "That only shows that you have not got the title." Defendant told plaintiff that if he elected to purchase he would give him a bond, with satisfactory securities, that he should have a good title to the whole of the property. At the request of the plaintiff, defendant produced a later communication from Smith to Stillson, dated also September 2d, in the following words: "Los Angeles, September 2, 1887. C. A. Stillson, Esq.—Dear Sir: With regard to my written proposition to sell the Allen tract, I wish to say that if you have a purchaser ready to close at once I will sell upon the terms proposed; otherwise, please consider the proposition withdrawn. Yours, truly, GEORGE H. SMITH." It thus appears that no attempt was made by the defendant to get title to the five acres until the expiration of the option, and after the plaintiff had rescinded the contract, and, as a matter of fact, the defendant never did succeed in getting title to the property held by Smith, and could not have conveyed it before the expiration of the time given for the exercise of the option. The offer given by Smith to O'Dea and Stillson, seems to have been one subject to an option which had already been given to another party, and it was withdrawn on the day it was made. Under the rule laid down in *Goetz v. Walters*, supra, of the soundness of which we have no doubt, the plaintiff, we think, is entitled to recover the \$1,000. This case is not in any material respect different from the case referred to. It involves the same principles, and it was not necessary for the court to find whether the plaintiff was willing or anxious to take the property. Judgment and order affirmed.

We concur: FOX, J.; SHARPSTEIN, J.; McFARLAND, J.; THORNTON, J.

#### STATE *ex rel.* BOYLE V. BOARD OF EXAMINERS. (No. 1,334.)

(Supreme Court of Nevada. Aug. 1, 1890.)

#### AMENDMENTS TO CONSTITUTION—SUBMISSION—ELECTORAL QUALIFICATIONS.

1. Const. Nev. art. 16, § 1, provides that proposed amendments to the constitution shall be submitted to the people, and that, if "the people shall approve and ratify such \* \* \* amendments by a majority of the electors qualified to vote for members of the legislature voting thereon, such \* \* \* amendments shall become a part of the constitution." *Held*, that the words "voting thereon" refer to "a majority of the electors," and not to "members of the legislature," and hence they do not restrict the right to vote for the approval of the amendments to those electors who voted for the members of the legislature that voted to submit the amendments to the people.

2. Act Nev. Jan. 19, 1889 providing for the submission of certain constitutional amendments,



is not in violation of this section because it does not require the same registration of voters required for electors for members of the legislature, for registration is not an electoral qualification, but only a means of determining whether the constitutional qualifications exist.

8. Nor is such act objectionable because it adopts the registration lists of the election of 1888, where that was held only three months before the special election ordered by the act.

*Wm. Woodburn, for relator. The Attorney General, for respondent.*

**BELKNAP, J.** This is an application for a writ of *mandamus* requiring the board of examiners to order the publication of certain proposed amendments to the constitution of the state, preliminary to their submission to the people at the approaching general election. The proposed amendments are 14 in number, and are those which were submitted to a vote of the people at the special election held upon the 11th day of February, 1889, under the provisions of a law providing for such election, approved January 19, 1889. St. 1889, p. 14. The application is made upon the ground that the law authorizing the special election is unconstitutional and void, and that the proposed amendments were not, therefore, legally submitted to the voters of the state. The submission at the special election being invalid, it is now the duty of the board, it is said, to order publication under a general law of the state which provides that, whenever the conditions prescribed by the constitution for its amendment have been complied with by the legislature, the board of examiners shall order such proposed amendments to be published in a daily newspaper of general circulation for the period of 90 days preceding any general election. St. 1887, p. 122. It is contended that the statute under which the specific election was held is unconstitutional, in that it does not prescribe the qualifications imposed by the constitution upon electors voting upon amendments to the constitution. The constitution defines the course to be pursued by the legislature in the matter of amendments, and requires that they shall be submitted to a vote of the people. "And if the people," the constitution proceeds to say, "shall approve and ratify such amendment or amendments by a majority of the electors qualified to vote for members of the legislature voting thereon, such amendment or amendments shall become a part of the constitution." Article 16, § 1.

The contention is that the voters registered under the act of January 19, 1889, were not qualified to vote upon the proposed amendments, because they were not at the day of the special election registered so as to have entitled them to have voted for a member of the legislature, if one were then to have been chosen. The error of the position lies in the assumption that registration is an electoral qualification. The qualifications of an elector are prescribed by the constitution (section 1, art. 2) and cannot be altered or impaired by the legislature. *State v. Findley*, 20 Nev. —, 19 Pac. Rep. 241. The registration laws of the state do not attempt to add to these qualifications. These laws simply

provide means for ascertaining and determining in a uniform mode whether the voter possesses the necessary qualifications, and are also intended to secure in an orderly and convenient manner the right of voting. Upon this subject Chief Justice DILLON, speaking for the supreme court of Iowa in *Edmonds v. Banbury*, said: "But the legislature, while it must leave the constitutional qualifications intact, and cannot add new ones, may nevertheless prescribe regulations to determine whether a given person who proposes to vote possesses the required qualifications." 28 Iowa, 272. "No registry law can be sustained," said the supreme court of Wisconsin, "which prescribes qualifications of an elector additional to those named in the constitution, and a registry law can be sustained only, if at all, as providing a reasonable mode or method by which the constitutional qualifications of an elector may be ascertained and determined, or as regulating reasonably the exercise of the constitutional right to vote at an election." *Dells v. Kennedy*, 49 Wis. 558, 6 N. W. Rep. 246, 381. "It is now generally admitted that these laws do not add to the constitutional qualifications of voters." *McCrary, Elect.* § 7.

Another objection made to the law involves a different construction of the same constitutional clause. It is claimed that the words "voting thereon," contained in the quoted clause, refer to the words "members of the legislature," as their antecedent, and this view leads to the result that only those were competent to vote at the special election who were qualified to vote for the members of the legislature who voted upon the proposed amendments. The construction contended for would lead to results which could not have been contemplated. For instance, the right of an elector to vote would depend not alone upon his qualification to vote for members of the legislature of the session at which the proposed amendment was considered, but also upon the fact whether such member or members did actually vote upon the proposed amendment. For if, from any cause, the member did not vote, it would seem that the elector would be disqualified. Other results quite as surprising and unreasonable, but not necessary to suggest or discuss, would proceed from the adoption of the construction. Without pursuing the matter further, we consider that all of the electors of the state are entitled to vote upon the submission of a proposed amendment. We are led to this conclusion by a consideration of the provision under discussion in connection with the other provisions of the constitution bearing upon the same subject, and the theory of our political system. The power of the great body of the people as an organized body politic to amend or revise the constitution of their state is a fundamental principle of the governments of the states of the Union. The power is expressly declared in the constitution of this state in these words: "All political power is inherent in the people. Government is instituted for the protection, security, and benefit of the people, and they have the

right to alter or reform the same whenever the public good may require it." Article 1, § 2. And, in defining the qualifications of electors, the constitution further declares that every elector "shall be entitled to vote for all officers that now are or may be elected by the people, and upon all questions submitted to the electors at such election." Section 1, art. 2. The clause under consideration must be construed with reference to these provisions. The conclusion reached is in harmony with them, and is supported by the language of the clause itself.

Objection is also made to the provisions of the law adopting the registry lists of the general election of 1888. The constitution has committed the subject of the registration of electors to the legislature. The object of these laws, as before stated, is to determine the qualifications of the voters. Laws of this description must be reasonable, uniform, and impartial, and must be calculated to facilitate and secure, rather than to subvert or impede, the exercise of the right to vote. *Monroe v. Collins*, 17 Ohio St. 685. The provisions of the statute meet these requirements. The special election was to be held about three months after the general election of 1888, and electors registered for the general election, and continuing qualified voters, were not required to make further registration. The adoption of the registry lists of the then recent election, and dispensing with the burdensome requirement of a second registration, commend themselves as reasonable regulations calculated to facilitate, rather than impede, the exercise of the right to vote. Relator having failed to establish the invalidity of the special election law, or the proceedings thereunder, it is ordered that the writ of *mandamus* be denied.

#### WEBB v. DENVER & R. G. W. RY. CO.

(Supreme Court of Utah. July 28, 1890.)

#### DEATH BY WRONGFUL ACT—DAMAGES—MENTAL ANGUISH.

1. Comp. Laws Utah, § 3374, provides that "in an action for the recovery of money only, or specific real property, the jury in their discretion may render a general or special verdict. In all other cases the court may direct the jury \* \* \* to find upon particular questions of fact." *Held*, that in an action for the wrongful death of plaintiff's intestate it is within the discretion of the court to refuse to direct such special findings.

2. In such an action by a mother for the death of her son the court instructed the jury that in assessing plaintiff's damages they might consider not only the pecuniary value of his services had he lived, but also the mental pain and suffering caused by his death. *Held*, that it was error to allow consideration of such mental pain and suffering, though Comp. Laws Utah, § 3170, provides that in such an action the jury may give such damages as "under all the circumstances of the case may be just."

Appeal from third district court; C. S. ZANE, Judge.

*Bennett, Marshall & Bradley*, (Robert Harkness, of counsel,) for appellant. J. L. Lawlins, for respondent.

ANDERSON, J. This is an action against the defendant for negligently causing the

death of plaintiff's decedent, a car inspector and repairer in its employ, while engaged in assisting a brakeman in coupling a car that was out of repair to another car, by means of a chain, in order that the broken car might be set out on a side track for repairs. The case was tried before a jury, which rendered a verdict for plaintiff for \$4,995. The defendant moved for a new trial, which was overruled, and it appealed from the order overruling the motion, and from the judgment. At the trial, counsel for defendant requested the court to instruct the jury to make special findings on certain questions of fact, which the court refused to do, and this refusal is assigned as error. Section 3374, 2 Comp. Laws 1888, provides that, "in an action for the recovery of money only, or specific real property, the jury, in their discretion, may render a general or special verdict. In all other cases, the court may direct the jury to find a special verdict in writing, upon all or any of the issues, and in all cases may instruct them, if they render a general verdict, to find upon particular questions of fact, to be stated in writing, and may direct a written finding thereon." It was within the discretion of the court, whether it would direct the jury to make special findings or not, and it was not error to refuse to do so. The court gave to the jury the following instruction: "(10) If the jury find in favor of the plaintiff, such damages may be given as, under all the circumstances of the case, may be just, not exceeding the amount claimed in the complaint." It is contended that this instruction is too general, and should have stated the rule as to the measure of damages more explicitly. Excepting the last clause, the instruction is in almost the exact language of the statute. But whether it is fairly open to the criticism made or not, the objection urged against it is obviated by the next instruction, it being a familiar rule, that all the instructions given are to be construed together. The next instruction is as follows, to-wit: "(11) In estimating the loss sustained by the plaintiff as administrator and the mother of said deceased, who is his heir, you have a right to take into consideration, not only the pecuniary value of his services and support to her during her life, if he had lived, but the social and domestic relations of the parties, their kindly demeanor, or the lack of it, toward each other, the loss which the mother may sustain in being deprived of the society, aid, and care of her son, as well as the mental pain and suffering caused to her by his death, as may appear from the evidence, in estimating what damages under all the circumstances of the case may be just." Counsel for defendant insist that this instruction is erroneous, in so far as it authorizes the jury to take into consideration the mental pain and suffering caused to the mother of the deceased by his death.

At the common law the right of action for a personal injury, whether it produced death or not, was terminated by the death of the injured party. *Broom. Leg. Max.* 400, 401; *Whit. Smith, Neg.* 430; 3 *Suth. Dam.* 281; 1 *Shear. & R. Neg.* § 124. But in

England this rule was abolished in 1846, by what is commonly called "Lord Campbell's Act," (9 & 10 Vict. c. 93,) and which has been adopted in substance by most of the states of this Union, as well as by this territory. 2 Comp. Laws 1888, §§ 2961, 2962. This statute was adopted in this territory in 1874, and provides that an action may be maintained against any person or corporation whose wrongful act or neglect has caused the death of any person, notwithstanding the death of the injured person, if the injured party could have maintained an action for damages in respect thereof if death had not ensued; and that every such action shall be brought by, and in the name of, the personal representatives of such deceased person, and the amount recovered shall be distributed by the probate court to the heirs of the decedent to the exclusion of creditors, and that the amount of damages so recovered shall not in any case exceed the sum of \$10,000. By sections 3178 and 3179, Comp. Laws 1888, adopted in 1884, it is provided that such an action may be maintained for the death of a minor by the parent or guardian, and for the death of one not a minor by his heirs or personal representatives, and that in such action, "such damages may be given as under all the circumstances of the case may be just." Under a statute similar to the one last referred to, it has been held in California, in an action by a father for the death of his daughter, that it was proper for the jury to consider, in determining the amount of his recovery, his mental anguish and suffering for the loss of his child. *Cleary v. Railroad Co.*, 78 Cal. 240, 18 Pac. Rep. 269. The court gives no reason for so holding, aside from the wording of the statute, but contents itself by referring to *Beeson v. Green Mountain, etc., Co.*, 57 Cal. 20; *Cook v. Railroad Co.*, 60 Cal. 604, and *Nehrbas v. Railroad Co.*, 62 Cal. 320. But in neither of these cases was the point directly raised. In the case in 62 Cal., which was an action by a father for the negligent killing of five of his minor children, the jury gave a verdict for \$10,800, and the court, in refusing to set aside the verdict as excessive, said that the jury was not "limited to the actual pecuniary injury sustained by the plaintiff by reason of the loss of the services of his children," but nothing was said anywhere in the case about the mental anguish and suffering of the father being a proper element of damage. The case in 60 Cal. was an action by the wife as administratrix for the death of her husband caused by the negligence of the defendant. The plaintiff and her daughter were permitted to testify against the objections of defendant that the deceased was a kind and attentive husband and father, and that his social and domestic relations were happy. But no proof was offered of the mental anguish of the widow or family, nor were any damages given on that ground. The court held that it was proper to show the domestic relations of the parties, their kindly demeanor to each other, etc. The foregoing cases decided by the California courts are all based on the case of *Beeson v. Green Mountain, etc., Co.*, 57 Cal. 20. That was a case where

the wife sued for the death of her husband, caused by the negligence of the defendant. Evidence was offered as to the social and domestic relations of the plaintiff and her deceased husband, and the lower court instructed the jury that they might consider the pecuniary loss, if any, the plaintiff had suffered in the death of her husband by being deprived of his support; "also the relations proved as existing between plaintiff and deceased at the time of his death, and the injury, if any, sustained by her in the loss of his society." The latter part of the instruction was objected to, but the supreme court sustained it. Nothing was claimed, however, for mental anguish of the plaintiff, and the court intimated that it would not be allowable. The court say: "We think that the social and domestic relations of the parties, their kindly demeanor toward each other, the society, were parts of 'all the circumstances of the case,' for the jury to take into consideration in estimating what damages would be just, from a pecuniary point of view, especially as there is nothing in the case to show that the jury were instructed that they might give damages by way of solace." We think, therefore, the case of *Cleary v. Railroad Co.*, supra, is not sustained by the other California cases cited to support it. The only other state in which it has been held that the mental suffering of the survivor may be taken into consideration in assessing damages in such cases is Virginia. *Matthews v. Warner*, 29 Grat. 570. The court in that case say: "The certificate of facts shows that Warner was shot and killed by Matthews under circumstances which, if not such as the law declares to be murder in the second degree, or, at the very least, voluntary manslaughter, certainly must be held to be a wrongful act." The statute in that state provides that "the jury in any such action may award such damages as to it may seem fair and just," etc. The lower court was requested to instruct the jury that if they found for the plaintiff the measure of damages would be the pecuniary loss sustained by the mother of plaintiff's intestate by reason of the death of her son, and that they must confine themselves to injuries of which a pecuniary estimate could be made in reference to a reasonable expectation of pecuniary benefit to his mother from the continuance of the life of the deceased, and that they could not take into consideration the mental suffering occasioned by his death to his mother. The court refused to give the instruction, and a verdict being rendered against the defendant, he appealed, and the supreme court say the appeal presents for consideration "the important question, what is the true construction to be given to the statute respecting the measure of damages it prescribes,—whether the jury is confined in its estimate of the damages incurred by the death of the party to the pecuniary loss thereby sustained by the party for whose benefit suit is brought, or whether they are justified in giving punitive and exemplary damages?" The court held that the Virginia statute allowing the jury to "award such damages as to it (the jury) may seem fair and just,"

manifested an intention by the legislature to allow the jury in such cases to award punitive and exemplary damages, and therefore they might take into consideration the mental suffering of those for whose benefit the action was prosecuted, and that the lower court did not err in refusing to give the instruction asked.

But the decisions in California and Virginia in the cases of Cleary v. Railroad Co. and Matthews v. Warner are in conflict with the rule almost uniformly laid down by the courts of England and the United States to the effect that only the pecuniary loss sustained can be compensated for, and that no compensation can be given for the mental anguish or suffering of the heirs or next of kin of the deceased. We cite only a few of the many authorities that might be cited on this point. 3 *Suth. Dam.* 281, 282, and cases; 2 *Ror. R. R.* 845, 861, 862, 1167, and cases; 3 *Lawson, Rights, Rem. & Pr.* 1729, and cases; 8 *Wood, Ry. Law*, 1536-1538, and cases; *Whit. Smith, Neg.* 484, and cases; *Wood's Mayne, Dam.* 74; *Railway Co. v. Levy*, (Tex.) 12 *Amer. & Eng. R. Cas.* 90; *Railroad Co. v. Hauer*, (Md.) *Id.* 154; *Lett v. Railway Co.*, (Ont.) 21 *Amer. & Eng. R. Cas.* 165; *Holmes v. Railway Co.*, (Or.) 6 *Sawyer*, 262, 5 *Fed. Rep.* 75; *Donalson v. Railroad Co.*, 18 *Iowa*, 280; *Railway Co. v. Miller*, 2 *Colo.* 442; *Fleld, Dam.* § 630. But the word "pecuniary" in this connection is not construed in any very strict sense, and the tendency is to still greater liberality, and to include every element of injury that may be deemed to have a pecuniary value, although this value may not be susceptible of positive proof, and can only be vaguely estimated. It may include the loss of nurture, of the intellectual, moral, and physical training which a mother only can give to children. *Tilley v. Railroad Co.*, 29 *N. Y.* 287. It may include the loss of expected services of children who at the time of their death are too young to render any service, (*Ihl v. Railway Co.*, 47 *N. Y.* 317;) or of children or persons under no legal or moral obligation to render service or support, if the circumstances shown render it probable it will be rendered, (*Railroad Co. v. Bayfield*, 37 *Mich.* 205; *Railroad Co. v. Barron*, 5 *Wall.* 90.) It may include the loss of the society of a near relative, (*Beeson v. Green Mountain, etc., Co.*, 57 *Cal.* 20.) and may include damages for the loss of the father by children who are of full age living away from the home of the deceased and supporting themselves, (*Lockwood v. Railway Co.*, 98 *N. Y.* 523.) The damages, the pecuniary injury, in cases under this statute, cannot be proved with even an approach to accuracy, and yet they are to be estimated and awarded, for the statute has so commanded, and the jury is to give such damages as may be just under all the circumstances.

Section 2962, Comp. Laws, provides that the action shall be by the personal representatives of the deceased, and the damages awarded shall not exceed \$10,000. Section 3179 provides that the action may be by the personal representative or heirs of the deceased, and places no limit on the amount of the recovery, but the jury may give such damages as "under all

the circumstances of the case may be just." This section by its terms adds no new element of damage not contained in the earlier statute, and we think none should be added by construction. The difficulty of proving or estimating the pecuniary loss to the heirs occasioned by the death of a human being is recognized by all the courts. But if the mental suffering of the heirs is to be taken into the account, and compensated for in money, the difficulty is infinitely increased. Upon what rule in computing damages can the sorrows of the heirs be estimated? If their number should be great, and their grief poignant, the damages would be beyond computation. But even if the number of the heirs should be small, their mental anguish might be so intense that, in the estimation of a sympathetic jury, the damages given would be such as to bring bankruptcy to the wealthiest defendant. Affection and tears, even for a distant relative, would be given a cash valuation in the verdict, and which might be out of all proportion to the real value of the life of the deceased. In what manner shall the mental anguish, its intensity, or duration, or whether feigned or not, be determined. If the husband should be tyrannical, and abusive, or the wife a shrew, the death of either might not bring to the survivor such poignancy of grief that it could be assuaged only by a large verdict; it might in fact bring pleasure instead of sorrow, yet the mental anguish might be successfully assumed for the purposes of the trial, and the defendant have no means of exposing the hypocrisy of the pretended grief. If a son should be a drunkard, or indolent or vicious, the real mental anguish of the mother at his death might not be so great that she would refuse to be comforted without the solace of a sum of money. These are some of the difficulties courts and juries would have to encounter if the mental sufferings of surviving relatives should be held to be elements of damage. While the question is not free from difficulty, we are of the opinion that the court erred in admitting evidence of the mental suffering of the mother of the deceased, and in instructing the jury that they might take into consideration the mental pain and suffering caused the mother by the death of her son. We think the mental suffering of the heir, on account of the death of a deceased relative, too remote and sentimental to be a proper element of damage under the statute, and is not necessary, as held in *Matthews v. Warner*, supra, to enable exemplary damages to be recovered, where malice, wantonness, or such gross negligence as amounts to willfulness, are shown, neither of which, however, are claimed to have been shown in this case. We find no other error in the record. Reversed.

HENDERSON and BLACKBURN, JJ., concur.

(7 Utah, 26)

UNITED STATES v. CHRISTENSEN.

(Supreme Court of Utah. July 12, 1890.)

DISQUALIFICATION OF JUROR—SITTING ON GRAND JURY.

Where a juror answers on his *voir dire* that he has formed no opinion as to the guilt or inno-

cence of defendant, but it transpires after a verdict of "guilty" that he had been on the grand jury which found the indictment, it is proper to grant a new trial; defendant not having discovered the disqualification of the juror, or been put on inquiry concerning it, before the verdict.

Appeal from first district court; before Justice J. W. BLACKBURN.

C. S. Varian, U. S. Atty., for appellant.  
S. R. Thurman, W. H. King, and John B. Milner, for respondent.

ANDERSON, J. The defendant was indicted for unlawful cohabitation, and was tried and convicted. He moved for a new trial upon the ground, among others, of misconduct of the jury tending to prevent a fair and due consideration of the case, based upon affidavits showing that one John Harris, who was one of the petit jury which convicted him, was on the grand jury which found the indictment, and that the fact was not known to him or his counsel until after the verdict, and that the juror stated falsely on his *voir dire* that he had not formed or expressed an unqualified opinion as to the guilt or innocence of the accused of the offense charged. The motion was sustained, and a new trial granted, and the United States excepted to the ruling of the court, and now prosecutes this appeal from the order of the court granting a new trial. When the juror Harris was called, he was sworn on his *voir dire*, and interrogated by defendant's counsel as follows: "Do you know the defendant? Do you know any of the witnesses named on the back of the indictment? Have you talked with any person regarding this case? Have you ever formed or expressed an opinion as to the guilt or innocence of the defendant?" To each of these questions he answered in the negative, and was accepted as a juror in the case.

The only question to be determined is whether the court erred in sustaining the motion for a new trial. In the case of *People v. Reece*, 8 Utah, 72, 2 Pac. Rep. 61, it was held that where a juror falsely stated, upon examination under oath as to his qualifications as a juror, that he was a citizen of the United States, and neither of the defendants knew or had reason to believe until after verdict that he was not a citizen, the defendants could not be deemed to have waived their right to a jury of 12 men possessing the qualification of citizenship, and, being guilty of no negligence or want of watchfulness, were entitled to have the verdict set aside, and a new trial granted. In *People v. Lewis*, 4 Utah, 42, 5 Pac. Rep. 543, the defendant was convicted of grand larceny. One of the trial jury which convicted him was a member of the grand jury which found the indictment against him. Neither the defendant nor his counsel knew this until after the verdict. The defendant moved for a new trial, which was overruled, and the ruling was affirmed in this court, upon the ground of the defendant's negligence in not making sufficient inquiries as to the qualifications of the jurors. The jurors were sworn on their *voir dire*, and interrogated as to their statutory qualifications, to which no an-

swer was given. Counsel for defendant then examined the jurors as follows: "Are any of you acquainted with the defendant, Walter Lewis, here? Have any of you heard so much about his case as to form or express an opinion, an unqualified opinion, concerning his guilt or innocence? If any of you have, make it known. I will not put questions directly to each of you." The jurors were then asked if any of them were related to the prosecuting witness, and if they had formed or expressed an opinion from anything they had heard him say, and he added: "You don't seem to answer, and I will not put the question to any of you particularly." No statement of the facts constituting the alleged offense was made to the jurors, and hence the court say, the jurors could not well have known whether they had an opinion as to the guilt or innocence of the defendant or not, and that, taking into consideration the timidity and apparent unwillingness of many jurors to answer questions unless they are individually interrogated, it is not surprising that there was no response to the questions of defendant's counsel. The court was of the opinion that interrogating the jurors in such a general way was such negligence that the defendant could not, after an unfavorable verdict, successfully move for a new trial, when, with the proper diligence, good ground for a challenge of the juror would have been discovered. The court said, however, that "an express unqualified answer that the juror is a citizen, or that he has not formed or expressed an opinion as to the guilt or innocence of the accused, is sufficient to relieve the defense from further investigation unless there is something to put the party upon further inquiry." In the present case the defendant's counsel asked the juror whether he had formed or expressed an opinion as to the guilt or innocence of the defendant, and he answered that he had not, and under the ruling in *People v. Lewis*, supra, the defendant was not bound to pursue the investigation further. It is not shown that the juror Harris had formed or expressed an unqualified opinion as to the guilt or innocence of the defendant further than the fact that he was one of the grand jury that found the indictment against him, and as to this fact he was not interrogated. The case of *Rice v. State*, 16 Ind. 298, was precisely like the one at bar in its facts. One of the trial jurors had been one of the grand jury which found the indictment. The juror was not asked as to whether he had been on the grand jury that found the indictment, but was asked whether he had formed or expressed an opinion as to the guilt or innocence of the accused, and answered that he had not. The fact that he had been on the grand jury was not discovered until after verdict, and, on a motion for a new trial, the affidavit of the juror was filed in support of the verdict to the effect that at the time of being examined he had no opinion as to the defendant's guilt, and had forgotten the circumstance of his having been on the grand jury. The court held that the defendant was entitled to a new trial, and was guilty

of no negligence in not sooner discovering the fact of the juror's incompetency, but that, if the fact had been known to the accused at the time the jury was accepted and sworn, he could not afterwards have been heard to make the objection.

An objection to a juror such as is raised in this case is not like merely technical disqualifications, such as alienage, non-residence, and the like, which do not tend to impeach the fairness and impartiality of the jury. It is possibly true that the juror in this case had no opinion at the time of his examination as to the guilt or innocence of the accused. He may have forgotten that he was on the grand jury that found the indictment. He may have voted against finding the indictment, or may have been absent when it was found, as 12 of the 15 jurors constitute a quorum, and may transact business; but the presumptions of the law are all to the contrary, and, in the absence of any showing to that effect, he must be presumed to have participated in the finding of the indictment, and to have formed an opinion as to the guilt or innocence of the defendant. It might be possible also, even if the juror had formed an unqualified belief of the defendant's guilt from the evidence submitted to the grand jury, to change the opinion by evidence at the trial, if he were a man of candor and intelligence. But the defendant has a right to be tried by an impartial jury. A juror who, acting on his own oath as a grand juror, and upon the sworn testimony of witnesses, has already formed an opinion as to the defendant's guilt, and has solemnly accused him of a crime, should not be deemed an impartial or proper juror to try him. Having served on the grand jury which found the indictment, and having formed or expressed an unqualified opinion or belief that the prisoner is guilty or not guilty of the offense charged, are each a ground of challenge to a juror for implied bias. 2 Comp. Laws 1888, § 5022, subds. 4, 8. And where the accused properly examines the jurors concerning their qualifications, and they do not answer truthfully, he is thereby not only deprived of his right of challenge for cause, but may also be prevented from exercising his right of peremptory challenge. If, in such a case, a defendant, in trying to ascertain whether the jurors are competent or not, without negligence on his part, is denied a new trial, the greatest injustice might be done. In this case the names of the grand jurors did not appear on the indictment, the law only requiring that the name of the foreman should appear; and there was nothing to notify defendant that the juror had been on the grand jury that found the indictment, nor to put him on inquiry. It is true if he had searched the records of the court he would have ascertained that fact, and it would have been commendable prudence and diligence to have done so; but we do not think his failure to do so is such negligence as should deprive him of the right to be tried by an impartial jury, especially in view of the false answer given by the juror. The motion for a new trial was properly

granted. In support of the views above expressed, see *Com. v. Hussey*, 13 Mass. 221; *Dilworth v. Com.*, 65 Amer. Dec. 264; *Bennett v. State*, 24 Wis. 57; *Hayne, New Trials*, § 45, and cases cited. See, also, section 64. Our attention has been called to a number of cases where, upon the same state of facts as are presented here, a different conclusion has been reached, but we think the weight of authority as well as of reason is in accordance with this opinion. The ruling of the district court is affirmed.

ZANE, C. J., and HENDERSON, J., concur.

#### SPANISH FORK CITY V. MORTENSON.

(*Supreme Court of Utah*. July 28, 1890.)

##### PEDDLERS—LICENSE—SEWING-MACHINE AGENTS.

Under an ordinance which imposes a fine on persons selling goods from house to house without a license, a sewing-machine agent is liable to such fine where he sells by a sample machine carried about with him, whether the sample itself be delivered to the purchaser, or another similar machine, after the bargain is made.

Appeal from first district court; J. W. JUDD, Judge.

A. Saxey, for appellant. Thurman, Sutherland & King, for respondent.

ZANE, C. J. The defendant was found guilty by a justice of the peace of selling sewing-machines in violation of an ordinance of Spanish Fork City, and convicted and fined. From this judgment he appealed to the district court, and by it he was again convicted and fined. This is an appeal from the latter judgment. An ordinance of Spanish Fork City imposes a penalty upon any person who engages in peddling within the city limits without first obtaining a license, under an ordinance that declares all persons selling, or offering to sell, goods from house to house, who use a vehicle, or who carry jewelry to so sell, to be first-class peddlers, and declares all other peddlers to be second-class, and requires a license fee in either case. And section 123 of the same ordinance is in the following language: "There shall be levied and collected upon a license for the sundry kinds of business herein specified as follows: For machine or vehicle agents for each company represented, \$4 per quarter or \$15 per year." The right of the city to pass the ordinance is not questioned. The evidence in the record shows that the defendant was the agent of the Provo Book & Stationery Company whose place of business was Provo City; that the defendant used a vehicle, and carried sample machines with him, and sold machines to be afterwards delivered to the purchaser, and that, in some instances, he would sell and deliver the machine that he carried as a sample, and would obtain another machine from the principal to use as a sample; that generally the machine would not be delivered at the time of the bargain, but would be in a short time thereafter, and in other cases the sale would be completed at once by delivery. The defendant claims that this amounted to selling by sample, and,

that no license was required. In one of the cases mentioned the sale is executory. In the other it is executed by the seller at the time of the bargain. The sale is completed in either case by delivery. The court holds that a sale in either way violated the ordinance. The judgment of the district court is affirmed.

HENDERSON, ANDERSON, and BLACKBURN, JJ., concur.

*KERSHAW et al. v. DYER et al.*

(Supreme Court of Utah. July 12, 1890.)

JUDICIAL SALES—DEFICIENCY—RIGHTS OF CREDITOR.

1. Plaintiff obtained a decree foreclosing a mortgage on two lots, and an order for their sale was put in the hands of the marshal, and a certain sum bid on one of them. The defendants paid to the marshal the difference between that sum and the amount of the decree which he received as being "in full of all demands as deficiency" in the case. The bidder, however, failed to comply with the bid, and that lot was sold for a less price, leaving a deficiency. *Held*, that plaintiff was not bound by the marshal's receipt, and was entitled to have the second lot sold to pay the deficiency, though third persons had taken a mortgage thereon on the faith of the marshal's receipt.

2. The court may order a sale of such second lot without either confirming the sale to the first bidder, or ordering a resale of the first lot at his risk.

Reversing 21 Pac. Rep. 1000.

On rehearing. For former opinion, see 21 Pac. Rep. 1000.

*A. R. Heywood and Emerson & Allison*, for appellants. *P. L. Williams*, for respondents.

ZANE, C. J. It appears from the record in this case that July 23, 1886, John J. and Margaret Kelly obtained a decree against Andrew J. and Sarah Kershaw foreclosing a mortgage on two pieces of real estate of the latter, to secure a debt due from them to the former; that, in pursuance of the decree, the marshal on January 18, 1888, exposed the property for sale, and that one piece was struck off to C. S. Varian at the price of \$4,500, and the other to Charles Woodmansee for \$1,725; that the marshal reported these facts to the court, and, also, that Varian had refused to pay his bid, and that the validity of the sale was questioned, and that he did not accept the money on Woodmansee's bid; and it also appears that on February 17, 1888, the court set aside this sale for the reason that the purchaser refused to make payment, and ordered the marshal to resell the property. It also appears from the record that on April 11, 1888, the officer again exposed for sale the piece of land that had been struck off to Varian, and that one D. H. Peery bid therefor \$4,000, and that the officer reported these facts to the court, and, also, that Peery had said he would pay the amount of his bid as soon as the parties could meet at the First National Bank; that the Kershaws then tendered the sum of \$2,229.30, the difference between Peery's bid and the amount due on the decree with costs, which he took, and did not offer the other lot for sale, and executed

and delivered to the Kershaws a receipt in the following words: "Ogden City, Utah, April, 1888. Received of Andrew J. Kershaw in full of all demands as deficiency in the case wherein John J. Kelly and wife are plaintiffs, and Andrew J. Kershaw and Sarah Kershaw are defendants. [Signed] FRANK H. DYER, U. S. Marshal. By E. W. EXUM, Deputy." It also appears from the record that the Kershaws exhibited this receipt to the appellants Hartog and Huss, and that they loaned the Kershaws \$3,000, and took a mortgage to secure the payment of the same on the lot not offered for sale. It also appears that Peery refused to pay the amount bid by him, and, upon that fact being reported, the court made another order for the sale of the lots, and in pursuance thereof, on September 28, 1888, the marshal again exposed for sale the lot that had been struck off to Peery, and that James L. Dee and Charles Woodmansee bid therefor the sum of \$2,300, and the same was paid over to the plaintiff in the decree. This sale and payment the marshal reported to the court, and also the fact that he had in his hands the \$2,229.39 paid to him by the Kershaws, and that including this there still remained unpaid on the decree the sum of \$1,940. And on November 10, 1888, the court ordered the sale of the other lot to pay this balance. But before this sale was made an injunction was obtained by the appellants restraining the marshal from making it. And upon answer filed a motion to dissolve, which was heard, and the facts appearing as above, the court granted the motion, and the injunction was dissolved. From this decree the appellants have prosecuted this appeal. The appellants insist that the Peery bid, and the payment to the officer of the difference between that and the amount of the decree, satisfied the lien of the decree against the lot last ordered to be sold; that the only remaining remedy for the benefit of the respondents was to resell the lot bid off by Peery, and to sue him for the difference, if any, between his bid and the amount realized on such resale; and that, therefore, the last order of the court to sell the other lot to satisfy the deficiency was a nullity, and that the officer for that reason had no authority to make the sale under it.

The appellants rely upon section 3437 of the territorial statute: "If a purchaser refuses to pay the amount bid by him for the property struck off to him at a sale under the execution, the officer may again sell the property at any time to the highest bidder, and if any loss be occasioned thereby the officer may recover the amount of such loss, with costs, from the bidder so refusing in any court of competent jurisdiction." 2 Comp. Laws Utah 1888. Under this law if the bidder refuses to pay the amount of his offer, the officer may expose the property for sale again, and sell it to the highest bidder, and if a loss occurs he is also authorized by an action to recover that amount, with costs, from the first bidder. Section 3439 of the same compilation provides that the officer shall not be liable for more than the amount of the second bid, and the sum collected from



the purchaser refusing to pay. If the position of the appellant is right, and no other property can be subjected to sale when the first bid equals the amount of the judgment, and payment is not made, the creditor might lose the difference when the defendant in the execution, or order, has property to pay him; for the first bidder might be insolvent, or facts might be made to appear on the trial constituting a defense. If a suit should be instituted against Peery for the loss in this case, and he should make a successful defense, or he should be found to be insolvent, then the respondents would lose their \$1,940, though the other piece of land in the mortgage and decree may be of sufficient value to pay it. The law requires the officer to sell the property to the highest bidder. And that bid might exceed the amount due on the execution, and the second bid might be sufficient to satisfy the judgment. In that case the plaintiff would have no interest in the difference; yet the loss would be the same to the defendant, and the officer would be authorized, if the sale was fair, to collect it by suit for the benefit of the defendant. When the first bidder fails to pay, and the resale is less, the difference is the defendant's loss. If the proceeds of the last sale are not sufficient to pay the execution, so much of the difference collected will be paid by the officer for the defendant on the plaintiff's judgment, and the remainder, if any, will be paid to the defendant. Neither the plaintiff nor the defendant has the right to sue for the loss, under the Utah statutes. The officer's authority and instructions in making the sale are in the law. He does not receive them from the plaintiff or the defendant. It is because the defendant refuses to pay, and the plaintiff is without authority to compel him to do so, that the government through its officer takes the defendant's property, and sells it as the government directs by its law, and pays the proceeds to the parties as their rights appear.

The case of *Gaskell v. Morris* was an action to recover the difference when the first bidder failed to pay, and the second sale was for less. In deciding the case the court said: "The fifth error is an exception to the instructions given by the court to the jury that a suit brought for the purpose of the present case might be maintained by the sheriff in his own name. We are decidedly of opinion that the court was right on this point. It is in accordance with the opinion of this court as expressed in *Adams v. Adams*, 4 Watts, 160, where it was not only held that such action might be maintained by the sheriff who made the sale, but that it could not be maintained by any other person." The opinion concludes: "And seeing that no reason whatever has been given why the defendant below did not comply with his contract for the purchase, it is clear, therefore, that by his failure to do so he has caused a loss equal to this difference to the owner of the estate, and upon every principle of justice ought to make it good." 7 Watts & S. 38.

In *Adams v. Adams* the court said: "The sheriff in making the contract of sale

with James Adams was not acting as the agent of the plaintiff, nor yet of any one else. He is considered the principal himself in such case, and the legal, as well as the real, party making the contract of sale. Although it be true that he acts in the character of trustee, yet it must be borne in mind that it is as an officer of the law that he does so, and that it is from the law he derives all his power and authority." To the same effect are the following cases: *Burbank v. Dodd*, 4 Pac. Rep. 303; *Griffin v. Thompson*, 2 How. 244.

It follows that the Kellys were not bound by the actions, or the omissions, of the marshal further than he conformed to the law. The decree and order of sale made it the duty of the marshal to make the money due as shown by them. He had no authority to receive anything but lawful money in satisfaction of the decree. He had no right to take Peery's promise, and execute to the Kershaws a receipt in full for the sum due on the decree. He could not acknowledge satisfaction of the decree that would be binding on the plaintiff without first receiving payment in full in lawful money. And having done so the Kellys had a right to insist that the court set aside the sale, and order a resale of so much of the property described in the decree as would be necessary to satisfy it; or they might have elected to ask the court to accept Peery's bid. But this they did not do. They claimed, as they had a right to, the payment of the decree in money. The marshal, as we have said, was required to convert into money so much of the land described in the decree as would pay the debt, and to pay it to the plaintiffs. He had no authority to turn over, in satisfaction of it, a promise of a bidder to pay a lawsuit. If the defendants in the case did not want their property sold, they should have paid the decree, as it was their duty to do. They having failed, it became the officer's duty to convert their property into money, and make the payment for them. *Colton v. Camp*, 1 Wend. 365; *Griffin v. Thompson*, 2 How. 244; 2 Freem. Ex'ns, §§ 443, 444; *Bank v. Wakeman*, 1 Cow. 46, and note a; *Mumford v. Armstrong*, 4 Cow. 553.

In *Griffin v. Thompson* the marshal had returned on an execution that he had received in satisfaction thereof bank-notes. And upon motion of the judgment creditors, the lower court quashed the return, and ordered and issued an *alias* execution, which the judgment debtor moved to quash. Upon a division of opinion the case came before the supreme court of the United States, and in deciding it that court said: "It cannot be questioned that the defendant in that motion was entitled to the full benefit and operation of his execution, and these were to cause to be made for him of the goods and chattels, lands and tenements, of his debtor the sum of \$1,740.02 of lawful money of the United States. With his claim thus solemnly ascertained of record, we are aware of no authority from any source which can compel him to commute it, or to receive in satisfaction thereof any other thing which he shall not voluntarily elect." Referring to argument to the contrary the court fur-

ther said: "But the fallacy of the argument here consists in totally misconceiving the situation and functions of the marshal. He is properly the officer of the law rather than the agent of the parties, and is bound to fulfill the behests of the law, and this, too, without special instruction or admonition from any person." The court held that return on the first execution was properly quashed, and that the *alias* execution should not be. Freeman in his work on Executions says: "If a sheriff returns a writ satisfied when he has not received payment thereof in money, the plaintiff is not bound thereby. He may have the return vacated and procure an *alias* writ, or he may treat the return as true, and compel the sheriff to account to him for the amount of the writ in the kind of money which the officer was by law to collect." In the case of Colton v. Camp, the deputy-sheriff misconstrued the written instructions given him by the plaintiff in the execution, and took the note of the defendants for his fees, and the latter executed a bill of sale, of the property that had been levied on, to third persons, the officer informing the parties to whom the bill of sale was executed that he had no lien on it. But afterwards, upon discovering his mistake, he again took possession of the property, and removed it from the house of the defendant in the execution, and the parties to whom the bill of sale had been executed instituted an action of trover against him. The court in its opinion said: "The material question then appears to me to be whether the deputy-sheriff was authorized to relinquish the lien acquired by his levy. For if he was not I should be very clearly of the opinion that the act was entirely nugatory, and could not in any manner affect or prejudice the rights of the plaintiffs in the execution, or of their assignee; that the lien still remained, notwithstanding the declaration of the deputy-sheriff that he relinquished it; and that the sheriff or the deputy would be justified in subsequently enforcing the execution against the same property. A sheriff cannot discharge an execution without payment. If he returns the execution satisfied upon receiving the defendant's note instead of money, it is no satisfaction of the judgment or execution." The marshal in this case was not authorized to acknowledge, by receipt or otherwise, satisfaction of the decree, and thereby release its lien on the property, or any portion of it, without receiving the money due upon it, and Hartog & Huss relied upon the receipt at their peril. They should have seen that the decree was satisfied. They should have ascertained that Peery had paid his bid upon one piece of the land before advancing money on the other piece.

A further point in this case is that the injunction in question was issued to restrain the marshal from executing an order of sale made in an equitable case. The court had jurisdiction of the subject-matter of the order, and of the parties. And it follows from that, that the order cannot be treated as a nullity. It was such an order as could have been appealed from.

In order to sustain the injunction in question it would be necessary to treat the order as absolutely void. The trial court did not confirm the sale to Peery, and accept the offer in that way; nor did it make any order, or take any action, to hold him to his bid, and order a resale in the mean time at his risk, according to chancery practice in such cases.

The case of Camden v. Mayhew, relied on by appellants, was an appeal from a final order requiring Camden to pay the difference between the amount bid for real estate offered for sale under the decree in that case and the amount the property brought on a resale. The court said: "It is undoubtedly true that Camden's lien \* \* \* was in legal effect only an offer to take property at that price; and that the acceptance or rejection of the offer was within the sound equitable discretion of the court, to be exercised with due regard to the special circumstances of the case, and to the stability of judicial sales." And the court, after stating, in substance, that it was further contended that an acceptance of that offer could only have been manifested by an order confirming the sale, and admitting that a formal order of confirmation, and the tender of a deed followed by an order compelling him to pay the whole amount, would have been necessary to the completion of the contract, used this language: "But it was not restricted to that particular mode, \* \* \* for upon appellant refusing to pay the amount bid, the court without confirming the sale by a formal order could have held him to his offer, and ordered a resale in the mean time at his risk, both in respect to the expense of the resale, and any deficiency resulting therefrom." 129 U. S. 73, 9 Sup. Ct. Rep. 246.

In its opinion the court stated, in substance, three propositions: (1) That acceptance or rejection of the bid was within the sound equitable discretion of the court. (2) That a formal confirmation of the sale, and a tender of a deed, followed by an order compelling the whole amount to be paid, is necessary to hold the bidder to the payment of the full amount of his offer. (3) If the bidder refuses to pay, the court without a formal order of confirmation can hold him to his offer, and order a resale in the mean time, at his risk, as to the deficiency and expenses. In the second proposition the requisite steps to enforce a specified performance of the contract of the payment of the full amount of the bid are enumerated. In the third proposition the prerequisites to a decree for the loss from a failure to pay the bid are mentioned. The court below did not confirm the sale to Peery, nor did it order a resale at his risk. From the order made, we must assume that it decided not to do either. It follows that the order of sale complained of was not a nullity, and that the court committed no error in so deciding in dissolving the injunction that so treated it. If the appellants were not satisfied with the order of sale complained of, they should have appealed from it. Upon further consideration and more mature reflection, we are disposed to hold that

this court at a former hearing of this case reached a wrong conclusion. The order of the court below is affirmed.

ANDERSON and BLACKBURN, JJ., concur.

BARNETT v. KINNEY.

(*Supreme Court of Idaho*. Jan. Term, 1890.)

For majority opinion, see 23 Pac. Rep. 922.

BERRY, J., (*dissenting*.) A part of the subject of the assignment in question was personal property in the territory of Idaho. The assignor lived at the time of its execution in Utah territory, where the assignment was made. It was a voluntary assignment in trust for the benefit of creditors, and is conceded to be valid under the laws of Utah territory. The assignee had gone into possession, and was in possession as such assignee, when the property was seized and taken from his possession by the sheriff of Alturas county by virtue of a writ of attachment in favor of a creditor of the assignor, residing in the state of Minnesota, where the debt was contracted. The assignee brought replevin against the sheriff, and on the trial in the court below had judgment for the property. This appellant seeks to reverse that judgment. There is but one controlling question in the case, viz., whether that assignment, valid where it was made, should, under the statutes of this territory, be held to be operative here. Under our statute I think it is clearly valid and operative. The appellant rests upon section 5932 of the Revised Statutes of Idaho, which provides that "no assignment of any insolvent debtor other than as provided in this title is legal or binding on creditors." This is the closing section of title 12, p. 677, of the statutes of Idaho. The act is headed "Proceedings in Insolvency." The general scope and apparent purpose of the whole title of 58 sections is shown in its first section, (5875,) as follows: "Every insolvent debtor may, upon compliance with the provisions of this title, be discharged from his debts and liabilities." No stronger terms are needed to show that the parties thus to be favored are the citizens of Idaho; and certainly it was not designed to compel all persons contemplating assignment to reside here six months before doing so, or to compel, in to our courts, citizens of other states and territories to get a discharge from their debts through insolvency proceedings. I do not believe that the revisers of our law, in 1887, had any design that Idaho should take upon her a task of that magnitude. Nor do I think there was any design to preclude parties out of this territory, who might have property in it, from making any assignment whatever for the benefit of their creditors without going through our courts in insolvency proceedings. Of course to hold that this act has any extra-territorial scope and meaning is practically to deny to a non-resident the right to make any assignment whatever of his property here for the benefit of creditors. The statement of the proposition seems to

me to carry with it a most forcible denial of any such intent. It is not claimed but that a state or territorial legislature may do so if it desires; but the precedents are that it will not be presumed to have so intended unless its enactments to that effect shall be clear and unequivocal. *Butler v. Wendell*, 57 Mich. 62, 23 N. W. Rep. 460; *Ockerman v. Cross*, 54 N. Y. 29.

In 1860 a statute was enacted in New York entitled "An act to secure to creditors just division of the estates of debtors who convey to assignees for the benefit of creditors." Such act forbade preferences. It provided how the assignment must be executed; that an inventory should be filed of the property assigned; assignees should give bonds, etc.,—all substantially as provided in our act, but with a prohibition as to other assignments as strong as our own. An assignment was made by a debtor in Canada, valid according to the laws of Canada, but in no way complying with the requirements of the New York statute. Possession in New York had been taken by the assignee, whereupon a New York creditor (not, as in this case, a foreign creditor) attached it; but the court held the act to apply to domestic assignments only, and held the foreign assignment good. *Ockerman v. Cross*, 54 N. Y. 29. So in *Butler v. Wendell*, 57 Mich. 62, 23 N. W. Rep. 460. So in *Train v. Kendall*, 137 Mass. 366. So, also, in *Rice v. Curtis*, 32 Vt. 460. But we need go, I think, no further than to the internal evidences of the act to be convinced that it was not intended to apply to foreign assignments. In fact the title provides expressly, that the assignor must be a resident of the territory. The judgment in the court below should be affirmed.

*In re CAMPBELL et al.*

(*Supreme Court of Washington*. May 31, 1890.)  
INCORPORATION OF CITIES—REINCORPORATION.

1. Laws Wash. 1889-90, p. 280, c. 1, § 1, relating to the incorporation of cities and towns, contains a proviso that nothing therein contained shall prevent the reincorporation thereunder of towns and villages which had attempted to incorporate under the void act of February 2, 1888; and section 6 empowers such towns and villages to incorporate under section 4. *Held*, the statute does not legalize attempted incorporations under the void act, but provides for incorporation by taking the steps prescribed in section 4.

2. Towns and villages which attempted to incorporate under the void act of February 2, 1888, may incorporate under this act with a larger territory than was included in that attempt.

Case certified from superior court, Pierce county, under Code Wash. T. § 453.

Laws Wash. 1889-90, p. 280, c. 1, § 1, provides that "any portion of a county containing not less than 300 inhabitants, and not incorporated as a municipal corporation, may become incorporated under the provisions of this act, and when so incorporated shall have the powers conferred, or that may be hereafter be conferred, by law upon municipal corporations of the

1 Publication delayed through failure to receive copy.

class to which the same may belong: provided, that nothing herein contained shall prevent the reincorporation of towns and villages under the provisions of this act, whatever their population, heretofore incorporated or intended so to be, under the provisions of the act approved February 2, 1888, entitled 'An act for the incorporation of towns and villages in the Territory of Washington,' and said reincorporation shall be construed as a full acceptance of the terms and conditions imposed by this act." Section 2 prescribes the steps to be taken, and section 3 is upon the election of officers. Section 4 prescribes the steps to be taken by towns or cities already incorporated to secure reincorporation under this act. Section 6 provides that "all towns, villages, and cities heretofore incorporated by virtue of an act entitled 'An act for the incorporation of towns and villages in the Territory of Washington,' approved February 2, 1888, may incorporate under the provisions of this act, in the manner provided by section 4 of chapter 1 of this act."

*B. F. Jacobs and Parsons & Caldwell*, for petitioners. *W. H. Snell*, for respondents.

**HOYT, J.** This cause comes to this court upon the certificate of the judge of the superior court that it is desirable to have the opinion of this court upon the questions presented, and upon the order of said superior court that the proceedings be brought here for the determination of four questions, as follows: "(1) Can a city incorporated under the act of February 2, 1888, (Laws 1887, p. 221,) entitled, 'An act for the incorporation of towns and villages in the Territory of Washington,' incorporate under sections 1, 2, and 3 of an act entitled 'An act providing for the organization, classification, incorporation, and government of municipal corporations, and declaring an emergency, approved March 27, 1890?' (Laws 1890, p. 280.) (2) Can a city incorporated under the act of February 2, 1888, incorporate under sections 1, 2, and 3 of the act of March 27, 1890, with a larger territory than that included in the original boundaries? (3) Should not a city incorporated under the act of February 2, 1888, reincorporate under sections 4, 5, 6, of the act of March 27, 1890? (4) Must not cities incorporated under the act of February 2, 1888, enlarge their boundaries under section 9 of the act of March 27, 1890, or under an act entitled 'An act to provide for the extending and enlarging of the corporate limits of any city, town, or village in this state, and for consolidating and uniting towns and villages, and declaring an emergency, approved February 26, 1890?'"

The first two of these questions are clearly pertinent to the controversy between the parties, and their rights cannot be determined without a finding which must substantially answer said questions. We therefore think them properly before us for decision. An answer to the other two questions is not necessary to the determination of this action, and for that

reason we do not feel called upon to answer them. We however fully appreciate the fact that they relate to matters of grave public interest, and that the object of the lower court in sending them here was a most worthy one, and, had the case been as fully presented by counsel affirming the right of cities to reincorporate under sections 4, 5, and 6 of the act in question as it has by those inclined to a contrary view, we should perhaps feel at liberty to enter upon the investigation thereof; but as this has not been done we must decline to examine these questions, and content ourselves with a decision of the first two, as above stated. If the proviso in section 1 of the act in question had been omitted from said section, and section 6 from said act, it would be clear that the territory included within that part of a county in which a void attempt at incorporation had been made was as fully covered by the act as any other. All attempts to incorporate under the act of February 2, 1888, were absolutely void, and such attempts, unless legalized by legislation, did not and could not change the *status* of the inhabitants included in the territory so attempted to be incorporated, and sections 1, 2, and 3 of the act in question apply to all such territory the same as to any other. It follows that the only inquiry necessary is as to the effect upon the question before us of said proviso to section 1, and said section 6. It has been suggested upon the argument that said portions of the act were absolutely void; that it was not competent for the legislature to thus indirectly vivify and give force to acts of attempted incorporation, but, as we see our way clear to decide this cause without determining as to the soundness of such argument, for the reasons hereinbefore stated, we shall decline so to do. We are of the opinion that, even if such portions of said act are valid, they are not exclusive; that the most that can be claimed thereunder is that by virtue thereof it was competent for such attempted incorporations, by taking steps thereunder, to become legal incorporations. Assuming that it was within the power of the legislature to have legalized all such attempted incorporations, it cannot be contended that by the passing of the act in question it has done so; that is, it cannot be claimed that at the time this law took effect it then and there transformed all these attempted incorporations into real ones. Until by some act of the so-called corporations, or of their board of officers, the territory and the inhabitants therein were as much a part of the body of the county as any other part of the same. And if a part of the county at large, then such inhabitants, either by themselves or with others of the county, could avail themselves of the provisions of said sections 1, 2, and 3, and become incorporated as a body politic. Let it be certified to the court below that this court answers the first two questions submitted in the affirmative, and that it declines to answer the others, and that the judgment of the superior court in this cause is affirmed, and the same remanded

to said court for further proceedings thereon.

ANDERS, C. J., and STILES, SCOTT, and DUNBAR, JJ., concur.

WALLACE V. HELENA ELECTRIC RY. CO.

(Supreme Court of Montana. July 25, 1890.)

JUDGES—POWERS IN ANOTHER DISTRICT—INJUNCTION IN CHAMBERS.

Const. Mont. art. 8, § 12, which provides that "any judge of the district court may hold court for any other district judge," confers no authority on a judge so holding court in a district other than his own to issue an order of injunction in chambers, and such order is therefore void.

Appeal from first district court; THOMAS J. GALBRAITH, Special Judge.

In the matter of the application of Frank Langford for a writ of *certiorari*.

McCutcheon & McIntire, for appellant.  
McConnell & Clayberg, for respondent.

HARWOOD, J. It appears from the record that on the 21st day of June, 1890, Franklin R. Wallace, plaintiff, brought an action in the district court of the first judicial district against the Helena Electric Railway Company, defendant, to obtain an order of injunction requiring said defendant to desist and refrain from laying a street railway in a certain portion of Main street in the city of Helena, Lewis and Clarke county. The complaint and undertaking were filed in the office of the clerk of said district court on said 21st day of June. That during said day Hon. THOMAS J. GALBRAITH, judge of the fifth judicial district, was the presiding judge, holding court for Hon. WILLIAM H. HUNT, judge of the first judicial district, in the trial of an action at the city of Helena in the first district; that at 5 o'clock in the evening of June 21st, after court had adjourned until the succeeding Monday, application was made to Judge GALBRAITH in chambers by plaintiff's counsel for an order of injunction in said action to restrain defendant from laying said street railway, which application was heard, and an order of injunction was thereupon granted by Judge GALBRAITH. It further appears from the record that at the time of granting said order of injunction Hon. WILLIAM H. HUNT, judge of the first district, was present in the city of Helena, the county-seat of Lewis and Clarke county, which county is the first judicial district; that on the 23d day of June, Judge HUNT presided in his court during the morning hour in hearing motions and demurrers, that being motion day; and on the same day Judge GALBRAITH proceeded with the hearing of the same case which had been on trial in said court before him on the 21st of June, and both said judges signed the minutes of the said court for June 23d. Following the issuance of said order of injunction, certain proceedings were had against one Frank Langford, in said first district court, for the alleged violation of said order, which resulted in the court finding him guilty of contempt, and assessing a fine of \$500 against him as punishment therefor.

Whereupon Langford was granted a writ of *certiorari* from this court to bring up said proceedings whereby he was found guilty of contempt, for review. The learned counsel on behalf of the relator, Langford, urges several points of objection touching the jurisdiction of the judge who issued said order of injunction; the first, and, as we consider, the most important, objection, being that Judge GALBRAITH, the judge of the fifth judicial district, while holding court in the first district under the constitutional provision that "any judge of the district court may hold court for any other district judge," had no power to discharge the other duties, and exercise the other functions, of the judge of the first district, such as issuing an order of injunction in chambers.

Jurisdiction and judicial power must be conferred by law. The judicial districts of the state, and the organization of the district courts as now established, rest wholly upon the provisions of the constitution. The legislature is given power to make changes in the districts, and to increase or decrease the number of judges in any judicial district, but so far this legislative power has not been exercised. Section 11, art. 8, of our constitution defines the jurisdiction of the district courts, and also provides in the latter part of said section as follows: "Said courts and the judges thereof shall have power also to issue, hear, and determine writs of *mandamus*, *quo warranto*, *certiorari*, prohibition, injunction, and other original and remedial writs, and also all writs of *habeas corpus*, on petition by or on behalf of any person held in actual custody in their respective districts." Section 12, art. 8, provides as follows: "The state shall be divided into judicial districts, in each of which there shall be elected by the electors thereof one judge of the district court, whose term of office shall be four years, except that the district judges first elected shall hold their offices only until the general election in the year one thousand eight hundred and ninety-two, (1892,) and until their successors are elected and qualified any judge of the district court may hold court for any other district judge, and shall do so when required by law." Section 13, art. 8, defines the limits of each judicial district of the state. It will be observed that the constitution defines the jurisdiction of the district courts, and of the judges thereof, and provides for one judge in each district to exercise these judicial powers in holding court and otherwise, as prescribed by the constitution. The judicial powers of the district judge for each district are committed to one chosen person, with the provision that "any judge of the district court may hold court for any other district judge." Under that provision it is clear that any district judge may go into another district, and hold court for another judge. It is equally clear, also, that without a provision of law authorizing it a district judge would not have authority to go into another district, and exercise his judicial functions. The jurisdiction must be conferred by law. The learned

counsel for respondent contends that under the clause of section 12 of the constitution above mentioned the district judge who goes into another district to "hold court for any other district judge" may exercise all the powers of the judge of the latter district. When first announced the proposition seemed tenable, but upon mature consideration of the provisions of the constitution we are inclined to conclude otherwise. There are many powers by law committed to a district judge to be exercised otherwise and at other times than in holding court; and, moreover, these powers are as well defined in law as the powers of the court. The provision of the constitution is that "any judge of the district court may hold court for any other district judge." This provision is limited. Is it implied in this clause that the district judge acting for another under it may exercise out of court all the powers of the judge whose court he is holding? It seems to us that there is no room for such implication. Under this provision of the constitution, any judge of the district court may be called into another district to hold court for another judge. Such holding of court by the judge going into another district may be for one hour, or one day, or more, or for the trial of one cause, or more, according to the exigency which prompted the call. The judge of the district may be in his district exercising his official powers in all matters except the special matters committed to the judge called in to hold court. There is at present no provision of law giving to the district judges concurrent jurisdiction in any district. Neither the constitution nor the legislature has made any provision to that effect. The constitution has defined the limits of each judicial district, and provided for one judge for each judicial district. When a judge goes out of his district to hold court for another, he holds court "for" another district judge, not concurrently with another district judge, but "for" him. If, then, there is no provision of law authorizing two judges to exercise their judicial power concurrently in the same district, and, as contended by counsel for respondent, Judge GALBRAITH was empowered, while holding court in the first district, to exercise all the powers of judge of that district in chambers as well as in holding court, we are confronted with a grave and pertinent question, namely: Was the judicial power of Judge HUNT suspended while Judge GALBRAITH was temporarily holding court for him in the first district? We find no provisions of law to warrant us in affirming that proposition. It must follow then that Judge GALBRAITH possessed only a special jurisdiction to hold court for the judge of the first district, and was not authorized to exercise his judicial powers in said district in matters not properly brought before him while holding said court.

This interesting question might be illustrated by a further suggestion. Certain judicial districts in this state comprise three counties. The jurisdiction of the judges of such districts is of course co-extensive with the judicial district. The constitution provides that terms of court

shall be held in each county at stated times. Suppose the judge of a district comprising three counties should call in a judge of another district to hold court for him in one of his counties for the trial of one action. Can it be affirmed that this special jurisdiction to preside in the court of one county in the district for a limited purpose conferred a jurisdiction to make an order, out of court, in a case pending in another county in said district? It is essential that the judicial powers, whether exercised by the courts or the judges thereof, should repose upon clear provisions of law. For the reasons herein expressed we hold that the judge issuing said order of injunction exceeded his jurisdiction, and therefore the proceedings set forth by the return of said writ of *certiorari*, whereby said Frank Langford was found guilty of contempt for violating said order of injunction, must be set aside, and that no further proceedings be had thereunder, and it is so ordered.

BLAKE, C. J., and DE WITT, J., concur.

#### CARTIN v. HAMMOND.

(Supreme Court of Montana. July 22, 1890.)

VENDOR AND VENDEE—POSSESSION UNDER CONTRACT—IMPROVEMENTS.

Defendant contracted that he and his wife would convey to plaintiff for a certain sum land belonging to the wife. Plaintiff entered on the land, and made improvements, though nothing was said in the contract as to possession, and neither defendant nor his wife consented to his entry. Afterwards the wife refused to convey. Held, that plaintiff had no right to the possession, and hence is not entitled to recover the value of his improvements as damages for breach of the contract.

Appeal from third district court; DAVID M. DUFFEE, Judge.

*Robinson & Stapleton* and *W. L. Browne*, for appellant. *F. W. Cole* and *H. R. Whitehill*, for respondent.

BLAKE, C. J. This action was commenced by the respondent to recover the sum of \$1,000 from the appellant, for the breach of a certain contract. A trial by jury was waived, and the following facts appear from the findings: The parties entered into a contract in writing, March 9, 1889, whereby Hammond agreed that he, in conjunction with his wife, would sell to Cartin certain real property. The title to the premises was vested in the wife of Hammond when the contract was signed, and also at the trial. Hammond executed and acknowledged a deed to the property, March 9, 1889, and placed the same in a bank in Philipsburg, with the understanding that his wife would also execute and acknowledge the instrument upon her return. Cartin was to pay Hammond the sum of \$1,100 upon the execution of the conveyance by the proper grantors, and the deposit thereof in this bank. Cartin proposed, March 20, 1889, to pay this amount to Hammond, if he would have the deed properly executed, and tendered, March 28, 1889, the money. The wife of Hammond did not make any conveyance, and did not sign the contract. The sixth

and eighth findings are as follows: "(6) That the plaintiff upon the execution of the contract on the 9th day of March, 1889, went into the possession of the premises in controversy, and made improvements thereon, to the amount of two hundred dollars, relying upon his contract with the defendant." "(8) That as a conclusion of law from the foregoing facts, the plaintiff is entitled to recover from the defendant the sum of two hundred dollars, with interest from the first of April, 1889, and judgment should be entered accordingly." The pleadings show that the contract was signed March 9, 1889; that Cartin then paid Hammond the sum of \$100, and was to make, March 20, 1889, the final payment of \$1,100; and that the sale of the premises was not effected. The contract is silent upon the subject of the possession of the property, and neither Hammond nor his wife, the owner, assented to the entry thereon by Cartin.

It is a fair deduction from the findings that the sole ground on which the damages were based was the value of the improvements that the respondent made upon the premises. This allegation is made in the complaint: "That the plaintiff, in relying upon the agreement entered into as aforesaid, made improvements upon said premises to the amount of two hundred and forty dollars; that said premises now are of the value of fourteen hundred and fifty dollars; that by reason of the breach of said contract by defendant plaintiff has been damaged in the sum of \$1,000." No other element of damages is referred to in the pleadings and findings. Every presumption is to be drawn in favor of the ruling of the court below, but we cannot ignore this salient fact. It is evident from the record that the respondent complied with all the conditions of the contract which were to be performed upon his part, and that the appellant was in fault. Hammond entered into the contract without title, but in the expectation of acquiring the same afterwards, through the concurrence of his wife in the execution of a good and sufficient deed. The authorities of this country now declare that the appellant "is liable to full compensatory damages, including those for the loss of the bargain." 2 *Suth. Dam.* 418, and cases there cited. Can the respondent recover in this action the value of these improvements as damages? What rights did he possess under the foregoing contract? As early as 1812 the supreme court of the state of New York held in *Suffern v. Townsend*, 9 *Johns.* 35, that an agreement of this character, "to purchase and convey, did not of itself amount to a license to enter. It was a mere executory agreement." The same doctrine is laid down in *Erwin v. Olmstead*, 7 *Cow.* 229; *Spencer v. Tobey*, 22 *Barb.* 260. In *Gaven v. Hagen*, 15 *Cal.* 208, Mr. Justice BALDWIN in the opinion says: "There is no implication of a license to enter from the mere fact of an executory agreement of this sort. \* \* \* See *Spencer v. Tobey*, 22 *Barb.* 260, a case which we do not entirely approve of, but which we think correctly lays down the general proposition as to implied license arising from a mere

contract of purchase." In *Willis v. Wozencraft*, 22 *Cal.* 607, this proposition of the case of *Gaven v. Hagen*, supra, was examined and questioned. It is however stated by the court that the contract then under consideration stipulated that the vendee was to enjoy the possession of the realty. In the opinion upon the petition for a rehearing, Mr. Justice CROCKER observed: "Whether in equity a vendee in a simple contract to convey at some future time which is silent about the possession has a right to take and hold possession before the conveyance is a question not before us, as the contract in this case specially gives him the right of possession." The case of *Gates v. McLean*, 70 *Cal.* 42, 11 *Pac. Rep.* 489, recognizes the principle referred to in *Spencer v. Tobey*, supra, and *Gaven v. Hagen*, supra. The supreme court of the United States cites with approval *Suffern v. Townsend*, supra, and *Erwin v. Olmstead*, supra, and says in *Burnett v. Caldwell*, 9 *Wall*, 290: "If the contract in such cases be silent as to possession by the vendee, he is not entitled to it." It is clear that the respondent unlawfully entered and made his improvements upon the property of Mrs. Hammond. In *Peters v. McKeon*, 4 *Denio*, 546, the court discusses the measure of damages in similar cases, and Mr. Chief Justice BRONSON concludes: "He (the vendee) cannot, I think, be entitled to the expenses which may have been incurred in removing to the land, or in making improvements upon it, whether of a permanent or temporary nature, \* \* \* It may be added that in this case the plaintiff did not act with sufficient caution. He should have looked into the title, and ascertained whether it was likely to prove satisfactory before he took possession of the property under the contract." This rule with stronger reason is applicable to the case at bar, and excludes from the measure of damages the value of improvements made by the respondent. It is therefore ordered and adjudged that the judgment be reversed with costs, and that the cause be remanded for a new trial.

HARWOOD and DE WITT, JJ., concur.

#### STATE V. McDONALD.

(*Supreme Court of Montana.* July 25, 1890.)

#### LARCENY—INDICTMENT—DESCRIPTION OF PROPERTY—VARIANCE.

*Crim. Laws Mont.* § 78, provides that if any person shall steal a "mare, gelding, stallion, colt, foal, or filly" he shall be deemed guilty of grand larceny. Defendant was indicted for stealing "one \* \* \* horse, a gelding, about three years old." All the witnesses for the state at the trial described the animal simply as a "horse" or "colt." *Held*, that the variance was fatal, and a new trial would be granted.

Appeal from district court, Choteau county; C. H. BENTON, Judge.

The defendant was indicted for grand larceny. The subject of the larceny is described in the indictment as "one iron gray horse, a gelding, about three years old," etc. The proof on the trial on the part of the prosecution described the animal alleged to have been stolen as a "horse" or



"colt." Each of these words were used by the witnesses. The defendant moved to be dismissed on the ground of the variance between the allegation and the proof, claiming that the indictment describes a gelding, and the proof of the larceny of a horse or colt is insufficient. The record states that all the proceedings are therein contained. No witness for the state testified that the animal was a gelding. On such evidence the defendant moved to be discharged. The county attorney did not offer to aid his proof by showing that the animal was a gelding. The motion to discharge being denied, the defendant was convicted. The statute under which the indictment was drawn provides: "If any person or persons shall steal, or with intent to steal, shall take, carry, drive, lead, or entice away any mare, gelding, stallion, colt, foal, or filly, mule or ass, ox, cow, bull, stag, heifer, steer, or calf, being the property of another, of whatever value, he or they shall be deemed guilty of grand larceny," etc. Section 78, Crim. Laws. The first question raised on the appeal is whether the variance was fatal.

*S. H. McIntire*, for appellant. *Henri J. Haskell*, for the State.

DE WITT, J., (after stating the facts as above.) A horse is "a neighing quadruped used in war, draught, and carriage." Johns. Dict. Webster uses the term in two senses: (1) Generically, as the animal simply, including all variations of age, sex, and condition; (2) especially, as indicating the male in distinction to the female. We believe that the term has a third sense, a popular sense, as denoting a castrated male in distinction to a stallion. The indictment is carelessly drawn. It describes the animal as "an iron gray horse, a gelding." A "gelding" is a fully castrated horse, in distinction to a "stallion," who is possessed of all his parts, and a "ridgling," which is deprived of half of them. How the pleader used the word "horse" in the indictment we can determine only from the context. If he employed it in the first sense, generically, then the word "gelding" following, defined and specialized the general term, and indicated the variety of "horse" intended, to-wit, a gelding, and the allegation amounts to a charge of stealing a gelding. If the word "horse" were used in the second sense, it is equivalent to alleging that the animal was a male, and then by adding the word "gelding," describing the kind of a male, that is, a "gelding," in distinction to a "stallion." Again, if the word "horse" be employed in its most restricted sense, as meaning a castrated animal of the species, we have simply the description of a gelding. We conclude that the indictment describes the larceny of a gelding. Is the charge proved by evidence of the stealing of a "colt" or "horse?"

The statute is a special one making the taking of certain animals grand larceny, without regard to the amount of the value. Statutes similar to this one use the descriptive terms "horse, mare, gelding, colt, filly, ass," etc. Our statute omits the word "horse." In the statutes employing this word, as a description of one

of the subjects of larceny, "horse" means the unaltered male animal. See cases *infra*. Our statute supplies that term so used by the word "stallion." In the states having the statutes referred to, it is held that an indictment for stealing a horse is not supported by evidence of larceny of a gelding, and *vice versa*. *Hooker v. State*, 4 Ohio, 348; *State v. Buckles*, 26 Kan. 237; *Turley v. State*, 3 Humph. 323; *Jordt v. State*, 31 Tex. 571; *Banks v. State*, 28 Tex. 644; *Briscoe v. State*, 4 Tex. App. 219; and Texas cases cited in *Bish. St. Crimes*, § 248, note 5; *Whart. Crim. Ev.* § 124; *Whart. Prec. Ind.* 415, note 2; *State v. Royster*, 65 N. C. 539; *State v. Plunket*, 2 Stew. (Ala.) 569. Applying the doctrines of those cases to the descriptive words used in our statute, an indictment for the larceny of a stallion would fail on proof of the taking of a gelding, and *vice versa*. In the case at bar the larceny alleged is of a "gelding." The proof is of a "horse,"—something not included in the special statute describing the subjects of larceny within the purview of its special provisions. When the witnesses testified about a horse, they meant to describe something, but what was in their minds their words do not disclose. If they used the word in the first sense indicated above they meant "a neighing quadruped used in war, draught, and carriage," including not only males and females, but males possessed of all the gifts of nature, or deprived of such endowments by the art of man, and stallions, geldings, ridglings, and mares, old and young, grown and colts. If the witnesses confined the term to the second definition of "horse," which we have shown obtains, they testified about a "stallion." If they employed the word in the third and most restricted sense, they may have intended a "gelding." But there is nothing to indicate that such was the signification. Thus, in the indictment, we have the description of one definite well-known object; in the proof, a term which may be applied to a half-dozen different objects. The matter is not aided if we take the testimony that the animal was simply a "colt." "Colt" is separately named in the statute, and proof of stealing a "colt" does not support an indictment for taking a "gelding," under this specially descriptive statute. Not only is the weight of authority with these distinctions, but we are of opinion that they are well taken, and not technical. A defendant is not proven guilty if it be shown that he took not the article charged in the indictment, but may have taken one of several others, when the statute specially distinguishes between the objects. The judgment is reversed, and the cause remanded for a new trial.

BLAKE, C. J., and HARWOOD, J., concur.

PEOPLE v. ADAMS. (No. 26,646.)

(Supreme Court of California. Aug. 4, 1890.)

HOMICIDE—SELF-DEFENSE—ARREST—EVIDENCE—INSTRUCTIONS.

1. On the trial of a constable for murder it appeared that deceased had had a quarrel in a saloon; that he went out, returned with a pistol, fired at the other party, without injuring him,

and was immediately disarmed. Defendant testified that he heard the noise, saw deceased go out, and return with the pistol, heard the shot, hurried to the saloon to arrest him, found all the parties talking, and when deceased soon after started out he followed, took hold of him, and told him he was under arrest; that deceased was defiant, threatening, and resisting arrest, and when defendant fired deceased had his hand where he could have drawn his pistol, and defendant thought that if he did not disable deceased the latter would kill him. *Held* that, there being a conflict of evidence as to defendant's knowing that deceased was disarmed, an instruction that "any person making an arrest may take from the person arrested all offensive weapons which he may have about his person" was proper.

2. When a killing is claimed to have been necessary for self-defense, it is proper to instruct that defendant "must have acted under the influence of such fears alone."

3. There was no error in refusing to instruct that it was immaterial whether deceased was armed or not, if defendant believed he was armed; as the circumstances must have been such as to reasonably warrant the belief.

4. Evidence of deceased's quarrel and fight with the other party was properly admitted, as bearing on the question of whether deceased had committed a felony, and whether defendant had a right to arrest him without a warrant, and to kill him if necessary to effect the arrest.

5. It was error to admit evidence that deceased and the other party had made up their quarrel before the arrest was attempted, as it was on this account none the less defendant's duty to make the arrest.

Department 2. Appeal from superior court, San Bernardino county; JOHN L. CAMPBELL, Judge.

*Hargrave & Bledsoe and Harris & Gregg*, for appellant. *Geo. A. Johnson*, Atty. Gen., for the People.

BEATTY, C. J. The defendant was charged with murder, and convicted of manslaughter. In support of his appeal he assigns error upon various rulings of the court in the admission of testimony and in the giving and refusing of instructions to the jury. To a proper understanding of these exceptions a brief statement of the case is necessary:

The defendant, at the date of the homicide, was a constable. The deceased, John Collins, and one Clarke had been engaged in a quarrel and fight in which Collins was worsted. Collins left the saloon where the fight occurred, went to his home, armed himself with a pistol, and returning to the saloon approached Clarke from behind, and fired one shot at him. The shot failed to take effect, owing to the interference of one Boyle, who struck the pistol aside at the moment of firing, and who immediately disarmed Collins. The defendant testified that his attention was attracted by the noise in the saloon; that he saw Collins go to his house and return to the saloon with his pistol, and that he heard the shot; that he took his own pistol and hurried to the saloon under the impression that Collins had shot some one, and for the purpose of arresting him. In the saloon he found Clarke, Collins, and others, who, after some talk, took a drink together, whereupon Collins started to leave. Defendant followed him outside, took hold of him, and told him he was his prisoner. There is a conflict of evidence as to what ensued. According

to the testimony of the prosecution the defendant shot Collins without excuse or provocation. But the defendant introduced evidence which, if true, showed that Collins was a quarrelsome and dangerous man when drinking; that he had been drinking on this occasion; that on previous occasions he (defendant) had been compelled to threaten Collins with arrest for disturbing the peace; that Collins had declared he never should arrest him alive, and had made other threats which had been communicated to him. And the defendant testified that he did not know that Collins had been disarmed, but believed that he still had the pistol with which he had just assaulted Clarke, and would use it if he had the opportunity. To quote his own words: "His right hand, when I shot, was in a position where he could have drawn his pistol. I thought at the time of firing that if I did not kill Collins or disable him he would kill me. I had no grudge against him." According to the testimony for the defense, the manner, bearing, and words of Collins, at the time defendant attempted to arrest him, were defiant and threatening, and he was resisting the attempt to arrest him. According to the testimony for the prosecution defendant did not distinctly inform Collins of his intention to arrest him, and Collins neither resisted arrest nor threatened violence to defendant. This being the case it is claimed that the court erred in instructing the jury that "any person making an arrest may take from the person arrested all offensive weapons which he may have about his person." The argument in support of this assignment of error is that it must have produced the impression upon the minds of the jury that the failure of defendant to search Collins for arms was a neglect of duty, and that an inference of guilt must be drawn therefrom. We do not think that it could have been so understood, and we can see that the right of defendant to search and disarm the deceased when he first encountered him in the saloon had its bearing upon a very material question in the case. There was a conflict of evidence as to whether defendant knew that Collins had been disarmed, and the jury was entitled to consider the failure to search him when defendant had the right and opportunity to do so as bearing upon the probability of his statement that he had not been informed that Collins' pistol had been taken away.

It is next claimed that the court erred in giving the instruction numbered 12. In this instruction the jury are told that if certain things are proved beyond a reasonable doubt they should find the defendant guilty. Among other facts enumerated in the instruction is this: That the defendant, at the time of the homicide, was constable, and in the exercise of his official duty. It is contended that this fact was matter of defense, and that the court virtually instructed the jury that it must be proved beyond a reasonable doubt. But certainly the instruction does not say so, nor does it necessarily imply it. It tells the jury that if this and

other facts are proved beyond a reasonable doubt they should find the defendant guilty; but it neither says, nor of necessity implies, that he must be found guilty if this fact is not proved by that degree of evidence. Nor do we think that the jury could have understood that, as a matter of defense, it must be so proved.

There was no error in the instructions of the court laying down the law of self-defense. The whole theory of the defense was that the killing was necessary, not for the purpose of making the arrest, but to prevent Collins from killing the defendant. The defendant himself confines his justification to that ground. And, even if he had also made a serious claim that the killing was necessary in order to effect the arrest, it would have been proper and necessary to give the law of self-defense complete, and in doing so to use the expression complained of, viz., that the defendant "must have acted under the influence of such fears alone," confining its application, of course, to this ground of defense. And we think the collocation of the instructions in this case was such, especially in view of the defendant's testimony, that the jury could not have failed to apply the expression complained of exclusively to the plea of self-defense. It is true the court refused to give one instruction asked by defendant, to the effect that a homicide is justifiable when necessarily committed in a lawful attempt to arrest a person who has committed a felony, and this might have prejudiced the defendant but for the fact that another instruction, also drawn by his counsel, in slightly different terms, but in substance the same, had already been given. The instruction so given was in the following terms, and we think covers the whole ground: "The court charges the jury that an officer in making an arrest has the right to use all the force which from the surrounding circumstances seems to him, as a reasonable man, necessary; that he has a right to arm himself and to go armed, and, where the offense charged is a felony, he has a right, if apparently necessary to a reasonable man, to kill the person whom he is seeking to arrest; and he has a right, and it is his duty, to arrest a man who has committed a felony, with or without a warrant."

The court did not err in refusing to instruct the jury that it was immaterial whether Collins was armed or not if defendant himself believed he was armed. The defendant's belief that Collins was armed would not justify him in acting upon such assumption unless the circumstances were such as reasonably to warrant the belief. With this necessary qualification, the instruction was substantially included in the charge of the court. Nor did the court err in admitting evidence as to the quarrel and fight between Clarke and Collins. This had a necessary bearing upon the question whether Collins had committed a felony, and whether defendant had a right to arrest him without a warrant, and to kill him if necessary to effect his arrest. The effect of the testimony could only have been favorable to the defendant.

The testimony of the justice of the peace that he had issued no warrant for the arrest of Collins was perhaps immaterial, but its admission cannot have been at all prejudicial to the defendant. But the testimony which was admitted, over the objection of defendant, for the purpose of showing that Collins and Clarke had made up their quarrel and become reconciled before defendant attempted to make the arrest, was immaterial, and, since the only use that could be made of it was to argue that no arrest was necessary, it must have been prejudicial. If Collins had committed a felony it was the duty of the defendant to arrest him, no matter how complete the reconciliation between him and the man he had assaulted. It was a vital point to the defense to show that the defendant was doing his duty at the time of the homicide, and any incompetent evidence submitted to the jury for the purpose of showing that he was transcending his duty or exceeding his rights as an officer was prejudicial error. In this instance the error might perhaps have been cured if the court had given the instruction asked by the defendant to the effect that it is the duty of an officer to arrest a person who has committed a felony, even though the parties concerned may have attempted to settle it. But this instruction was refused.

It was also error to refuse the instruction that if the testimony of Boyle and Clarke was true Collins had committed a felony. According to their testimony, he had undoubtedly committed felony, and if so it was the undoubted duty of defendant to arrest him and to use sufficient force for that purpose. This, as we have said, was a vital point in the defense, and the defendant was entitled to have the law affecting it given to the jury. For the error of the court in refusing these instructions, the judgment must be reversed, and the cause remanded for a new trial. It is accordingly so ordered.

We concur: MCFARLAND, J.; SHARPSTEIN, J.

85 Cal. 39

PEOPLE v. LEVINE. (No. 20,572.)

(Supreme Court of California. July 21, 1890.)

CRIMINAL LAW—ALIBI—EXPERIMENTS IN COURT.

1. On a trial for arson, where the judge charged that it was for the jury to decide as to the truth of an *alibi*, interposed as a defense, "giving the defendant the benefit of every reasonable doubt," and has further fully charged on the burden of proof, and the subject of reasonable doubt, a verdict of guilty will not be set aside because he also charged that the proof offered to sustain the *alibi* should be subjected to a rigid scrutiny. PATERSON and WORKS, JJ., dissenting.

2. The trial judge is not bound to stop proceedings in order to try an experiment in open court as to the length of time it would take a candle to burn down to the point of some discovered after the fire on the premises attempted to be burnt; but, in his discretion, he may admit proof of such an experiment.

In bank. Appeal from superior court, Los Angeles county; J. W. MCKINLEY, Judge.

On rehearing. For the facts, see opinion in department, 22 Pac. Rep. 969.

*Payton & Grant, (Max Loewenthal, of counsel.)* for appellant. *G. A. Johnson, Atty. Gen., and Frank P. Kelly, Dist. Atty.,* for the People.

Fox, J. In the petition for and in the argument upon rehearing, it is suggested that in department we fell into error in relation to the evidence in regard to the pieces of candle left at the saloon by the plumber. We stated that he left three half candles there, and that three pieces of candle were found at the time of the fire. Our attention is now called to the fact that, according to the testimony of the plumber himself, he left one whole candle, a half candle, and a piece of another half candle; and that, according to the other evidence, only two pieces of candle were found at the time of the fire, one burning, and the other extinguished. We accept the correction of an error into which we were led by a statement found in one of the briefs examined after we had read the evidence, but we are unable to perceive that the error was prejudicial to defendant. To our minds, the evidence as corrected rather strengthens than weakens the case of the prosecution. More candle remains unaccounted for than we at first supposed, and if the candle which was found burning half or three-quarters of an hour after the fire was discovered was whole when lighted, that fact will account for its having lasted so much longer than the other pieces, without resorting to any chemical considerations whatever. As requested, we have carefully re-examined the evidence, and after such examination we still fail to see how we can disturb the verdict on the ground of insufficiency of the evidence. Upon the decision in department, we were not free from doubt as to the correctness of instruction 10½, and we readily acquiesced in the prayer for a rehearing that the case might be further considered upon that point. That instruction reads as follows, —the portion of it which we place in italics being the portion to which exception is taken: "*One of the defenses in this case is called an 'alibi,'—that is, that the accused was elsewhere at the time the offense is alleged to have been committed. If this is true, it being impossible that the accused should be in two places at the same time, it is a fact inconsistent with the charge sought to be proved, and excludes its possibility. This is a defense often attempted by contrivance, subornation, and perjury. The proof, therefore, offered to sustain it is to be subjected to a rigid scrutiny; because, without attempting to control or rebut the evidence of facts sustaining the charge, it attempts to prove affirmatively another fact wholly inconsistent with it; and this defense is equally available, if satisfactorily established, to avoid the force of positive as of circumstantial evidence.*" In considering the strength of the evidence necessary to sustain this defense, it is obvious that all evidence tending to show that the accused was in another place at the time of the offense is in direct conflict with that which tends to prove that he was at the place where the crime was committed, and ac-

tually committed it. In this conflict of evidence whatever tends to support the one tends in some degree to rebut and overthrow the other, and it is for the jury to decide where the truth lies, giving the defendant the benefit of every reasonable doubt."

It is claimed that this charge is in direct conflict with, and overrules, the decision of this court in *People v. Bushton*, 80 Cal. 160, 22 Pac. Rep. 127, 549. We are unable to discover in the whole or any part of this charge any such conflict, or to see how it can work any such result. There is certainly nothing in the language adopted by the court below tending towards advising the jury that the defense of *alibi* must be made out by a preponderance of evidence, or to change the rule laid down in the *Bushton* Case that, "if upon the whole case they entertained a reasonable doubt from the evidence, as to his guilt, he should be acquitted." So far from this, the charge concludes with the express direction that "it is for the jury to decide where the truth lies, giving the defendant the benefit of every reasonable doubt." Stripped of their context the words which we have italicized in our quotation of the charge as a whole, though not new in such a place, would be objectionable. They have been both approved and condemned by able jurists at different times, and in different states. If they had been given in this case free from all their context, and the case was one where we could conceive it possible that the verdict turned upon the question of the truth or falsity of the evidence given in support of the defense of *alibi*, we should be inclined to hold that the instruction was erroneous to a degree that entitled the defendant to a reversal of the judgment; for the defense of *alibi* is, in our judgment, not one requiring that the evidence given in support of it should be scrutinized otherwise or differently from that given in support of any other issue in a cause. But the remaining portions of the charge are such that when given as a whole, as it was, it is hardly possible that an intelligent jury could have been misled by it. This is particularly so when we read, as we do, in charge No. 20: "The burden of proof is upon the prosecutor. All the presumptions of law, independent of evidence, are in favor of innocence, and every person is presumed to be innocent until he is proven guilty. If upon such proof there is a reasonable doubt remaining, the accused is entitled to the benefit of it by an acquittal." And in 21 and 22: "In the decision of a criminal case there must be more than a preponderance of evidence. It would not be sufficient to justify a conviction if the jury should be satisfied of the guilt of the defendant to such a moral certainty as would influence their minds in the important affairs of life. But the evidence must entirely satisfy the jury of the guilt of the defendant before they can convict. If the jury are not entirely satisfied, they should acquit." With such a context as these instructions afford, followed by 13 instructions carefully prepared by, and requested by, the defendant, which included all that he asked, it is hardly possible that the

words objected to in, and forming only a small part of, instruction 10½ could have misled the jury. This is the more particularly so since there is no conflict in, or contradiction of, the evidence offered by the defendant tending to prove an *alibi*. The prosecution made no attempt to impeach the truth of that evidence, but accepting it as true relied upon the proposition that the train was laid, and the candles lit, before he closed the saloon for the night. The question for the jury to determine was whether the evidence was sufficient to support this theory beyond a reasonable doubt. It is in view of this theory of the case that appellant insists that it was error to admit the evidence of what is termed the "candle experiment." We held in department that the admission of this evidence was entirely in the discretion of the court; that the court was not bound to suspend the trial to try the experiment over again in the presence of the jury, as the court would undoubtedly have received evidence of other experiments made for the same purpose, if any such had been offered.

The proof of the result of experiments was equally as open to the defendant as the prosecution, and if other experiments would have shown a different result from that shown by the experiment proved by the prosecution, the defendant had ample opportunity to show the fact. The books are full of authorities sustaining the court in admitting evidence of the result of experiments in chemistry, in toxicology, and particularly in the use of fire-arms, for purposes similar to that for which this evidence was admitted. It has been quite a common thing in cases of homicide to make experiments with fire-arms to determine the carrying distance, the penetrating force, and the distance to which fire will be carried by fire-arms of certain pattern and caliber, and to prove the results of such experiments at the trial, as tending to show the guilt or innocence of the accused. The experiment in this case was one of a similar character and for a similar purpose. Its result was not conclusive, but a mere circumstance to be considered in connection with the other evidence in the cause. It was both competent and admissible; its weight was for the jury to determine. We cannot agree with counsel that it was the "material and effective" evidence in the cause. The material and effective evidence on that branch of the case was the substantive fact of the candles themselves, and the condition in which they were found. They and the coal oil with their surroundings were tangible things, rendering it certain that the fire was incendiary, and the proof in relation to them, independent of any proof of the result of experiment, was "the material and effective" proof in the case. We are also reminded of the age and of the reputation of the defendant, and of the severity of his punishment. His age and reputation were matters addressed to, and undoubtedly considered by, the jury. Notwithstanding them the jury have found against him, and on evidence of such a character that we are not at liberty to disturb their verdict. In view of his age

and reputation, the severity of his punishment may excite our sympathies, but it cannot control our judgment. The penalty imposed by the court below was not in excess of that prescribed by law; and upon the assumption of his guilt, upon which alone any penalty could be imposed, no mild punishment would have been commensurate with the offense; for it was no light offense to attempt, at midnight, to burn a hotel, in which more than 100 people were sleeping. Judgment and order affirmed.

We concur: BEATTY, C. J.; SHARPESTEIN, J.; MCFARLAND, J.; THORNTON, J.

We dissent on the ground that the court erred in giving instruction 10½. PATERSON, J.; WORKE, J.

85 Cal. 119

*In re BELL'S ESTATE.* (No. 18,113.)

(*Supreme Court of California.* July 30, 1890.)

LEASE—INSOLVENT—RENT.

The lessee under a lease for a term of months, providing for the payment of certain rent on a certain day in each month, and that in case of default for five days the lessor might enter and terminate the lease, left the premises, and repudiated the lease, being half a month in default. He soon afterwards became insolvent. The lessor immediately entered and tried, without success, to relet the premises, but did not consent to the abandonment, or in any way release the lessee from the lease. *Held*, that the lessor's claim was not for damages, the obligation to pay which was mature before the insolvency, but for rent due, or to become due, within Insolvent Act Cal. 1880, § 42, providing that where the debtor is liable to pay rent, or other debt falling due at fixed and stated periods, the creditor may prove for a proportionate part thereof, up to the time of the insolvency, as if the same became due from day to day, and not at such fixed and stated periods.

Commissioners' decision. In bank. Appeal from superior court, San Diego county; F. PARKER, Judge.

*J. E. Deakin*, for appellant. *Hendricks & Younkis*, for respondent.

VANCLIEF, C. This is an appeal from an order rejecting in part the claim of T. J. E. Scoones against the estate of the insolvent under the following circumstances: Scoones executed to Bell a lease of a certain room in San Diego for the term of 27 months, from January 15, 1888, at the monthly rent of \$225, payable monthly, in advance, on the 15th day of each month during the term, the lessee covenanting to pay the rent and to quit and surrender possession at the expiration of the term, or any sooner determination of the lease, and also that in case of default in payment of rent for five days the lessor, at his option, may re-enter and terminate the lease. Bell entered into possession under the lease and paid the rent until July 15, 1888; but on July 29, 1888, he left and vacated the premises, declaring his intention to abandon the premises and to repudiate the lease, and to pay no further rent. Upon the vacation of the premises by Bell the lessor (Scoones) re-entered, and endeavored to relet the premises without delay, for the residue of the term, for the benefit of Bell, "but in so doing did not in

any way release or discharge the said Bell or his estate from any liability under the covenants of said lease." Scoones did not relet the premises, however, but states in his affidavit that they are now of no greater rental value than \$75 per month, and that he will not be able to let the same during the remainder of the term for more than \$75 per month, "whereby he is damaged in the sum of \$3,675." His claims, which he asks the court to allow against the estate of the insolvent, are \$112.50 for rent due under the lease from July 15th, until August 1, 1888, and \$3,675 for "damages sustained by him by reason of the said insolvent's repudiation of the said lease and breach of covenants of the same."

The court allowed the claims of \$112.50 for rent, but rejected the claim of \$3,675 for damages. In this I think the court did right. Section 37 of the insolvent act of 1880, provides: "All debts due and payable from the debtor at the time of the adjudication of insolvency, and all debts then existing, but not payable until a future time, a rebate of interest being made when no interest is payable by the terms of the contract, may be proved against the estate of the debtor." Section 42 of the same act is as follows: "Where the debtor is liable to pay rent, or other debt falling due at fixed and stated periods, the creditor may prove for a proportionate part thereof up to the time of the insolvency, as if the same became due from day to day, and not at such fixed and stated periods." These are the only sections of the act having any direct bearing on the question under consideration. It is admitted by counsel for appellant that if Bell had not abandoned the lease and vacated the premises before the adjudication of his insolvency Scoones could not have been allowed to prove, as a debt against the insolvent's estate, anything more than the proportionate part of the rent up to the adjudication of insolvency, as provided in section 42 of the insolvent act, which amounted to \$112.50, and which was allowed by the court; but counsel insists that the lessor's claim of \$3,675 is not for rent due or to become due, under the terms of the lease, but that it is for unliquidated damages for a breach of covenants of the lease before the adjudication of insolvency, the obligation to pay which was mature before the adjudication of insolvency; and therefore that the claim was provable as a "debt due" in the sense of section 37 of the insolvent act. This attempted distinction cannot be maintained. The lessee was not discharged from the obligation of his covenant to pay rent by an abandonment of the lease without lawful cause or consent of the lessor; and it appears that there was no justifiable cause for the abandonment, and that the lessor did not consent thereto, or "in any way release or discharge the said Bell or his estate from any liability under the covenant of said lease." Therefore the lease still subsisted in full force, though no rent had been paid for the month commencing July 15, 1888. For this default in payment of rent the lessor was only entitled to the ordinary remedies on the

covenants of the lease. The abandonment of the premises and declaration of intention not to pay any more rent by the lessee without the consent, express or implied, of the lessor, did not change the relation of lessor and lessee, nor add anything to the ordinary remedies for breach of the covenants of the lease; although, in such case, the lessor might have relet the premises for the benefit of the original tenant. See cases cited to sections 128, 176, Gear, Land. & Ten.

The record discloses nothing to relieve this case from the full operation and effect of section 42 of the insolvent act, with which the court strictly complied by allowing the claim for rent up to the time of the insolvency. I think the order should be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order is affirmed.

85 Cal. 98

*In re* ESCHRICH'S ESTATE. (No. 13,485.)

(Supreme Court of California. July 30, 1890.)

GUARDIAN AND WARD—ACCOUNTING—ALLOWANCE FOR BOARD.

A guardian collected the money of his wards, used it, and did not attempt to account for it until compelled to do so, 10 years later. When the guardian was appointed the wards were living with their elder brother, and continued to live with him thereafter. As soon as the guardian was cited to account, he, without any demand being made, proposed to pay the brother for the wards' board, and gave him his note for a certain amount therefor. There was no evidence that there was any agreement for any board to be paid, or that the elder brother claimed anything, or that their keeping was worth anything above what their work was worth to him. *Held*, that the court properly disallowed the claim for board, and charged the guardian with compound interest on the money received by him.

In bank. Appeal from superior court, Los Angeles county; W. H. CLARK, Judge. Wells, Guthrie & Lee, for appellant. Dupuy & Bentley and Antonio Orfila, for respondents.

WORKS, J. William Moore was appointed the guardian of Albert C. and Charles Eschrich, and as such guardian received from the sale of certain lands belonging to them the sum of \$1,000, one-half of which belonged to each. He allowed several years to pass without taking any steps in the matter of his trust, and used this money for his own purposes. On the petition of his wards he was cited to appear and render an accounting. He filed his account, in which he charged himself with \$1,000, and gave himself credit for \$312 alleged to have been paid for two years' board for Charles, and \$468 alleged to have been paid or three years' board for Albert. He also gave himself credit for \$75 for two cows furnished to Charles. These items were disputed, and the court disallowed the claims for board, and allowed only \$50 for the cows. The court also charged the guardian with 7 per cent. interest on the money received by him, with annual rests. The guardian appeals from and complains of these rulings.

The evidence shows that at the time of Moore's appointment as guardian his wards were living with their elder brother, Fred Eschrich, and that they continued to live with him afterwards. The evidence of Moore tends slightly to show that he stated to Eschrich that the keeping of the boys would be paid for, but his recollection of any such promise seems to be very uncertain. And, whether he agreed to pay for their keeping or not, he did not do so before this proceeding was instituted, and, according to Moore's own testimony, Eschrich made no demand upon him for any such payment, nor did he claim that he was entitled to compensation for their keeping. Moore was appointed guardian February 14, 1877, and during the same year received the amount of money above mentioned. This proceeding was commenced December 1, 1888, more than 10 years later. As soon as the petition was filed Moore, without any demand having been made upon him by Eschrich, or any claim being made by him against his wards, hunted Eschrich up and proposed to settle with him for his brothers' board, and upon settlement gave Eschrich his note for \$750. There was no evidence that any fixed amount was agreed upon to be paid to Eschrich in the beginning, nor is there any evidence as to what their keeping was worth, or that it was worth anything over and above what their work was worth to him. Under these circumstances the court below was clearly right in disallowing these claims.

As to the amount allowed for the cows, the evidence was conflicting as to their value, and we cannot disturb the finding on that issue. The evidence shows that Moore had converted the money of his wards to his own use, and had used it for a number of years without accounting for it in any way. Under such circumstances he was properly charged with the interest compounded annually. *Estate of Stott*, 52 Cal. 403; *Estate of Clark*, 53 Cal. 355; *Merrifield v. Longmire*, 66 Cal. 180, 4 Pac. Rep. 1176. The cases cited relate to executors and administrators, but the rule must be the same as to guardians, under the circumstances of this case.

It is further contended by the appellant that the court below erred in excluding certain evidence offered. Fred Eschrich was called as a witness for the appellant, and testified that he had presented his account to the guardian "a winter or so ago." The court remarked that the claim had been "outlawed." The counsel for appellant then asked: "Would the court hear evidence with regard to his keeping those boys?" And the court said that he did not care to hear any evidence on that point. There was no formal offer to prove any fact, or any question asked and not allowed upon which an exception could have been reserved. There did not seem to be any dispute about the witness having kept the boys, and no further evidence was needed on the point. We cannot say, therefore, that there was any error committed in this ruling for which the judgment should be reversed. The conclusion reached by the court below seems to us to have been just and right. The guardian

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had collected the moneys of his wards, used it, and did not attempt to account for it until forced to do so by the court, 10 years later. Such having been his conduct, he is not entitled to anything more than the strict letter of the law allows him. Judgment affirmed.

We concur: Fox, J.; SHARPSTEIN, J.; MCFARLAND, J.; THORNTON, J.

3 Cal. Unrep. 282

BUCKLEY v. ALTHOFF. (No. 13,824.)

(*Supreme Court of California*. July 28, 1890.)

APPEAL—PRACTICE—STATEMENT ON APPEAL.

A motion on the minutes for a new trial having been overruled the only statement that could then be pending is a statement on appeal, and the time for that having expired, and no transcript having been filed in the time limited, the appeal will be dismissed.

In bank. Appeal from superior court, city and county of San Francisco.

*Hassett & Tevlin*, for appellant. *Gunnison & Booth*, (*Chas. J. Heggerty*, of counsel,) for respondent.

PER CURIAM. When the notice to dismiss the appeal in this case was given, no transcript had been filed, and the time within which the party was required to file the same had fully expired. It had not been extended by any stipulation or order of court, nor was there pending for settlement any statement on appeal or bill of exceptions, and the time for presenting such statement or bill of exceptions had passed. Appellant attempts to show that there was pending for settlement a statement on motion for a new trial, but that motion had already been heard and determined on the minutes of the court, and the only statement which could then be pending, if in time, was a statement on appeal. But no statement, either on motion for new trial or on appeal was presented until after the notice of this motion, and the time for the presentation, even of statement on appeal, had already expired. The appeal must, therefore, be dismissed, and it is so ordered.

85 Cal. 86

PEOPLE v. AYHENS. (No. 20,657.)

(*Supreme Court of California*. July 30, 1890.)

CRIMINAL LAW—LIMITATIONS—DEMURRER.

1. Pen. Code Cal. § 801, providing that an information for a misdemeanor must be filed within a year, bars prosecution of an accused taken before a magistrate who, at his request, continued the hearing from time to time until the year expired, when he was bound over, and an information filed.

2. Under Pen. Code Cal. § 1004, providing that the accused may demur when the information discloses a legal bar to the prosecution, a demurrer lies if it charges the commission of a misdemeanor more than a year before its filing.

Commissioners' decision. Department 2. Appeal from superior court, San Luis Obispo county; V. A. GREGG, Judge.

J. M. Wilcoxon, for appellant. Wm. Shipsey, Graves, Turner & Graves, and Geo. A. Johnson, Atty. Gen., for respondent.

BELCHER, C. C. The defendant was charged with the crime of obtaining prop-



erty by false pretenses. The information against him was filed in the superior court on the 17th day of October, 1889, and it alleged that the crime was committed on the 26th day of June, 1888. The defendant demurred to the information upon the ground, among others, that the prosecution was barred by the provisions of section 801 of the Penal Code. The court sustained the demurrer, and dismissed the case, and the people appeal.

1. The Penal Code made the offense charged, at the time of its alleged commission, a misdemeanor, (sections 17, 533,) and it provided that an information for any misdemeanor must be filed within one year after its commission, (section 801.) It is, however, argued for appellant that the "information" referred to in the above section is the complaint made before a committing magistrate for the issuance of a warrant of arrest, and that as the complaint in this case was filed within a year the prosecution was not barred. The constitution provides as follows: "Offenses heretofore required to be prosecuted by indictment shall be prosecuted by information, after examination and commitment by a magistrate, or by indictment, with or without such examination and commitment as may be prescribed by law." Article 1, § 8. And the Penal Code contains the following provisions: "The complaint is the allegation in writing made to a court or magistrate that a person has been guilty of some designated offense." Section 806. "When a defendant has been examined and convicted, as provided in section 872 of this Code, it shall be the duty of the district attorney, within thirty days thereafter, to file in the superior court of the county in which the offense is triable an information charging the defendant with such offense." Section 809. "All public offenses triable in the superior courts must be prosecuted by indictment or information," etc. Section 888. "The first pleading on the part of the people is the indictment or information." Section 949. From these provisions it very clearly appears, we think, that the information spoken of in section 801 is the paper required to be filed in the superior court, and not the one filed before the magistrate.

2. It appears from the bill of exceptions that the complaint was filed on February 11, 1889; that a warrant was issued, and the defendant was arrested and brought before the magistrate on the 25th of the same month, and that thereafter the examination was proceeded with, and continued from time to time, at the request of defendant, until September 30, 1889, when it was concluded, and the defendant held to answer. It is claimed that as the continuances were granted at the request of the defendant he thereby waived the filing of the information within the time limited by the statute, and therefore cannot now raise the objection. But the statute is imperative that the information must be filed within a year after the commission of the offense, unless the defendant has been absent from the state. Section 802. As well might it be claimed that the bar of the statute could not be invoked if

the defendant had persuaded the district attorney to delay filing the information until after the year had expired, or had concealed himself within the state, and thus prevented his arrest and prosecution within the year.

3. It is further contended that the question could not be raised on demurrer. But the Code provides that "the defendant may demur to the indictment or information when it appears upon the face thereof \* \* \* (5) that it contains any matter which, if true, would constitute a legal justification or excuse of the offense charged, or other legal bar to the prosecution." Section 1004. We see no error in the rulings of the court, and therefore advise that the order and judgment be affirmed.

We concur: FOOTE, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order and judgment are affirmed.

(85 Cal. 322)

MCLAUGHLIN v. CLAUSEN. (No. 13,298.)

(Supreme Court of California. Aug. 4, 1890.)

ACTION ON NOTE—ESCROW.

In an action on a note, an answer alleging that the note was executed in consideration of the extension of a street railroad by the payee, and deposited with a bank, with the stipulation that it was not to be delivered until the condition was fulfilled, but that the road has not been so extended, is not demurrable. *PATERSON, J.*, dissenting.

In bank. Appeal from superior court, Los Angeles county; *WALTER VAN DYKE*, Judge.

*Gage & Roberts*, for appellant. *Dooner & Burnett*, for respondent.

*WORKS, J.* This is an action upon a promissory note for \$400, dated December 27, 1887, and payable four months after date with interest from maturity. The answer admits the making of the note, and that plaintiff is the owner thereof, and that no part of it has been paid, and then, by way of avoidance, alleges that on the day of its date "the plaintiff and defendant made and entered into the following contract." A copy of the contract is then set out, and in it 20 persons, the defendant being one of them, are named as parties of the first part, and the plaintiff is named as party of the second part. The substance of the contract is that the parties of the first part, in consideration of the advantages to be derived by them from the extension and operation of a certain steam-dummy railroad, from a point named to another point named, agree to pay to the party of the second part the sum of money subscribed by them, set opposite their names. Each of the sums is to be evidenced by two promissory notes of the subscriber, one payable two months after the date thereof, and when the grading is done and the iron is on the ground, and the other payable four months after its date, and on completion of the road. The road is to be extended from its present terminus to the other point named "within four months, weather permit-

ting." The notes, when executed, are to be deposited with George H. Bonebrake, at the Los Angeles National Bank, to be held in trust until the conditions specified in the contract shall be performed by McLaughlin, and the certificate of the constructing engineer of the road that the conditions have been performed shall be served upon the said trustee. Upon the delivery to the trustee of the engineer's certificate that the grading is done and the rails are on the ground the two-months notes are to be given to McLaughlin, and upon a like certificate that the road is completed and in running order the four-months notes are to be given to him. The contract is signed by three of the parties named therein, as parties of the first part, and by McLaughlin, but not by the defendant. After setting out the contract *in hæc verba*, the answer proceeds to allege that the note in suit "was made and given by this defendant to the plaintiff, in pursuance of, and on the conditions set forth and expressed in, said contract, and not otherwise, and for no other or different considerations in said contract than those by the plaintiff covenanted to be by him carried out on his part." It is then further alleged that the plaintiff did not carry out the contract nor comply with the conditions thereof in this: that he did not have the railroad mentioned therein extended to the point designated within four months after the signing of the contract and note, nor until the 1st day of August, 1888, and that he was not prevented by stress of weather, or otherwise unavoidably prevented from so doing; that, as defendant is informed and believes, the constructing engineer of the road did not certify to the trustee named in the contract that the grading provided for in the contract, and to be performed by the plaintiff, had been done, and the rails placed on the ground, or that the road or any part thereof had been completed or was in running order; that the said note, in contravention of the terms of the contract, was delivered by the trustee of the plaintiff before the road or any part thereof was completed or in running order; that, if the plaintiff had completed the road and operated the same as in the contract provided, "the defendant would have been able to have sold his property, then and now held by him, and through which said railroad was planned and laid out, at a greatly enhanced price over what it was then worth without said railroad, and over what it is now worth with said railroad extended over, upon, and through said land; that this defendant could, during the month of December, 1887, and before signing said contract and note, have sold his said land at a greater price than he could at the time of the alleged completion of said road or at any time since;" and, "that the defendant has never received any adequate or any consideration from the plaintiff for the making or giving of the said promissory note." The prayer was that the plaintiff take nothing by his action. A general demurrer to the answer was interposed and sustained, and, the defendant declining to

amend, judgment was entered against him. From that judgment he appeals.

It is argued for appellant that the note and contract must be read together, as parts of one transaction, and that when so read it appears that the promise on the part of the defendant to pay his subscription, and the promise on the part of the plaintiff to complete the road within four months, were mutual and dependent promises; and that the averments of the answer are admitted by the demurrer to be true, and from them it appears—*First*, that the note was executed without any sufficient consideration therefor; and, *second*, that the consideration for its execution, if any, had failed, because the road was not completed within the time agreed upon. The demurrer to the defendant's answer should have been overruled. The contract set out in the answer provided in express and unequivocal terms, not only that the notes should not be paid until the completion of the road, as therein provided, but that they should be held by Bonebrake, trustee, and not delivered until such condition was complied with. Therefore, if the allegations of the answer be true, and the demurrer admits them, these notes never became binding upon the defendant. They were delivered in violation of the terms of his contract, and, as against him, never became fully executed. It does not present the mere question whether the stipulation that the road should be completed and running within a certain time was of the essence of the contract, and therefore the case of Railroad Co. v. Butler, 50 Cal. 574, is not directly in point. The completion of the road was by the terms of the contract made an absolute condition precedent, and until such completion, the note could not be delivered or take effect, nor could its payment be enforced when delivered. But, if the case above referred to can be construed as against the view here taken, we are satisfied that it should be overruled. Judgment reversed, with instructions to the court below to overrule the demurrer to the answer.

WE CONCUR: BEATTY, C. J.; FOX, J.; THORNTON, J.

PATERSON, J., (*dissenting*.) I think the judgment should be affirmed. The note imports a consideration, (Civil Code, §§ 1614, 1615,) and the contract shows that the consideration for which it was given was "the advantages to be derived from the extension and operation of said railroad." Time was not expressly declared to be of the essence of the contract, and I do not think it can be fairly said that it was intended to be so. The note itself is an absolute promise to pay, and there is nothing in the contract to indicate that payment was to be made only on condition of strict performance. The road was completed in about three months after the time named for its completion, "weather permitting." The cause of the delay is not shown, but certainly the delay was not long. I am unable to distinguish this case from the case in 50 Cal. 575. That was an action brought to recover a sum of money, subscribed by the

defendant therein, to aid in the building of a street railroad, under a contract which provided that the road should be completed in six months. It was nearly three months after the time stipulated in the contract before the road was completed. It was held on appeal that, where property holders contract with a railroad company to pay it certain sums of money, if within a certain time it constructs a railroad, the fact that the road is not built within the time named in the contract is not an excuse for the non-payment of the money, if the road is actually built, but the subscribers will recoup the damage they sustain by the failure to complete the work in time; that courts should not construe stipulations in a contract as conditions precedent unless the language thereof clearly shows them to be such, because such a construction prevents the court from dealing out justice to the parties according to the equities of the case. In the case before us we have an instance of the injustice of departing from the rule of construction applied in that case. The defendant herein believed that the extension of the road would be to his advantage, and he therefore made his subscription, and executed his note for the sum subscribed. The road has been built, and he has received the benefit thereof. The delay may have prevented him from securing all of the benefit which he would have received if the road had been built promptly on time. It may have been occasioned by fortuitous circumstances beyond the control of the plaintiff. The rights of the parties would be protected, and justice dealt out according to the equities of the case, by holding, as it was held in the case referred to, that, if the defendant "has sustained damages by the delay, he is entitled to recoup to that extent against the claim of the plaintiff."

85 Cal. 187

**WALKERLY v. BACON et al.** (No. 13,018.)  
(Supreme Court of California. July 31, 1890.)

**ADMINISTRATION—ALLOWANCE OF PART OF CLAIM—ESTOPPEL—TRUST.**

Decedent received an estate subject to a trust to pay plaintiff \$10,000. The executors allowed and the probate judge approved the claim for \$5,000 only. Plaintiff filed his claim for \$5,000, under Code Civil Proc. Cal. § 1497, providing that where a claim is allowed and approved it shall be filed within 30 days thereafter. Held that, though the claim allowed and filed had the force of a judgment, plaintiff, not having accepted the \$5,000 in full satisfaction of his claim, was not estopped from maintaining his bill to enforce the trust as to the other \$5,000.

PATERSON, J., dissenting.

In bank. Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

*R. B. Wallace and B. B. Newman, (Kellogg & King, of counsel,)* for appellant. *Mastic, Belcher & Mastic*, for respondents.

**PER CURIAM.** This is a bill in equity against the executors of the last will and testament of William Walkerly, deceased. Decedent was the sole devisee of Martin Walkerly, deceased, and as such received on distribution the entire estate left by

said Martin, amounting to about \$200,000. It is alleged and the court finds that he accepted and received this estate subject to a parol trust to pay out of said estate to the plaintiff in this cause the sum of \$10,000. William Walkerly died without having executed the trust by paying the said \$10,000 or any part thereof, and his estate passed to his executors, subject to the trust. In this state of the case the plaintiff presented a formal claim against the estate for said \$10,000 to the executors for allowance. They allowed it for \$5,000 only, when it was presented to the judge of the proper court, and by him approved for the same amount, and it now stands as an allowed claim for \$5,000 against the estate, having the force and effect of a judgment payable in due course of administration. This bill is filed to enforce the trust against the estate and the executors as to the remaining \$5,000. The court finds all the facts in favor of the plaintiff, and specially finds that the plaintiff did not intend to waive his claim to the balance of \$5,000 of his \$10,000 claim, by any of the acts alleged in the complaint and answer herein, and has never received any money whatever from the defendants, or the estate of William Walkerly. It also finds that the claim is not barred by the statute of limitations, and is not stale. It then finds "as conclusion of law from the foregoing facts, in connection with the admissions of the pleadings herein, that the acceptance by the plaintiff herein of the partial allowance of the claim presented to the defendants prevents his recovery in this action, and that defendants are entitled to judgment for costs herein." The case comes up on the judgment roll. Under the admissions of the pleadings and the facts found we see no good reason for this conclusion of law. The plaintiff might have filed his bill to declare and enforce the entire trust for the full sum of \$10,000, no part of the same having yet been paid, but the executors having acknowledged it, and, in conjunction with the judge of the court sitting in probate, given it the force and effect of a judgment payable in due course of administration of a perfectly solvent estate, to the extent of one-half of the amount, he seeks in this action only to have it declared and enforced as to the remaining half. Under the facts found he seems entitled to that relief. Until demand of the executors he could not have maintained his action. If upon making such demand they allow, or even pay over, a part of the trust fund, that fact will not estop him from claiming the balance, unless he accepts the same in full satisfaction of the demand, and the findings do not support any such theory. The demand having been allowed in part it was the duty of the claimant to file it in the court within 30 days, to be paid in due course of administration. Code Civil Proc. § 1497. But we know of no statute which estops even a single creditor from bringing his action for that which was disallowed him simply because he has performed a duty required of him by law, in filing with the records of the estate the allowance which was made in his favor. If he would not be thus estopped in an action at law, why

should he be upon a claim which, if resisted, can be enforced only in equity? "Equity is not bound to the strict legal rights of the parties, but will take into consideration all the circumstances, in order to arrive at the justice of the case." *Johnston v. Savings Union*, 75 Cal. 134, 16 Pac. Rep. 753. In this case the executors might, with propriety, have disallowed the entire claim on the ground that it was one to be established in equity, if at all. If they had done so the action would not have been at law, as in the case of a simple creditor, but, as now, in equity to enforce the trust for the full amount. They having, however, allowed a part of the claim it is sought to enforce all that it remains necessary to enforce to protect the rights of the plaintiff in the only place where it could be done—a court of equity. We think he has the same right to relief as to this part that he would have had as to the whole, if his claim had been rejected *in toto*, and in such case there can be no question that under these findings he would have been entitled to judgment and decree in his favor. Judgment reversed, and cause remanded with instructions to enter judgment on the findings in favor of the plaintiff as prayed.

PATERSON, J. I dissent. An entire demand cannot be thus split up into several causes of action. The claim allowed and filed for \$5,000 has the force of a judgment, (*Estate of Glenn*, 74 Cal. 567, 16 Pac. Rep. 396,) and is a bar to this action for the balance, (*Zirker v. Hughes*, 77 Cal. 235, 19 Pac. Rep. 423; section 1543, Code Civil Proc.)

85 Cal. 304

STORCH v. MCCAIN *et al.* (No. 13,501.)

(*Supreme Court of California*. August 4, 1890.)

AGENCY—POWER TO SATISFY MORTGAGE — ADMISSION OF EVIDENCE.

1. In an action to foreclose a mortgage it appeared that the note was indorsed in blank by plaintiff, and sent to a bank for collection, with instruction to turn it over to one B. in case it was not paid promptly; that the bank gave the note to B., and the latter agreed to and did take a conveyance of land from defendant to plaintiff, and in consideration thereof surrendered the note to defendant, and satisfied the mortgage of record, as plaintiff's attorney in fact; that, though B. had a power of attorney from plaintiff, it did not authorize him to satisfy the mortgage. Defendant testified that, at the time the mortgage was given, plaintiff told him that the money for which it was given belonged to B.; and that plaintiff wrote him that he had sent the note to the bank for collection, that B. was there, and anything defendant did with B. plaintiff would stand by; that he stood by anything B. did for him. *Held*, that the evidence justified a finding that B. had authority to satisfy the mortgage as he did.

2. The admission of defendant's testimony over plaintiff's objection of "irrelevant and immaterial" that, at the time B. took the land in payment, real estate at that point was very active, was material error. *McFarland and Thornton, JJs.*, dissenting.

In bank. Appeal from superior court, Los Angeles county; *WALTER VAN DYKE*, Judge.

*Sargent & Harpham and John F. Ellison*, for appellant. *Robert Hardie*, for respondents.

**SHARPSTEIN, J.** Action to foreclose a mortgage, given to secure the payment of a promissory note of \$8,000. The central question in the case is whether the note had been paid, and the mortgage discharged, before the commencement of this action. The court so found, and that finding is attacked by appellant on the ground of the insufficiency of the evidence to justify it. The evidence shows that one John Belz had possession of the note and mortgage by authority of plaintiff, who testifies as follows: "Shortly before maturity I sent the note to the First National Bank of Los Angeles, Cal., for collection. I stated to them if it was not paid promptly to turn it over to John Belz, who would see to the collection of it." The note was indorsed by plaintiff generally or in blank, and was turned over by the bank to Belz. On December 22, 1889, Belz and defendant McCain negotiated for the exchange of said note and mortgage for an absolute conveyance to plaintiff by defendant McCain of an undivided one-fourth part of the mortgaged premises and a note for \$1,485.35 secured by a mortgage on another fourth of said premises. Belz, in consideration of said absolute conveyance, and last-mentioned note and mortgage, delivered to defendant McCain said note of \$8,000, canceled and executed the following indorsement on the record of the mortgage given to secure the payment of said note: "Received full and entire satisfaction on the within mtg. this 22d day of Dec., 1887. GEORGE STORCH. By JOHN BELZ, his Attorney in Fact." If John Belz had authority to bind the plaintiff, there can be no doubt of the satisfaction of the mortgage which this action is brought to foreclose. It is not shown that Belz was authorized, by any formal power of attorney, to execute a release of said mortgage. He held plaintiff's power of attorney at the time, but it did not authorize him to enter the satisfaction of said mortgage, and the court finds that Belz had authority from plaintiff other than that contained in said power of attorney for executing the satisfaction of the mortgage, which plaintiff is seeking to foreclose in this action. The defendant McCain testified that plaintiff told him, at the time the loan was made for which said note of \$8,000 and mortgage were executed, that the money loaned belonged to Belz, and that plaintiff wrote him, defendant McCain, that he, plaintiff, had sent the note to the First National Bank for collection; that Belz was there, and anything that defendant McCain did with Belz, he, plaintiff, stood by it; he stood by anything that Mr. Belz did for him. That testimony, and the turning over to Belz of the note indorsed by plaintiff, together with the mortgage, constitute the evidence of the authority of Belz to receive anything other than money in satisfaction of the note and mortgage. And we think that is sufficient to justify the finding that Belz had such authority. The indorsement and delivery of the note by plaintiff to Belz was strong evidence of it. A note indorsed in blank is payable to bearer, and may be negotiated by delivery alone. *Curtis v. Sprague*, 51 Cal. 239; *Peacock v.*

Rhodes, 2 Doug. 635; Swan v. Australasian Co., 2 Hurl. & C. 175; Morris v. Preston, 98 Ill. 215. The mortgage was a mere incident of the debt which it secured, and followed the transfer of the note with the full effect of a regular assignment. *Ord v. McKee*, 5 Cal. 515.

Conceding that parol evidence was admissible to show that the transaction was not what the law, in the absence of such evidence, would presume it to be, we have here the evidence of defendant McCain that it was intended to operate as an assignment of the note and mortgage to Belz. There is evidence tending to show that the indorsement was intended to be special for the purpose of authorizing Belz to collect the amount of the debt secured in money. But we cannot interfere with the finding where the evidence upon the issue found is conflicting. It is exclusively for the court below to determine the weight of evidence.

The court did not err in permitting the defendants to amend their answers, nor in refusing to postpone the trial on the ground of absence of evidence to meet the issues raised by such amendment. The record does not disclose that the motion was made upon affidavit showing the materiality of the evidence expected to be obtained, and that due diligence had been made to obtain it; and it is only upon such an affidavit that a motion to postpone a trial on the ground of absence of evidence can be made. Code Civil Proc. 595.

While the defendant was on the witness stand testifying in his own behalf, his counsel asked him: "What was the condition of the real-estate market in this city and county [Los Angeles city and county] about the time of this transaction, December 22, 1887?" Plaintiff's counsel objected to the question on the ground that it was irrelevant and immaterial.

"The Court. I think it would go to show why action might be brought."

Counsel for plaintiff excepted, and witness answered: "It was very active. What was called a boom, especially in this section. This land was located at what was known as Santa Fé Springs, and runs up and adjoins the town site." This was followed by other questions and answers of similar import, which were objected to, objections overruled, and exceptions reserved. That this evidence was wholly irrelevant and immaterial we have no doubt. It is entirely outside of any issue in the case, and ought not to have influenced the decision in any degree, whatever. But we are not at liberty to hold that the admitting of it was a harmless error. The overruling of the objection to admitting it, on the ground that it was irrelevant and immaterial, indicates that in the opinion of the court it was relevant and material. And counsel for respondent defends the action of the court on the ground that it was relevant and material. In his brief he says: "The materiality of the evidence of defendant McCain, as to the value of real estate on December 22, 1887, when the settlement was effected, and its value about the time suit was commenced, is well shown by the quota-

tion from the opinion of Judge VAN DYKE, in which he says: 'I cannot resist the conclusion that the rapid decline in the price of land between the date of settlement and the commencement of this action accounts for the proceeding.' The evidence was material to show why suit was brought." But the motive for bringing suit was in no way material, and could not properly be inquired into. That the court attached some importance to this evidence we are bound to presume from his admitting it against the objection made to it. We, therefore, cannot see from the record that this evidence did not prejudice the plaintiff, and the error in admitting it entitles appellant to a new trial. *Rice v. Heath*, 39 Cal. 609; *Spanagel v. Dellinger*, 38 Cal. 278; *Sweeney v. Reilly*, 42 Cal. 402; *Ponce v. McElvy*, 51 Cal. 222. Judgment and order reversed and cause remanded for a new trial.

We concur: PATERSON, J.; FOX, J.; WORKS, J.

McFARLAND, J. I dissent. I think that the case was properly decided in the court below, and that the error, if any, in admitting certain evidence was not of sufficient importance to change the result.

THORNTON, J. I concur with Justice McFARLAND.

83 Cal. 214

CROW v. MINOR, Judge. (No. 13,292.)

(*Supreme Court of California*. Aug. 2, 1890.)

EXCEPTIONS—ALLOWANCE—DISPUTED FACTS.

On petition for leave to prove an exception to the refusal to give an instruction made after judgment, under Code Civil Proc. Cal. § 652, where an order is made requiring the trial judge to show cause why the exception should not be allowed, and he denies that any such instruction was asked or refused, which denial is supported by a preponderance of the evidence before the referee to determine the question, the petition will be denied.

In bank. Petition to prove exceptions from Stanislaus county; WILLIAM O. MINOR, Judge.

*Stonesifer & Minor*, for petitioner. *Hatton & Fulkerth*, for respondent.

WORKS, J. This is an application by the petitioner for leave to prove an exception under section 652 of the Code of Civil Procedure. An order was made requiring the respondent to appear and show cause why the exception should not be allowed. The petition alleged that in the trial of a certain cause had before the respondent, in which the petitioner was a defendant, the petitioner requested the court to give a certain instruction, which was refused, to which the petitioner excepted, and that, in the settlement of the statement, the respondent refused to allow such exception. The respondent appeared, and, by way of answer, denied that such an instruction was asked or refused, and alleged that another instruction, different in form and substance, was the one asked and refused. Therefore the whole controversy between the parties was as to which of these instructions should be the basis of the peti-

tioner's exception. This question of fact was referred to Hon. JOSEPH H. BUDD, judge of the superior court of San Joaquin county, to take the evidence and report the same to this court, which has been done. We have examined this evidence, and find that it fails to establish the allegations of the petition; the preponderance of the evidence being in favor of the respondent. Petition denied.

We concur: PATERSON, J.; THORNTON, J.; SHARPSTEIN, J.; MCFARLAND, J.

85 Cal. 151

*In re* ESTATE OF ARGUELLO. (No. 13,595.)  
(Supreme Court of California. July 31, 1890.)  
ADMINISTRATOR'S SALE TO PAY DEBTS—FINDINGS  
—LACHES.

1. The defect in a petition to sell land to pay debts, in not showing whether it was separate or community property, is cured by stating the fact in the order of sale.

2. Under Code Civil Proc. Cal. § 634, requiring findings of fact when they have not been waived, their absence will not be noticed on appeal, unless it affirmatively appear that there was no waiver.

3. While the administration is pending, the statute of limitations does not run against a petition to sell land to pay debts which have been allowed.

4. An administrator was appointed in 1869. In 1872, a creditor asked a sale of land to pay debts, but the court delayed action because the interest of the deceased was an undivided one, subject to the debts of another estate. This lasted to 1886, when a new petition was prepared, but it was burned with the attorney's office. The present one was filed in 1889. There had been a change of administrators, and other causes for delay. *Held* not barred by laches.

In bank. Appeal from superior court, San Diego county; GEORGE PUTERBAUGH, Judge.

Collier, Hammack & Mulford, for appellants. Hendrick & Younkin, for respondent.

MCFARLAND, J. This is an appeal from an order directing the sale of certain real property of the estate, upon the petition of E. W. Morse, a creditor.

1. Appellants contend that the petition is fatally defective, because it does not contain the matters required to be stated therein by section 1537, Code Civil Proc. It has been settled here that a substantial compliance with that section is sufficient. *Stuart v. Allen*, 16 Cal. 501; *Richardson v. Butler*, 82 Cal. 174, 23 Pac. Rep. 9. But it would not be necessary for respondent to invoke that rule in the case at bar, because the petition here is very full, and seems to cover every particular mentioned in the Code, except one. It neglects to state whether the real property was separate or community; but that defect is remedied by the fact that it is stated in the order directing the sale that the property was separate property. The point originally made in appellants' brief, that the petition was not verified, has since been met by a stipulation mending the record.

2. It is contended that the order cannot stand, because there were no findings. It has never been definitely determined here that findings were necessary in prob-

bate orders like the one involved in this case. In *Re Sanderson's Estate*, 74 Cal. 201, 15 Pac. Rep. 753, some doubt on the subject was intimated. In *Re Crosby's Estate*, 55 Cal. 574, where there were findings, the point was made by counsel that findings on an order in probate for the sale of property were not authorized by the Code; and this court merely said that findings were "proper." But assuming that the rule about findings applies to probate orders in like manner, as to an ordinary civil action tried without a jury, still appellants are in no position to make the point, because the record does not show that findings were not waived, and therefore does not show any error,—a thing which an appellant must always do, affirmatively, before he can expect to have a judgment reversed. The Code does not unconditionally require findings. It requires them only when they have not been waived by one or more of the several methods therein mentioned. Code Civil Proc. § 634. And as was said in *Mulcahy v. Glazier*, 51 Cal. 627: "A party, therefore, who comes here to say that the court below committed an error in failing to find the facts, must, by bill of exceptions, or some other similar and appropriate method, make it affirmatively appear by the record that no waiver of findings had in fact occurred in the court below; otherwise the intendment here must go to the support of, and not to overthrow, the judgment therein." This rule has since been approved and reasserted. See *Reynolds v. Brumagim*, 54 Cal. 258; *In re Sanderson's Estate*, supra; *Campbell v. Coburn*, 77 Cal. 37, 18 Pac. Rep. 860. We think that it sufficiently appears that the respondent, as creditor, had the right to petition for the sale; but it is not necessary to discuss that point, because the administrator joins in the petition.

3. The statute of limitations does not run while the administration is pending and unsettled, as to a claim against the estate which has been allowed. In *re Schroeder's Estate*, 46 Cal. 312. As to the contention that the petition should fall on account of the delay in asking for the order of sale, it may be said that laches will, no doubt, in some cases, defeat a creditor's application for the sale of property of the estate. The rule, however, goes only to this extent: that a probate court has a discretionary power to deny a petition for the sale of real property when there has been unreasonable delay without circumstances to excuse it. In *re Crosby's Estate*, 55 Cal. 580, and cases there cited. In the case at bar the petition shows that an administrator was first appointed in November, 1869; that respondent's claim against the estate was allowed in June, 1870; that in 1869 the administrator filed a petition for the sale of the real property to pay charges, expenses, and claims; that no order of sale having been made, the respondent on July 1, 1872, filed his petition for such sale, and that the same is still pending; that the court postponed action on said petition, on the ground that the interest of the deceased in the lands sought to be sold was too un-

certain to justify a sale under the circumstances then existing; that said interest was undivided, and held in common with other heirs of one Santiago Arguello, deceased, which still belonged to the estate of the latter; that the lands had never been surveyed or set off in partition, and were subject to the debts, expenses, and charges of said estate of Santiago; that this condition of affairs continued until 1886; that shortly after the latter date the administrator had a petition for sale prepared by his attorneys, which was destroyed by the burning of their office; that there had been a change of administrators; and that these and other considerations caused the delay. The present petition was filed in June, 1889. Under these circumstances we cannot say that the court below abused its discretion in holding that the delay was excusable.

The order appealed from is affirmed.

We concur: WORKS, J.; SHARPSTEIN, J.; FOX, J.; THORNTON, J.; PATERSON, J.

85 Cal. 122

KELLY *et al.* v. MATLOCK. (No. 13,590.)  
(Supreme Court of California. July 30, 1890.)

SATISFACTION OF MORTGAGE ASSIGNED AS COLLATERAL—RIGHTS OF DEBTOR.

Where a creditor, after bringing suit to foreclose a mortgage assigned to him by his debtor as collateral security, dismisses the suit, accepts a conveyance of the property from the mortgagor, and releases the mortgage, the debtor may charge him with the amount of such mortgage, have it applied in satisfaction of his debt, and recover the balance, though the mortgage was without consideration as between him and the mortgagor, and the note secured by it, and also assigned as collateral, was not negotiable.

In bank. Appeal from superior court, Los Angeles county; A. W. HUTTON, Judge.

*Wells, Guthrie & Lee*, for appellants.  
*Davis & Taylor* and *W. F. Henning*, for respondent.

WORKS, J. The appellants and one Ausmus, for the accommodation of the respondent, executed to him their two promissory notes for \$1,000 and \$1,500, respectively, which notes were negotiated by the respondent, and upon his failure to meet them they were paid and taken up by the appellants. The respondent and his wife, to secure the appellants and Ausmus from loss on these accommodation notes, executed to them a mortgage on an undivided interest in certain real estate, in the state of Oregon, owned by the respondent. He also assigned and delivered to them, as further collateral security, a note of his brother to him for \$2,500, and a mortgage on a part of the same real estate given to secure said note. Upon the payment of the accommodation notes by them the appellants secured an assignment from Ausmus of his interest in the securities above mentioned, brought an action against the respondent and his wife to foreclose the mortgage given by them, recovered a decree of foreclosure thereof, sold the land, realizing less than their claim, and procured the entry of a deficiency judgment for the balance. They also brought an action against respondent's

brother to foreclose the mortgage given by him and assigned to them as collateral security. The respondent was made a party to this proceeding, but was not served with process. Instead of proceeding to a judgment in this case, the appellants took a deed from the mortgagor in satisfaction of their claim against him, and agreed to and did dismiss the action, and deliver up and satisfy the mortgage of record. This action was brought by the appellants to recover the amount of the deficiency judgment above mentioned. The respondent answered alleging payment in full, and set up a counter-claim alleging the facts with reference to the collateral mortgage, and praying that the plaintiffs be charged with the amount thereof on account of their acceptance of a conveyance of the land and satisfaction of the mortgage, that enough thereof to satisfy the deficiency judgment sued on be applied to the payment thereof, and that he have judgment for the balance. The court found in favor of the defendant, and decreed the satisfaction of the judgment, and rendered judgment in his favor for \$1,397.09. From this judgment the plaintiffs appeal.

It is contended by the appellants, and conceded by the respondent, that the transfer and delivery of the mortgage as collateral security was a pledge of personal property. The appellants further claim that, being a simple pledge of personal property, the appellants had no power to accept a conveyance of the property and release the mortgage; that such release was a nullity so far as the respondent was concerned; and that, therefore, they could do nothing but ignore that transaction, and sue upon the deficiency judgment as if no such transaction had taken place. It may well be conceded, for the purposes of this case, that without the respondent's consent the appellants had no right to release his mortgage, held by them as collateral, and that, if he had elected to do so he might have repudiated the transaction, and had the release or satisfaction canceled, or held the appellants as trustees of the land for his benefit, subject as collateral security for the amount due them. *Chester v. Hill*, 66 Cal. 480, 6 Pac. Rep. 132; *Ponce v. McElvy*, 47 Cal. 159. But if the respondent might have consented to the conveyance before it was made, and thereby have authorized the appellants to receive the same and hold the title as their own, we see no reason why he may not subsequently ratify their act and hold them liable for at least the value of the property received by them, if not for the full face of the note secured by the mortgage. The appellants certainly cannot complain of such a result. They have, as they conceded, acted in violation of the respondent's rights, and should be held to answer to him for the value of the property actually received by them. The case of *Smith v. Bunting*, 86 Pa. St. 116, so much relied upon by the appellants, is not in point. There the holder of the collateral securities proceeded to collect his debt by foreclosing the same, recovered a decree, caused the property to be sold on execution, himself became the purchaser,



and gave his debtor credit for the amount of his bid. The attempt on the part of the debtor was to hold the creditor liable for the full value of the property, instead of the amount at which he bid it in. It was held that this could not be done. It was further held, however, that conceding the right of the debtor to show that the property was worth more than the bid, and that by purchasing the property the creditor became a trustee thereof for him, then the creditor was not bound to give credit on his claim for the amount of his bid or any other sum, but could recover his whole debt, and that in either event the plaintiff was entitled to judgment. It was not held in the case referred to that the creditor did hold the property as a trustee for his debtor, but that, conceding that he did, as claimed by the debtor, he was still entitled to judgment.

In our judgment, under our Code, the holder of a mortgage as collateral security who causes the property to be sold on execution, and himself becomes the purchaser, does not hold the title as a trustee for his debtor unless it is shown that he obtained the title by some fraudulent means. He cannot sell an evidence of debt of this kind, but may collect the same when due. Civil Code, § 3006. And to that end he may foreclose the lien and himself become the purchaser. Id. § 3011. If so, and no fraud is shown, he takes the absolute title to the property, and must account to the debtor for the proceeds. Instead of taking this course the appellants saw proper to take a conveyance without a judicial sale, and they were properly held for the value of the property received by them. The respondent might have held them as trustees, for the reason that they had taken title to the property without his consent, and in violation of his rights, but he was not bound to do so, but had the right to treat them as having wrongfully converted the same, hold them for the value of the property, have his debt satisfied, and recover the balance. It is claimed by the appellants that this could not be done in this case, because it was shown by the evidence that the note and mortgage were given to the respondent by his brother without consideration. Conceding that the note and mortgage were given without consideration, we do not see how this can affect the question before us. The mortgage was held by the appellants on a sufficient consideration. The mortgagor could not have pleaded want of consideration against them. Had they forced the property to a judicial sale and become the purchasers, or if some one else had become the purchaser, could they have set up a want of consideration against the respondent, and thereby avoided liability to him for the amount realized by the sale? Clearly not. Then why could they do so where they have voluntarily abandoned their right to a judicial sale, and taken a conveyance from the mortgagor instead? No reason is apparent to us. The question of want of consideration is one to be determined between the respondent and the mortgagor, and in which the appellants are not interested. Again, it is contended that the

note secured by the mortgage was not negotiable because it provided for the payment of an attorney's fee. But whether it was negotiable or not is wholly immaterial in this case. The appellants have realized upon it, and cannot, in justice, be allowed to withhold what they have got by pleading its non-negotiability. It is contended that the findings of the court are not sustained by the evidence in various particulars specified, and that the decision of the court is against law. We have examined the evidence, and are satisfied that it is such that the findings cannot be disturbed by this court. The decision of the court is claimed to be against law on the grounds above noticed, and ruled against the appellants. Judgment affirmed.

We concur: MCFARLAND, J.; SHARPSTEIN, J.; FOX, J.; THORNTON, J.

85 Cal. 105

GILBERT v. JUDSON. (No. 13,563.)

(Supreme Court of California. July 30, 1890.)

REAL-ESTATE AGENT—COMPENSATION.

Under a contract to make one sole agent to sell lots at a commission, "which shall be in full for any service he may render in surveying and laying out the land," the agent cannot, when he has made no sales, recover on a *quantum meruit* for the service, the owner having put prices on the lots, and given him the agency.

Commissioners' decision. In bank. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, Judge.

R. K. Wood, for appellant. Brousseau & Hatch and W. S. Knott, for respondent.

GIBSON, C. This was an action brought by A. C. Gilbert to recover of A. H. Judson the value of certain services rendered to Judson, under a written contract, in assisting and advising him in relation to the surveying and laying out of a portion of a tract of land in Los Angeles county known as "Highland Park Tract," for the purpose of placing the same upon the market for sale; also, damages for the breach of said contract caused by Judson refusing to permit him to proceed with the erection of two houses on a portion of the tract, upon the cost of which he was to receive a certain percentage, in consideration of furnishing plans and specifications, and purchasing material therefor, and in superintending the construction thereof. The court found that the plaintiff did, under the contract, superintend the survey and subdivision of a portion of the defendant's tract of land, and that such services were reasonably worth \$100; but found against him and in favor of the defendant as to the other matter. Judgment for the amount so found to be due him passed for plaintiff, from which defendant brings this appeal.

The only question presented here is whether the plaintiff, under the terms of the contract, is entitled to compensation for the services found by the court to have been rendered, and depends upon a construction of the contract. The portion of it material to this question is as follows: "I hereby appoint A. C. Gilbert sole agent for the sale of such property as I may de-

sire to sell in the Highland Park tract, at a commission of 10 per cent. on all sales that may be effected by him, which shall be in full for any services he may render me in assisting and advising in the surveying and laying out of the lands ready for market. \* \* \* I hereby authorize him to at once proceed and have the lots known as my 'Home Tract,' to be surveyed and mapped ready for beginning operations. \* \* \* Prices and items to be hereafter agreed upon." From the language of this contract we think it clear that the commissions plaintiff was to receive for selling the lots, were intended to compensate him, and be his only compensation, for services rendered in surveying and laying them out ready for the market. This is the construction placed upon it by the plaintiff in his complaint, who seems to have realized that in order to recover the reasonable value of his services, instead of the sum expressly provided for in the contract, it would be necessary for him to show a breach of the contract on the part of the defendant, whereby he was prevented from selling such lots. With this end in view he alleged that he had often insisted upon defendant placing a price upon lands in the home tract, a portion of the Highland Park tract, but he always refused to do so, and that plaintiff, who had shown the lands to customers, was prevented from selling any of such lands because of the defendant's refusal to fix any price thereon. The defendant, in his answer, denied these allegations, and averred that he did fix prices on all lands in the home tract he desired to sell, and that plaintiff failed to procure a purchaser for said lands or any part thereof. On the issue thus tendered the court found: "That defendant gave plaintiff prices on his (defendant's) lots in the tract surveyed and subdivided, but that the plaintiff did not sell any of said lots." This finding must be regarded as conclusive, as the evidence is not before us. And as it shows that the defendant complied with the terms of the contract upon his part in fixing prices upon all the surveyed lots he desired to sell, and that plaintiff failed to sell any of such lots, upon the sale of which his compensation depended, it follows that the trial court erred in concluding that he was entitled to recover the reasonable value of the services he rendered in connection with the laying out of the lots. We, therefore, advise that the judgment be reversed, and the cause remanded, with instructions to the trial court to enter judgment for the defendant upon the findings.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and cause remanded, with instructions to the court below to enter judgment for the defendant upon the findings.

85 Cal. 116

BUELL v. EMERICH. (No. 13,530.)  
(Supreme Court of California. July 30, 1890.)

SETTING ASIDE DEFAULT—DISCRETION.

It is not an abuse of discretion to set aside a judgment taken in the absence of the defendant

on an affidavit of merits, and a showing that he and his counsel resided at a distance, and had not been notified that the case was set for trial, and were absent for that reason only.

Commissioners' decision. In bank. Appeal from superior court, Santa Barbara county; R. M. DILLARD, Judge.

W. C. Stratton, for appellant. Howard A. Broughton and W. P. Butcher, for respondent.

BELCHER, C. C. This action was brought to recover the value of certain personal property alleged to have been owned by the plaintiff, and to have been unlawfully converted by the defendant to his own use. The answer denied each and every allegation of the complaint. On the 8th day of July, 1889, the case was set for trial on the 15th day of August following. On the last-named day the case was tried, neither the defendant nor his attorney being present in court, and judgment was given for the plaintiff. On the 26th day of the same month the defendant served and filed notice of motion to set aside and vacate the judgment on the grounds that the defendant was not present at the trial; that his absence was not caused by any fault or neglect on his part; that he had no notice that the action was set for trial upon the 15th of August; and that he was taken by surprise and greatly prejudiced by the trial and judgment. The motion was heard by the court upon affidavits, and granted on condition that defendant pay to plaintiff the full amount of his costs to date. The appeal is by the plaintiff from this order. The motion was made under section 473 of the Code of Civil Procedure, which provides that the court may, "upon such terms as may be just, relieve a party or his legal representative from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect." It is a settled law that applications like that made here are addressed to the sound legal discretion of the trial court, and that orders granting such applications will not be reversed on appeal unless it clearly appears that the court abused its discretion. In *Roland v. Kreyenhagen*, 18 Cal. 455, where a similar question was presented, the court said: "It would require a very clear case of abuse of discretion in the judge below to induce us to interfere with his action upon such applications." And after quoting section 68 of the old practice act, which is substantially the same as section 473, supra, it is further said: "The power of the court should be freely and liberally exercised under this and other sections of the act to mould and direct its proceedings so as to dispose of cases upon their substantial merits." And in *Howe v. Independence Co.*, 29 Cal. 75, it is said: "Orders of the court below upon applications made under the sixty-eighth section of the practice act will not be disturbed by this court except in cases of gross abuse, where the power of the court has been exercised in a manner which is calculated to defeat rather than advance the ends of justice." See, also, *Cameron v. Carroll*, 67 Cal. 500, 8 Pac. Rep. 45, and *Dougherty v. Bank*, 68

Cal. 275, 9 Pac. Rep. 112. The question, then, is: Does it clearly appear that the court below abused its discretion in making the order complained of? We do not think it does. The affidavits presented in support of the motion stated in substance that both the defendant and his attorney resided at a great distance from the county-seat, and that neither of them was present when the case was set for trial, or when it was tried; that they were never notified of the setting of the case, and never heard that it had been set until just before the trial, and then, owing to their distance from the county-seat, the time was too short to enable them to be present; that the only reason they were not present at the trial was the lack of notice that a time for the trial had been set; and that defendant had a good and substantial defense to the action on its merits. The facts set forth in the affidavits were not controverted by the other side, and they were sufficient, we think, to make out at least a *prima facie* case of excusable neglect. The court evidently so thought, and made its order accordingly. As we can see no abuse of discretion in the action of the court, we advise that the order be affirmed.

We concur: HAYNE, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order is affirmed.

35 Cal. 219

ALTA LAND & WATER CO. v. HANCOCK *et al.* (No. 18,533.)

(Supreme Court of California. Aug. 4, 1890.)

RIPARIAN RIGHTS—ADVERSE USE OF WATER—LIMITATION.

1. A "squatter" who enters upon, occupies, and cultivates part of the riparian land of another, claiming adversely in the belief that it is government land, can gain no title to the use of the waters of the stream by diverting and using them for purposes of irrigating such land, since such use inures to the benefit of the true owner, and is not adverse to him. And it can make no difference that the land irrigated does not border on the stream, since such land is not segregated in title by the occupancy, but remains part of the entire riparian tract.

2. Where a "squatter" entered upon part of the riparian land of another, claiming adversely, and diverted and used the waters of the stream for the irrigation thereof, such use was "interrupted," so as to prevent the running of limitation in the squatter's favor, by the bringing of ejectment for the lands.

In bank. Appeal from superior court, San Bernardino county; JOHN L. CAMPBELL, Judge.

*Byron Waters, Charles J. Perkins, Wicks & Ward, and E. A. Meserve, for appellant. Barclay, Wilson & Carpenter and E. E. Rowell, for respondents.*

FOX, J. This is an action to quiet title to the claim of plaintiff, a corporation, to the right to use seven-eighths of the waters of East Twin creek, in San Bernardino county. Judgment went for the defendants, from which plaintiff appeals, the case coming up on the judgment-roll. Plaintiff claims by prescription in favor of its grantors, and under grant of such alleged prescriptive right to itself. Defend-

ants are riparian proprietors on both sides of the stream below the point where plaintiff claims the right of diversion. It was alleged and shown that in April, 1875, the defendant Hancock, who was then the owner of a tract of 1,280 acres, part of the Muscupiabe rancho, lying on both sides of this creek, and below the point at which plaintiff claims the right to divert seven-eighths of its waters, (and under whom the other defendants now claim as grantees,) took the preliminary steps to acquire by appropriation 500 inches of this water, but this right of appropriation was never perfected, and its consideration is of no moment in this case, as it is conceded by both parties that defendants take nothing by that proceeding. Nor is it necessary in this case to discuss the character or extent of the right of Hancock or his grantees to the use of the waters of the creek by virtue of his riparian proprietorship. That they had some right in the flow and to the use of said waters as such riparian proprietors is conceded on both sides. To the extent that it existed, it was an appurtenance to the land, running with it as a corporeal hereditament. It was one which might be segregated by grant or by condemnation, or extinguished by prescription, but could not be defeated by simple appropriation. The term "appropriation," as applied to the acquirement of the right to the use of water, has in this state a statutory technical meaning; and the simple act of appropriation under the statute will not of itself defeat or extinguish any prior right. Actual and uninterrupted user, however, with or without the statutory appropriation, if adverse, for a useful purpose, and under claim of right, continued for the period prescribed by the statute of limitations, gives a prescriptive right which will extinguish the rights of the riparian proprietor. Statutory appropriation, therefore, is not necessary to prescription, but it gives to one who seeks to acquire a right by prescription this advantage, that it gives to prior claimants notice that his user is adverse, and under claim of right, and sets the statute in motion against such prior claimant. In this case the claim of plaintiff is based upon prescription, pure and simple. If it is valid it has, to the extent of seven-eighths of the waters of that creek, extinguished the rights of defendants. If under the facts, however, plaintiff's claim has not merged into title by prescription, then plaintiff has no right which can be quieted in this action, and it is not in position to question the right or the extent of the right of defendants. The court finds that in April, 1875, the defendant Hancock was the sole owner of the 1,280-acre tract of land hereinabove mentioned; that in May, 1887, he conveyed the same, with the water-rights appurtenant thereto, to the other defendants herein, reserving to himself 17 acres thereof, with a certain quantity of the water for the use of said 17 acres, and that at the time of the filing of the complaint herein the defendants were the owners in fee of the whole of said tract; that in the spring of 1876 one Burton entered upon 80 acres of land, part of said 1,280-acre tract,

situate from a half to three-quarters of a mile from the channel of the creek, claiming the same as a squatter, and believing the same to be government land; and at the time of such entry diverted from the channel of said creek, at a point beyond and outside of the rancho, all the waters of said creek, and conducted the same through an artificial channel made by him to the said 80-acre tract so entered upon by him, and there used all of said water for the irrigation of said 80-acre tract until some time in 1877, when one Stones in like manner entered upon a 40-acre tract, part of said 1,280-acre tract, adjoining that so entered upon by Burton, and thereafter, by some arrangement between Burton and Stones, the latter commenced to use one-fourth of the water so diverted by Burton for the irrigation of his 40-acre tract; that Stones also entered as a squatter, and he and Burton both claimed adversely to Hancock; that they so continued to use all the said water for said purpose and upon the said lands, and not elsewhere, until August, 1887; that the said use was continuous, open, notorious, peaceable, and adverse to all the world; that while so using and claiming the said water they also used and claimed the land upon which the same was used, by the same character of holding and title, namely, adverse to Hancock, but never set up any special or distinctive right in the water different from their right in the land, but claimed both land and water; that in July, 1881, Hancock, being then the owner of the whole of the said 1,280 acres, commenced an action in ejectment against Burton, Stones, and others for the recovery of the possession thereof, which culminated in a judgment in favor of Hancock in August, 1885, appealed to this court, where the judgment was affirmed, (14 Pac. Rep. 392,) and the *remitter* therein filed in the court below August 4, 1878, when a writ of possession was issued under which Burton and Stones were put out, and possession restored to Hancock; that five years did not intervene between the time when the water was so diverted by Burton, and the time when such action was commenced by Hancock; that it is not shown that said Burton or Stones ever paid any taxes on said water-right, or on the right to divert the same, or that any were ever levied thereon, but it is shown that Hancock has paid taxes, and taxes have been levied upon the whole of said 1,280 acres of land every year since and including the said year 1876. The court then finds that during the year 1887, and prior to the execution of the writ of possession, all the right which Burton and Stones, or either of them, acquired in and to the said waters, or to use and divert the same, came down by certain meane conveyances, to and became vested in, this plaintiff, who acquired and took the same with full notice of the pendency of said ejectment suit, and that plaintiff still holds the same. And as conclusion of law, the court finds that the plaintiff at the time of the commencement of this action had no estate, right, title, or interest in or to the waters of said creek, or any of the tributaries thereof, and thereupon ordered

judgment for defendants, which was entered accordingly.

It will thus be seen that the whole question is whether these facts gave to plaintiff's grantors a prescriptive right to the diversion and use of that water. This right becomes fixed only after five years' adverse enjoyment. *Crandall v. Woods*, 8 Cal. 136; *Water Co. v. Crary*, 25 Cal. 504. And to have been adverse it must have been asserted under claim of title, with the knowledge and acquiescence of the person having the prior right, and must have been uninterrupted. *American Co. v. Bradford*, 27 Cal. 360. "In order to constitute a right by prescription there must have been such an invasion of the rights of the party against whom it is claimed that he would have had ground of action against the intruder." *Anaheim Water Co. v. Semi-Tropic Water Co.*, 64 Cal. 185. To be adverse it must be accompanied by all the elements required to make out an adverse possession. The possession must be by actual occupation, open, notorious, and not clandestine. It must be hostile to the other's title. It must be held under claim of title, exclusive of any other right, as one's own. It must be continuous and uninterrupted for the period of five years. *Thomas v. England*, 71 Cal. 458, 12 Pac. Rep. 491. Can it be said that the use made of this water was adverse to Hancock's riparian right when it was used upon his own land riparian to the stream, and under no pretense or claim of right to divert or use it elsewhere? We think not. The use of the land may have been adverse, and against his will, but the bringing of the water to and use of it upon his land was an improvement of his land, and an advantage to him, not an act which of itself gave him an independent cause of action for its diversion, and required him to bring such action or lose his right in the water. If, while as trespassers occupying a portion of his land, Burton and Stones had undertaken to divert the waters of the stream, and carry them away from the land, this would have been an act so hostile to his right as to have given him an independent cause of action for the diversion. If, after notice of such an act, he had suffered them to divert the water away from his land for the period of five years, without interruption, they might have acquired a right in the water which would have extinguished his own; but, as his right in the water, or the use thereof, was a corporeal hereditament appurtenant to his land, we cannot conceive that such right would be lost by user upon his land, under no claim of right to divert or use it elsewhere. Nor was the use "uninterrupted" for the period of five years. The court has apparently *ex industria* refrained from the use of that word in the findings. And yet the use must be not only adverse, under claim of right, open, and notorious, but it must be "uninterrupted" for the period of five years to ripen into a right by prescription. The court has found that the use was "continuously" from 1876 to 1887, but not that it was "uninterruptedly." Counsel insists that the words are synonymous,—that the one means the same as the other.

They are very nearly, but not in law exactly, synonymous. This case furnishes a fair illustration of the distinction between them. Burton and Stones used this appurtenant to the land "continuously" for the period of 11 years. They used the land itself, and this appurtenant to it on the land, during the whole of the same period, "continuously." The use of the land was unquestionably adverse to the claim and right of Hancock, and yet its continuous use for the period of 11 years did not give to those using it a right to the land by prescription, though the rule of law as to acquiring right to land and right to water by prescription is the same. Then why did it not give the right? Because just before the expiration of the five years the use was "interrupted" by the bringing of the action in ejectment, and this interruption, though it did not break the continuity of use until final judgment and writ of possession, six years afterwards, stopped the running of the statute, and no right could be acquired by use after that during the pendency of that suit. As this in law so interrupted the use of that land as to prevent the acquiring of a prescriptive right to the land itself, so it also, and by the same act, so interrupted the use of every appurtenant to the land which was being used on it, as to prevent the acquiring a prescriptive right to that appurtenant, to use it there or elsewhere. The recovery of the land in ejectment carried with it the recovery of every appurtenant thereto. Burton and Stones, according to the findings, had never attempted to acquire, or asserted any right in, the water, independent of or segregated from the land, or under other right, title, or claim than that which they asserted to the land. They therefore, when ejected, had nothing to convey to plaintiff, and the plaintiff acquired nothing under them.

We fully concede the proposition contended for by appellant, based upon *Smith v. Logan*, 18 Nev. 149, 1 Pac. Rep. 678, that the use of water by a trespasser upon the land of another does not make such water appurtenant to the land upon which it is wrongfully used. But it does not follow from this that the use of water upon land to which it is already appurtenant by one who is a trespasser thereon will give him such a right in the water as that he may thereafter divert it from the land, or, upon being ejected therefrom, convey to a stranger a legal title in the water or in the use thereof. We do not mean to be understood as holding, and indeed it is not claimed, that anything has been added to the rights of defendants by the acts of Burton and Stones; but simply that nothing has been taken from those rights. It is probable that there are those as against whom these defendants could not successfully claim the right to the use of all the water which Burton and Stones carried upon their lands; but the measure of their rights is not here involved. The judgment in this case does not determine them. It simply determines that the plaintiff has no right which it is entitled to have quieted as against the defendants. Beyond the proposition above stated, the case of

*Smith v. Logan* is not in point. Nor is there anything which militates against the view here taken in the further proposition insisted upon by appellant, that the 120 acres upon which Burton and Stones used this water were not riparian to the stream. Situate as this tract was, a half-mile or more away from the stream, if it had been held by a title separate from and independent of the 1,280-acre tract, it would not have been riparian, and no portion of the waters of the stream would have been appurtenant to it; but the 120 acres was a part of, and never segregated from, the 1,280 acres, all of which was riparian to the stream. We do not understand *Lux v. Haggin*, 69 Cal. 255, 10 Pac. Rep. 674, as holding, as claimed by appellant, that only that portion of a larger tract bordering upon a stream is riparian thereto which is actually washed by the waters of the stream; or only so much thereof as the waters of the stream are sufficient to irrigate. Such a rule, while it would limit the area of riparian lands to a comparatively infinitesimal quantity, would extend the rights of a riparian proprietor to whom the water might first come far beyond anything heretofore recognized or claimed for them. It would recognize the right of such proprietor to consume, if he could, on his riparian lands, all the waters of the stream for purposes of irrigation, without regard to the rights of other proprietors below him, either for their natural wants or for irrigation. So far the right of a riparian proprietor to the use of water for purposes of irrigation at all has been assumed, rather than determined, and has been properly regarded as among the last, though not perhaps the least important, of his riparian rights; one that must be always held in subordination to the rights of all other riparian proprietors to the use of water for the supply of the natural wants of man and beast, extended to the occupants of each and every tract held as an entirety, bordering upon the stream, whatever its extent. These natural wants supplied and protected, the right to a reasonable use of the surplus water by the riparian proprietor in common with others in like situation, for purposes of irrigation, has been acknowledged and recognized, but it cannot be extended even by implication. Nor can the area of the lands to which riparian rights are appurtenant be diminished by the acts of a trespasser segregating for the time being the actual occupancy, without segregation of title. Nor can the use of all the waters of a stream upon 120 acres of land change the law, and establish it as a fact that there can be but 120 acres riparian to that stream as claimed by appellant.

We do not deem it necessary to follow the counsel for appellant in their discussion of the question of the payment of taxes as one having any effect upon this case; nor do we find anything in any of the authorities cited in conflict with the views here expressed. Judgment affirmed.

WE CONCUR: SHARPSTEIN, J.; MCFARLAND, J.; PATERSON, J.; THORNTON, J.; WORKS, J.

85 Cal. 80

KERCKHOFF-CUZNER M. & L. CO. v. OLMSTEAD *et al.* (No. 13,147.)

(Supreme Court of California. July 30, 1890.)

## MECHANIC'S LIEN—STATEMENT—RETROACTIVE LAW.

1. Code Civil Proc. Cal. § 1187, provides that every one save the contractor must, within 30 days after completion, file his statement for a lien. That section was amended in 1887 by adding that cessation from labor for 30 days on any unfinished building shall be deemed equivalent to completion. A contractor having, after the amendment, refused to finish the building, and no work having been done thereon for 30 days, of which the material-man had knowledge, *held*, that the time in which his statement must be filed runs from the end of the 30 days, though part of the materials were furnished before the amendment. THORNTON and WORKS, JJ. dissent.

2. This application of the amendment does not make it retroactive within Code Civil Proc. § 3, providing that "no part of it is retroactive unless expressly so declared."

Commissioners' decision. Department 1 Appeal from superior court, Los Angeles county; A. W. HUTTON, Judge.

*Williams & McKinley*, for appellant. *Graves, O'Melveny & Shankland*, for respondent.

BELCHER, C. C. Action to foreclose the lien of a material-man. The facts of the case, as shown by the findings are, in substance, as follows: The defendant Olmstead owned a lot of land in the city of Los Angeles, and on the 16th day of November, 1886, entered into a contract in writing with the defendants H. N. and D. F. Sheldon, whereby they agreed to construct for him on his said lot a two-story frame dwelling-house under the supervision, and to the satisfaction, of John C. Pelton, an architect. The contract price was \$3,600, and was made payable as follows: \$1,200 when the frame was up, the building inclosed, and the roof shingled, \$1,200 when brown mortar was on, windows glazed, and outside finish complete; and the balance when the whole of said material and work shall have been certified to have been completed according to the said plans, specifications, conditions, and stipulations, to the satisfaction of the said architect. The contract was filed for record in the recorder's office of the county on the 3d day of January, 1887, but no specifications were filed therewith. On or about the 20th day of November, 1886, the contractors entered into an agreement with the plaintiff, a corporation, by which it was to furnish lumber, and other building material, to be used in the construction of the said house, from time to time, as required, such material to be paid for at the current market rates as the same was delivered. In pursuance of this agreement the plaintiff, between the 20th of November, 1886, and the 6th of April, 1887, furnished building material for the construction of the said house, and which was actually used in the construction thereof between the dates named, of the value of \$763.60, no part of which sum has been paid. On the 9th day of April, 1887, the contractors quit work upon the building, and refused to finish it, and no work or labor was done thereon for more than 30 days thereafter. The plaintiff had

notice of this cessation of labor upon the building for 30 days at the time thereof. On or about the 23d day of November, 1887, the building was finished, and it was then accepted by Olmstead, and thereafter occupied by him. On the 20th day of December, 1887, the plaintiff duly filed its claim of lien for the value of the materials furnished, and this action was commenced within 90 days from that date. Upon the facts found the court rendered a personal judgment against the defendants Sheldon for the amount found due the plaintiff, with costs and attorney's fee, and decreed that plaintiff had a lien for these sums upon the lot of defendant Olmstead, and that the premises should be sold in payment thereof. Olmstead appealed from the judgment against him, and has brought the case here on the judgment roll.

In support of the appeal it is claimed, among other things, that the plaintiff's claim of lien was not filed in time, and therefore that it cannot be enforced. This claim is based upon the amendment to section 1187 of the Code of Civil Procedure, which was passed March 15, 1887, and was made to take effect immediately. By this section, as it stood before the amendment, it was provided that "every person, save the original contractor, claiming the benefit of this chapter, must, within thirty days after the completion of any building, improvement, or structure," file for record with the county recorder a claim containing a statement of his demand, etc. And it was held if the claim of a material-man, who was not an original contractor, was filed before the completion of the building, that the filing was premature, and the lien could not be enforced. *Perry v. Brainard*, 8 Pac. Rep. 882; *Roylance v. Hotel Co.*, 74 Cal. 273, 20 Pac. Rep. 573; *Schwartz v. Knight*, 74 Cal. 432, 16 Pac. Rep. 235. The amendment consisted of additions to the section which read as follows: "Any trivial imperfection in the said work or in the construction of any building, improvement, or structure, or of the alteration, addition to, or repair thereof, shall not be deemed such a lack of completion as to prevent the filing of any lien; and in case of contracts the occupation or use of the building, improvement, or structure by the owner or his representative, or the acceptance by said owner, or his agent, of said building, improvement, or structure, shall be deemed conclusive evidence of completion; and cessation from labor for thirty days upon any unfinished contract, or upon any unfinished building, improvement, or structure, or the alteration, addition to, or repair thereof, shall be deemed equivalent to a completion thereof for all the purposes of this chapter." It is argued for respondent that it was intended by the amendment only to make it possible for a material-man or laborer to file his claim of lien before the actual completion of the building, and not to make it necessary for him to do so. But, as we construe the last clause of the amendment, its operation cannot thus be restricted. The words, "shall be deemed equivalent to a completion," mean, "shall be equal in legal effect to a completion;"

that is, shall be treated, for the purpose of filing a lien, as an actual completion. And, this being so, it is clear that whenever there has been a cessation from labor for 30 days upon any unfinished building the time within which a material-man or laborer must file his claim of lien at once begins to run.

It is also argued that the amendment cannot apply to or affect the respondent's claim, for the reason that as a portion of the materials were furnished before the amendment was passed, to hold it applicable would be giving it a retroactive effect, and that this is forbidden by the Code, which says: "No part of it is retroactive unless expressly so declared." Section 3, Code Civil Proc. We do not think that the amendment, when applied to the case in hand, is retroactive in effect. It is true it shortened the time which the respondent would otherwise have had to file its claim, and thus seek its remedy. But the authorities are numerous to the effect that a change of remedy, or in the time within which it must be sought, does not impair the obligation of a contract, provided an adequate and available remedy be left. Thus it has been held that an enactment reducing the time prescribed by the statute of limitations in force when the right of action accrued is not unconstitutional, provided a reasonable time be given for the commencement of an action before the bar takes effect. *Terry v. Anderson*, 95 U. S. 628. In that case the court, by WAITE, C. J., said: "The parties to a contract have no more a vested interest in a particular limitation which has been fixed than they have in an unrestricted right to sue. They have no more a vested interest in the time for the commencement of an action than they have in the form of the action to be commenced; and as to the forms of action or modes of remedy, it is well settled that the legislature may change them at its discretion, provided adequate means of enforcing the right remain." And see *Scarborough v. Dugan*, 10 Cal. 305; *Society v. Hayes*, 56 Cal. 297; *People v. Campbell*, 59 Cal. 243. When the amendment in question was passed the materials had not all been furnished, and work on the building had not been suspended. Afterwards, when the work was suspended the respondent had notice of it, and when the suspension had continued for 30 days it still had 30 days within which to file its claim. This seems to us to have been a reasonably sufficient time, and, if so, it follows that the claim was filed too late.

In our opinion the court erred in entering a judgment of foreclosure against the defendant Olmstead, and we therefore advise that the judgment appealed from be reversed.

We concur: FOOTE, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is reversed.

WORKS, J. I dissent. The amendment of section 1187 of the Code of Civil Procedure was evidently intended for the benefit

of the material-man, and extended the time within which he may file his notice of lien when work has been suspended for 30 days. As the section now stands he is not bound to wait until the building is completed before filing his notice. But in my judgment he may do so. The statute should not be so construed as to compel the owner to submit to a forced sale of an uncompleted building because a faithless contractor has failed to comply with his contract, and left the building unfinished. I think, therefore, that it is not enough to show that the contractor has failed to carry out his contract, but that it must be shown that the owner, who alone is affected by the filing of the lien, has himself abandoned the work on the building. If he has not abandoned the completion of the building, but is only delayed in its completion by no act of his own, but by the failure of the contractor to comply with his contract, he should not, for that reason be subjected to the filing and enforcement of the lien until the building has been completed. This construction of the statute seems to me to be the only reasonable and just one. The construction given the section referred to in the foregoing opinion overlooks the true intent and meaning of the statute, and the real parties to be affected by the enforcement of its provisions, looks only to the strict letter of the statute, and must necessarily work injustice.

THORNTON, J. I concur with Justice WORKS in his dissenting opinion. It presents the just and proper construction of the statute.

83 Cal. 251

WALDRON v. WALDRON. (No. 13,503.)  
(*Supreme Court of California*. Aug. 4, 1890.)

DIVORCE—CRUELTY—MENTAL ABUSE.

Though Civil Code Cal. § 94, defines "extreme cruelty" as "the infliction of grievous bodily injury or grievous mental suffering upon the other by one party to the marriage," a divorce should not be granted the wife on the ground of extreme cruelty because the husband, when intoxicated, and in the presence of others, called her a "whore," and other vile names, where the evidence shows that she was not uniformly kind to him, and that the mental suffering endured by her did not injure her health. *McFARLAND and PATERSON, JJ.*, dissenting.

Commissioners' decision. In bank. Appeal from superior court, Los Angeles county; W. P. WADE, Judge.

*Smith, Winder & Smith*, for appellant.  
*Wells, Guthrie & Lee*, for respondent.

VANCLIEF, C. This is an action for divorce on the ground of extreme cruelty, by the use of vile and offensive language, without any physical force or violence applied to the person of the plaintiff. The answer of the defendant denies the cruelty and the use of the language alleged. The court found for the plaintiff, and decreed a divorce and permanent alimony of \$100 per month while she shall remain unmarried, and \$1,000 for her attorneys' fees; and defendant appeals from the judgment and from an order denying his motion for a new trial.

The material substance of the findings



as to extreme cruelty is as follows: That, upon occasions when the defendant was intoxicated, he wrongfully and unjustly, and without sufficient provocation to justify him in so doing, called the plaintiff vile names, once called her a "whore," and on several different occasions called her a "damned bitch," and a "damned witch from hell," in the presence and hearing of other people, thereby inflicting upon her grievous mental suffering, but without injury to her health; that when he called her such vile names she was not without fault, and that she was not uniformly kind to him; that there is reasonable apprehension to believe that such cruel treatment will be continued if a divorce is not granted. The defendant contends—*First*, that these findings as to cruelty do not support the judgment; and, *second*, that they are not justified by the evidence.

1. As to the sufficiency of the finding, it is to be observed that the degree of cruelty which the law recognizes as a cause of divorce never has been exactly defined. Perhaps as near an approach to an exact definition as is practicable is made by Mr. Bishop, who, admitting the great difficulty of formulating such a definition, thinks the task not impossible, and gives as his definition the following: "Cruelty is such conduct in one of the married parties as, to the reasonable apprehension of the other, or in fact, renders cohabitation physically unsafe, to a degree justifying a withdrawal therefrom." 1 Bish. Mar. & Div. (6th Ed.) § 717. Yet this expression of the degree of cruelty which may justify a withdrawal from cohabitation seems to leave it quite as indefinite as was the degree which will justify a divorce, without aid from this definition; and the learned author seems to admit as much further on, (section 740,) where, referring to this definition, he says: "By our definition of cruelty, the apprehension of physical danger to the complaining party must, to justify a divorce, have proceeded to a degree justifying a withdrawal from cohabitation." Now, if this seems indefinite, so is the law. There is no possibility of measuring the depth of woe or danger thus required except by the understandings of the men who occupy the bench and the jury-box, enlightened and strengthened by what has been heretofore deemed or adjudged." Certainly, where the fact upon which the law is to operate is indefinite, the law is necessarily indefinite and uncertain to the same degree; and generally uncertainty of the law proceeds from uncertainty as to the ultimate matter of fact which forms a part of, and a term in, every proposition of law. True, it is sometimes uncertain whether a law is mandatory or merely directory or permissive; but much oftener the "uncertainties of the law" arise from uncertainties as to the facts or things commanded, permitted, or prohibited; and so it is with the fact of cruelty prohibited by the law governing the marriage relation. Since all degrees of cruelty are not prohibited, and the requisite degree to bring it within the prohibition being uncertain, the law prohibiting it must be correspondingly uncertain.

But, although the degree of cruelty constituting a ground for divorce may not have been exactly defined, it has been so described by the decisions of courts that it may be sufficiently identified for practical purposes; and although the judicial descriptions of what is and what is not a sufficient degree of cruelty do not reduce the distinction to a line clearly separating the sufficient from the insufficient degrees of cruelty in all possible cases, they reduce it to a very narrow zone, within which the true line of distinction is to be judicially ascertained or sufficiently approximated by means of the peculiar circumstances of each case, viewed in the light of "what has been heretofore deemed or adjudged." A great majority of the cases, however, will be found to fall within the authoritative descriptions of either the requisite or the insufficient degree of cruelty. It is contended, however, by counsel for respondent, that extreme cruelty is defined by section 94 of the Civil Code, and that the finding in this case, being in the language of that section, must be sufficient. That section is as follows: "Extreme cruelty is the infliction of grievous bodily injury or grievous mental suffering upon the other by one party to the marriage." If this section is to be considered a proper legal definition of the words "extreme cruelty," as used in section 92 of the same Code, it certainly deprives those words of an essential part of their meaning as used in the books to express a cause of divorce, since it entirely omits the attribute of wrong or injustice. "The infliction of grievous bodily injury or grievous mental suffering" does not imply wrong or injustice, and it may be justifiable; whereas the word "cruelty" alone, is always understood as implying wrong or injustice; and the "extreme cruelty" which is a cause of divorce is necessarily wrong, and never justifiable. Therefore, to say that section 94 of the Civil Code was intended as a complete definition of the words "extreme cruelty," as used in section 92, would be to affirm that the mere "infliction of grievous mental suffering," though excusable or justifiable, is a cause of divorce,—an absurdity not to be attributed to the legislature. The probable object of the legislature in enacting section 94 of the Civil Code was to affirm the previous decisions of the supreme court of this state in the cases of *Morris v. Morris*, 14 Cal. 78, and *Powelson v. Powelson*, 22 Cal. 360, to the effect that extreme cruelty may be effected without, as well as with, physical violence, and thus to settle the law on a point as to which there was thought to be some contrariety of judicial opinion in other states and in England. Surely it was not intended to disturb those decisions; for, although they limit the rule that extreme cruelty may be the result of treatment other than that of physical violence to such treatment and conduct as produce bodily harm or ill health, or furnish reasonable apprehension that further cohabitation would endanger the life or physical health of the complaining party, yet they extend the rule quite as far as it has gone elsewhere in the United States or in England. Although the character of the ill

treatment, whether it operates directly upon the body or primarily upon the mind alone, and all the attending circumstances, are to be considered for the purpose of estimating the degree of the cruelty, yet the final test of its sufficiency, as a cause of divorce, must be its actual or reasonably apprehended injurious effect upon the body or health of the complaining party. 1 Bish. Mar. & Div. (6th Ed.) §§ 732, 733b; *Morris v. Morris*, 14 Cal. 80; *Powelson v. Powelson*, 22 Cal. 362. This is the only practically safe rule. The grave remedy of divorce is disproportioned to the petty marital wrongs and annoyances whose injurious effect upon the body or health cannot be shown and sensibly appreciated, and is not to be administered on the ground of cruelty, except in conservation of life or health. Many of such wrongs and annoyances productive of more or less unhappiness must be borne, if they cannot be justly remedied or avoided by the parties themselves. The following passage from Lord STOWELL'S opinion in *Evans v. Evans*, 4 Eng. Ecc. R. 310, delivered 100 years ago, has ever since been regarded and cited as sound law both in England and the United States: "Mere austerity of temper, petulance of manners, rudeness of language, a want of civil attention and accommodation, even occasional sallies of passion, if they do not threaten bodily harm, do not amount to legal cruelty. They are high moral offenses in the marriage state, undoubtedly, not innocent surely in any state of life, but still they are not that cruelty against which the law can relieve. Under such misconduct of either of the parties—for it may exist on one side as well as on the other—the suffering party must bear in some degree the consequences of an injudicious connection; must subdue by decent resistance or by prudent conciliation, and if this cannot be done both must suffer in silence. And if it be complained that by this inactivity of the courts much injustice may be suffered, and much misery produced, the answer is that courts of justice do not pretend to furnish cures for all the miseries of human life. They redress or punish gross violations of duty, but they go no further. They cannot make men virtuous; and, as the happiness of the world depends upon its virtue, there may be much unhappiness in it which human laws cannot undertake to remove. Still less is it cruelty where it wounds, not the natural feelings, but the acquired feelings, arising from particular rank and situation; for the court has no scale of sensibilities by which it can gauge the quantum of injury done and felt, and, therefore, though the court will not absolutely exclude considerations of that sort where they are stated merely as matter of aggravation, yet they cannot constitute cruelty where it would not otherwise have existed." Speaking of this passage, and of cruelty inflicted by other means than physical violence, Mr. Bishop says, (section 725:) "And though the court may not, as Lord STOWELL said, have 'any scale of sensibilities by which it can gauge the quantum of injury done and felt,' it may sometimes perceive that it is greater

than can be practically endured, as well when falling on the mind as on the body. Equally, whether of the one sort or the other, the court must be made affirmatively to perceive that cruelty exists in fact, and is sufficient in degree, before it can grant the remedy." Yet the practical view of the law is that a degree of cruelty which cannot be perceived to injure the body or the health of the body "can be practically endured," and must be endured, if there is no other remedy than by divorce, because no "scale" by which to gauge the purely mental susceptibilities and sufferings has yet been invented or discovered, except such as indicate the degrees thereof by their perceptible effects upon the physical organization of the body.

From the foregoing considerations it follows that the findings of fact are not sufficient to sustain the judgment. "Extreme cruelty" is not expressly found in any sense; nor does it, in the legal sense above described, follow as a necessary inference from the facts found. The finding of "grievous mental suffering" is, and purports to be, only an inference or conclusion from the opprobrious language found to have been used by the defendant. In the case of *Smith v. Smith*, 62 Cal. 466, in which the only issue was as to the fact of extreme cruelty, it appeared that the trial court, after finding the acts claimed to have constituted extreme cruelty, concluded as follows: "That the repeated acts of cruelty, as established by the evidence, upon the part of said defendant towards her said husband and children during the last several years, have inflicted upon the plaintiff grievous mental suffering." Held, that this finding "is but a conclusion of law, and does not find any fact in issue in the case." Now, whether this finding is a conclusion of law or a conclusion of fact, the decision that it is not a finding of any fact in issue is correct, though the fact of extreme cruelty was in issue; because, as we have seen, the infliction of grievous mental suffering is not the equivalent of extreme cruelty in a legal sense, nor is extreme cruelty a necessary inference from the infliction of grievous mental suffering, since the latter may be excusable, and even justifiable, while the former never is so. Although the evidence is conflicting as to the finding that the defendant, when intoxicated, unjustly, and without sufficient provocation, once called the plaintiff a whore, and several times a bitch, and a witch from hell, in the presence of other people, yet this finding is justifiable by the rule applicable to findings upon conflicting evidence; but, qualified as it is by the further findings that the plaintiff was not uniformly kind to the defendant, that at the times when he called her those vile names she was not without fault, and that her health was not injured thereby, it does not stand the final test of its sufficiency, as it does not affirmatively show any actual or reasonably apprehended injurious effect of the language used upon the body or health of the plaintiff, and therefore it could not have been affirmatively perceived by the court that the cruelty was sufficient in degree. Upon the findings of fact, I think the judgment should have been for the de-

fendant; and as the case appears to have been thoroughly tried as to the facts, it appears very improbable that a new trial would result more favorably to the plaintiff. *Ford v. Chambers*, 28 Cal. 18.

A careful examination of the evidence will show that it is barely sufficient to justify even the insufficient findings, and that there are many circumstances tending to qualify the facts found in favor of the defendant, and to mitigate their effect upon the plaintiff's mind. Both parties had been married before. The plaintiff had three children by her former marriage, aged, respectively, seven, nine, and eleven years, but the defendant had no children by his former marriage. The plaintiff had about \$2,500, and defendant had property worth about \$100,000, at the time of their marriage. The intemperate habits of the defendant, such as they were after marriage, were known to plaintiff before marriage, and she testified that she once broke off her engagement to marry him on that account; and, as a condition of renewing it, she required him to sign a written pledge to her, not that he would not drink, but only that he would not drink to excess, and that his hand trembled from the effect of drink at the time he signed the pledge. Soon after the marriage plaintiff's niece, then a young unmarried lady, came to live with them and remained until she was married, on July 25, 1888, nearly three months after the commencement of this suit; for it appears that the plaintiff continued to reside in defendant's house up to the time of trial, as before, except that he occupied a separate room from hers. The defendant kept his pledge until about two months after marriage. The niece, Mrs. Albee, testified as to the first time he became intoxicated after marriage, as follows: "When I first came down I was very much pleased with my aunt's choice. He was apparently a gentleman, and acted the gentleman for quite a while, until probably six weeks afterward. We came home and found him in a state of intoxication in the hall, and my aunt remonstrated with him after he got into the room, and he became very angry and swore a great deal. \* \* \* She remonstrated with him, and said to him: 'Do you remember the promise you made to me?' He said: 'My promise outside of a business transaction does not amount to anything.'" As to how often after this first scene he became intoxicated, or called her vile names, the evidence is indefinite. The plaintiff testified that it may have been two or three times a month, but probably oftener. She could not tell how often, but that the first time he called her a whore or bitch was during the holidays, when he came home intoxicated late at night, upon which occasion the principal quarrel seems to have occurred, and as to which the plaintiff in part testified as follows: "I would not let him in the room at night. \* \* \* That was the first occasion that happened, and he was going to kick in the door. \* \* \* I never have seen him quite so mad as that before. Then I was nervous. I did not know. I was all alone in the house. My little girl

was in the room with me. My niece was at the theater with Mr. Albee. My little girl heard a noise in the house, and asked me if she could come in my room. I told her she could come until Mr. Waldron came. I says: 'If he comes home sober, you will have to go to your own room. If he comes home drunk, you can stay.' \* \* \* We heard something in the hall, as if somebody fell. He came to my door, and demanded to come in. I told him he could not come in. \* \* \* He said he wanted some quilts. I said I had no quilts only what was on my bed. I told him if he had come home sober he could have come in. He says, 'Open this door,' and went on damning and cursing and swearing, and I thought I would scare him, and call a policeman. I raised the window. There was no policeman around there. When I called the policeman he says, 'You damn bitch, you damn whore, you damn tramp,' or something like tramp. I says: 'I will not stand that in the world.' I was paralyzed. I never thought Mr. Waldron would call me any such names as that. When he called me these names first it almost paralyzed me. Then the colored girl heard him down stairs, and she came up, and tried to get him down stairs. He went down and sat in the parlor by the fire. \* \* \* It was about the holidays, either the last part of December or a little after New Year's. I cannot exactly tell when the next time was. Of course I did not feel very kindly toward him after he called me those names, and when I got him sober I gave him a piece of my mind about it. He was sitting at the head of the table, and I says to him: 'You have called me the very worst kind of names the other night, and remember I will never stand that.' I says: 'I have not done anything to deserve any such names as that, and you can't do that.' I says: 'Probably you are calling me after the women that you have been used to associate with all your life. It comes natural; but remember you cannot call me any such names as that.' He spoke of his property at Washington Gardens, and says: 'Look at the wealth ahead of you.' I says: 'The wealth ahead of me don't license you to call me any such names.' He says: 'If you leave me you will go to the poor-house.' It was no use for me to talk to him at all about it. He behaved himself for a little while. About a week or so he behaved himself; kind of stayed sober; did not drink much. He kind of thought I would do something, I guess. Then I guess he thought I would not. I don't know what it was. In the hall upstairs, anyhow, he says: 'You are a damn whore, anyhow.' Just then I leaned over the banister, and saw my niece on the stairs, and I says: 'Jennie, did you hear what he called me?' She says, 'Yes, I did.' He says: 'Oh, well, I will take it back.' \* \* \* When he thought she heard him, he says: 'I will take it back.' I says: 'You better take it back.'" It appears that there was no spare bed in the house at the time she barred him out of her room, their spare bed-room not being fully furnished at that time. On cross-examination plaintiff said: "The time

there was a fuss about the quilts was the first time he called me names. \* \* \* When I told him he could not come in he says: 'I want some quilts.' I says: 'I have none in here only what is on my bed, and if you had come home sober, sir, you could come in, and have quilts where you belong.' " Being asked by her counsel if she ever did anything to provoke him or seek quarrels with him, she answered: "He would come home drunk, you know. I would say: 'Now, Dave Waldron, now you are drunk again.' I would go on, and I said: 'Now you know very well the promise you made me, and the condition upon which I married you, and you have broken that promise, and you know you took an oath to me, and you kept sober before you married me for months.' \* \* \* If he would come home drunk, and fall in the door-way, and lay in the hall, so we could not get him up, when my niece invited company, we had to send over to Mansfield to take him off of the floor. He has fallen in the front door so the whole house shook. When he would come home so, I was a little bit provoked, you know. Then I would think it was my time to talk to him, and tell him what he was doing. He could not enjoy his money, and when he would get to drinking he would kill himself. I would tell him about his soul, and the hereafter. Then he would answer me in the most terrible blasphemous remarks when I would begin anything about religious subjects. \* \* \* At one time I don't know as he had much liquor. \* \* \* I made the most solemn appeal to him in the dining room. When I got through he knew I was right. \* \* \* When I made this eloquent appeal to him, he picked up his head, and said: 'You are a d—— fool.' My appeal was all right, but it was foolish to apply it to him. \* \* \* All I would do I would talk to him, you know, and sometimes I would scold him. \* \* \* I says: 'Didn't your first wife ever scold you about your actions generally, and try to make you do what was right? Didn't she scold like I do?' He said: 'She scolded louder and faster than you do, but she did not spread it on quite so thick,' meaning it was not to the point, as mine was." Mrs. Albee, the niece, testified: "I think it was after Christmas that his language and conduct was most vile,—well, almost up to the time, and after, she applied for a divorce." So it seems that the plaintiff and her niece remained in the house with him, and that the quarreling was kept up after the suit for divorce had been commenced; the niece remaining until she was married, nearly three months after the suit was commenced. Being asked how often she heard him call plaintiff vile names before the divorce suit was commenced, Mrs. Albee answered: "I never heard him call her out of her name except this once. I heard him call her a whore but once. I never heard him call her a bitch. \* \* \* I remonstrated with him. I was very indignant, and I spoke to him about his conduct."

Plaintiff admitted that the defendant was an honest man in all his business transactions, and that he liberally sup-

plied her and her children and niece. She complained of no unkindness when he was sober, and feared no physical violence from him when he was drunk. In their quarrels she appears to have been more than his match, though she could not descend to answer his profanity and obscenity in kind. While drunkenness was no excuse for calling her vile names under any circumstances, yet the injurious effect thereof upon her mind should not have been, and probably was not, so bad as if he had deliberately called her by those names when he was sober. No mental suffering produced by his drunkenness merely can be considered, because not complained of. *Haskell v. Haskell*, 54 Cal. 262. The mental suffering caused by his words alone can be considered in this case.

The finding that defendant called the plaintiff a whore and a bitch in the presence and hearing of other people should be qualified by the admitted facts that none but the niece and her caller and the colored servant heard him call her out of her name; and that he was not aware that even they heard what he said, or that the caller upon the niece was in the house at the time. This seems material, as tending both to modify the otherwise apparent motive of the defendant, and to mitigate the alleged painful effect upon the mind of the plaintiff; as without this qualification it would appear that the defendant intended to defame the plaintiff in public estimation, which would indicate a worse motive on his part, and produce a more painful effect upon her mind, than would the mere intention privately to annoy her, or to revenge himself for the fancied wrongs of having been barred out of her room and threatened with the police. While the defamatory, obscene, and profane language of the defendant was wholly unjustified, inexcusable and unmanly, it may be said that the conduct of the plaintiff was at least unkind and censorious, and tended to provoke anger and harsh language on the part of the defendant. It probably resulted from her ill temper, bad judgment, and a mistaken view of the duty of a wife under the circumstances. She probably deemed it her duty, by means of censure, reproach, and scolding, to make her husband "do what was right," and it seems that she faithfully, in season and out of season, applied such means. In this I think she was mistaken. Intemperate husbands are seldom, if ever, reformed by such treatment, whereas uniform kindness may often prove effectual, and never harmful; but should kindness fail, and the intemperance of the husband become habitual, the wife will be entitled to a divorce on that ground alone. I think the judgment should be reversed, and the court below directed to render judgment for the defendant on the findings, without costs, and that the appellant pay his own costs of the appeal.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, and the court below directed to render judgment for the defendant on the

findings, without costs, and that the appellant pay his own costs of the appeal.

I dissent: PATERSON, J.

McFARLAND, J., (*dissenting*.) I dissent. It is possible that the judgment in this case might be reversed for want of sufficient proof of facts, but I dissent *in toto* from the views expressed in the opinion adopted by the majority of the court on the subject of extreme cruelty. The opinion goes back to the old cases of *Morris v. Morris*, 14 Cal. 80, and *Powelson v. Powelson* 22 Cal. 362, and adopts their doctrine that no conduct of a husband towards a wife constitutes extreme cruelty unless it injures bodily health or endangers physical safety. It treats a woman as having only a bodily structure and physical organs like one of the lower animals, and utterly ignores her mental, moral, and emotional nature. Those cases, following musty decisions in the past, when women had few civil immunities which man was bound to respect, were determined before the present statutory law of California upon the subject, and at a time when human rights, as human rights, were but dimly recognized, even in these free United States, and when extreme, and in some cases wholesale, violation of personal liberty was common against all except one class, viz., white male citizens. The theory of those cases is that a husband may heap all sorts of wrongs upon a wife short of beating or threats of personal violence; that his conduct towards her may be a continuous series of acts of insult and contumely; that he may continuously call her vile names, and unjustly and falsely charge her in the presence of others with indecent acts and base practices, so that she is ashamed to look her neighbors in the face, and unable to find aught in life but misery,—so that the common voice of mankind would call him cruel beyond all patience; and yet, as long as her physical constitution can bear up under the strain, she can get no redress. She must be a wreck before she can be rescued. This doctrine makes legal cruelty depend, not on the misconduct of the husband, but on the endurance of the wife; not on the guilt of the wrong-doer, but on the vitality of the victim. The anguish of the mind must have eaten through the flesh, and exhibited itself in bodily disease, before there can be any legal evidence of cruelty. But some women, like some men, have inherited from sturdy ancestors physical constitutions so robust, with bone and blood, and muscle and nerve, and heart and lungs so charged with vitality that the woes of a Lear would not wear out the machinery or obstruct the currents of healthy physical life. Must such a woman suffer on forever, and only the weak, who faint at a gentle reproach, be relieved? There is not, in my opinion, any necessity whatever to follow *Morris v. Morris* and *Powelson v. Powelson* as authorities; for since they were decided the statute law has been changed, and changed, I think, for the express purpose of obliterating those decisions. At that

time the statute merely made "extreme cruelty in either party" a cause of divorce, without any attempt to define or describe it. *Hitt. Gen. Laws*, par. 2416. But the Code has added the following: "Extreme cruelty is the infliction of grievous bodily injury or grievous mental suffering upon the other by one party to the marriage." Civil Code, § 94. Here "bodily injury" and "mental suffering" are mentioned as two entirely distinct things, and each by itself as constituting extreme cruelty. If the legislature had merely meant bodily injury caused by mental suffering, there would have been no occasion for the legislation at all, because that was included clearly in the decisions in the *Morris* and *Powelson* cases. It is entirely evident, therefore, to my mind, that both in a philologic and historical view the language of section 94 means that the infliction of grievous mental anguish alone constitutes legal cruelty. It is said that the definition of extreme cruelty in section 94 is defective. Of course there cannot be a perfect definition of such a thing. The qualities of human actions cannot be designated by accurate lines, as fields can be by fences. Can grievous bodily injury be accurately defined? It is said that the infliction of grievous suffering does not imply wrong or injustice. But section 94 is dealing with extreme cruelty, and uses that phrase. And does not "extreme cruelty" itself imply wrong and injustice? And while extreme cruelty of either kind cannot, in the very nature of things, be accurately defined, there is often misconduct so far outside of and beyond that produced by the ordinary weaknesses and passions of men that the common judgment of mankind pronounces it extremely cruel. Every case where a divorce is sought on this ground must depend upon its own particular facts; and a correct decision must depend, as most cases depend, upon the sound sense and judgment of juries and courts. Some divorces are no doubt obtained upon insufficient proof; but it must be remembered that one reason why more divorces are granted than formerly is because formerly wives had no remedy for many outrageous wrongs.

35 Cal. 300

PEOPLE v. LEE FOOK. (No. 20,664.)

(Supreme Court of California. Aug. 4, 1890.)

CRIMINAL LAW—INSANITY OF ACCUSED—QUESTION FOR JURY—INSTRUCTION.

1. Pen. Code Cal. § 1368, provides that "when an action is called for trial, or when the defendant is brought up for judgment on a conviction, if a doubt arise as to the sanity of the defendant, the court must order the question as to his sanity to be submitted to a jury." The court allowed evidence, on the trial of defendant, as to his sanity after and before the time of the alleged offense, but refused to instruct that if the jury believed defendant insane at the time of the trial they should acquit him. *Held*, that it could not be said that the court had doubt as to the defendant's then sanity necessitating his ordering the submission of the question to the jury.

2. The fact that the jailer having charge of defendant testifies that he has observed defendant during his imprisonment, and believes him to be insane, is not sufficient to create such a doubt

as to require the court to order the question of defendant's sanity to be submitted to the jury.

PATERSON, J., dissenting.

Commissioners' decision. In bank. Appeal from superior court, Los Angeles county; LUCIEN SHAW, Judge.

*Hugh J. and William Crawford*, for appellant. *Atty. Gen. Geo. A. Johnson*, for the People.

FOOTE, C. The defendant was convicted of assault with a deadly weapon, upon an information charging the crime of assault with intent to murder. The claim made for a reversal of the judgment rendered in the premises, and from an order denying a new trial, is that the court erred in not submitting the question of the sanity of the defendant to a jury, under the provisions of section 1368 of the Penal Code, and that it should have given, instead of refusing, an instruction asked for on behalf of the defendant. The section of the Penal Code with which it is alleged the trial court failed to comply is: "When an action is called for trial, or at any time during the trial, or when the defendant is brought up for judgment on a conviction, if a doubt arise as to the sanity of the defendant, the court must order the question as to his sanity to be submitted to a jury. \* \* \*" In the present case the court, upon the trial of the defendant, allowed evidence as to his sanity after and before the commission of the offense charged, but would not give an instruction to the jury to the effect that if they believed the defendant insane at the time of trial they should acquit him. It was proper for the court to allow such testimony to go to the jury on the trial, with a view to enable them to determine whether the defendant was insane at the time of the trial. *People v. Farrell*, 31 Cal. 576. But it does not follow, because of this, that the court must have had a doubt of the defendant's then sanity; for, as we have seen, it refused to give an instruction that the defendant must be acquitted if he was then insane. Judge TEMPLE, in the case of *People v. Ah Ying*, 42 Cal. 21, says: "The fact that evidence upon the subject was allowed to go to the jury, and that they were instructed to find a verdict that the defendant was then insane, if they were satisfied from the evidence that he was so, implies a doubt on the part of the court as to his sanity." There the learned judge found two circumstances, which together implied a doubt by the court. In the present case the most important and persuasive circumstance showing doubt in the former case is absent; that is, the granting of the instruction to the jury. In the present case the court evidently had no doubt that the defendant was sane, and there being no request made by him to have the question of insanity submitted, as the section *supra* requires, as a separate and distinct issue from that of the defendant's guilt or innocence of the offense charged, it did its duty by allowing the evidence to go to the jury, as bearing upon the question of the sanity of the defendant at the time of the commission of the offense. Therefore, the case in 42 Cal. is not in

point here, as showing conclusively that the court must have had doubt as to the defendant's then sanity.

The evidence in the transcript is not of a kind from which we can say that the trial court either ignorantly or capriciously disregarded its force and effect, in not entertaining therefrom doubt as to the defendant's sanity. It is clear that no such doubt existed in the mind of the trial court, and we cannot say that it was its duty to have entertained such doubt from that evidence. The instruction refused is: "You are also instructed that if you believe from the evidence that the defendant is now insane you shall find him not guilty because of insanity." "There was no plea of insanity required." *People v. Ah Ying*, *supra*.

The proof upon the matter of insanity was not admitted under any such issue as present insanity, as we have seen. No such issue was before the jury, and no such instruction was proper. We perceive no prejudicial error in the record, and advise that the judgment and order be affirmed.

We concur: BELCHER, C. C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

PATERSON, J., (*dissenting*.) I think it was the duty of the court, when the deputy-sheriff testified he believed the defendant to be insane, to suspend the trial, and order the question of his sanity to be submitted to a jury. The deputy testified that he was the jailer, and had observed the actions and language of the defendant during the time of his imprisonment in the county jail, and believed him to be insane. This was sufficient to create the doubt provided for by the provisions of section 1368. I do not mean to say that in every case where a witness testifies that he believes the defendant to be insane the court must order the question of his insanity to be submitted to a jury. The defendant in nearly every case might be able to procure a witness who would testify to his insanity. Each case must depend upon its own peculiar circumstances. Here an officer of the state,—the defendant's keeper,—without any interest whatever in the result of the prosecution, and having had opportunity for two months to converse with and observe the actions of the defendant, testified that he believed the defendant to be insane. There was other evidence, uncontradicted, which tended to show that the defendant was insane prior to the time of the assault, and that the act of the defendant was that of a madman without provocation or motive. As was said by Judge TEMPLE in *People v. Ah Ying*, "common humanity requires that one should not be tried for his life while insane, and counsel for the defendant cannot waive such inquiry when the doubt exists." It was the duty of the court, of its own motion, to suspend the trial or further proceedings in the case, at whatever stage the doubt arose, until the question of sanity was determined.

85 Cal. 191

ARZAGA v. VILLALBA. (No. 13,471.)  
(Supreme Court of California. Aug. 4, 1890.)

## EXEMPLARY DAMAGES.

1. Civil Code Cal. § 8294, provides that "in an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, actual or presumed, the jury, in addition to the actual damages, may give punitive damages." Plaintiff lived with defendant, her father, who was angry with her because she would not contest her mother's will. While she with her little child was in town for medicine, defendant locked them out, and they were obliged to sleep in an outhouse, which had been used for a granary, but which had a bed. Plaintiff was very sick at the time, and unable to work. The next day defendant refused to give her clothes and furniture to her. *Held*, that plaintiff was entitled to exemplary damages, besides a judgment for the property.

2. The fact that plaintiff obtained possession of the property pending the proceedings does not affect the question of exemplary damages.

3. Exemplary damages may be awarded in an action for the conversion of personal property as well as in an action for the recovery of the property itself.

4. Civil Code Cal. § 3396, provides that "the detriment caused by the wrongful conversion of personal property is presumed to be \* \* \* (2) a fair compensation for the time and money properly expended in pursuit of the property." *Held*, that expenses of pursuit could be recovered as well in an action to recover the property as in an action for conversion merely.

Commissioners' decision. In bank. Appeal from superior court, Santa Barbara county; B. T. WILLIAMS, Judge.

W. C. Stratton, for appellant. *Fernald, Cope & Boyce*, for respondent.

HAYNE, C. This was an action for the recovery of personal property and damages. The plaintiff obtained judgment for the possession of the property or its value in the sum of \$350, and for the sum of \$530 damages.

1. The defendant contends that there is no evidence that justifies the award of damages. And it is quite true that there is no evidence of actual damage (the property itself having been returned) beyond a small sum expended in pursuit of the property. But "in any action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, actual or presumed, the jury, in addition to the actual damages, may give damages for the sake of example, and by way of punishing the defendant." Civil Code, § 3294. And we think that the circumstances of the case justified the award which the jury made. The plaintiff was the daughter of the defendant, and lived in his house with her two children, one of whom was about four years old, and the other a baby. The property consisted principally of her clothes and furniture. There is evidence tending to show that about 10 days after her mother's death the defendant became angry with the plaintiff because she refused to try to have her mother's will set aside; that on January 3, 1889, she went to a neighboring town to get some medicine, and on her return found that defendant had put new locks on the doors, so that she could not get in. She says: "I slept in an outhouse the night of January 3d. It is an unfinished house; a

little farm-house; an old house that they use to keep grain in." It appears that this house was not unoccupied, and that she did not have to sleep on the floor, but had a bed. But she "was very sick at the time and not able to work." And one of the neighbors to whom she applied says: "I saw her the next morning. The child was with her. The child was running at the nose and eyes, and he seemed to be all drawn up, like he was starved during the night. She looked miserable, and said she didn't sleep at all." The next day she asked her father for her things, but he refused to give them to her, and retained them until they were taken from him under the process of the court. There is evidence tending to contradict some of the foregoing; but wherever there is a conflict it must be presumed that the evidence tending to support the judgment is true. And assuming that it is true, we think that there was such oppression on the part of the defendant as justified the award of the jury. It makes no difference with respect to the exemplary damages that, pending the proceedings, the plaintiff obtained possession of the property under the process of the court. That could affect only the judgment for the value of the property. It does not affect the exemplary damages. Section 626 of the Code of Civil Procedure does not establish a different rule.

2. The defendant contends that the court erred in instructing the jury that the action was for the conversion of personal property, and that in such an action they could give exemplary damages if they believed that there was malice, etc. The argument is that this was not an action for the conversion of personal property, but was for the recovery of the property itself. But whatever may be the distinction between the two actions it is not important here, for the provision of the Civil Code above quoted does not confine the recovery of exemplary damages to actions for the conversion of the property. It says, "in an action for the breach of an obligation not arising from contract," which is certainly broad enough to include both the actions above referred to. The court, therefore, was right in telling the jury that if they believed that there was malice, etc., they could give exemplary damages. And if it called the action by a wrong name the mistake was immaterial.

3. It is urged that under the cases of *Kelly v. McKibben*, 54 Cal. 195, and *Redington v. Nunan*, 60 Cal. 632, the plaintiff cannot recover what she expended in pursuit of the property. These cases seem to lay down the rule that expenses in pursuit of the property can be recovered only in actions "for" the conversion, and not in actions to recover the property itself. Undoubtedly the property itself is a different thing from damages for its conversion. The pleader may unquestionably omit one of them. He may not allege any damages from the conversion, and if not he cannot recover any. In that sense it is true that in an action to recover the property itself, i. e., the property only, the plaintiff cannot recover damages for the conversion.



But it is perfectly clear that the party may have sustained damages from the conversion outside of the loss of the value of the property itself. The Code expressly provides that "the detriment caused by the wrongful conversion of personal property is presumed to be \* \* \* (2) a fair compensation for the time and money properly expended in pursuit of the property." Civil Code, § 3336. If, therefore, he has made such expenditures, he is entitled to recover them as damages for the wrongful act of the defendant. He is also, undoubtedly, entitled to a recovery of the property itself if possession thereof can be had. Why should he be compelled to waive one or the other, or to bring separate actions for relief on account of the same wrong? To say that the expenses of pursuit can be recovered in an action for the conversion, but not in an action for the property itself, is to say that the expenses of pursuit can be recovered where the party abandons the pursuit, but not where he follows it up, and is successful. In other words, that the expenses of pursuit cannot be recovered when he pursues, but only when he ceases to do so. We can perceive no reason for such a result. There is nothing in the statute which points to it. The provision establishes the measure of damages for "the wrongful conversion of personal property." And we do not see any reason for saying that this means that the damages can be recovered only in the old rigid form of action in which a recovery therefor used to be allowed at common law. Under the Code, if a complaint states a cause of action of any kind, a recovery may be had accordingly. As above stated, a recovery of the expenses of pursuit is not inconsistent with a recovery in the same action of the property itself. And if it were, the misjoinder would have to be objected to in some appropriate way. That part of the case cannot be simply disregarded. The form of the judgment does not make this conclusion. The argument in this regard is that, in cases where the possession can be had, to apply the measure of damages established by section 3336 would be to give the plaintiff both the property and its value. But the judgment must always be in the alternative. Even where the possession not only can be, but has been, delivered, under provisional process, the judgment must, nevertheless, be for the recovery of the property or its value in a specified sum in case possession cannot be had. *Berson v. Nunan*, 63 Cal. 552; *Brichman v. Ross*, 67 Cal. 606, 8 Pac. Rep. 316. And it by no means follows that the plaintiff is to have both the property and its value. So far as this part of this judgment is concerned it is for one thing or the other, not both; and, if possession has already been delivered to the plaintiff, the court would not allow him to proceed with his execution for that part of the judgment. But that would not affect the other parts. As to the damages the judgment is not required to be in the alternative. The form of the judgment therefore does not show that the expenses of pursuit cannot be recovered in an action for the property itself. On the contrary it tends to support the conclu-

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sion at which we have arrived; for it cannot ordinarily be known with certainty whether or not possession of the property itself can be had until the alternative judgment comes to be executed, and if the expenses of pursuit cannot be included in such a judgment, and it should turn out that possession cannot be had, then the plaintiff would obtain only the bare value of the property, although the statute expressly gives him the expenses of pursuit in addition. For these reasons we think that the doctrine of the decisions referred to must be limited to cases where the plaintiff has so framed his complaint as to seek only a recovery of the property, and has not alleged any damages; but that when he makes proper allegations of damage he may have judgment for it as well as for the property itself. In the present case the complaint alleges that the defendant took the plaintiff's property, and refused to return it on demand. This amounted to a conversion. *Wood v. McDonald*, 66 Cal. 548, 6 Pac. Rep. 452; *Doyle v. Callaghan*, 67 Cal. 155, 7 Pac. Rep. 418. The evidence sustained the allegation, and we think that the statutory measure of damages for a conversion applies.

4. The conversation between the plaintiff and her mother in regard to her remaining in the house, which must have occurred before the mother's death, and, consequently, some time before the occurrence in question, was clearly irrelevant, and the objection to it was properly sustained. As above stated the form of the judgment was proper. We therefore advise that the judgment be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

85 Cal. 362

*In re WALPOLE.* (No. 20,725.)

(*Supreme Court of California.* Aug. 18, 1890.)

CRIMINAL LAW—HABEAS CORPUS—COMMITMENT.

1. Where an information is set aside, and the prisoner is again examined by the court, acting as committing magistrate on the original complaint, and again held to answer, the error, if error there is, is reviewable on motion to set aside any new information that may be filed, and then on appeal, but not on *habeas corpus*.

2. An order of commitment to answer the charge of murder is not invalid by reason of its failure to give the name of deceased, this not being required by Pen. Code Cal. § 872.

*In bank.* On *habeas corpus*.

*Claranco A. Raker*, for petitioner.

*Fox, J.* The petitioner in this case, and one Washburn, were arrested upon a warrant based upon a complaint charging them with the crime of murder. They were regularly examined before a committing magistrate, and held to answer to the charge. In due time information was filed against them, and upon arraignment they pleaded guilty. Washburn was sentenced to the state-prison for life, but the petitioner was allowed to withdraw his plea; and, upon proceedings subsequently had, the information was set aside, and the court remanded the petitioner to

the custody of the sheriff. Thereupon the judge of the superior court, acting as committing magistrate, again held an examination of the petitioner, and on the evidence adduced he was again held to answer. To this proceeding the petitioner objected, on the ground that the judge, acting as a committing magistrate, had no jurisdiction to hold such examination, for the reason that no complaint had been filed charging the defendant with the crime of murder, or any crime. This objection was based upon the proposition that the original complaint filed in the case was *functus officio*, and that a new examination could not be had without a new complaint; also on the ground that the superior court had not in terms ordered the case resubmitted to a grand jury, or that a new information be filed. The court overruled these objections, and proceeded with the examination. We do not think that there was error in this ruling, but if there was it was subject to review first in the superior court, upon motion to set aside any information that might be filed, and then upon appeal; but it is not ground for discharging the prisoner on *habeas corpus*. Following this examination an information was filed which upon motion was again set aside, and the court again ordered "that the said Paul Walpole be held for further examination, and that he be examined by the judge of the superior court acting as magistrate," etc. In pursuance of this order a further examination was had, at which the petitioner was represented by counsel, and the objection again taken that there was no complaint, etc., as before. The magistrate overruled the objection, and proceeded with the examination, resulting in an order of commitment for the crime of murder, committed on the 22d day of April, 1889, at Willow Ranch, in the county of Modoc, state of California. To this point our answer is the same as before: If error, it is reviewable on motion and appeal, but not on *habeas corpus*.

A point is also made that the order of commitment is invalid for that it fails to give the name of the person alleged to have been murdered. This is not a defect which entitles the prisoner to his discharge. The order for commitment is even more full than required by section 872 of the Penal Code, and the commitment is in the form prescribed by section 877 of the same Code. It is the complaint and depositions which furnish the information upon which future action is based, and they were duly filed with the clerk, although not until a subsequent day.

The point is also made that the commitment is without probable cause, and upon this point the petitioner asks his discharge, or if not discharged that he be admitted to bail. The transcript of the testimony given upon the examination and filed with the clerk has been presented in this court. It shows beyond all doubt that a deliberate, cold-blooded murder was committed. This fact seems to be conceded. It would be improper for us to express an opinion as to whether or not the evidence submitted, without further testimony, is sufficient to convict this pe-

titioner of having been a party to the commission of that offense; but the point having been here made, we are compelled to express an opinion as to whether or not it shows reasonable or probable ground to believe the defendant guilty, and are of opinion that it does. The petitioner is not, therefore, entitled to be discharged.

On the question of admission to bail: The offense charged is punishable with death, unless the jury fix it at imprisonment for life. The defendant, therefore, cannot be admitted to bail, if the proof of his guilt is evident, or the presumption thereof great. Pen. Code, § 1270. So much of the evidence on the part of the prosecution as has been made public was heard by the committing magistrate, a judge of one of the superior courts of the state. He saw and heard the witnesses, an advantage which we have not had. From the transcript of the evidence as brought here we cannot say that he was not correct in holding that it was not a bailable case. Writ discharged, and prisoner remanded.

We concur: BEATTY, C. J.; MCFARLAND, J.; WORKS, J.; PATERSON, J.

85 Cal. 131

BARNARD V. LLOYD. (No. 13,467.)

(Supreme Court of California. July 30, 1890.)

WAY OF NECESSITY—PLEADING.

1. On a grant of land to which there is no access except by a private road laid out and used by the grantor over his other lands, a right to use the road passes as a way of necessity.

2. A complaint stating an agreement voidable unless in writing will be construed to mean a written contract.

Commissioners' decision. In bank. Appeal from superior court, Ventura county; B. T. WILLIAMS, Judge.

W. H. Wilde, (John D. Bicknell, of counsel,) for appellant. Blackstock & Shepherd and Barnes & Selby, for respondent.

HAYNE, C. As we construe this complaint the action is to abate obstructions in a private road or way, and for damages. The general features of the case are as follows: One Snodgrass, who was the owner of a large tract of land, conveyed a portion of it to the plaintiff. At the time of this conveyance a road was laid out on a strip belonging to the grantor along the south side of the land granted, and it was verbally agreed between the grantor and grantee that this should be and remain a road for the plaintiff's use, and he began using it as such. Subsequently Snodgrass conveyed to the defendant, who took with notice of the verbal agreement above mentioned. The defendant afterwards obstructed the road by placing a barn and a wire fence upon it. The action is against him alone. The trial court gave judgment for the plaintiff, and the defendant appeals.

It is contended that the demurrer should have been sustained because the complaint shows no right in the plaintiff to the road in question. But the complaint alleges that at the time the plaintiff bought the land it was expressly agreed

that the strip claimed as a road "should be permanently set apart, left open, and appurtenant to said land to be used as a road-way." This must be construed to mean that it was so agreed in writing. *Wakefield v. Greenwood*, 29 Cal. 597; *Miles v. Thorne*, 38 Cal. 337; *Brennan v. Ford*, 46 Cal. 14. In this view the complaint stated a cause of action, and the demurrer was properly overruled. It is somewhat doubtful whether the judgment ought not to be affirmed on this ground, for the findings state that the allegation above referred to is true, and we are not satisfied that there is any sufficient specification attacking it. But, waiving this, we think that there was a way of necessity without reference to any agreement. The complaint alleges that "the free and unobstructed use of said road-way is necessary to the convenience and enjoyment of the ten acres of said 20-acre tract now owned and in possession of this plaintiff; that he has no other means or way of ingress or egress to or from his said 10-acre tract except along or over said road-way." The finding is that this allegation is true. And there is evidence in support of the finding. In this regard the plaintiff testified as follows: "Question. You may state now, Mr. Lehman, whether the existence of this road-way is necessary to the convenient use, beneficial use, and enjoyment of that piece of property. Answer. It certainly is. Without it I could not get to it. \* \* \* It has shut me up. I cannot get out, and I would have no front to my property; no frontage." The defendant contends, however, that the plaintiff had another means of access to his property, and relies upon a diagram attached to the complaint. But it certainly cannot be said from a mere inspection of this diagram that such means of access existed. And the evidence seems to be the other way. The plaintiff says in regard to it: "May be some wagons ran across there, which they often do, but there was no regular track; nothing of the kind that I ever knew of or had any idea of. \* \* \* There was a road-way passed by my property, but I didn't know where or how it ran; but there was a road-way to go up to the cañon, the property that Mr. Lloyd has. There was no regular track; nothing of the kind that I ever knew of or had any idea of." And another witness testified as follows: "I have been familiar with this land for seventeen years. There has been a road-way going up the cañon simply for the convenience of parties going up the cañon. There has been no public road. I know of only one tract of land up in the cañon, and there was simply a track used for the purpose of going to this piece of land. I don't remember how plain it was. There was no public road." Upon the evidence we do not think that the finding referred to can be disturbed. And taking it to be true, we think that there was a way of necessity. *Taylor v. Warnak*, 55 Cal. 350. The evidence as to the damages (\$100 was awarded) is not very strong; but there was no evidence to the contrary, and the only objection that seems to be taken to it is that the averment in the complaint is not suffi-

cient. We think that the complaint is sufficient. In the view we have taken the other matters discussed need not be noticed. We therefore advise that the judgment and order appealed from be affirmed.

We concur: BELCHER, C. C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

85 Cal. 108

COHN v. COHN. (No. 13,564.)

(*Supreme Court of California*. July 30, 1890.)

DIVORCE—VACATING—DECREE—INSANITY.

A divorce on default for "inhuman cruelty" of a wife declared insane a month later, should be set aside on a showing by her guardian that the "cruelty" was the result of insanity existing when the process was served on her.

Commissioners' decision. In bank. Appeal from superior court, Ventura county; B. T. WILLIAMS, Judge.

*Barnes & Selby* and *Jos. Rothchild*, for appellant. *Blackstock & Shepherd*, for respondent.

FOOTE, C. This is an action for divorce brought by a husband against a wife on the ground, among others, of acts of "inhuman cruelty." The defendant was served with process, and failing to answer a default was entered against her, and a decree of divorce based thereon. About a month after this she was judicially declared insane, and shortly thereafter placed in an insane asylum. Her guardian appeared for her, while she was in said asylum, and moved to set aside the judgment thus entered. It is plain that the acts of alleged cruelty were the result of a diseased mind on the part of the unfortunate woman, culminating in her insanity as above stated. We think she was also in the same condition at the date of the service of summons upon her. This being the state of facts, it seems to us that under the rule in divorce cases laid down in *McBlain v. McBlain*, 77 Cal. 507, 20 Pac. Rep. 61, and *Wadsworth v. Wadsworth*, 81 Cal. 182, 22 Pac. Rep. 648, the court below should have set the judgment aside, both upon grounds of public policy, and as an act of justice in relieving an unfortunate lunatic of the stigma of "inhuman cruelty" to her husband. For these reasons we advise that the judgment and order be reversed, with leave to file an answer on behalf of the defendant.

We concur: VANCLIEF, C.; GIBSON, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed, with leave to file answer on behalf of the defendant.

85 Cal. 142

PENDLETON et al. v. CLINE et al. (No. 13,203.)

(*Supreme Court of California*. July 31, 1890.)

FIRM NAME—BURDEN OF PROOF—REMOTE DAMAGES.

1. A firm name showing the surnames only of the partners is not "a fictitious name," nor "a

designation not showing the names of the partners," within Civil Code Cal. § 2466, requiring every firm doing business under such name or designation to file and publish a certificate showing the full names and residences of its members. *Worke, J.*, dissenting.

2. On a *quantum meruit* for services the defendant has the burden of proving a special contract as to time and price under which he alleges the work was done. *Distinguishing Scott v. Wood*, 22 Pac. Rep. 871.

3. Loss of the increase in value of land for which one was negotiating, but did not buy for want of money he could have borrowed on other land had the abstract of title been done at the time agreed, is too remote.

In bank. Appeal from superior court, Los Angeles county; *H. K. S. O'MELVENY*, Judge.

*W. T. Williams*, for appellant. *C. C. Hamilton* and *Dupez & Bentley*, for respondents.

*Fox, J.* This was an action to recover \$302 for services in making an abstract of title. The defendants put in a counter-claim for \$6,000 damages, alleged to have been sustained by reason of the fact that the abstract was not made in time. The jury found a verdict in favor of the plaintiffs for \$250, and the defendants appeal.

1. The facts stated in the counter-claim are, in substance, that, if the plaintiffs had made the abstract in time, the defendants would have been able to borrow money on their property, and would have been able with such money to purchase other lands for which they had been negotiating, which latter land has subsequently increased in value in the sum of \$6,000 over and above what they could have purchased it for. The counter-claim is defective, both in form and substance. The damages claimed are too remote, and the court properly excluded all evidence relating thereto.

2. The plaintiffs, whose names are *C. W. Pendleton* and *W. J. Williams*, were partners, doing business under the firm name of *Pendleton & Williams*. They have never published any certificate of copartnership, and it is contended that this prevents their recovery in this action. Section 2466 of the Civil Code provides that "every partnership transacting business in the state under a fictitious name, or a designation not showing the names of the persons interested as partners in such business, must file with the clerk of the county in which its principal place of business is situated a certificate stating the names in full of all the members of such partnership, and their places of residence, and publish the same," etc. We do not think that the case before us falls within this provision. The name of one partner was *Pendleton*, and that of the other *Williams*. The firm name of *Pendleton & Williams*, therefore, was certainly not fictitious. It was true as far as it went. The only thing that can be said is that it did not go far enough; that it was not a "designation showing the names of the persons interested as partners." But we think that if the legislature had meant so unusual a thing as a firm name showing the full names of all the partners it would have been more natural to have

said so explicitly, just as it did do in speaking of the names to be inserted in the certificate. The reason of the provision, doubtless, was to enable persons dealing with the firm to know whom to hold responsible,—whom to proceed against. And for all practical purposes this reason is satisfied by information as to the surnames of the partners. If, for example, a man desires to sue the members of a partnership whose firm name informs him that the partners are a man named *Williams* and a man named *Pendleton*, it would be a matter of little difficulty for him to ascertain what the initials of those persons are. No one would pay much attention to him if he should say that he might be led into error in such a case. The inquiry would be too easy. It was not intended to relieve persons dealing with a partnership of all possible exertion or fatigue. For all practical purposes the information mentioned would be sufficient. The reason of the provision, therefore, is satisfied by the construction which we give to it. The opposite construction is not required by the language, and would put an unnecessary clog upon business transactions. We have heard it suggested that the persons dealing with the partnership would not know that the names stated in the designation of the firm were the true names of the partners; that is to say, in the case before us it would not be known that *Williams* was the real name of the one, or *Pendleton* of the other. But this argument proves too much. It would apply no matter how fully the names of the partners were stated in the firm name. If, for instance, the real names of the partners here were *Charles William Pendleton* and *Walter James Williams*, and the firm name was "*Charles William Pendleton & Walter James Williams*," it might still be said that persons dealing with the firm would not know whether these were the real names of the partners. Yet if such were their real names no certificate would be required. This argument, therefore, does not change our conclusion. Nor is there any opposition or contrast between the phrase a "fictitious name" and the phrase "a designation not showing the names of the persons interested." The latter is supplementary to the former. For instance, if in the case before us *Pendleton* or *Williams* was not the real name of either partner, the firm name would be fictitious. But if such names were the true names of the partners, and the firm name was *Pendleton & Co.*, it would not be fictitious, but would be a designation not showing the names of all the persons interested as partners.

3. The action is upon a *quantum meruit*. The complaint alleged a request, the rendition of the services, their reasonable value, and the refusal to pay. The answer admitted the request and the service, but denied the reasonable value, and was silent on the subject of non-payment, thus admitting that allegation of the complaint. The only issue it tendered on the allegations of the complaint was as to the reasonable value. But the answer, also, affirmatively tendered another issue, by alleging that the work was done under

special contract, both as to time and as to price, the latter being alleged to be a sum less than the amount claimed by plaintiffs, or recovered in the action. The court instructed the jury that the burden was upon the defendant to prove by a preponderance of evidence that the plaintiff had done the work under an express contract, and that, if the evidence was equally balanced upon this point, they should find for the plaintiffs in such sum as they found the work to be reasonably worth. This instruction is assigned as error. Under the pleadings and the issues as they were framed in this case, we think the instruction was right. The case was unlike that of *Scott v. Wood*, 81 Cal. 404, 22 Pac. Rep. 871. In that case the plaintiff himself pleaded, and relied upon an express contract as to price, made before the inception of the work, and under which he alleged that all service was rendered. The defendant admitted the special contract as pleaded by plaintiff, and that the work commenced under that contract, and at the monthly salary therein agreed upon, but alleged that at a subsequent period a new contract was made, by which the monthly salary was reduced from and after the date thereof. A divided court held that the burden of proof in that case remained with the plaintiff to show that the service continued throughout the employment to be at the salary fixed by the original contract. In other words, to show that the service, which continued through many years, having commenced, and being alleged to have continued, under an express contract as to price, must be so proved. We are not disposed to carry the doctrine further than it was carried in that case. In this case the first and only issue tendered as to special or express contract in regard to price was tendered by the defendant, and we agree with the court below that the burden of proving it was on the defendant. Judgment and order affirmed.

WE CONCUR: BEATTY, C. J.; THORNTON, J.; SHARFSTEIN, J.; MCFARLAND, J.; PATERSON, J.

WORKS, J. I dissent. The firm name of the plaintiffs was a "designation not showing the names of the persons interested as partners." Pendleton & Williams were not their names, but only a part of their names. The intent of the statute is that the true names of the members of a copartnership shall be given, so that parties contracting with them may know to whom they are giving credit. Such a statute should be so construed as to give it full effect. The requirement that notice shall be given showing their names when they are not shown by the firm name is reasonable and just. Besides, such a construction of the statute will, or may, lead to great abuse. Why may not Jones & Jones, or anybody else, do business under the firm name of Smith & Smith, if such a construction is to prevail, and thereby conceal their true names and identity as effectually as by using the firm name of Jones & Co. if there are a number of partners? If this were done, under the forego-

ing opinion, there would be no remedy for the unfortunate individual who might contract with irresponsible Jones & Jones, believing they were Smith & Smith, who are known to be responsible. On the other hand, if such a partnership is required to publish notice giving their true names, and in such notice give the names falsely, they may be held responsible. Again, suppose the firm name is correctly given as Smith & Smith. There may be a hundred Smiths in the same locality, some perfectly good and reliable peculiarly, and others worthless. In such a case their names are necessary in order to contract with them intelligently. There is nothing burdensome in this statute, and its beneficial effects should not be frittered away by a narrow construction of its provisions.

85 Cal. 291

ORCUTT v. PACIFIC COAST RY. CO. (No. 13,607.)

(Supreme Court of California. Aug. 4, 1890.)

RAILROAD COMPANIES—KILLING STOCK—SIGNALS—CONTRIBUTORY NEGLIGENCE.

1. Civil Code Cal. § 486, provides that "a bell \* \* \* must be placed on each locomotive engine, and be rung at a distance of at least 80 rods from the place where the railroad crosses any \* \* \* road, \* \* \* and be kept ringing until it has crossed such \* \* \* road, or a steam-whistle must be attached and be sounded. \* \* \* The corporation is also liable for all damages \* \* \* caused by locomotives, train, or cars when the provisions of this section are not complied with." In an action for killing plaintiff's horse at a crossing the evidence was conflicting as to whether the required signals were given. Held, that it was proper to instruct that, if the signals were not given, defendant was *prima facie* liable for the damages, unless plaintiff's negligence contributed thereto.

2. The fact that on the morning of the day the accident occurred plaintiff saw the horse in a lane half a mile from defendant's track and turned towards the crossing, and left it there, does not, of itself, show that he was guilty of contributory negligence, as it is too remote to have been the proximate cause of the injury.

Commissioners' decision. In bank. Appeal from superior court, San Luis Obispo county; V. A. GREGG, Judge.

Graves, Turner & Graves, for appellant. Venable & Goodchild, for respondent.

GIBSON, C. This action was brought by the plaintiff to recover damages for a mare killed and a colt injured by the locomotive and cars of the defendant corporation, which locomotive and cars, it is alleged in the complaint, were so negligently managed and run over that portion of defendant's railway which passes through the plaintiff's land, and were driven at such undue speed, and without ringing any bell or sounding any whistle or other alarm in approaching the crossing on said land, as to run against the mare and colt, then casually, and without any fault of plaintiff, passing across the track at said crossing. Judgment for the plaintiff was entered upon a verdict in his favor. From the judgment and an order denying a new trial, the defendant brings this appeal.

The lane which formed the crossing with defendant's railway where the engine ran against the animals is an open one used

by the public, and extends from plaintiff's house to a public highway just beyond the railway, and crosses the latter at right angles, and at about one-half of a mile from plaintiff's house. The railway is inclosed upon the sides with substantial fences, and at the crossing with cattle-guards. On the morning of the accident the plaintiff, while on the way to town, saw the mare and colt with other cattle unattended in the lane near his house, the mare and colt being then turned in the direction of the railway, but he passed on, and did not prevent them from straying thereon. The evidence is conflicting as to whether a bell was kept ringing or a whistle sounding at intervals in approaching the crossing, and also as to which side of the track the mare and colt came from in getting on the track. That of the plaintiff tended to show that no warning signals were given upon the engine in approaching the crossing or in passing over it, and that the mare and colt came from the east or right-hand side of the track, and could have been seen by the engineer upon the locomotive; while that of the defendant tended to prove that the whistle was blown at about one-half of a mile before reaching the crossing, and that at a point 80 rods from the crossing a bell was kept ringing and the whistle sounding at intervals until within 40 feet of the crossing where the collision occurred; that the animals approached from the west or left-hand side; that there is a sharp curve to the right in the track near the crossing, and a cut in the lane on the west or left-hand side, from which the animals came, of from two to four feet in depth, which prevented the engineer in his position on the engine from seeing them; and that he did not see them until within 40 feet of the crossing, when they came running upon the track; that immediately the engineer reversed his engine, applied the air-brakes, and did all he could to prevent colliding with them, but without effect. Upon this state of facts the court, in one of the instructions given at the request of plaintiff, declared the rule to be that where an injury at a railroad crossing is caused by a locomotive upon which a bell was not kept ringing, nor a whistle blown at intervals, for a distance of 80 rods before reaching the crossing, and also in passing over it, the railroad company operating the locomotive is *prima facie* liable for such injury, unless the person sustaining it contributed thereto by his own negligence. The giving of this instruction the defendant claims was error, and it contends that the court should have charged the jury as requested by it, to the effect that the mere failure to ring the bell or blow the whistle in approaching the crossing would not render it (the defendant) liable unless it was proved by the plaintiff that the failure to ring the bell or blow the whistle was the proximate cause of the injury.

The question, then, is, and it is the principal one in this case, whether the failure of a railroad corporation to ring a bell continuously, or sound a whistle at intervals, for a certain distance in approaching a crossing, and in passing over it, will

render the corporation *prima facie* liable for any injury caused by the locomotive at such crossing, not contributed to by the person who sustains the injury. We think it will. By section 486 of the Civil Code it is provided: "A bell of at least twenty pounds weight must be placed on each locomotive engine, and be rung at a distance of at least eighty rods from the place where the railroad crosses any street, road, or highway, and be kept ringing until it has crossed such street, road, or highway, or a steam-whistle must be attached and be sounded, except in cities at a like distance, and be kept sounding at intervals until it has crossed the same, under a penalty of \$100 for every neglect, to be paid by the corporation operating the railroad, which may be recovered in an action prosecuted by the district attorney of the proper county for the use of the state. The corporation is also liable for all damages sustained by any person and caused by the locomotives, train, or cars, when the provisions of this section are not complied with." This section is too plain to admit of construction. It means what it so clearly expressed in it. It is designed under the penalty of a fine, and a *prima facie* liability for injury caused by locomotives, trains, or cars at a street or road crossing, to compel railroad corporations to exact vigilance and diligence of those to whom they intrust the running of engines, trains, or cars across such places of danger to the public as streets and highways. As already stated, the evidence as to whether the bell was rung or the whistle blown upon the locomotive on approaching the crossing was conflicting, and seems to have been evenly balanced. In such a condition it was for the jury alone to determine the question, and in finding a general verdict for the plaintiff which covers all the material issues they determined it adversely to the defendant, and it cannot now be disturbed. In view of the meaning of the above section of the Code governing this case, the evidence as to whether the engineer, from his place on the engine, could see the animals near the track when the engine was approaching the crossing becomes immaterial, because whether he could see them or not, before they came running upon the track when the engine was but 40 feet from the crossing, and though he then did all he could to avoid injuring them, if he failed to give the required signals such omission amounted to presumptive negligence. Even if, as defendant contends, it was incumbent upon plaintiff to prove that the failure to give the required signals was the proximate cause of the injury before he could recover, in which case it would be material whether the engineer could have seen the animals in time to prevent any injury to them, though they might have been on the track through plaintiff's want of ordinary care, still, as the evidence on this point was strongly conflicting, we would upon the same principle, applicable to a finding by a jury upon conflicting evidence, be constrained to hold that the jury had in finding for the plaintiff impliedly passed upon it in his favor.

The remaining question is whether the plaintiff was guilty of contributory negligence. That the above section of the Code did not abrogate the doctrine of contributory negligence was determined in *Meeks v. Railroad Co.*, 52 Cal. 602, and *Glascoek v. Railroad Co.*, 73 Cal. 137, 14 Pac. Rep. 518. This was recognized by the trial court, and stated to the jury in the instruction complained of, as well as in other appropriate instructions given. Ordinarily the question of contributory negligence, like that of negligence, is a question for the jury, but when the evidence tending to establish it is undisputed, as in the present case, it becomes a matter of law for the court to determine. *Glascoek v. Railroad Co.*, *supra*. The only evidence here in support of it is that, on the morning of the day on which the collision occurred, the plaintiff, who was on his way to town, saw the mare and colt with other cattle in the open lane, near the house, which was a half mile from the railway, and passed on to town without endeavoring to prevent them from straying upon the track, towards which the mare and colt were turned at the time. Now, assuming that the act of March 7, 1878, (St. 1877-78, p. 176,) applicable to San Luis Obispo county, requires all cattle to be confined by their owners, to prevent trespass upon the land of others, and that plaintiff's mare and colt were running at large in the lane, where they might trespass upon defendant's right of way across the lane, contrary to the provisions of such act, the defendant upon its part could not rely on this fact alone, but would still have to show that it was the proximate cause of the injury complained of. See *Seigel v. Elsen*, 41 Cal. 109. The cattle when last seen by the plaintiff were nearly one-half a mile from the track, and the plaintiff had a right to assume that the required statutory signals would be given by defendant, so that, if his mare and colt should reach the track when any locomotive or train was about to pass over the crossing, they would thereby be driven off or from the track, as the only directions they could have run from the track was down the lane on the one side or to the highway on the other. *Higgins v. Deeney*, 78 Cal. 578, 21 Pac. Rep. 428; *Williams v. O'Keefe*, 9 Bosw. 536; *Jetter v. Railroad Co.*, 2 Abb. Dec. 458. Hence we think that, although the plaintiff may not have been entirely free from blame in leaving the mare and colt unattended with other animals in the lane near the house and nearly half a mile from the track, such fact is too remote to be regarded as the proximate cause of the injury, and therefore advise that the judgment and order be affirmed.

WE CONCUR: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

THORNTON, J. I concur in the judgment and in the conclusions reached by the opinion, but I do not concur in the *dictum* that, when the facts are undisputed, negli-

gence is a question of law. The correct rule is laid down in *Fernandes v. Railroad Co.*, 52 Cal. 45, where the subject is fully discussed, and the conclusion there reached fortified and sustained by reason and authority. See, also, *Payne v. Railroad Co.*, 83 N. Y. 574, and cases therecited. If the rule as declared in the *dictum* above stated has ever been regarded as a law, it has long ago been rejected as unsound by jurists and courts. In the case under consideration the negligence was too remote, as is clearly shown in the opinion of the learned commissioner.

85 Cal. 313

ADAIR v. WHITE *et al.* (No. 13,475.)

(*Supreme Court of California.* Aug. 4, 1890.)

BOUNDARIES—EVIDENCE—NATURAL MONUMENTS.

In ejectment for land claimed by plaintiff under a patent from the United States the evidence showed that the land in controversy was a strip along the southern part of his grant; that the southern line, as located by a well-known natural monument, which was one of the calls of the survey, included this strip; but that if the southern line was run by course and distance it did not include the strip, which in that case belonged to defendant. *Held*, that the evidence was not sufficient to sustain a judgment for defendant, as the natural monument called for in the survey must prevail over the courses and distances when there is a discrepancy.

In bank. Appeal from superior court, Ventura county; B. T. WILLIAMS, Judge. *W. H. Wilde*, for appellant. *Blackstock & Shepherd*, for respondents.

THORNTON, J. Action of ejectment for a parcel of land in Ventura county, in which judgment passed for the defendants. Plaintiff moved for a new trial, which was denied, and he appeals from the judgment and the order denying his motion. The plaintiff claims under a patent of the United States, issued on a confirmed Mexican grant of the Rancho Santa Paula y Satcoy. The patent was issued by the United States on the 22d day of April, 1872. With the grantee of this patent the plaintiff connects himself by proper mesne conveyances executed before the commencement of this action.

The main point to be determined herein turns upon the location of the southern boundary line of the rancho abovenamed, which will be herein called the "Santa Paula." It is claimed by the plaintiff that the strip of land in controversy herein, lying along the southern boundary of the Santa Paula, of which the defendants were in possession when the action was brought, is within the lines of the patent abovenamed, issued in 1872, while the defendants contend that it is not included within such lines. On this point testimony was introduced by the parties, and this court is called on to determine whether, within the rules laid down in our decisions, there is an insufficiency of the evidence to justify the decision of the court below, which was adverse to the contention of plaintiff. We proceed to the consideration of this point. The patent herein, having been issued upon a confirmed Mexican grant, is conclusive upon the United States government and all claiming under it. Such is the meaning of the



act of congress of March 3, 1851, entitled "An act to ascertain and settle the private land claims in the state of California." See fifteenth section of the act. This interpretation has always been given to the fifteenth section of the above-cited act. See *Waterman v. Smith*, 13 Cal. 373; *Moore v. Wilkinson*, id. 478.

The question of the conclusiveness of the patent upon all, except third persons, should be regarded as conclusively settled by the cases above cited, which have been approved and followed in many cases decided by this court and the supreme court of the United States. There is no case to the contrary. The defendants claimed under a homestead entry made under an act of congress. They certainly can only be regarded as claiming under the United States, and as the patent is conclusive on the United States, and was so from the date of its issue, it must be held to be conclusive on the defendants. The southern line of the patent of the Santa Paula is thus described in the field-notes of the patent (both patent and field-notes were offered in evidence, and are set forth in the transcript) as commencing at the station mentioned, S. P. 13, and running "thence S.  $42\frac{1}{4}$  E., at 30 links enters bed of Santa Clara river, course S. W.; at 4 chains, intersects offset of township line in township 3 N., range 21 W., 39.50 chains E. of corner of sections 10, 11, 14, and 15; at 4 chains and 50 links crosses river and ascends; thence along westerly slope of abrupt hill called 'Lomas de Santa Paula,' 492 chains, to stake marked 'S. P. 14,' station at the most southern point of above-named hills, known as the 'Punta de la Loma.' It will be observed that this line terminates at the most southern point of the hills called the "Lomas de Santa Paula," which point is known as the "Punta de la Loma." This is a natural object or monument, and the station S. P. 14 was there fixed and established by the calls of the patent. If this point can be found, it is only necessary to run a line from S. P. 13 to S. P. 14 to fix the southern boundary line. It may be that the length of this line as stated in the field-notes is not accurate. It is stated in the notes to be 492 chains in length. If it should turn out to be actually longer or shorter than 492 chains, this is immaterial in fixing the line. The line must, according to the calls of the patent, run to this point, whatever be its length, whether the line exceed in length 492 chains or be less than 492 chains. The same may be said of the course. Any variation in the course should be disregarded. The variation, if any, as the testimony shows, can only be trifling. Whether varying in any wise or not, that course must be pursued which will bring the line to the natural object, the Punta de Loma. The above is in accord with the well-settled rule that, in applying a conveyance to the tract of land described in it, course and distance must yield to natural objects or monuments called for. Such monuments are more certain and less liable to mistake or error than course and distance, and therefore monuments, as more certain, prevail over course and distance, partaking more

or less of uncertainty. The plaintiff called a surveyor, one George C. Power, who was admitted by the counsel for defendants to be pre-eminently qualified as a surveyor. Power located the southern line of the patent of Santa Paula in conformity to its calls. A plat of the survey made by Power is contained in the record, as well as a topographical map of the Punta de la Loma. The southern line, according to the testimony of this witness, includes within the lines of the patent the land in possession of the defendants, sued for in this action. The witness first proceeded to fix the location of the Punta de Loma. He states it to be "A well-known, recognized landmark." The Punta de Loma was fixed by Power in accordance with the calls of the patent "as the most southern point of the hills" styled in the field-notes of the patent the "Lomas de Santa Paula." See extract from field-notes of patent given above. From the point Punta de Loma, so fixed, he (Power) ran other lines to test the accuracy of its location. In running these test lines, he used the data furnished by the field-notes contained in the patent of the Santa Paula. He ran a line in a north-easterly direction from the Punta de Loma, and, though he found some discrepancies in courses and distances from the courses and distances stated in the patent, still his southern line was substantially in accordance with the southerly line of the patent, or as near such south line (the witness said) as could be determined from the evidence given him. The plat and field-notes of the final survey of the Rancho Santa Clara del Norte, which adjoins the Santa Paula for some distance on the south, were offered in evidence. The final survey of the Santa Clara del Norte and the final survey of the Santa Paula were made by the same surveyor, J. E. Terrell, and in the same month, December, 1860. The above final surveys have a common line, which is described in the latter portion of the extract of the field-notes of the Santa Clara del Norte as follows: "Thence" (from Station S. C., No. 4, near old abode) "N.,  $37\frac{1}{2}$  E., 455.63 chains to large redwood post marked 'S. C. No. 3,' at foot of hill called Loma del Arroyo Colorado; thence running towards the Punta de Loma S.  $77\frac{1}{2}$  W., along southern slope of abrupt hills 319 chains to stake marked 'S. P. 14,' a corner of Rancho Santa Paulay Saticoy, on point of hill known as the Punta del Loma, marked 'Stake S. C., N. 4,' and run along boundary of Rancho Santa Paulay, Saticoy through sandy bottom."

It will thus be seen that S. C. 4, in the final survey of the Santa Clara del Norte, and S. P. 14, in the patented survey of the Santa Paula, are the same. The corner of the survey of the Santa Clara del Norte No. 3, Power testifies, is positively located, and was in evidence when he gave his testimony. He states that he started from that point S. C. 3, and ran a transverse line around to the Punta de Loma, and calculated the course and distance, and it measured 324.30 chains; that it should measure by the patent 319 chains S.,  $77\frac{1}{2}$  W. He further says that by following the

course and distance of the patent it would bring the point a trifle north of the point he had located at the south point of the Punta de Loma, but it would be on the same ridge a little further north of the point he had located, which is at the most southerly point of the hill. The same observations made above as to the prevalence of natural objects over course and distance apply here. The line should be run to the natural object or monument, regardless of the discrepancies of course and distance and for the reason above stated. So run, the line should be run to S. P. 14, or the Punta del Loma, it being apparent from the field-notes of the Santa Clara del Norte, that S. P. 14 and S. C. 4 are identical as regards location. The same witness further testifies that he next went up into the Santa Paula Cañon, some three miles to a well-defined point then existing there, and acknowledged as the common corner of the Ex-Mission, and the Santa Paula y Saticoy ranchos, and ran down, according to the patent, to S. P. 13 of the Santa Paula patented survey, which was thus located as on the plat made by witness of the land in dispute. The south line of the plat is shaded blue. This blue line, the witness testifies, is the patent line by course and distance, as measured from the Punta del Loma. This blue line, Power states, is the southern line of the survey of the Santa Paula, which went into the patent, and within this patented line is included the land sued for in this action. Another and independent survey was made of this southern line of the Santa Paula by one J. A. Barry, a surveyor. He was called as a witness. In his testimony he agrees with the witness (Power) as to the location of the Punta de Loma, and says it is a well-known, visible landmark. He ran this southern line in accordance with the calls of the patent, and states that, as so run, it includes the lands in possession of the defendants and in controversy in this action. The principal witness on the point of the location of the southern line of the Santa Paula called by defendants was a surveyor named Stow. He had been county surveyor of Ventura county for 26 years. He testified that he had occasion to attempt to retrace the south line of the Santa Paula rancho; that this line is one of the Terrell surveys, and it is in the same condition that all the rest of them are, generally, all wrong. He then proceeded to explain, and said that a good many years ago there was some disagreement about the location of a line running from what is known as "Punta de la Loma;" that "we went there, and endeavored to locate, from the data that we had and other ways, the corner of the Punta de la Loma, which we found, but we could not locate, at least satisfactorily, at the time, by running the various lines running into it in different directions according as they were on the Terrell survey. Starting at other known corners and running to the Punta de la Loma, there are no two lines that would come out in the same place." He further said that, as to the patent survey of the Rancho Santa Paula y Saticoy, to endeavor to follow the exact field-notes of

the patent is radically wrong and it cannot be done. It is evident from the testimony of Stow that he attempted to ascertain the southern line of the Rancho Santa Paula by course and distance, as called for in the field-notes of the patent. It is not surprising that he could not so locate this line. It rarely happens that the lines of one survey, run by course and distance, are found to coincide with the lines so run of a subsequent survey. It is easily accounted for by inequalities of the ground on which the lines are run, by minute difference in the length of the chain used, and sometimes by trifling changes in course. This is more apt to occur where the lines are long. In the case before us the southern line is 492 chains in length. In consequence of the frequent occurrence of such discrepancies between different surveys the rule that course and distance must yield to monuments is established. Stow states in his testimony that he was reasonably familiar with the Santa Paula Hills terminating at the Punta de la Loma; that he had been over it at different times as a surveyor; that the topographical map of it made by Power shows about the topography of what is known as the Punta de la Loma; that it (the Punta) is a permanent natural landmark, and that it is the most southerly point of the Punta de la Loma. This Punta de la Loma or Punta del Loma (for it is called by both of these names) is a controlling call in the southern line of the Santa Paula, as set forth in the patent and field-notes of the ranch, is a permanent natural monument, and fixes the location of the line in dispute. By Stow's statement as to the Punta he shows that Power's location of the line is correct, or so nearly correct as to clearly demonstrate that the court erred in fixing the southern line of the Santa Paula so as to exclude the land herein sued for. It may be conceded that the southern line as fixed by Power is not identical with the southern line of the patent, but it suffices to show that the court below went wrong in coming to the conclusion that the land sued for was entirely outside of the patented southern line. At any rate it shows that the greater part of the land in suit lies within the lines of the patent, which part plaintiff is entitled to recover. As to Norway's survey, made about 18 years after the patent of Santa Paula was issued, it is entitled to but little consideration. Norway was sent to survey the land remaining as public land after the survey of the granted lands had been made, and it would be highly unjust to allow such a survey to disturb or damage the lines of the lands which had gone into the patent. A holder of land under a patented Mexican grant would never be safe in his holding if his survey, which had gone into a patent declared to be conclusive between him and the United States government, could thus be disturbed. We are of opinion that the evidence was not sufficient to justify the decision of the court in this case, and therefore the judgment and order should be reversed, and the cause remanded for a new trial. We find no error in the record for which a reversal should be ordered, but for the error

pointed out above the judgment must be reversed, and the cause remanded for a new trial in conformity with the views expressed in this opinion. So ordered.

We concur: FOX, J.; SHARPSTEIN, J.; WORKS, J.; MCFARLAND, J.

85 Cal. 350

PEOPLE V. MURRAY. (No. 20,634.)

(Supreme Court of California. Aug. 11, 1890.)

CRIMINAL LAW—DISCHARGE OF JURY—IMPEACHING WITNESS—NEW TRIAL.

1. An order of the court to the sheriff recited that whereas the business of the court required a jury for the trial of criminal cases, it was ordered that he summon 40 men eligible for jurors. Before defendant's case was reached they were discharged, and a new jury summoned, by which he was tried. *Held*, that the first jury having been summoned for no fixed term, and for the trial of no particular case, the court could discharge it any time without cause.

2. On cross-examination of defendant's witness, he was asked if he had not made statements to the effect that he was friendly to defendant, and would say nothing to hurt him; and on his denying this a witness was called who testified to such statements. *Held*, that if the testimony of defendant's witness was material and favorable to him, the impeaching testimony was properly admitted, and if the former testimony was immaterial defendant could not have been injured by the latter.

3. On a motion for a new trial in a murder case defendant should have been allowed to show that during the trial the jury read a local newspaper containing a savage attack on the juries of that county for several years previous, especially in criminal cases, alleging that certain persons frequently appeared on the juries in criminal cases, and that murders were declared to be manslaughter, etc.; and it would then have been for the prosecution to have shown, if possible, that the article was not read by the jury, or, if read, that they were in no wise influenced thereby.

Department 1. Appeal from superior court, San Diego county; W. L. PIERCE, Judge.

*Hunsaker, Britt & Goodrich*, for appellant. *Atty. Gen. Geo. A. Johnson*, for the People.

WORKS, J. The defendant was charged, tried, and convicted of the crime of murder, and sentenced to be hanged. He moved for a new trial, his motion was denied, and he appeals. The first error complained of relates to the selection of a jury. On the 30th day of September, 1889, the court below made the following order: "To the sheriff of said county—Greeting: Whereas the business of the superior court requires the attendance of a trial jury for the trial of criminal cases, and no jury is in attendance, it is the order of the court that you are hereby directed to summon forty (40) men having qualifications of jurors from the body of this San Diego county, state of California, to be and appear in department No. 3 of the superior court, at the court-room in the Express block, on the north-east corner of Sixth and F streets, in the city of San Diego, county of San Diego, state of California, on Monday, October 7th, A. D. 1889, at the hour of 9 o'clock A. M. of said day, and of this writ make legal service and due return." The clerk issued a *venire* in accordance with this order, and the same was

placed in the hands of the sheriff, who made return that he had duly summoned the number of jurors required, giving the names of those summoned. Afterwards, on the 7th day of October, 1889, the case of *People v. Frank C. Tower*, charged with the crime of an assault with a deadly weapon, came on for trial, and the jurors, selected as above, were called, and a jury of their number impaneled, who tried the cause and returned a verdict of guilty of a simple assault. Again, on the 14th day of October, 1889, the case of *People v. Chabo* was called for trial. The jurors above mentioned appeared for duty in said cause, whereupon the district attorney moved the court to discharge from further duty as jurors the persons who had served as jurors in the case of *People v. Tower*. The bill of exceptions shows that the motion of the district attorney was based on the ground that the verdict of these jurors in the *Tower* Case was so palpably in opposition to the evidence given in the case, and in violation of their duties as such jurors, that they were unworthy to sit in other causes. The judge of the court below seems, from his remarks in passing on the motion, to have agreed with the district attorney, and an order was made discharging the jurors, which does not, however, state upon what ground, except that it was for ample and sufficient reasons. On the 17th day of October, 1889, this cause was called for trial, and the following proceedings were had, as recited in the bill of exceptions: "The defendant, by his counsel, moved the court to vacate and set aside the order of said court, made by the court on the 14th day of October, 1889, discharging from further service or attendance, as jurors, J. R. Scranton, Robert Steadman, J. H. Tyler, W. W. Collier, W. H. Crawford, Andrew Casady, F. M. Green, Sam Deeble, Henry Cook, A. D. Starkweather, Thomas Tighe, and Jacob Vanderwaite, on the ground that said order was made without authority of law or power on the part of the court to make the same; and in support of said motion called and examined W. W. Whitson, who testified as follows, to-wit: 'I am the official short-hand reporter of department No. 3 of the superior court of this county. I was acting as such reporter of said court on the 14th day of the present month, when the order referred to was made by the court. I don't know that I took all the proceedings at that time, but I think I did. Here is a sheet with some notes on it. I don't know that it has all the proceedings had at that time, but it has all that was said by the court and Mr. Daney. Mr. Daney said at that time: "I have a motion which I desire to make this morning, before any juror is selected in this case, [*People v. Ignatio Chabo*.] My motion is this: Last Friday the jury in the *Tower* Case rendered a verdict that it seems to me must have been arrived at only after a total disregard of the instructions of the court and the evidence in the case. It seems to me that it must have required a great stretch of the imagination to have brought in such a verdict as was brought in in that case, and the jurymen must be very tired

after rendering that verdict, and, perhaps, a little vacation would not do them any harm. It is just such verdicts as this that bring the court and the law into contempt and disrespect by the community, and it seems to me that it is my duty, however unpleasant it may be, to state to the court that I do not feel that I could select the gentlemen that were on that jury on this jury this morning with any degree of safety. It seems to me that that verdict is so outrageously beyond and outside of the evidence, and beyond and outside the law of the case, that it makes one feel indignant to think that twelve men would bring in such a verdict, and I say, though unpleasant the duty may be, I think it is my duty, it is a duty I owe to the community, to make a motion that the twelve gentlemen that served on that jury be discharged from further attendance on this court." The court said: "It is the opinion of the court that the verdict of the jury in that case must have surprised even the most sanguine expectations of counsel for the defense. Mr. Hunsaker, I remember, said to the jury that he accepted the challenge of the district attorney, and that the jury in this case should bring in either a verdict of guilty, as charged in the indictment, or a verdict of acquittal. The jury might have brought in a verdict of acquittal in that case, and no discredit could have attached to their finding, because evidence was before them which tended to establish an *alibi*, and they had a right, if they desired, to believe that evidence, and to discard the evidence on the part of the prosecution tending to show that the defendant was at the place where the assault with intent to commit murder was effected: but when the jury brought in a verdict of simple assault in a case where the evidence showed, and the jury believed by their verdict, that an assault had been made, and the evidence showed that the assault was made with a loaded pistol, which was then and there rapidly fired, the jury, in order to bring in the verdict of simple assault, had to say that the loaded pistol being then and there fired was not a deadly weapon, being fired at a time when an assault was being committed. This court has no further use for the twelve gentlemen that were sitting upon that panel. They will be discharged." Whereupon said motion to set aside said order was submitted to the court for decision, and the court denied the same, to which ruling defendant then and there excepted. That thereafter, and before the impaneling of the jury was begun, the defendant moved the court to direct the clerk to place in the jury-box the names of the twelve persons mentioned in the order of October 14th, and offered in support of said motion the evidence, heretofore set forth, which had been offered in support of the motion to vacate and set aside the order of October 14th, which motion was by the court denied, and to which ruling the defendant then and there duly excepted."

It must be conceded that this was a novel proceeding. Ordinarily a court would not be justified in discharging a jury because it had returned a verdict which did

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not meet with the approval of the court. But the verdict might be such as to convince the court that the jury had purposefully and willfully disregarded the evidence, and returned a verdict in violation of their sworn duty. Under such circumstances the court would not only be justified in discharging the jurors, but it would be its duty to do so. The judge of the court below seems to have been of the opinion that the verdict returned in the case referred to was such as to justify the action taken, and in the absence of any showing to the contrary we must presume in favor of the action of the court. But the jurors discharged were not selected to try the defendant's case, nor were they selected to serve for any fixed term, as is shown by the order above set out. This being the case, the court had the undoubted right to discharge them, or any of them, at any time, without giving any reason for such discharge, and without the existence of any reason. The only difficulty apparent in this case is that the jurors were discharged for what might, under some circumstances, be an insufficient reason. But as no reason was necessary, the fact that an insufficient one was assigned as the ground of the order can make no difference. Again, conceding that the discharge of the jury was unwarranted, it does not appear that any injury resulted or could have resulted to the defendant by reason of such discharge. As the jury was not selected for the trial of his case he had no vested right to a trial by such jury. Another jury by which he was tried was ordered to be summoned in precisely the same manner that the first one had been selected and summoned, viz., by the sheriff. It is not shown or claimed that the jurors thus selected were less favorable to the defendant than the jurors discharged would have been. As to these jurors all of his rights of challenge were preserved, and he has no just reason to complain. *People v. Arceo*, 32 Cal. 40. The case of *Hildreth v. City of Troy*, 101 N. Y. 234, 4 N. E. Rep. 559, relied upon by the defendant, differs materially from the one under consideration. There the jury had been selected under and in conformity to a statute of that state, which the court say made "elaborate provision for securing an impartial jury," and not by the sheriff, upon an open *venire*, as in this case, and the jury thus selected constituted the regular panel of jurors to try that particular case. Certain of the jurors were discharged by the court below on the erroneous ground that they were incompetent to sit as such jurors by reason of the fact that they were tax-payers of the city of Troy, the city being a party to the suit. There was sufficient ground in that case, we think, for reversing the case for the reason that the additional jurors were not selected as provided by the statute, but upon an open *venire* by the sheriff. By this means the party was deprived of the safeguards provided by the statute for procuring a fair and impartial trial. In this case, as we have seen, the defendant was deprived of no such right, and, therefore, the case is not in point.

It is further contended by the appellant

that the court erred in admitting certain testimony offered by the respondent. The defendant had examined a certain witness in chief, and on cross-examination he was asked whether he did not make certain statements tending to show that he was friendly to the defendant and one Hubbard, a friend of the defendant, and that he would not tell anything that would hurt the defendant. The witness denied having made the statements, and the person to whom he was claimed to have made them was called and allowed, over the defendant's objection, to contradict the former witness, and to testify to the statements made by him. It is insisted that the testimony was immaterial, and only tended to contradict the witness as to a collateral and immaterial matter. The evidence is not in the record, and for that reason we are unable to say whether the evidence was material or not. But if the witness had testified favorably to the defendant in his examination in chief it was competent to show that he had made statements out of court tending to show his friendly feeling towards the defendant, and that he had expressed an intention to suppress facts within his knowledge that would injure the defendant's case. If this were not so the evidence of the witness given in chief is not set out in the transcript, and we cannot know whether he had testified to any facts favorable to the defendant or not. If not, the testimony tending to impeach him was immaterial; but for the same reason that it was immaterial it must be held not to have been injurious to the defendant, because to impeach a witness who had testified to nothing favorable to him could work him no injury.

Certain instructions were asked by the defendant, and refused, and this is complained of. But the instructions given by the court were very full, fairly presented the case to the jury, and covered the matters included in those refused.

In support of the motion for a new trial it appeared that the jury upon being sworn to try the case were placed in charge of a bailiff, and not allowed to separate, and the defendant offered to prove by the bailiff that while the jury was so in his charge, and during the trial, the jurors were allowed to and did read certain issues of the San Diego Union, a newspaper printed and published in the city where the trial was in progress, and certain of the articles published in said issues of the paper were offered for the purpose of showing that they were calculated to influence the jury against the defendant. The evidence was excluded. We set out in this opinion some of the matter contained in the articles referred to:

"Are there any Flies on the Juries of San Diego County?—Some Ideas Suggested by the Records—A Suspicion that Things are not what they should be—Some of the Facts about the Subject.

"Incident to the recent outrageous verdict in the Tower Case, a correspondent of the Union called attention to the fact that within the past few years there have been numerous equally unaccountable

findings by juries in San Diego county, and it was suggested that if the list of jurors were gone over possibly there might be found a thread running through, which might be used as a clue to the cause of such verdicts. Certain it is that within the last eight years public sentiment has been strained and roused to indignation over the acquittal of more than one criminal around whom there had gathered evidence of guilt, until it seemed nothing short of a violation of a jurymen's duty could possibly render a verdict exculpating the offender from the consequences of his acts. Never, within the history of the county, has capital punishment been inflicted, and yet there have been committed crimes as infamous and cold-blooded as ever stained the annals of any municipality, and made a mockery of law. Public sentiment, time and again, aroused to indignant remonstrance, but helpless under the miscarriage of the established methods of administration of justice, has suffered under repeated acquittals or preposterously inadequate verdicts, until more recent suspiciously insane findings have called forth widespread and unanimously unfavorable comment. Have the juries who have sat in criminal and civil cases in San Diego county during the past few years been packed? Is it possible that in this vaunted county there has for years been practiced the most flagrant violation of the very first principles of the jury system, as it had been so long honored? There is the incontrovertible evidence of the records to show that juries of the past four years, at the very least, have been composed in part of the same individuals. Does anything follow? Let the people draw their own inferences. Since 1881 there have come into the courts of this county thirty or more murder cases, many of them as utterly wanton and cold-blooded as were ever perpetrated. In all this criminal record there have been only four convictions straight on the information. There was, indeed, one infliction of capital punishment in the case of a poor, friendless Indian. Upon one man the death sentence was pronounced, but never carried out, because he suicided. In seven straight out murder cases the verdict of manslaughter was rendered, which in the crime of murder is about as heavy as the verdict of simple assault where a man shoots several times into a house full of women. In two cases of murder the records show that there appears to have been no disposition of these cases. The verdict in eight of these murder cases was a straight out declaration 'not guilty.' What follows? The answer will be given to-morrow."

After stating that certain persons frequently appeared on juries, in criminal cases, it is further said: "In 1888, the names of most of these men appear from three to eight times. In a city of 30,000 people why were the same jurors used over and over again? The law says that jurors shall be drawn from different parts of the county. Men have performed jury service repeatedly whose known haunts are a certain saloon on Fifth street. A *venire* is called and rapidly exhausted. Directions

are issued to issue a special venire. Time is short; all parties in the suit are ready for trial. There is no time to search the country for jurors who have not before served. Certain men are known to be found in a certain resort, henchmen of a high official. They must be taken care of, and \$2.50 a day is good average pay. *Sabe!* Mr. Juror is taken, notwithstanding he has already served from one to six times. He knows that by rendering verdicts in accordance with the desires of a certain high official he will be provided with a \$2.50 per day job whenever opportunity offers, and that the opportunity will be created when possible. He becomes a professional jurymen, and his verdict sometimes causes his fellow-citizens to enter an indignant protest, but, secure in the protection of certain well-known attorneys and high officials, he renders his verdicts, and keeps his soft snap. These men appear mostly in murder cases and murderous assaults. Murders are declared to be manslaughter, assault and murderous assault, 'simple assaults,' until the people have come to be hopeless of seeing justice meted out, and the punishment is rarely made to fit the crime."

The refusal to admit this testimony was error. A judge or juror who is called upon to sit in the trial of a case, especially where the life of the defendant is involved, should act calmly, deliberately, dispassionately. He should be governed entirely by the law and the evidence, uninfluenced by his own feelings, prejudices, or passions, or the passions or prejudices of others. But we cannot shut our eyes to the fact that the man who acts as judge or juror is but human, and is not always up to the ideal or legal standard of fairness and impartiality, and that improper influences will sometimes bring about improper and unjust verdicts. Therefore, it is always competent for a defendant who has been convicted to show, if he can, that the verdict rendered against him is the result of such improper influence. *Farrer v. State*, 2 Ohio St. 54; 2 *Grah. & W. New Trials*, 484; *Walker v. State*, 37 Tex. 367. An attempt on the part of any person, whether through the medium of a newspaper or otherwise, to influence a jury by any improper means to bring in a verdict against a defendant is a palpable violation of his right to a fair and impartial trial, and if it appears to the court to have had such an effect a new trial should be granted. There can be no doubt as to the intention or palpable effect of the articles above set out. It was the clear intention of the publishers of this paper to intimidate the jury, and by abusing other jurors, who had returned verdicts of acquittal, to induce them to find the defendant guilty, and impose upon him the extreme penalty of the law. Whether they had that effect upon the jury or not was a question that the defendant had a right to have determined by the court on his motion for a new trial. The defendant should have been allowed to make the proof with leave to the people to show, if possible, that these particular articles were not read by the jury, or, if they were, that they were not

in any way influenced by them. *People v. Goldenson*, 76 Cal. 328, 353, 19 Pac. Rep. 161. The judgment is affirmed. The order denying the defendant a new trial is reversed, with instructions to the court below to vacate the same, and rehear the motion allowing the defendant to introduce the evidence excluded on the former hearing, and the people to rebut the same by other evidence, if it is desired.

We concur: FOX, J.; PATERSON, J.

SOCIETE DES MINES D'ARGENT ET FONDERIES DE BINGHAM v. MACKINTOSH.

(Supreme Court of Utah. July 28, 1890.)

CORPORATIONS—SECOND APPEAL—REVIEW.

1. A corporation cannot recover on a note given to its defaulting manager by defendant, where the evidence shows that it was a personal transaction for the accommodation of such manager, without consideration, and there is no evidence to show that its having been given enabled the manager to defraud the company, or assisted him in so doing.

2. Where, on appeal from an action on such note, the judgment was reversed, and the cause remanded, on a second appeal the supreme court is bound by its former decision only so far as the evidence in the two trials was the same.

3. Where the evidence at the former trial was not adduced at the second, and so is not in the record, the supreme court can only consider so much of it as is set out in its former opinion, in order to determine how far it coincides with that adduced at the second trial.

4. There being evidence that the note was not given to the corporation, and that it was without consideration, and none to the contrary at the second trial, the former decision, that it was upon consideration, and injured the corporation, does not bind the supreme court, where its opinion does not show the amount of the consideration nor the extent of the injury.

Appeal from third district court; before Justice ANDERSON.

For opinion on former appeal, see 18 Pac. Rep. 363.

*Marshall & Royle*, for appellant. *Bennett, Kirkpatrick & Bradley*, (*R. Harkness*, of counsel,) for respondent.

BLACKBURN, J. This suit was brought December 23, 1884; tried before the court December 30, 1886, and judgment rendered for defendant; appeal had to supreme court, and on May 2, 1888, judgment was reversed. On January 23, 1890, the cause was retried by the court, jury being waived, and judgment again rendered for defendant, and a motion was made for a new trial, and the motion was overruled. From the overruling of the motion for a new trial, and the judgment, this appeal is taken. The complaint alleges that the plaintiff, a foreign corporation, did business in mining in this country in the name of "F. Medhurst, Commercial Director." That the defendant well knew that was the name in which the company did business. That the defendant, at the city of Salt Lake, on the 8d day of February, 1882, under the name of "R Mackintosh," executed and delivered to plaintiff, under the name and style of "F. Medhurst, Commercial Director," his promissory note as follows: "3 February, 1882, Salt Lake City. Six months after date, for value re-

ceived, I promise to pay to F. Medhurst, Commercial Director, or order, the sum of seven thousand dollars (\$7,000) together with interest at the rate of ten (10) per cent. per annum. R. MACKINTOSH." That said note has not been paid, nor any part thereof. The respondent answered denying specifically the allegations of the complaint, and for a further answer set up affirmatively that said note was given to Medhurst alone, for his own use, and not given to plaintiff; that it was an accommodation note, for which he got no consideration; that it was given to Medhurst for his sole and private use; that the plaintiff had no interest in the note whatever, and paid no consideration for it. The defendant also pleaded a counterclaim, as follows: That the said Medhurst, at the time the note sued upon was given, gave him, as an offset to that note, a note for like amount, with like interest, payable at the same time, and signed it "F. MEDHURST, Com.," which was to protect him if anything should happen Medhurst, and that the whole transaction was a private one between him and Medhurst, in which the plaintiff had no interest. The record shows the facts substantially as follows: The appellant was a foreign corporation doing a large mining business in Utah. F. Medhurst was its financial agent. It kept its bank-account in the name of F. Medhurst, commercial director. The business at the mine was under the management of one Cohen, and at the mine the business was carried on in the name of the appellant, and its vouchers and all its papers were in its name. The respondent carried on an ore-sampling business, and sampled the ores of the appellant for several years; sampled a large amount of ores, and was paid by checks on the bank signed "F. MEDHURST, Commercial Director," or an abbreviation thereof. Medhurst used the funds of the company to a large amount, and on February 3 1883, Medhurst went to respondent, and on certain representations, of an indefinite character, induced him to sign the note sued upon, payable to F. Medhurst, Commercial Director, with the distinct understanding that it was for Medhurst's personal use, and was not to be negotiated. This note was put in an envelope, and handed to one Fox, the book-keeper of the company, with the direction by Medhurst that it was to be put into the safe where the company's papers and the private papers of Medhurst were kept, and was not to be negotiated. The appellant did not know of the note until about two years afterwards, and after Medhurst had left the country. Then it found the note in an envelope, as it was at the time it was put into the safe; and on December 23, 1884, brought this suit upon it. At the time the note was given Medhurst gave to the respondent a note for a like amount, with like interest, signed "F. MEDHURST, Com.," remarking, this would protect him if anything would happen, and also gave him the following statement: "3rd Feb., 1882, Salt Lake City, Utah. My Dear Mackintosh: The object of the present is to state that you have this day given me, as a personal obligation to my-

self, your note of \$7,000, payable in six months, with interest at the rate of ten per cent. per annum, and not for value received; said note being given in exchange for one of mine, of like amount, time, and interest, and I hereby pledge myself not to discount or in any way make use of your said note, and thank you for the favor conferred. F. MEDHURST." The note given to Medhurst was not indorsed when the appellant found it in the safe. At the time respondent gave the note sued upon, Medhurst gave to respondent a check as follows: "No. 2,776. Salt Lake City, Utah, Feb. 4th, 1882. McCormick & Co., Bankers, Salt Lake City, Utah: Pay to the order of Richard Mackintosh fifteen hundred dollars, (\$1,500.) F. MEDHURST, Com. Dir.,"—which was indorsed by respondent, and Medhurst got the money upon it. This check was given without explanation by Medhurst, and was indorsed by respondent, without any explanation asked for. Before that time, the following check was made and used by Medhurst: "No. 2,772. Feb. 1st, 1882. McCormick & Co., Bankers, Salt Lake City, Utah: Pay to the order of F. Medhurst seventeen hundred dollars, (\$1,700.) F. MEDHURST, Com. Dir.,"—which was indorsed by Medhurst, and used by him, but respondent knew nothing of this check at the time he gave the note sued upon, nor until after this suit was brought. On February 4, 1882, Medhurst caused the book-keeper to enter upon the books of the appellant the following:

Bills receivable, loans to Mackintosh, etc. Dr. To cash.....	\$7,000	
Represented by credit to M.....		\$3,808
Check of Feb. 1st.....		1,700
Check of Feb. 4th.....		1,500
		\$7,000

—Of which entry respondent knew nothing until shown in court. In October, 1881, F. Medhurst, being short in his account to the appellant, drew a check on the company in favor of respondent for \$4,500, which respondent indorsed and handed back to Medhurst, and he caused Fox, his book-keeper, to enter it on the books of the company as a *bona fide* loan to respondent, but respondent knew nothing of the use Medhurst made of the check, nor was anything said, at the time he indorsed it, of the use Medhurst intended to make of it. The findings of fact by the court were substantially as stated above, and as a conclusion of law the court says: "I find the defendant did not make or deliver the note to the plaintiff; that the plaintiff take nothing by its action; and that defendant is entitled to judgment for costs of suit, and judgment accordingly is entered." We think the findings of the court are fully sustained by the evidence; and as they have the force and effect of the verdict of a jury in a suit at law, when the case is tried by the court, as this case was, the evidence in the record will not justify us in setting them aside.

We do not see what the check for \$4,500 has to do with this case, or the check of \$1,700. They are not sued upon or mentioned in the pleadings, and the evidence does not show that they in any way a-



tered into the consideration of the note sued upon, or had any connection with it; and the \$4,500 check was indorsed a long time before the note was given. Where a note is made to one party, and delivered to another party as the real payee of the note, the real payee may sue in his own name upon the note, and allege it was made to him in the name of the party mentioned in the note, and parol proof is admissible to prove the allegation, and if it is proved he can recover. But the parol proof in this case shows beyond question that this note was not made to the appellant, but was made to Medhurst, as his personal note, and was made without consideration, as an accommodation to him, and not to be used. But it is contended that this note was used by Medhurst to defraud the appellant company, and if the respondent negligently or fraudulently, by giving this note to Medhurst, put it in his power to defraud the appellant, and thereby he did defraud the appellant, he is liable for whatever damage the appellant suffered. This is doubtless true as a legal proposition, but to recover in that case would it not be necessary to plead the negligence or fraud, and prove at the trial the damage done? We think it would. This is a suit on the note alone, alleging that this note is the note of the appellant, and made and delivered to it under the name of "F. Medhurst, Commercial Director," and for value. There is no evidence in the record to show that the appellant was cheated or defrauded by this note, or that it paid any consideration whatever for it. Whatever defrauding was done by Medhurst was not in any way aided or induced by this note. What he did was done while he was the trusted agent of the appellant, and had full control of its funds. The appellant did not see or know of the note until a year and more after it was given, and until long after Medhurst had completed his pilfering from the appellant company, and it clearly appears by undisputed testimony that he was not assisted in his crookedness by this note. We think, therefore, this judgment ought to be affirmed, unless we are bound by a former decision made in this case by this court.

It is contended by appellant that the decision heretofore made by this court settles this case in favor of appellant, and therefore this judgment ought to be reversed. The rule in such cases is well stated in the case of *Elston v. Kennicott*, 52 Ill. 274, cited by appellant, as follows: "The former decision of this court is urged as conclusive of the questions then presented, and of the case as disclosed by this record. So far as questions were there determined, that is true, but it is not as to new questions and new facts. The very object of remanding a case for a new trial is to enable the parties to introduce any further legitimate evidence. It is the purpose of the law to administer justice, and afford protection to parties in their legal rights, and not to prevent its attainment by mere technical rules. When a case has been determined in an appellate court, and remanded for further proceedings, and on a new trial further and material evidence is

introduced, it becomes a new case in so far as to require the additional evidence to be considered in connection with the evidence previously before the court, and decided upon all the evidence then heard." In the trial of the cause now before us, the evidence upon which the case was tried that was formerly decided by this court was not put in evidence, and the trial court had no means of knowing whether the evidence in the former trial was the same as that produced in the new trial, and therefore he could only decide the case on the evidence before him; so this court cannot consider the evidence introduced in the first trial of this case, for it is not in the record, and this court can go no further in comparing the evidence given at this trial with the evidence at the first trial than so far as that evidence is given in the opinions rendered by the court in its decision on this case when formerly before it. Each of the three judges rendered a separate opinion, and from the statement of facts in those opinions the facts in the first trial were much the same as in the second trial. Two of the judges concur in reversing the case, and one dissents. The two judges who concur agree that the note was given to the plaintiff, and was given for value.

Judge BOREMAN, who rendered the main opinion, does not state how much value was given by the company for the note, and Judge HENDERSON, in his separate opinion, limits the value to the \$1,500 check, and of course the recovery would be limited to that. But neither of the concurring judges passed upon the question as to the extent the appellant was damaged by the giving of this note, nor as to whether the damage, if any, occurred before or afterwards; nor is there any statement of facts as to whether Medhurst was indebted to the company at the time this suit was brought. If there was evidence at the first trial on that question, nothing is said about it in any of the three opinions. It is fair to presume there was such evidence. But in the trial from which this appeal is taken there is no such evidence. All there is on that subject is Fox's statement, and what the company's books show, on the date of February 4, 1882, one day after the giving of the note. Fox's statement is confined as to what the books of the appellant showed at the date of February 4, 1882. True, he says Medhurst left the country, but he does not say when, nor does he say one word about the condition of Medhurst's obligations to the company when he left the country, or what amount he owed the company at the time he left, if anything. Can it be said that the appellant can recover so large a sum as claimed, or any sum, from respondent, to make good the overdrafts of Medhurst, in such indefinite and uncertain testimony as this record shows? Considering all this, and conceding that the two questions, namely, that the note sued upon was given to the appellant, and that it was given for value, are settled by the former decision of this court, we think there was not such an adjudication in the opinions of this court when this case was formerly before it as concludes us in con-

sidering this case. The note was given February 3, 1892. This suit was brought December, 1894, nearly three years afterwards. The testimony shows that Medhurst continued in the service of the appellant nearly all that time, and that the appellant did not have this note in its possession, or know of its existence, or do anything about the examination of Medhurst's account with it. It appears also from the evidence that the last examination of Medhurst's account would have detected his crookedness. If the respondent was liable to the extent of this note for the overdrafts of Medhurst, can it be said that the appellant was not negligent in allowing this matter to run so long without examination,—so negligent as to relieve the respondent from liability? When a person is liable to a third party for the good conduct of the agent of such third party, it is the duty of the third party to watch the conduct of the agent, and notify the person responsible for his faithful service of any failures promptly. If the respondent was negligent in so foolishly signing the note and giving it to Medhurst, the appellant was still more negligent in not examining the accounts of Medhurst, and giving the respondent notice of their condition before he left the country, so that the respondent could secure himself while Medhurst was still in reach. There is no error in the record in the trial of this case of which the appellant can complain. It had a fair and impartial trial, and the evidence in the case, as we think, sustains the findings of fact and the judgment. Therefore the judgment must be affirmed.

ZANE, C. J., concurs. HENDERSON, J., dissents.

(7 Utah, 44)

VANCE *et al.* v. WHALON.

(*Supreme Court of Utah*. July 12, 1890.)

VENDOR AND VENDEE—Breach of Contract—EVIDENCE.

Defendant contracted to buy lots from J., and, plaintiffs alleged, agreed to sell to them certain of them. He then threw up his contract with J., and plaintiffs sued for breach of his contract with them on the ground that he had put it out of his power to perform it. There was no evidence that the lots contracted to be sold to plaintiffs were those included in the repudiated contract with J., as plaintiffs refused to produce that contract, though it was shown to be in court. *Held*, that it was error to refuse a nonsuit.

Appeal from third district court; before Justice ANDERSON.

O. W. Powers, for appellant. Jas. M. Bowman and John M. Zane, for respondents.

BLACKBURN, J. Plaintiffs sued defendant for breach of contract for sale of certain lots in Salt Lake City. The contract is set out in the complaint, and it is admitted that it has been complied with as far as it had matured, and plaintiffs allege willingness and readiness to perform fully on their part, and allege as breach of the contract that the defendant has put it out of his power to perform, and it entitles them to bring suit at once. Defendant denies these allegations specifically. The

gist of the case as shown by the record will appear from the opening paragraph of respondents' brief as follows: "This cause arose out of the following circumstances: The defendant, Whalon, had a contract with Mrs. Thomas W. Jennings for the purchase of certain lots in her city addition. Afterwards, December 29, 1886, the plaintiffs, Vance and Lynch, made a contract with Whalon for the purchase of 101 of these lots. Thirty of these lots were delivered to Vance and Lynch. After thirty of these lots were thus delivered, Whalon threw up his contract with Jennings, and definitely repudiated his contract with Vance and Lynch, and refused to perform." This surrender of his contract with Jennings is the ground on which it is sought to charge Whalon. The complaint does not charge that Whalon repudiated his contract and refused to comply with its terms, but only put it out of his power to comply. Now was this breach proved? It is contended by respondents that by surrendering his contract with Jennings he put it out of his power to convey these lots to them. But there is no proof whatever that the lots in the contract of Whalon with Jennings were the same lots bargained by Whalon to the respondents. The only way to prove that would have been to introduce in evidence the contract with Jennings. It was shown to be in court, and the plaintiffs refused to introduce it in evidence. Nor was their parol evidence given to show the lots in these two contracts were the same. This utter failure of proof to make out their case by the respondents justified the appellant in moving the court for a nonsuit, which he did, and the court overruled the motion. We think this was error. The other errors claimed by the appellant it is unnecessary to notice, as this is sufficient to reverse the case. A motion was also made for a new trial, which ought to have been granted. Judgment is reversed and remanded, and *venue de novo* awarded.

HENDERSON, J., concurs.

(7 Utah, 46)

SHOSHONETZ v. CAMPBELL *et al.*

(*Supreme Court of Utah*. July 12, 1890.)

CONDITIONAL SALE—RECOVERY OF PROPERTY FROM MORTGAGEES.

Where one sells personally to another for \$800, of which \$250 is paid down, and it is agreed that title shall not vest in the buyer unless he pays the balance in a given time, the sale is a conditional one, and where the balance is not paid within the time named or after demand the seller may recover the property from the buyer's mortgagee.

Appeal from first district court; before Justice HENDERSON.

Kimball & White, for appellant. Thomas Maloney, for respondents.

ZANE, C. J. The plaintiff instituted this action to recover 19 Cayuse horses alleged to be worth \$550, and \$100 damages for the wrongful taking and detention of them. The defendants filed an answer denying the allegations of the complaint, and the issues were submitted to a jury

upon the evidence and the instructions of the court, and a verdict was found for the plaintiff that the right of property and possession was in him; that its value was \$550; and that the damages for its detention were \$130. A motion for a new trial was made by the defendants, and overruled by the court, and judgment was rendered upon the verdict. This appeal is from that judgment and order.

It appears from the record that the plaintiff was one of a band of Indians who had separated from their tribe, and were living in Utah, off of their reservation; that the horses in question were owned by plaintiff and members of his band; that he was authorized by the owners of those that did not belong to him to sell, and for that purpose he was intrusted with possession. It also appears from the record that the defendant Campbell went to Washakie, where the Indians lived, and made a verbal bargain with the plaintiff through an interpreter. While the evidence as to the terms of this contract was conflicting, we are disposed to hold that it authorized the jury to find that Campbell undertook to pay \$800 for the horses; that \$250 of that sum was paid down, and that he was bound to pay the residue within 10 days thereafter; that Campbell was intrusted with the possession of the horses, and allowed to take them to Ogden City, but that the title was not to vest in him unless he paid such residue within the 10 days. Such a transaction would amount to a conditional sale. It appears from the evidence that before the expiration of the time within which the deferred payment was to be made Campbell executed to the defendant Adams a chattel mortgage on the property, and that the residue, or any part thereof, was not paid, and that a sufficient demand was made upon the defendants for possession. Upon a careful consideration of the evidence in the record, we are of the opinion that the true intent of the parties to the contract under consideration was that the title to the horses in question should vest in Campbell upon the payment of the \$550 within the 10 days from the date of the contract, and that the sale was a conditional one. There is no evidence tending to show bad faith on the part of the plaintiff; and a conditional sale of personal property made in good faith is valid against third parties claiming under or through the purchaser as well as against the purchaser himself. *Russell v. Harkness*, 4 Utah, 197, 7 Pac. Rep. 865; *Harkness v. Russell*, 118 U. S. 633, 7 Sup. Ct. Rep. 51. The judgment of the district court is affirmed.

ANDERSON and BLACKBURN, JJ., concur.

ELLIOTT v. WHITMORE *et al.*

(*Supreme Court of Utah*. July 12, 1890.)

IRRIGATION—APPROPRIATION OF WATER—DATE OF ACQUISITION.

Where a person settles on public land unsurveyed with the intention of acquiring title as soon as he can under the law, and appropriates water for its cultivation, such appropriation is

effective from its date, though that may be several years before he succeeds in perfecting his title.

Appeal from first district court; before Justice HENDERSON.

*C. S. Varian*, for appellant. *Hoge & Burmister*, for respondents.

BLACKBURN, J. This is a suit brought to determine the water-rights in Grassy Trail Creek or Cottonwood, in Emery county. The only question of law involved in the case is the date of the appropriation of water made on the unsurveyed lands of the government. We think that where a person settles on the public domain unsurveyed with the intention of acquiring title so soon as he can under the law, and does acquire title, and afterwards appropriates water for its cultivation, such appropriation is effective from its date, although it may be several years before he succeeds in perfecting his title. An examination of the evidence in this case clearly shows that it is impossible to determine the rights of the parties, for it is too indefinite and uncertain. Litigants in reference to water-rights should present such evidence to the court in every case as will justify a definite decree. Because of uncertainty in this case the complaint was dismissed, and properly. But as it may become important at some future time to reinvestigate their water-rights, the decree of this court is that the complaint be dismissed without prejudice. And it is the opinion of this court that the findings of facts by the court below are not supported by the evidence, and they are therefore set aside and held for naught.

ZANE, C. J., and ANDERSON, J., concur.

CHAPMAN *et al.* v. HANDLEY *et al.*

(*Supreme Court of Utah*. July 28, 1890.)

INHERITANCE—ILLEGITIMATE CHILDREN—POLYGYAMY.

The "Anti-Polygamy Act" (Act. Cong. July 1, 1862, § 2) provides that the act shall be construed to "annul all acts and laws which establish, maintain, protect, or countenance the practice of polygamy," etc. *Held*, that the act annuls Act Utah, March 8, 1852, (Comp. Laws 1876, § 677,) which provides that "illegitimate children and their mothers inherit in like manner from the father, whether acknowledged by him or not, provided it shall be made to appear to the satisfaction of the court that he was the father of such illegitimate child or children."

Appeal from third district court; before Justice ANDERSON.

In the matter of the estate of George Handley, deceased.

*Sutherland & Judd*, for petitioners. *Hoge & Burmister* and *Arthur Brown*, for respondents.

HENDERSON, J. The appellants, Ruth A. Newson, Benjamin T. Handley, Harry L. Handley, and Sarah A. Chapman, petitioned the probate court for a distributive share of the estate of George Handley, deceased, as his heirs at law. Their petition was denied in the probate court, and they appealed to the district court, where the judgment of the probate court was affirmed, and they appeal to this

court. The facts are that George Handley died intestate on the 25th day of May, 1874, leaving an estate valued at \$25,000. He left surviving him Elizabeth Handley, his widow, and eight children, named, respectively, John Handley, William Handley, Charles J. Handley, Emma N. Handley, Mary F. Handley, Ruth A. Newson, Benjamin T. Handley, and Harry F. Handley; the last three of whom are petitioners and appellants herein. The first four children above named were all children of the deceased and Elizabeth Handley, his lawful wife, and the last four were children of the said deceased and Sarah Chapman, his plural wife, married to him according to the tenets and rites of the Mormon Church, and were the fruit of that polygamous relation. All these children are still living except Mary, one of the polygamous wife's children, who died sole and intestate September 28, 1879, and her mother, Sarah A. Chapman, has succeeded to her interests. The petitioners and appellants, therefore, are the polygamous children and the polygamous wife (the latter claiming as heir of her deceased daughter) of the deceased, and the only question presented by the record is whether the surviving polygamous, or illegitimate, children are heirs at law of the deceased, and entitled to share in his estate the same as the children born in lawful wedlock. The appellants base their claim upon the provision of an act of the territorial legislature approved March 3, 1852, (Comp. Laws 1876, pp. 268, 269, § 677,) which reads as follows: "Illegitimate children and their mothers inherit in like manner from the father, whether acknowledged by him or not, provided it shall be made to appear to the satisfaction of the court that he was the father of such illegitimate child or children." This statute, so far as territorial enactments are concerned, was the one in force at the time of decedent's death. On the part of the respondents it is contended—*First*, that this statute was annulled by the anti-polygamy act of congress, approved July 1, 1862; *second*, that the act is against public policy, and therefore void. The anti-polygamy act above referred to is as follows: "Be it enacted by the senate and house of representatives of the United States of America in congress assembled that every person having a husband or wife living who shall marry any other person, whether married or single, in a territory of the United States, or other place over which the United States have exclusive jurisdiction, shall, except in the cases specified in the proviso of this section, be adjudged guilty of bigamy, and upon conviction thereof shall be punished by a fine not exceeding five hundred dollars, and by imprisonment for a term not exceeding five years: provided, nevertheless, that this section shall not extend to any person by reason of any former marriage whose husband or wife by such marriage shall have been absent for five successive years without being known to such person within that time to be living; nor to any person by reason of any former marriage which shall have been dissolved by the decree of a competent court; nor

to any person by reason of any former marriage which shall have been annulled or pronounced void by the sentence or decree of a competent court on the ground of the nullity of the marriage contract. Sec. 2. And be it further enacted that the following ordinance of the provisional government of the state of Deseret, so called, namely, 'An ordinance incorporating the Church of Jesus Christ of Latter Day Saints,' passed February 8th, in the year eighteen hundred and fifty one, and adopted, re-enacted, and made valid by the governor and legislative assembly of the territory of Utah by an act passed January 19th, in the year eighteen hundred and fifty-five, entitled 'An act in relation to the compilation and revision of the laws and resolutions in force in Utah territory, their publication and distribution,' and all other acts and parts of acts heretofore passed by the said legislative assembly of the territory of Utah which establish, support, maintain, shield, or countenance polygamy, be, and the same are hereby, disapproved and annulled: provided, that this act shall be so limited and construed as not to affect or interfere with the right of property legally acquired under the ordinance heretofore mentioned, nor with the right 'to worship God according to the dictates of conscience,' but to only annul all acts and laws which establish, maintain, protect, or countenance the practice of polygamy, evasively called 'spiritual marriage,' however disguised by legal or ecclesiastical solemnities, sacraments, ceremonies, consecration, or other contrivances."

By the organic act approved September 9, 1850, relating specially to Utah, congress conferred upon the territorial legislature the right to legislate upon "all rightful subjects of legislation," but reserved to itself the right to disapprove, and thereby annul. Congress being the supreme legislative authority over the territories, it would have this right of disapproval, and to annul any territorial law, whether it was reserved or not. *Bank v. County of Yankton*, 101 U. S. 129. If, therefore, the territorial statute above quoted, or that part of it which provides that illegitimate children inherit from their father, was disapproved and annulled by the anti-polygamy act, above quoted, then the petitioner's claim is properly denied, and this question is solved by determining the character of the territorial act. Is it an act, or "part of an act," which establishes, supports, maintains, shields, or countenances polygamy? In determining the character and meaning of a legislative act, the surrounding circumstances existing at the time of its passage, as shown by contemporaneous history, should be considered. Endlich, in his work on the Interpretation of Statutes, (section 29,) thus states the rule: "The interpreter, in order to understand the subject-matter and the scope and object of the enactment, must, in Cole's words, ascertain what was the mischief or defects for which the law had not provided; that is, he must call to his aid all those external or historical facts which are necessary for that purpose, and which led to the enactment."

He must refer to the history of the times to ascertain the reason for and the meaning of the provisions of the statute, and to the general state of opinion, public, judicial, and legislative, at the time of the enactment. \* \* \* For this purpose, the court, in interpreting the statute, will take judicial notice of contemporaneous history, or it may consult contemporary or other authentic works or writings." In determining the meaning and effect of this statute, therefore, we are to consider that at the time the statute was passed the territory had but recently been settled and organized; that it was inhabited almost exclusively by people who believed in polygamy and plurality of wives and families as a part of their religious faith, and that its practice was common among them; that the legislative bodies elected by these people sought to support, shield, maintain, and countenance it. The result of polygamy as a practice would be what would be known to the law as "illegitimate children;" indeed, that would be its fruit. There was no provision of law by which these illegitimate children or their mothers could inherit from the father. This was the unquestioned condition in this territory when this statute was enacted, and in view of it I have no doubt that it was intended to, and did tend to, support, maintain, and countenance polygamy. Imagine a woman approached with a proposition of polygamy, under such circumstances; no public sentiment against it to deter or hinder. The anxious inquiry would be as to the legal status and rights of herself and children. By this statute they were provided for. But it is contended that it would tend to deter men from entering into polygamy, and would tend to create a sentiment against it on the part of legal wives; but this would not be so as to people who believe in it. It cannot be doubted that if polygamy was right this would be a proper provision, and its advocates must so regard it.

It is further contended that the provisions of the territorial statute in favor of illegitimate children is a proper measure for the protection of an unfortunate and innocent class of persons, and that the act of congress should not be construed to prevent it; that it was not the intention of congress to go beyond the guilty parties in imposing penalties or inflicting punishments. This view has been urged most eloquently, and with great ability, by the learned counsel for the appellants. It must be understood that congress was legislating against polygamy as an institution; that it intended to disapprove of all that tended to establish, support, countenance, or maintain it; sought to lessen and prevent injustice to illegitimate children by breaking up and destroying the system that applied to and produced them. In monogamous communities, as is well understood, the universal moral sentiment makes a plain distinction between the "ill begotten" and the "lawful born," and, however much we may pity and sympathize with the innocent sufferers from this sentiment, it must be acknowledged that its existence is one of the potent factors in preventing social

and sexual irregularities. Congress has recognized the potency of denying to illegitimate children the rights of legitimacy and inheritance as a means of breaking up and discouraging polygamy in the acts of 1882 and 1887. By 22 St. at Large, 31, and 24 St. at Large, 637, it is provided that illegitimate children begotten thereafter shall not inherit; and so emphatic is the language of the latter act that it may well be doubted whether testamentary provision can be made for them. On the argument it was contended that that law of 1882, *supra*, provided that illegitimate children begotten thereafter should not inherit; that this would have been unnecessary if congress had, as contended, in 1862, annulled the territorial act, and this is claimed as evidence that congress did not so construe the law of 1862. But it will be seen that the act of 1882 legitimates polygamous children begotten before its passage. If under the territorial law they already inherited "in like manner" as legitimate children, this would have been unnecessary. To my mind, all this is only evidence that congress intended to legislate upon all these subjects for itself primarily, and without reference to the territorial enactments, except to disapprove and annul all acts or parts of acts thereof which tend to encourage or countenance polygamy. It is contended, congress did not intend to annul this territorial provision, and did not regard it as one of the acts that countenanced and protected polygamy, because it has at least twice made similar provisions, but the acts referred to only legitimate children born before and within a short period after the passage of the act. The object of extending the provisions to children born within a few months after the act, placing them on an equality with those born before, is too obvious to require mention. Substantially, these acts only legitimate children begotten prior to their passage and publication. It is a concession in favor of illegimates then begotten, and, as before stated, this is coupled with a provision denying the right of inheritance to those begotten thereafter. The territorial act, on the contrary, establishes a continuing rule that runs with the future. In this respect there is the same difference between the territorial and federal acts that there would be between a pardon granted for a past offense and a commission to go forth and commit an offense in the future with impunity. I am of the opinion that the territorial act was disapproved and annulled by the anti-polygamy act above referred to, and that the judgment appealed from should be affirmed.

ZANE, C. J., concurs.

BLACKBURN, J., (*dissenting*.) I am compelled to dissent from the opinion of the court. The facts are not in dispute, and are as stated. The only question is, was the law such in 1874, when the decedent died, that an illegitimate or polygamous child was entitled to share in his father's estate? By the law of 1852 of the territory of Utah, "illegitimate children \* \* \* inherit in like manner from the father,

whether acknowledged by him or not, provided it shall be made to appear to the satisfaction of the court that he was the father of such illegitimate child or children." "In like manner" (referring to other portions of the act) means as legitimate children. There is no question made, nor could any be successfully made, that the rights of illegitimate children is a rightful subject of legislation. Therefore, if this law was in force at the time, in 1874, when the decedent died, there can be no doubt that the appellants were entitled to a share of their father's estate. It was in force so far as any act of the territorial legislature at that time was concerned, for it had not been repealed or changed by that body. But the contention of the respondents is that it was annulled by the act of congress of 1862, found in 1 Comp. Laws Utah, p. 109, § 2, which annuls the act in the territory of Utah incorporating the Church of Jesus Christ of Latter-Day Saints, and all other acts or parts of acts heretofore passed by said legislative assembly of the territory of Utah which establish, support, maintain, shield, or countenance polygamy by providing that the purpose of this act shall be "only to annul all acts and laws which establish, maintain, protect, or countenance the practice of polygamy, evasively called 'spiritual marriage,' however disguised by legal or ecclesiastical solemnities, sacraments, ceremonies, consecrations, or other contrivances." It is contended that the act of congress annuls the act of the legislature of Utah giving the right to illegitimate children to share in the father's estate, because such right of inheritance supports, maintains, and encourages polygamy. The purpose of the act of congress of 1862 was to define and punish polygamy, and to annul all laws of the territory in any way making it legal or giving it countenance and support. Nothing is said in the act of congress in reference to the rights of illegitimate children, and if that subject was in the mind of congress it would have been expressed, and not left in doubt or uncertainty. Courts do not favor the repeal of laws by implication, and laws are never interpreted to repeal former laws, unless the two are so repugnant that they cannot both be administered and allowed to stand. *U. S. v. Sixty-Seven Packages*, 17 How. 85; *Red Rock v. Henry*, 106 U. S. 596, 1 Sup. Ct. Rep. 434; *Ex parte Crow Dog*, 109 U. S. 556, 3 Sup. Ct. Rep. 396; *Chew Heong v. U. S.*, 112 U. S. 536, 5 Sup. Ct. Rep. 255. And certainly the same course of interpretation applies with equal, if not more, force to the annulling of laws. The law of the territory was before the congress, and how much easier it would have been to annul this territorial act by name, if it had intended that, than to have left its annulling to judicial interpretation by a sweeping clause that reads more like the rounding up of sentences in a stump speech than a solemn act of the highest legislature of the nation. This law of inheritance was before congress, and if the meaning is to be given to these general words claimed, it clearly

abdicated its functions, and left to the courts to make and annul laws by judicial interpretation. It cannot be supposed congress intended any such thing. Courts are human, and sometimes not overburdened with wisdom, and it would be, if such a thing can be supposed, a more dangerous exercise of legislative authority to form laws so as to leave to judicial interpretation their enlargement and annulling. Where the law would begin, and where it would end, would be left to conjecture and uncertainty. The law is uncertain enough interpreted as best it may be by the courts; and if the interpretation contended for was given, conjecture and uncertainty would be vastly increased. "It is always to be presumed that the legislature when it entertains an intention will express it, and that in clear and explicit terms." *Potter's Dwar*, St. 219. If this territorial law is annulled, a right is taken away, and all such laws are in the nature of a penalty, and are *stricti juris*, and are not to be extended by intendment. Another course of construction in such statutes is that where general words follow the enumeration of particular cases such general words are held to apply to cases of the same kind as particularly mentioned; for example, "An act of pasturage provided that whoever stole sheep or other cattle should be deprived of the benefit of clergy; and the courts held that 'other cattle' only meant sheep." *Id.* 220-227. The words of the acts of congress that it is claimed annul the act of the Utah legislature are, "which establish, support, maintain, shield, or countenance polygamy," etc. Afterwards there are words of explanation, but words of explanation cannot enlarge the meaning of the words they are intended to explain. These words are to be interpreted according to their common or ordinary meaning. Allowing illegitimate children to inherit from their fathers does not establish polygamy; does not support it; does not maintain it; does not shield it; does not countenance it; for it is consistent with the severest punishment of polygamy and its entire overthrow that illegitimate children should inherit from their fathers. Therefore, I do not think it repeals or annuls the act of the territorial legislature giving to illegitimate children the right to inherit. I am strengthened in this opinion by the act of congress of 1882, (called the "Edmunds Act,") § 7. That clearly shows that it was not the intention of congress to disinherit polygamous children, for it says all polygamous children born before the 1st day of January, 1883, shall be legitimate, making it clear that in the mind of congress nothing was intended by the act of 1862 to disinherit polygamous children. The act of the legislature of Utah says nothing about polygamous children. It only says illegitimate children, but the act of congress goes further, and says polygamous children, shall be legitimate. If, therefore, the territorial law, by inference, encouraged and countenanced polygamy, much more did the law of congress, and that idea cannot be entertained for one moment. Again, the act of congress of 1882,

In the eleventh section, provides that no illegitimate children shall thereafter inherit from their parents, and annuls all laws of the territory in reference thereto, but continues the power to inherit to all children born within 12 months after the passage of this act. So that if allowing illegitimate children to inherit from their fathers encourages polygamy, congress is guilty of fostering that institution; for the period of gestation is nine months. That leaves three months for men to beget illegitimate children, and encourages polygamy for that length of time. But does, in the nature of things, the permission of illegitimate children to inherit of their fathers encourage or countenance polygamy? If so, how? It would certainly increase the hostility of the lawful wife to polygamy, and the opposition of her children, for it would lessen their inheritance, and it would not increase the man's passions, or his love of lechery and dissoluteness. It only takes from the illegitimate the stain of bastardy, and places it on a plane where it will not be an outcast without recognized relationship or family.

Looking over these statutes, and remembering the condition of things in the territory of Utah at the time, I am forced to the opinion that the act of congress of 1862 did not annul the act of the legislature of Utah of 1852, allowing illegitimate children to inherit. It certainly did not in terms, and can be made to only by an interpretation that amounts to judicial legislation. Why should congress leave to the courts to hunt out the laws of the territory it intended to annul, when the laws of the territory were before it? Whose duty was it to point out the laws that maintain and encourage polygamy, the congress' or the courts'? If congress pointed them out, the question was definitely settled. If left to the courts, uncertainty would arise, and differences of interpretation would invariably occur, and the administration of the law would be rendered uncertain. These remarks only show that it could not have been the intention of congress to leave to judicial acumen the finding of those laws of the territory that might be thought to maintain and encourage polygamy. It is said, however, that that part of the law which allows the mother of illegitimate children to inherit clearly encourages polygamy. That question is not in this case, and if courts decide the questions before them they will be busy enough. But it may be remarked that it does not follow that because the mothers of illegitimate children are allowed to inherit encourages polygamy, the inheritance of their children would or does encourage that vile practice. The congress may have had in mind the allowance of mothers of illegitimate children to inherit when it used the expression "parts of laws." I do not think it follows that congress, when it passed the law of 1862, had in mind the right of illegitimate children to inherit from their fathers, as encouraging and supporting polygamy, because it was well known at that time that it was extensively practiced in Utah territory. The right of illegitimate children

to inherit from their fathers has been universally upheld and permitted from 1852 until now, and the title to much property is based upon its validity, and courts will not and ought not to declare that law invalid without weighty reasons. I think the law of the territorial legislature of 1852 was in force at the time Lewis Handley died, and that the appellants are entitled to share in his estate.

(7 Utah, 63)

COPE v. COPE et al.

(Supreme Court of Utah. July 23, 1890.)

Appeal from third district court; before Justice ANDERSON.

In the matter of the estate of Thomas Cope, deceased.

Sutherland & Judd, C. O. Whittimore, and S. P. Armstrong, for appellant. Le Grande Young and John M. Zane, for respondents.

HENDERSON, J. The questions in this case are the same as those in the case of Chapman v. Handley, ante, 673, in which opinions have just been handed down. The cause was heard in the district court by Justice ANDERSON, and Chief Justice ZANE was of counsel, as will be seen by the opinions just handed down in the Handley Case. We are unable to agree, and therefore the judgment of the court below is affirmed.

HENDERSON and BLACKBURN, JJ., concur.

(8 Utah, 408)

JOHNSON v. UNITED STATES.

(Supreme Court of Utah. July 23, 1890.)

SUITS AGAINST UNITED STATES—JURISDICTION  
—APPEAL.

1. Act Cong. March 3, 1887, § 1, (34 St. at Large, 505,) provides that the court of claims shall have jurisdiction to hear and determine all claims founded on any law of congress in respect of which the party would be entitled to redress against the United States either in a court of law or equity if they were suable. Section 2 provides that the district courts of the United States shall have concurrent jurisdiction of all such claims of an amount not exceeding \$1,000. Rev. St. U. S. § 1910, provides that "the district courts of the territories shall have and exercise the same jurisdiction in all cases arising under the constitution and laws of the United States as is vested in the circuit and district courts of the United States." *Held*, that the district courts of Utah have jurisdiction of an action against the United States to recover \$156 for services rendered as commissioner.

2. The supreme court of the territory has jurisdiction of an appeal in such action, since section 1910 further provides that "appeals in all such cases may be had to the supreme court of each territory as in other cases."

Appeal from first district court; J. W. BLACKBURN, Judge.

Geo. Sutherland and S. R. Thurman, for appellant. C. S. Varian, U. S. Atty.

ZANE, C. J. The appellant brought this suit to recover compensation for services rendered by him as a United States commissioner. His claim consists in part of fees taxed in cases in which the United States was plaintiff. The claim appears to be a just one, but the district court entered a judgment of dismissal upon the ground that the district courts of the territory have no jurisdiction of causes against the United States. From that judgment the plaintiff has appealed to this



court. Two questions are presented for our consideration and decision: (1) Had the court below jurisdiction of the cause? (2) Has this court jurisdiction of the appeal? Section 1 of an act in force March 3, 1847, (24 St. at Large, 505,) provides that "the court of claims shall have jurisdiction to hear and determine \* \* \* all claims founded upon \* \* \* any law of congress \* \* \* or upon any contract, express or implied, with the government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty, if the United States were suable." Undoubtedly the United States would have been suable on this cause of action in the court of claims. The plaintiff's claim constituted a cause of which that court would have had jurisdiction. And section 2 of the same act provides that the district courts of the United States shall have concurrent jurisdiction with the court of claims as to all of such causes where the amount of the claim does not exceed \$1,000, and the circuit courts of the United States shall have such concurrent jurisdiction in all of such cases when the amount claimed exceeds \$1,000, and does not exceed \$10,000. This section gives the district courts jurisdiction of all actions embraced in the first section when the amount does not exceed \$1,000, and the circuit courts when the amount exceeds that, and is not more than \$10,000. Subject to the limitation, as to amount, the district and circuit courts, under the first section mentioned, have the same jurisdiction as the court of claims. The claim for which this action was instituted amounted to \$158.70, and a suit to recover it could have been maintained in a district court of the United States. And section 1910 of the Revised Statutes of the United States provides, in the following terms, that "each of the district courts of the territories shall have and exercise the same jurisdiction in all cases arising under the constitution and laws of the United States as is vested in the circuit and district courts of the United States." In view of this provision and those quoted above, we are of the opinion that the court below had jurisdiction of the subject-matter of the action and of the parties to it. With respect to the second point mentioned above section 1910 declares that "writs of errors and appeals in all such cases may be had to the supreme court of each territory as in other cases." That provision gives the right of appeal to this court unless section 9 of the act of March 3d, supra, in connection with section 707, Rev. St. U. S., forbids it by implication. Section 9 as construed by the court in the case of *U. S. v. Davis*, 131 U. S. 36, 9 Sup. Ct. Rep. 657, gives the plaintiff or the United States in any suit under the act the same right of appeal as is reserved in section 707, supra; and that section gives the United States the right of appeal from all judgments of the court of claims adverse to it, and reserves the same right of appeal to the plaintiff in all cases where the amount in controversy exceeds \$3,000.

At the present term this court, in deciding a motion to dismiss this appeal, said: "If such appeal does not lie then the judgments of the district courts of the territory are final in all such cases when the claim in controversy does not exceed three thousand dollars. That section (section 9) does not, in express terms, deny the right of such appeal. Therefore, if such appeal is denied, it must be by implication. The law does not favor repeals by implication; and the same rule applies where the implication, if allowed, would so limit and narrow an existing law as to deny to the parties important rights. \* \* \* The right of appeal to the supreme court of the territory cannot deprive either party of this right of appeal to the supreme court of the United States. If no appeal is taken to the latter, one may be had to the former, and in that way both rights may stand together." We adhere to the decision from which these quotations are made. The judgment appealed from is reversed, and the case is remanded to the district court.

ANDERSON and HENDERSON, JJ., concur.

#### JENNINGS v. BARTELS.<sup>1</sup>

(Supreme Court of Washington Territory. July, 1884.)

##### APPEAL—REVIEW—FINAL ORDER.

An order denying a motion to set aside an order contained in the judgment that execution issue as well against defendant's person as his property, is not a final order, and therefore cannot be reviewed on appeal.

Error to district court, King and Kitsap counties.

Action by Peter Bartels against William A. Jennings. There was judgment for plaintiff, and added to it was an order that execution issue as well against the person as the property of defendant. Defendant was arrested, and thereafter moved to set aside the order contained in the judgment. An appeal from the order denying this motion was dismissed on the ground that it was not a final order.

*McNaught, Ferry, McNaught & Mitchell*, for plaintiff in error. *Burke & Rosin*, and *J. R. Lewis*, for defendant in error.

#### CONWAY v. UNITED STATES.<sup>1</sup>

(Supreme Court of Washington Territory. July, 1884.)

##### WRIT OF ERROR—SERVICE—DISMISSAL.

Where the United States is defendant in error, it is not sufficient service of the writ of error to leave a copy thereof at the residence, and with the wife, of the United States attorney.

Error to third district court.

A copy of the writ of error was left at the house, and with the wife, of the United States attorney. There was no other service, and on motion the writ was dismissed on the ground that this did not amount to a service on the defendant in error.

<sup>1</sup>This case, filed at July term, 1884, is now published by request, with two others, in order that the Pacific Reporter may cover all cases in Vol. 2, Washington Territory Reports.

*Struve Haines*, for plaintiff in error.  
*John B. Allen*, U. S. Atty., and *C. H. Hanford*, Asst. U. S. Atty., for defendant in error.

PERRY v. STONE *et al.*<sup>1</sup>

(*Supreme Court of Washington Territory*. July, 1885.)

RECORD ON APPEAL.

An appeal will be dismissed where the certificate of the clerk of the trial court fails to show that all the evidence has been certified.

Appeal from district court, Clarke and Skamania counties.

Action by Joseph Perry, Sr., against Jessie Stone, administratrix, and Antoine Bessette, administrator, of F. Stone, deceased, to reform a deed executed by decedent, so that it should convey to plaintiff certain land which decedent had sold, and given possession of, to plaintiff. The appeal of defendants from a judgment for plaintiff was dismissed on account of the failure of the certificate of the trial court to show that all the evidence had been certified.

*A. E. Isham*, for appellants. *John B. Allen* and *D. J. Crowley*, for appellee.

BUENZ *et al.* v. COOK.

(*Supreme Court of Colorado*. June 13, 1890.)

APPEAL—REVIEW—LIABILITY OF STOCKHOLDERS.

1. On appeal from a judgment by default all errors disclosed by the record are open to review, and the complaint may therefore be examined to see whether it states a cause of action, and, if so, whether it warranted the particular judgment.

2. Under Gen. Laws Col. 1883, c. 19, § 43, providing that "the officers and stockholders of every banking corporation or association formed under the provisions of this act shall be individually liable for all debts contracted during the term of their being officers or stockholders of such corporation equally and ratably to the extent of their respective shares of stock," in an action against all the stockholders for the entire debt of the corporation a judgment by default against one for the whole amount will be reversed.

Commissioners' decision. Appeal from Clear Creek county court.

*Bartels & Blood*, for appellant.

RICHMOND, C. This was an action commenced in the county court of Clear Creek county to recover of the defendants, as shareholders of stock in the bank of Breckenridge, the amount of an indebtedness due from said bank to Robert A. Sankey, and by him assigned to the plaintiff below, and appellee here. The plaintiff alleges that the bank of Breckenridge is a corporation existing under and by virtue of the laws of this state for the purpose of doing and conducting a general banking business; that the capital stock of said corporation was and is limited to 300 shares of the par value of \$100 each, making a total capital of \$30,000; that said capital stock was issued to and is owned by various persons, who are now and have been

such owners of said stock since the 1st day of October, 1882; and that the full amount thereof has been paid in to said corporation by the stockholders, and that such amounts paid in have been expended, and that nothing now remains to pay the claims of the creditors of said corporation, and that said corporation is insolvent; that on the 7th day of December, 1882, said corporation was indebted to Robert A. Sankey in the sum of \$642.10 money had and received for the use of said Sankey; that on the 8th day of December, 1882, Sankey demanded payment, which was refused, and that on the same day said corporation made an assignment of all the property both real and personal for the benefit of the creditors, and directed the assignee to pay Sankey the sum of \$263.75, and no more; that said assignee paid Sankey the sum of \$263.75, but refused to pay the balance; that on the 27th day of August, 1884, Sankey commenced an action against the corporation for the sum of \$378.35; that, on November 11th, judgment was rendered against said corporation for the sum of \$451.29, and \$19.70 costs; that execution was issued and returned wholly unsatisfied; that said judgment still remains in full force and effect; that June 10, 1885, Robert A. Sankey assigned and transferred the judgment to plaintiff below, appellee here; that at the time said debt was contracted the defendants were stockholders in said corporation, each holding stock therein as follows: Samuel L. Allen, 50 shares; Marshall Silverthorn, 50 shares; Charles H. Bacon, 50 shares; Claus Buenz, 10 shares; Charles E. Flack, 10 shares; William Kellogg and Samuel L. Allen, 1 share; William V. Clark, 129 shares; that the amount sued for herein is the whole amount of the indebtedness of said corporation now remaining unpaid, said defendants having refused to pay the same or any part thereof. Wherefore plaintiff asks judgment against said defendants for the sum of \$470.99, and interest thereon from November 11, 1884, and for costs of this suit. It appears that but two of the above-named defendants were served with summons, Marshall Silverthorn, who appeared and filed a demurrer, and the appellant herein, Claus Buenz, who failed to appear in obedience to the summons. Whereupon, the court, on motion and affidavit, August 3, 1886, entered judgment by default against appellant, and thereafter, on the 8th day of November, 1886, rendered final judgment against said appellant for the sum of \$574.94, being the amount of demand and interest. The cause appears to have been continued, and is still pending, as to the other defendants. Thereafter, on December 31, 1886, appellant filed his notice of appeal to this court, and executed an appeal-bond which was approved. No appearance is entered by appellee in this court. The assignment of errors presents two questions: (1) Does the complaint state facts sufficient to constitute a cause of action? (2) Did the court err in rendering judgment against appellant for the entire amount of the demand and interest?

Preliminary to the discussion of this question we have first to determine what

<sup>1</sup> This case, filed at July term, 1885, is now published by request, with two others, in order that the Pacific Reporter may cover all cases in Vol. 2, Washington Territory Reports.

matters are properly reviewable in this court, judgment by default having been entered against appellant in the court below upon due service of summons. Certainly all errors disclosed by the record are open to review and correction, notwithstanding the nature of the judgment. We may, therefore, examine the complaint for the purpose of ascertaining whether or not a cause of action be stated therein, and also for the purpose of determining whether or not those allegations of the complaint which are well pleaded are sufficient to warrant the particular judgment rendered. In *Hallock v. Jaudin*, 34 Cal. 167, *SANDERSON, J.*, rendering the opinion of the court, says: "As to the right of appeal there is no distinction between judgments by default and judgments after issue joined and a trial. The former is as much a final judgment as the latter, and the statute gives a right to appeal from all final judgments, without distinction. From this it follows that all errors disclosed by the record can be reviewed and corrected on an appeal from the former class of judgments as well as the latter." *Reynolds v. Steam-Boat Co.*, 17 La. 397, was a case where a judgment by default was entered, made final against a portion of the defendants as stockholders. The right of appeal was sustained in this case.

The right of action in this case accrued prior to the passage of the act of 1885, entitled "An act to fix and define the liability of shareholders in banks, trust, deposit, and security associations," and must, therefore, be controlled by section 43, c. 19, Gen. St. 1883, which reads as follows: "The officers and stockholders of every banking corporation or association formed under the provisions of this act shall be individually liable for all debts contracted during the term of their being officers or stockholders of such corporation equally and ratably to the extent of their respective shares of stock in any such corporation or association, except that when any stockholder shall sell and transfer his stock such liability shall cease at the expiration of one year from and after the date of said sale and transfer." Similar provisions contained in the statutes of other states have received consideration, and there is a decided unanimity of construction in holding that a stockholder can be charged only for the debts of the corporation proportionately to the extent of his stock. Under this section the stockholders are made liable in proportion to the extent of the shares respectively held by them. Liability of stockholders in a corporation is undoubtedly a creature of statute. It does not exist at common law; hence it can be said that such liability being statutory it cannot be extended beyond the plain purpose and intention of the statute. The above provision in legal effect fixes the proportionate liability of each stockholder to the extent of the number of shares owned by him. In *Pollard v. Bailey*, 20 Wall. 520, the action was brought by one creditor against one of the stockholders to recover the full amount of his debt, without regard to the creditors or the liability of the other stockholders to respond to other obligations

under the charter. The court said: "Each stockholder is bound for the debts in proportion to his stock. His liability is not limited to the par value of his stock, neither is he bound absolutely for the payment of the full amount of that. He must pay a sum which shall bear the same proportion to the whole indebtedness that his stock bears to the whole capital, and is not required to pay more. For the purposes of this case, it is not necessary to decide what effect the insolvency of any of the stockholders would have upon the liability of such as are solvent. It is certain that no stockholder is liable for more than his proportion of the debts." The act to enforce the liability of stockholders in banking corporations subjects each stockholder to a several liability for a ratable share of the debts in proportion to the whole capital stock, and the whole indebtedness of the bank, without reference to the solvency of any other stockholder. All law writers and jurists unite in the conclusion that the stockholder, under statutes similar to the one controlling in this case, can be charged only to the extent of his stock, "on payment of debts, or a personal charge in respect to them. To this amount there is an end of further liability." *Thomp. Lab. Stockh.* § 267. True it is that there is some conflict of the authorities concerning the remedy of a creditor in such cases. Some hold that this proceeding should be exclusively in equity; others, that the remedy may be had at law, and is concurrent with that of equity. It is sufficient for the purposes of this case to say that the facts alleged and proved are sufficient to meet the requirements in equity.

In the case at bar it is fair to presume that the appellant knew the extent of his liability under the statute, and having no defense was justified in not appearing, and in believing that the court could not and would not impose a greater obligation upon him. By no theory of reason can we conclude that plaintiff was entitled to proceed against the appellant herein, as sole defendant, for the purpose of recovering from him the entire amount of the corporate debt, nor can it be said that he did so proceed. On the contrary, he sought by setting out the number of shares held by each of the stockholders to recover a judgment against each to the extent only of their statutory liability. By the complaint the indebtedness for which recovery is sought constituted the entire and only indebtedness of the bank, and it is probable that had the court proceeded to determine the respective liability of each of the shareholders, and rendered judgment against those over whom it had obtained jurisdiction for their proportion of the amount of the debt, this court would not have reversed such a judgment, but when by the language of the complaint a judgment is sought against all without any agreement showing the exact statutory liability of each, and such judgment is rendered against one only for the entire indebtedness, thereby increasing his liability beyond the terms of the statute, in justice such a judgment must be reversed. *Reynolds v. Steam-Boat Co.*, supra. In *Railway Co.*

v. Nels, 10 Colo. 56, 14 Pac. Rep. 105, it was held, "where the judgment includes compensation to which plaintiff is not entitled, it must be reversed." We think the doctrine in this case is peculiarly applicable to the case at bar. It is true in that case the conclusion of the court is founded upon a review of the testimony, and in this case the conclusion is based upon the averments of the complaint. Yet in neither case can it be said that the judgment was warranted. For the reasons stated the judgment should be reversed, and the cause remanded for further proceedings.

PATTISON and REED, CC., concur.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the cause remanded.

(14 Colo. 325)

MEAGHER et al. v. REED.

(Supreme Court of Colorado. March 28, 1890.)

MINING PARTNERSHIP—EVIDENCE—STATUTE OF FRAUDS.

1. An agreement between parties to act together in obtaining a lease of mining property and to work such property as a partnership after the acquisition of the lease does not of itself constitute a partnership, and before the execution of the agreement one party may withdraw with the consent of the others, and another be substituted, without producing any of the consequences of a dissolution.

2. An agreement was entered into between plaintiff, defendant M., and others to procure a lease of certain mining property, and to develop such property as a partnership after the acquisition of the lease, the expenses and profits to be shared in accordance with their respective interests. Held, that such agreement, when carried out, constituted a mining partnership.

3. The lease was acquired in the name of M., pursuant to the agreement, and the property was devoted to partnership uses. Held, that the agreement was not within the statute of frauds, and that plaintiff was therefore entitled to prove it and his consequent interest in the leasehold estate by parol.

4. Defendant could not transfer any interest in the leasehold estate except his own, without the consent of his associates.

5. Plaintiff advanced some money to defendant to assist the latter in developing the mine. Subsequently defendant made a statement of the expenses, but declined to receive from plaintiff his share thereof, on the ground that plaintiff would be expected to furnish certain machinery. Plaintiff gave no attention to the enterprise for about six weeks, and a letter written to him by defendant concerning the machinery was not answered; but it appeared that plaintiff did not receive the letter until after defendant had acted on the assumption that plaintiff had abandoned the enterprise. Held, that no such abandonment was shown.

Commissioners' decision. Appeal from district court, Lake county.

Teller & Orahood and Jas. W. Taylor, for appellants. J. B. Bissell, for appellee.

PATTISON, C. This is an appeal from a judgment and decree rendered the 24th day of December, 1884, in a suit in equity brought by Clinton Reed, the appellee, to recover an undivided one-fourth interest in a leasehold estate in a certain lode mining claim, known as the "Felicia Grace," situate in the consolidated ten-mile mining district, Summit county, Colo., and for

an accounting of the proceeds realized by the appellants in working that property. The suit was predicated upon an alleged partnership agreement between appellants and three other persons, who will be named hereafter, and the issues presented to this court are—*First*, whether the partnership was established by the evidence; and, *second*, whether such evidence was legal and competent.

The first question necessarily involves a review of the evidence taken upon the trial. In the consideration of the case, only so much of the bill of complaint need be recited as defines the contract between the parties and their several interests in the property, and the proceeds of the property in controversy. It is alleged that in the month of April, 1884, the defendant J. C. Meagher, the appellee, Clinton Reed, A. A. Smith, and John Van Avery, by parol, entered into an agreement of copartnership, wherein and whereby it was agreed by and between the said several parties that they would together obtain a lease upon the property known as the "Felicia Grace" lode mining claim, and, after obtaining the lease of said property from the owners thereof, would together, as an association or copartnership, enter upon and into said mining property, and prosecute the work of developing and extracting the ore therefrom under and by virtue of the terms of said lease, for the joint benefit, profit, and advantage of said several partners. That by the terms of said agreement the interests of said several parties were to be as follows: The said Reed was to be and become the owner of one-fourth thereof, paying his proportion of the expense of working and developing said claim, and working it, and receiving such proportion of the profits thereof. That the said Smith was to own and enjoy in like manner one-fourth, and the said Meagher one-fourth. That by the terms of said agreement so entered into between the parties said Meagher was to procure from the owners of the property the lease thereof in his own name, and after its procurement, to execute to the said parties proper and sufficient transfer and assignment of their interests therein. That thereafter, and in the said month of April, A. D. 1884, in accordance with the said terms of said partnership agreement so entered into between the parties, the said Meagher procured from the owners of the said property, in his own name, a lease thereof, for the period of 18 months from the day of its execution. That said lease was executed by the owners of said property on or about the — day of April, A. D. 1884, and was thereafter duly recorded in the office of the recorder of deeds in Summit county, Colo. It is then alleged that after the execution and delivery of the lease Meagher, on behalf of the copartnership, took possession, and began developing the property; that complainant, as he was bound to do, contributed materials and funds to aid in the prosecution of the common enterprise. It is unnecessary to state the other allegations of the complaint, such allegations being such as are usually found in a suit brought between partners for an accounting and distribu-

tion of partnership property. The answer put in issue the allegations of the complaint, and interposed, as a separate defense, the statute of frauds. The case was tried to the court. It is unnecessary to recite the findings of fact, except such as define the relation of the parties to each other, and constitute the basis of the decree. Such findings are as follows: "(1) In the fore part of April, 1884, the defendant John C. Meagher, the plaintiff, Clinton Reed, A. A. Smith, and John Van Avery formed a copartnership for the purpose of procuring and working a lease on the Felicia Grace mine, situate in Summit county, Colo.: that each of said persons was to own an undivided one-fourth interest in said lease when the same was procured, and upon the suggestion of the defendant Meagher that he, being an owner of the property, could probably procure a lease on better terms than others, it was agreed that he should procure the lease in his own name, and after the procurement thereof should transfer to the other parties their respective interests, and until such transfer was made that he should hold their interests in his own name for their benefit. (2) That some time about the 24th day of April the lease was made, and on the 26th day of April Meagher and Patrick Barker, who succeeded to the interest of Van Avery in the premises, went to work. (3) Intervening the time when the agreement was made and the work commenced, Van Avery notified Meagher that he would not be able to take his interest in the lease. Thereupon, by agreement between Meagher and Barker and the other parties, Barker took that interest, an undivided one-fourth. (4) That such agreement and transfer was made prior to the time of the actual execution of the lease itself. (5) That on the 26th day of April work was commenced under the lease in accordance with the terms of the agreement antecedently made. That thereafter, on the 27th of April, as had been agreed, the defendant Meagher applied to A. A. Smith to furnish supplies under the copartnership arrangement. That on that day the plaintiff, Reed, sent Meagher the supplies asked for, amounting to the extent and value of \$13.05, which was received by Meagher, and by him used in the prosecution of the enterprise. (6) That afterwards, and about the 1st day of May, Meagher wrote to A. A. Smith for \$25, to be used in the payment of the current expenses of the prosecution of the work. That the said sum so applied for was sent to him by the check of plaintiff, Reed. (7) That Meagher thereafter, and until the commencement of this suit, made no other request or application to Reed for other supplies or money to be used in and about the work. (8) That it was agreed at the time of the formation of the original copartnership arrangement with Meagher that the several parties were to contribute whatever supplies and money might be needed in the prosecution of the common enterprise only, and whenever they should be called for by Meagher for their proportion of the expenses." The other facts found by the court do not appear to be material to the

discussion of the case. By the twenty-third finding it is declared that the said lease will by its terms continue until October 24, 1885; that there has been opened in the said premises a large and valuable body of ore; that the developments show that during the continuance of the lease there will probably be taken, mined, and removed from the said premises upwards of 3,000 tons, at the rate at which said mine is now being worked; and that the ore so mined will be of the probable value of \$50 per ton, and of the net value of upwards of \$100,000, of which the said Reed's share will be about \$25,000. By the twenty-fourth finding it is declared that the said Clinton Reed is now the owner of an undivided 7-32 in the said lease, and entitled to that extent to share in the benefits and advantages accruing thereunder, and to that proportion of the profits of all the ores mined; and that he is entitled to occupy, possess, and enjoy the said premises under the said lease with the said Meagher and the other defendants interested in said lease. If these findings are sustained by legal and competent evidence it is clear that the judgment and decree based upon them must be affirmed.

It is first necessary, therefore, to determine by a review of the entire case whether the findings of the court are warranted by the facts disclosed and established by the evidence. The evidence tends to prove that for some time prior to April 1, 1884, the appellant J. C. Meagher was one of the owners of the property in question. The property was undeveloped and its value unknown. A shaft had been sunk upon the premises to a considerable depth, but no valuable deposit of mineral had been found. In an adjoining property, known as the "Robinson Lode Mining Claim," a deposit of mineral had been discovered some time before, the dip or direction of which was towards the "Felicia Grace." Meagher having learned of this discovery, and believing that the same deposit or a continuation of it might be found within the territory of the property named, became desirous of securing a lease from his co-owners for the purpose of developing the property, and ascertaining whether this deposit of mineral could be found. Being without means it was essential for him to associate others with him to aid in the enterprise. Some time in the month of March, 1884, Meagher met at Leadville one Dr. A. A. Smith, and had some conversation with him in relation to the matter. He succeeded in interesting Smith, and obtained from him a promise that he would undertake to pay one-fourth of the expense of developing the property, if a lease was obtained, in consideration of the transfer to him of an undivided one-fourth interest in the lease when it was made. In this conversation it appears that Smith suggested that Clinton Reed would also take a quarter interest, and pay one-fourth of the expenses. Before the lease was actually obtained a definite understanding was arrived at between Meagher, Smith, and Reed that Reed and Smith would each pay one-fourth of the expense of developing the property, in consideration of which Meagher undertook

to transfer to each of them an undivided one-fourth interest in the lease when obtained. At about this time Meagher had some conversation with one John Van Avery in relation to the property. Van Avery then thought that he might also be able to take an interest in the property, and undertook to furnish an engine to be used in its development, in consideration of the transfer to him of a one-fourth interest if the lease should be obtained. The remaining one-fourth was to be held by Meagher, in consideration of his obtaining the lease and giving his time and labor to the working of the property. Before Meagher succeeded in obtaining the lease Van Avery decided that he would not interest himself in the enterprise, and so notified Meagher. Thereupon one Patrick Barker became interested to the extent of one quarter, but upon what terms the record does not clearly disclose. After these conversations were had with the several parties named Meagher succeeded in obtaining a lease of the property for the term of 18 months. The lease is in form a mining lease, and bears date April 26, 1884. It was made by John A. Hall, Jr., Martin Warner, Henry Woodford, James Dorland, George McClusky, J. W. Woodford, C. F. Woodford, W. N. Clark, C. H. Pierce, and A. W. Etter, as lessors, and John C. Meagher, as lessee. No money was expended by Meagher, or by any of the parties, to obtain the lease. No rental is reserved by the lease, except that by its terms the lessee covenanted to pay to the lessors, as royalty, 15 per cent. of the price paid or contracted to be paid for any ore extracted from the claim. After the execution and delivery of the lease it appears to have been delivered by Meagher to Smith, who seems to have retained it for a considerable time. It was recorded in the office of the clerk and recorder of Summit county, Colo., May 20, 1884. After the lease was secured Meagher and Patrick Barker immediately entered into the possession of the property, and began the work of development. The relation of the parties as disclosed by the record at this time was clearly defined. There seems to be no uncertainty as to the intention of the parties in the premises. The lease had been acquired as contemplated by the several parties in interest, and apparently in consummation of the understanding and agreement which had been entered into between them. When Meagher and Barker began the work of development there seem to have been four parties interested, and their respective interests seem to have been equal.

Attention is now called to so much of the evidence as relates to the conduct of the parties under the agreement after possession was taken of the mine. On April 27, 1884, the day after the date of the lease, Meagher addressed a letter to Smith as follows: "Robinson, April 27, 1884. A. A. Smith, Esq.: I started to work yesterday in the 60-foot shaft. I find by the Robinson mine maps that the mineral in their tunnel is going straight for the Felicia Grace. I was in to see the new strike, and I think it is going to be as big an ore-shoot as the old one. It is ten feet high,

and can't tell how wide. John Hall was here, and signed one copy of the lease. The other he will sign and send back. Sent it to him three or four days ago. I have taken this man Barker in. He is working with me here. I will have to put on another man. It will take three men to work this shaft. It is only about 125 feet from the Robinson mineral, so I think we will get it in 40 feet more, and if the water don't stop us, I think we will be able to get there in 30 days. We get water we will have to put up an engine. The snow is four or five feet deep, so we will have a hard time to get an engine here. If you see Van Avery tell him not to go to any expense until he hears from me that other arrangements might be made. If you and Mr. Reed take half of the lease there will be no interest left for Van. George and I took one-eighth each, and Barker one-fourth. John Hall says he can't take an interest, as he is hard run for money. I wish you would send me 10 pounds of giant powder; 200 feet fuse; one box giant caps; 1 box candles; 2 hammer handles; 2 picks. Please send the bill. Yours, respectfully, JOHN C. MEAGHER." Between April 27th and May 10th Meagher addressed a letter to Smith, asking him for \$25 to pay expenses. The letter was presented to Reed, who immediately gave him his check for \$25, which was sent to Meagher, inclosed in the following letter: "Leadville, Colo., May 10, 1884. My dear John: Yours reached me to-day, and I hand you herewith Clint's check for am't called for. I hope you will catch on to some pay soon. I will back you up to the best of my ability till I get some money which I am looking for every day. I will try to get up to see you some time next week. Do the best you can, and write me any new developments in the mean time. Clint has no faith in the thing, but if we find some then he will have more faith. Yours, truly, A. A. SMITH." The supplies above mentioned were purchased by Reed, and sent about May 3d. On that day Smith wrote Meagher as follows: "Leadville, May 3, 1884. My dear John: Yours reached me on Tuesday, and, owing to the excitement of the convention, was not attended to at once, and Clint struck out for Denver, and only returned this morning, when I proceeded to bounce him roughshod, and have ordered the supplies, which will probably not reach you before Monday. As the express company will not take powder, it will have to go by freight. Clint and I take one-half of it. I think I will have plenty of money in a few days, and will not hesitate doing all in my power to push the work, and will not have to run Clint down every time anything is to be done. I regret the delay in your first order. You know I have always been prompt in our operations together heretofore. Let me hear from you. SMITH."

About the last of May, it became necessary to obtain an engine on account of trouble with water. Meagher left the mine, and came to Leadville, and had some conversation with Reed in regard to this matter. Reed mentioned one or two engines which he thought he could obtain, but no definite arrangement was made.

Meagher had an account showing the amount which had been expended in labor and supplies up to that time in the development of the property. The amount was \$285.60, and the share of Reed was stated to be \$71.40, less the \$38.05 he had heretofore paid. Reed inquired of Meagher at the time whether he wished him to pay the balance then due from him, to which Meagher replied that he did not, as Reed would be compelled to incur expense in obtaining and sending the engine to Robinson. No engine was obtained by Reed at any time. On June 7th Meagher addressed the following letter to him: "C. Reed, Esq., Leadville, Colo.—Dear Sir: I have written to Dr. Smith to know what you have done about the engine, and have not received answer. It is about time that we had this shaft down, as the Robinson company is running an incline towards us night and day. Write, and let me know what you can do. Yours, respectfully, J. C. MEAGHER." This letter was received by Reed, but was not answered. June 9, 1884, the following letter was addressed to Meagher by Smith: "Dear John: I saw Clint a minute on Saturday, and I have not seen him since. Just now learned that he went to Denver last night again, and will not return until Tuesday or Friday. I don't think that he wants to do anything, or that he means to. The question is as to what we can do under the circumstances. I am still unable to do anything of myself, and if Clint won't do anything that seems to cook my goose till I am in a position to act for myself. If you can sell us out you had better do so, and I will make Clint surrender. I have received no money yet, and of course cannot tell when I will. No man can regret my circumstances more than I do myself, for I believe it to be a good thing. Would like to hold on. Yours, truly, SMITH." It does not appear that Reed had any knowledge that a letter of this tenor had been written by Smith, or that he had authorized or suggested that any sale of his interest should be made. June 14th another letter was addressed by Meagher to Reed as follows: "Dear Sir: Not hearing from you, I have made an arrangement for an engine which will answer for the present. I received a letter from Dr. Smith saying he would have to give up his interest. I am very sorry that he can't carry his interest, as I think it is a good lease, and must stop the Robinson company from going through to the Champion ground. Mr. Hall is here, and will take an interest in the lease, and I would like to know what you intend to do. I am not going to give up after spending what I have. Hoping to hear from you soon, I am, very truly yours, J. C. MEAGHER. P. S. Please tell Dr. Smith to send the lease to me. J. C. M." This letter was not received by Reed until some time in July, nor until after a large body of mineral had been discovered in the property. It appears that he was absent continuously from Leadville, on professional business, from about June 16th until some time in July. June 16th Smith wrote the following letter to Meagher: "Dear John: I finally had an

interview with Clint, and he don't seem inclined to do anything at all, and tells me to sell the thing out; and if I could do so for enough to pay what we owe I would be glad to have you do it. I have not received any money yet. Would be very glad to stay in and put up, but I don't see how I can at present. Clint is going east soon, liable to leave on any train, to be gone a week or two. Can you see any chance to do anything? Let me hear from you at once. SMITH." In relation to this letter Reed testified that he never had the interview with Smith mentioned, and that he never authorized Smith to direct Meagher to sell his interest in the property. On June 12, 1884, Meagher addressed the following letter to Barker: "P. Barker, Esq., Leadville, Colo.—Dear Sir: I have been working on the lease since I returned, fixing for an engine, but the engine has not been shipped yet, and there is no telling when it will. The doctor did not get his money yet, and is unable to pay his part. I was to see Rice's engine yesterday, but it can't be got out of the snow for two or three weeks yet, so the only thing I can do is to work the shaft by hand until I can get an engine of some one here, as we can't get the one in Leadville without paying for it, and that we can't do at the present time. The water is about twenty feet from the top of the shaft, but I think we can hoist it out in three or four days, and then we may be able to keep it down easier than when we worked it before. I would like to hear from you as to what you think of the situation, and if you are coming back to work, or what you intend to do. You know I must work, or give up the lease. I can get men here who will work for \$3 a day, but they must be paid at the end of each week or they will not work. Or their pay must be guaranteed by some responsible person. Hoping to hear from you soon, I am, very truly yours, J. C. MEAGHER." Smith never contributed any part of his share of the expenses. After June 14th, the date of his last letter, he seems to have relinquished all interest in the enterprise. Barker worked 28½ days and then left the property, and never returned. He appears to have transferred his interest to John A. Hall, one of the appellants. After the conversation between Reed and Meagher in May, no demand appears to have been made upon Reed for money or supplies. No communication seems to have been had between them except the two letters of June 7th and June 14th, in which Meagher asks Reed what he is going to do in relation to the engine. Neither does it appear that Reed ever offered to contribute either money or supplies after that conversation was had. As has already been stated, he was absent from Leadville during the greater part of June and July, and had no knowledge of the transactions in relation to the property hereinafter mentioned. It seems to have been his understanding at the time this conversation was had that there was so much snow at the mine that an engine could not be shipped at that time, and that Meagher should return to the property and perform



the work necessary to prevent a forfeiture of the lease, as by its terms the suspension of work for 10 days would work such a forfeiture. It further appears that after receiving the letter from Smith of June 16th Meagher began to dispose of interests in the property. On June 14th he made an arrangement with Samuel Rice and L. C. Swain to lease an engine, for which he was to pay \$25 per month. Afterwards, on July 1st, being unable to pay the rental of the engine, he transferred an eighth interest in the lease to Rice and Swain for the use of the engine and other considerations. Other interests were transferred by him for small sums of money and labor. In July a very large and valuable deposit of mineral was uncovered. When Reed returned to Leadville he demanded his interest in the lease and in the proceeds of the property, which was refused. Thereupon this suit was brought.

Upon the foregoing statement the first question naturally suggested is whether a copartnership was ever actually entered into between Meagher, Reed, Smith, and Van Avery, as declared by the court below by the first finding. A marked distinction exists in law between an agreement to enter into the copartnership relation at a future day and a copartnership actually consummated. It is an elementary principle that a partnership in fact cannot be predicated upon an agreement to enter into a copartnership at a future day unless it be shown that such agreement was actually consummated. In the language of the text-books, the partnership must be "launched." To constitute the relation, therefore, the agreement between the parties must be an executed agreement. So long as it remains executory the partnership is inchoate, not having been called into being by the concerted action necessary under the partnership agreement. It is undoubtedly true that a partnership *in present* may be constituted by an agreement if it appears that such was the intention of the parties. But where it expressly appears that the arrangement is contingent, or is to take effect at a future day, it is well settled that the relation of partners does not exist, and that, if one or more of them refuse to perform the agreement, there is no remedy between the parties except a suit in equity for specific performance or an action at law for the recovery of damages, should any be sustained. It is clear, therefore, that the first finding of the court, to the effect that the parties named entered into a copartnership for the purpose of acquiring the property in controversy, and engaging in a mining enterprise thereon, is unsustained by the evidence, and unsupported by the law. At best, the negotiations had between these parties constituted but an undertaking on their part to enter into a joint relation upon the terms proposed, if Meagher should obtain a lease satisfactory to them. The several parties named having never undertaken the project together, Van Avery having decided to withdraw, it follows that as between them the partnership relation never existed. 1 Bates, Partn. § 78; Wilson v. Campbell, 5

Gilman, 383; Pars. Partn. 6. Appellants' counsel claim that the finding of the court declaring that Meagher, Reed, Smith, and Van Avery entered into a copartnership is unsustained by the evidence; that the second finding, that Barker, by consent of the parties, succeeded to the interest of Van Avery, is in legal effect a finding that a partnership agreement was made and a partnership relation entered into, different from that alleged in the complaint as the basis of the action, and that there was, therefore, a fatal variance between the complaint and the proof. This proposition is predicated upon the principle that the relinquishment or transfer of his interest by a partner works a dissolution of the partnership. This contention is based upon the additional assumption that the partnership alleged, the partnership proved, if any, and the partnership found by the court was a general partnership, and subject to all of the legal and equitable principles incident to a commercial partnership of the usual character. Admitting this to be true, it does not follow upon the facts proven that the withdrawal of Van Avery from the agreement could have produced the result for which appellants contend. The mere refusal of a party to perform an executory agreement and to enter into the partnership relation cannot effect a dissolution, nor be followed by any of the legal consequences of a dissolution, for the reason that an executory contract of this nature does not constitute a partnership. Until the partnership agreement is consummated any one of the parties may refuse to enter upon its performance, and such refusal will simply subject him to an action for damages. It follows, therefore, that before the agreement is actually executed one party may withdraw with the consent of the others and another be substituted in his place. The fact, therefore, that the first finding of the court is not warranted by the evidence is not material unless it can be said that the fact that the complaint alleged a partnership between Meagher, Reed, Smith, and Van Avery, while the proof established only an executory agreement between them from which Van Avery withdrew and in which Barker was substituted, was such a fatal variance as to require that the judgment be reversed. Upon this proposition very little need be said. It does not appear that the question was ever raised except in this court. Such variance is not assigned for error. Proof of the facts, upon which the second finding of the court was predicated, was not objected to except upon the ground that such proof was incompetent under the statute of frauds. This question, therefore, may be passed without further consideration.

The second question suggested is whether a partnership relation between Meagher, Reed, Smith, and Barker was established by the evidence, and, if so, what was its nature? The case bears date April 26, 1884, and seems to have been executed about that time. Prior to this time a clear understanding existed between Meagher, Reed, and Smith as to the enterprise and their relations and interests in it. It was

settled that Reed should take and carry the burden of an undivided one-fourth interest. The interest of Smith appears to have been the same. In the letter of April 27th addressed by Meagher to Smith it is stated that Barker was to have one-fourth. It appears that Barker and Meagher went to the property together and began work, and that after this time Hall came to Robinson, and signed the lease. At the time the enterprise was set on foot, and prior to the execution of the lease, the four parties named seem to have undertaken to acquire a lease of the property in question, and to develop and work the same for the purpose of extracting the mineral therefrom, and to pay the expenses and share the profits, if any, in accordance with their respective interests therein. That this arrangement constituted a partnership between the parties cannot be doubted. What was the nature of the partnership? Was it a general partnership, and subject to all the incidents and principles of the law of partnership, or was it a mining partnership, as defined in the text-books and by the authorities? In England and in America the operation of mines has long been considered a species of trade. The nature of the business, and particularly the necessity for the continuous operation of mines, the practical impossibility of each owner acting independently, and the consequent necessity of community of interest in the conduct of the business, have induced a careful consideration by the courts, in the many cases which have arisen, of the principles of law and equity properly and legally applicable to the business of mining, and the relation of mine-owners to each other. The result has been the application to the relation of co-owners of mines, at least while engaged in their joint operations, of the principles of partnership law so far as such application has been essential to the successful prosecution of mining operations, and the protection of the rights and interests of the parties as between themselves and towards third persons. In law the owners of mines hold their property as joint tenants or tenants in common, and not as partners. The courts in applying the principles of the law of partnership to the relation of such owners, when conducting mining operations upon their property, have departed from the principles of the law of co-tenancy only so far as the nature of the business and the rights and interests growing out of the business and the remedies for their enforcement and protection have seemed to require. For this reason a mining partnership has been usually, if not always, considered and treated as a particular and not a general partnership. It is undoubtedly a general rule that when two or more persons acquire mining property solely or principally for the purpose of extracting the ores, in the absence of an express intention to enter into a general commercial partnership in the conduct of their mining operations, the relation existing between them in the transaction of their common business is a mining partnership, and not a general partnership. 1 Bates, Partn. § 163. In this case the principal if not the sole object of obtaining the

lease of the "Fellcia Grace" was the extraction of ores from the property. It is claimed by appellants that the partnership alleged in the complaint and found by the court is a general or commercial partnership, which would be necessarily dissolved by the transfer of the interest of any one of the parties. It is clear that this position is untenable unless the evidence clearly establishes the fact that it was the intention of the parties to enter into such a relation. That there is no such evidence is apparent. Neither is there any fact or circumstance upon which the conclusion that such was the intention of the parties can be predicated. The relation, therefore, between Meagher, Reed, Smith, and Barker, when the lease was obtained and at the time and after the work was begun, was that of a mining partnership, the members of which were changed from time to time as the work went on. In *Collier on Mines* (star page 88) it is said: "A question of some nicety sometimes arises whether persons working mines are trading partners or mere joint occupiers of the land, using the minerals as part of its produce. The result of the cases on this subject (some of which are somewhat conflicting) may be stated to be that this question will turn on the consideration whether the land be obtained wholly or principally for the purpose of trading in the ore, or whether the selling of the ore be only incidental or appurtenant to the occupation of the land. Where, however, companies of adventurers have been formed for the purpose of mining, and obtained leases either of the land or the minerals, or license to work in pursuance of that object, the courts of equity have long since recognized such associations as a species of trading partnership." Again, at page 89, it is said: "The dissolution of partnerships so numerous by death, bankruptcy, outlawry, or felony of any one partner, would have been incompatible with that continuous working of a mine which is necessary to success. It would have been highly inconvenient if no partner had been allowed to part with his share without the consent of each of his copartners. Moreover, the spirit of speculation and adventure, without which concerns so hazardous as those of mining would seldom be commenced or persevered in, and the fluctuating nature of the property, indicated the expediency of a ready transferability of shares. Again, it would have been somewhat hard upon the mining adventurer if each of his associates, whom he had not the means of selecting, had power to bind him by engagements with the public as extensive as those of partners in ordinary trading concerns. Accordingly, mining partnerships were early recognized as differing from ordinary trading partnerships in not being founded on *delectus personarum*, from which principle the rights and obligations of ordinary trading partners are mainly derived. It was decided, after many doubts, that the mining partner had a right either to relinquish or transfer his share without the consent of his copartners, and that upon his death or bankruptcy the law, instead of dissolving the partnership, would transfer it to his executors or assignees, and the power of

partners to bind each other by engagements entered into with non-partners were restricted." Finally, the author, after reviewing numerous cases, at page 125 says: "The result of the foregoing cases may perhaps be thus shortly stated: That a mining company is a trading partnership, a share of which may be acquired without such a conveyance as is necessary to pass an interest in land; that it differs from ordinary trading partnerships in not being founded on the *delectus personæ*, a difference which limits the powers of mining partners; that the mere constitution of such a company is no evidence of an implied authority from one partner to another to pledge his credit by drawing bills of exchange or borrowing money, even on the greatest emergency; that such constitution is, however, evidence for the jury of authority to order necessities on credit; that, wherever there is any question for the jury of implied authority, either to a mere partner or to a manager, the proper direction to them is to consider whether it be proved that such authority is necessary to the carrying on of the concern or usual in similar concerns." These principles have been recognized again and again by the courts of England and this country. *Crawshay v. Maule*, 1 Swanst. 495; *Fereday v. Wightwick*, 1 Russ. & M. 45; *Williams v. Attenborough*, 1 Turn. & R. 70; *Dickinson v. Valpy*, 10 Barn. & C. 128; *Colly. Partn.* §§ 801, 808; 1 *Bates, Partn.* § 163; *Charles v. Eshleman*, 5 Colo. 107; *Manville v. Parks*, 7 Colo. 128, 2 Pac. Rep. 212; *Skillman v. Lachman*, 23 Cal. 199; *Duryea v. Burt*, 28 Cal. 569; *Kahn v. Smelting Co.*, 102 U. S. 641; *Bissell v. Foss*, 114 U. S. 252, 260, 5 Sup. Ct. Rep. 851; *Rock Mines*, 574; *Lamar v. Hale*, 79 Va. 147. The cases cited not only clearly define the nature of a mining partnership, and distinguish such a partnership from a general partnership, but they also show that, except in the particulars mentioned, the affairs of a mining partnership are governed by the same principles in equity as a general partnership. In no case does this appear more clearly than in *Fereday v. Wightwick*, supra: "A lease was taken of certain mines, the lessees consisting of six persons; at the same time a lease was taken of the surface of the property. The mines and surface were used with a communion of expense and a communion of profit. The first question is whether this is a partnership property liable to be sold and disposed of to pay the partnership debts, and whether, a partner having sold part of his shares, his interest is to be considered subject, in the first place, to repayment of what is due from him to the partnership. This question is concluded by authority, but I am willing to decide it upon principle. Mining concerns are to some purposes trading concerns, but they are not so to all. They are not so in this particular, viz., that they are not, as an ordinary partnership trade, subject to dissolution on the death or bankruptcy of any of the partners, and the shares are transferable without the consent of the partners. In these particular instances, they have not all the incidents of a trading concern. In other respects, it has been

repeatedly held that they have. Now, it is a universal principle in regard to all property, whether real or personal, acquired for the purpose of a partnership, that property so acquired is, upon the dissolution of the partnership, subject to sale and accounts between the partners, and to payment of the partnership debts. That is a universal principle. To apply the rule to this particular case, the property was acquired by these partners for the purpose of the partnership concern. Therefore, though in the nature of real property it is subject to all the debts of the partnership, and subject to the debts of one of the partners incurred in the administration of the property, there can be no doubt that the plaintiffs have a right to make this claim." These principles are clearly stated and elaborated in *Duryea v. Burt*, supra. The relation, then, which existed between the parties before and at the time the appellant Meagher obtained the lease of the property in question, was that of mining partners. The lease having been acquired by Meagher as one of the partners, pursuant to and in consummation of the partnership agreement, and the property having been applied to the uses of the partnership for the purpose of conducting the business of mining thereon, the interest in the property, to-wit, the leasehold estate, must be deemed to be partnership property.

Third. That the interest in the premises acquired by the lease is an interest in lands, within the meaning of the statute of frauds, cannot be doubted. The question to be now determined is whether the arrangement or agreement between the parties, upon which the appellee predicated his rights in the premises, could be established by parol testimony. Can a copartnership entered into for the prosecution of a specific venture, necessarily requiring the acquisition of an interest in a particular parcel of land, be proven by parol, or is such an agreement within the provisions of the statute of frauds of this state? Gen. St. § 1515. That such a partnership differs very materially from a partnership entered into to trade in lands is manifest. Nevertheless, as the reasoning of the authorities maintaining the affirmative of the question would seem to apply to partnerships of either class, a review of the whole subject seems to be necessary. This precise question has never been presented to nor passed upon by this court. In the case of *Murley v. Ennis*, 2 Colo. 300, the agreement construed was stated by the court in the following language: "If two or more go into the public domain together to search and explore for mines, with the agreement to occupy and develop such discoveries as may be made for the joint benefit, and such discovery, development, and joint occupation follow, it is clear that while each explorer becomes invested with his due share and estate in the premises no provision of the statute of frauds is violated. \* \* \* But in the case supposed neither of the parties has at the date of the association any interest or estate which can be the subject of sale, and the contract of association does not contemplate that either shall part with any. Nor does the

interest or estate which is afterwards acquired vest or inure by virtue of the agreement, but by the occupation and appropriation alone." Such an agreement is clearly distinguishable from that under discussion. The question was incidentally considered in *Kayser v. Maugham*, 8 Colo. 232, 6 Pac. Rep. 803, but was not involved in the decision of the case. The court said: "It is true that a trust in lands cannot be predicated upon proof of an oral agreement to create a partnership for the purpose of purchasing and handling or improving such lands, the partnership relation not having existed prior to the acquisition of title, and no partnership funds having been invested in the property. To recognize a trust in such cases would be to abrogate the statute of frauds in this particular; it might as well be said that an oral contract providing directly for the purchase of an interest in lands is not obnoxious thereto. But the foregoing principle is not applicable to the case at bar, for the reason that here the partnership existed several months prior to the acquiring of title by defendants; that the partnership contract does not rest entirely in parol; and that the purchase of the mine was not contemplated by this contract."

The proposition actually decided is that contained in the last clause of the paragraph quoted. The counterpart of that proposition is that which is involved in this case, to-wit, whether a partnership agreement to acquire a lease of a particular property for the purpose of extracting ores therefrom, made before the lease has been obtained, can be proved by parol, when it appears that it was acquired in the name of one of the partners pursuant to the agreement, and applied to partnership uses under the agreement. It is a well-settled elementary principle that if a partnership be proven to exist by competent evidence it may be shown by parol that a whole or a part of its assets consist of real estate. The real question now presented is whether the fact that the acquisition of a leasehold interest in the property in question was actually contemplated at the time the contract was made changes the rule of evidence so as to require that such contract be proven by an instrument in writing. It is also an elementary principle that a contract to enter into a copartnership in a business which requires the acquisition of an interest in land as a necessary incident to the business may be proven by parol. The question here presented is whether a parol agreement to acquire a leasehold interest in a particular mine, as a necessary incident to the development of the property, and the extraction of ores therefrom, is within the statute of frauds. The further question is also presented whether the fact that by the terms of the agreement the interest in the mine was to be acquired by one, and the respective interests of the others to be transferred to them by him, in any wise change the rule applicable to the case. And finally, the general proposition is presented whether in this and in all cases of this nature the ultimate and only issue to be determined is not whether

the property in controversy is or is not partnership property, within the meaning of the principles of partnership law. If this be found to be the real issue, then it necessarily follows that neither the statute of frauds nor the law of trusts have any application to the case. There is a very considerable conflict in the authorities bearing upon these questions. Whether a partnership to trade in lands can be proven by parol has frequently been considered by the courts. The question has been discussed with great ingenuity, learning, and ability by many able jurists, but, even when the authorities are in harmony, the reasons and principles upon which the decisions have been predicated are by no means the same. In many cases the law of trusts, with its doubts and uncertainties, has been invoked, and the issue determined by applying principles, the application of which was by no means certain. It has been assumed that for all purposes, an interest in lands must be held by a title, either legal or equitable, within the meaning of the law. This is undoubtedly true, but to define this title it is not necessary to resort to the law of trusts. If the land is partnership property, the title is vested in the partnership, and is defined, governed, and controlled by well-settled principles of partnership law; and this is true whether the title is vested in one of the partners, or in all. A careful analysis of the more recent authorities clearly discloses a marked tendency to limit the issue to two independent propositions: *First*, is there a partnership? This may be proven by competent evidence. *Second*, of what does the partnership property consist? If of real estate, its treatment and disposition are regulated by the principles of partnership law, without reference to the title, or its character as realty. In *Bates on Partnership*, § 281, (the latest work on this branch of the law,) the following language is found: "Real estate bought or leased with partnership funds, for partnership purposes, and applied to partnership uses, is deemed to be partnership property whether the title is in all the partners as tenants in common, or in less than all, in the absence of any agreement. There is no necessity for any agreement in such cases. The statute of frauds has no application, but the title is held in trust for the firm. So of property originally contributed as stock, or if originally paid for by each out of his separate means, or brought into the use of the firm at its formation, and subsequently agreed to be converted into partnership property, it becomes part of the capital." Is not this rule applicable to all cases where lands are purchased or leased for partnership purposes, whether the purchase of such lands or the leasing of the same was either an incident of the business of the copartnership or the express object for which it was formed? The same author, at section 301, says: "Where a partnership holds land, not as the chief purpose of its existence but as an incident to the business, the statute of frauds does not apply, and the land may be shown to be a part of the partnership stock, and affected with partnership equities, by oral evidence. The

partnership requires no writing to prove it, and exists outside of the ownership of real estate." Section 302: "The authorities are divided on the question whether a partnership to trade in lands may be proved by parol in order to affect the lands with partnership liabilities and equities. The preponderance is in favor of considering that the statute does not apply if the land was or is to be purchased with the joint fund, whether the title be taken in one or all." And, commenting upon the authorities cited in support of the text, the author defines the real question out of which the conflict of authorities has arisen. "In those cases the partnership was formed to deal in land, and was not itself a transfer of the title, the land not being bought by the contract of partnership, but in pursuance of it, and out of the partnership funds. In the present class of cases the contract itself purported to be a transfer of interest." In *Lindley on Partnership*, 88, the author says: "With respect to that part of the fourth section of the statute of frauds which relates to lands, it is held (1) that a partnership constituted without writing is as valid as one constituted by writing; and (2) that, if a partnership is proved to exist, then it may be shown by parol evidence that its property consists of land." The opposite view is adopted by Judge Story in his work on *Partnership*. At section 83, he says: "But although there is no positive incompetency at the common law of creating a partnership in the buying and selling of lands on joint account, and for the benefit of the parties by way of commercial speculation and commercial adventure, yet such a contract must, from the nature of the case and the positive rules of law and the statute of frauds, be reduced to writing; and then the stipulations of the parties will constitute the sole rule to ascertain their intent and to enforce their respective rights."

Do the authorities sustain the principles of the author last cited? The leading case in support of this proposition is *Smith v. Burnham*, 3 Sumn. 435. In this case, after commenting upon the provisions of the statute of frauds, it is said: "Now, taking these clauses together, or separately, the same conclusion would seem to follow as to the parol agreement in the present case. If the agreement could be treated as a sale by the defendant to the plaintiff of any interest in the lands to be purchased, it would be within the statute. If it could be treated as the case of an estate created in lands, it would be a mere estate at will, which would defeat the whole intention of the agreement and the whole object of the bill. I incline to think that it properly falls under neither of these predicaments, but that it is the case of the declaration or creation of a trust or confidence in lands, not arising or resulting by implication in operation of law. The trust arises *eo instanti* upon each purchase, and is then to attach, if at all. \* \* \* It has been ingeniously argued that the interest of the plaintiff is in a moiety of the profits or proceeds of the sale, and not in the land itself, and that therefore, at least when the land has been sold by the defendant,

the agreement attaches to the moiety of the proceeds. But the agreement, if good at all, attaches also to the land at the time of the purchase, and it is then an agreement for an interest by way of trust in the land, a sort of springing trust; and it is in virtue of this trust-estate, and of this only, that any right can attach to the moiety of the proceeds. The right to follow the proceeds is a right which, if it exists at all, flows from the interest in the lands, and the trust created in favor of the plaintiff. It is not collateral, but direct." Again he says, at page 461: "Then it seems clear that this is not the case of a resulting trust by implication or construction of law. It is not the purchase of an estate by one man in the name of another, where the purchase money is paid by the former, and the deed taken in the name of the latter. It is not the case of a purchase confessedly paid for out of the funds of an existing partnership for partnership purposes, and the deed taken in the name of one partner. In each of these cases a resulting trust will arise by operation of law in favor of the party or parties advancing the money. \* \* \* The trust in the present case, if any there was, was one arising directly *ex contractu*, and not by implication or operation of law." In the above case it will be seen that a contract of partnership entered into for the purpose of trading in lands is regarded as a contract in respect to an interest in lands, within the meaning of the statute. It is assumed that such interest in land, or a trust therein, is transferred or created by the contract itself; that such interest or trust cannot be separated from the contract of copartnership; and that the issue in such cases is not alone whether a copartnership was entered into, but whether a copartnership was entered into the purpose of which was to acquire an interest in land. If such was the object of the agreement, then perforce of that fact it comes within the statute, and cannot be proved by parol.

This view of the question is adopted in a number of authorities, the most important of which is *Bird v. Morrison*, 12 Wis. 138. The court, at page 155, say: "These cases, therefore, go no further than to establish three propositions: (1) Where real estate is bought with partnership funds for partnership purposes, there is a resulting trust in favor of the partnership, though the title be taken in the name of one. (2) Where the title is held by all the partners jointly, so as to be entirely consistent with the character of partnership property, the fact of partnership may be shown by parol, and that the property was held for partnership purposes, and from these facts the law will imply its partnership character, and such trusts as resulted therefrom. (3) A partnership in any branch of trade or business may be shown by parol as an existing fact, and then whatever real estate is held for the purpose of such business is regarded as an incident thereto, and the law will imply a trust in favor of the partnership, where the legal title is not in all." And, as an illustration of the application of the principle contained in the third paragraph

quoted, he says, page 159: "If the bill had alleged that the partnership extended to the carrying on of an hotel business, that would have been a partnership, and might, so far as the hotel lots were concerned, have laid the foundation for applying the doctrine of implied trust to the real estate used for the hotel, as being incident to the business. But it only alleges that they were to build an hotel, and this does not make it a partnership, more than it would if they had built a boarding-house, or a mill." So far as the particular question under discussion is concerned, the correctness of the judgment under review might be rested upon the principles above stated alone. The acquisition of the lease was but an incident to the business contemplated, to-wit, the extraction of the ores. The law would therefore necessarily imply a trust for the benefit of the members of the copartnership in the leasehold estate. But it is unnecessary to rest the case upon so narrow a principle, for the reason, as it will clearly appear, that by the decided weight of authority a partnership to deal in lands may be established by parol. The leading case upon the subject is *Dale v. Hamilton*, 5 Hare, 369. The conclusion arrived at, after prolonged argument and careful consideration, is stated in the syllabus in the following language: "A partnership agreement between A. and B. that they shall be jointly interested in a speculation for buying, improving for sale, and selling, lands, may be proved without being evidenced by any writing, signed by or by the authority of the party to be charged therewith within the statute of frauds; and, such an agreement being proved, A. or B. may establish his interest in land, the subject of the partnership, without such interests being evidenced by any such writing." In *Forster v. Hale*, 5 Ves. Jr. 308, Lord Chancellor Loughborough observed, in response to the suggestion that the question was whether there was a declaration of trust within the statute of frauds: "That was not the question. It was whether there was a partnership. The subject being an agreement for land, the question, then, is whether there was a resulting trust for that partnership by operation of law. The question of partnership must be tried as a fact, as if there was an issue upon it. If, by facts and circumstances, it is established as a fact that these persons were partners in the colliery, in which land was necessary to carry on the trade, the lease goes as an incident. The partnership being established by evidence upon which a partnership may be found, the premises necessary for the purposes of that partnership are, by operation of law, held for the purposes of that partnership." A like principle is laid down in *Essex v. Essex*, 20 Beav. 442. Attention is now particularly called to the language of the court in *Chester v. Dickerson*, 54 N. Y. 1: "On the other hand it is claimed that such an agreement is not affected by the statute of frauds, for the reason that the real estate is treated and administered in equity as personal property for all the purposes of the partnership. A court of equity having full jurisdiction of all cases

between partners touching the partnership property, it is claimed that it will inquire into, take an account of, and administer upon all the partnership property, whether it be real or personal, and in such cases will not allow one partner to commit a fraud or a breach of trust upon his copartner by taking advantage of the statute of frauds." Citing cases. "I am inclined to think this doctrine to be founded upon the best reason and the most authority." \* \* \* But suppose two persons by parol agreement enter into a partnership to speculate in lands, how do they come in conflict with the statute of frauds? No estate or interest in land has been granted, assigned, or declared. When the agreement is made no lands are owned by the firm, and neither party attempts to convey or assign any to the other. The contract is a valid one, and in pursuance of this agreement they go on and buy, improve, and sell lands. While they are doing this, do they not act as partners, and bear partnership relations to each other? Within the meaning of the statute in such cases, neither conveys or assigns any land to the other, and hence there is no conflict in the statute. The statute is not so broad as to prevent proof by parol of an interest in lands. It is simply aimed at the creation or conveyance of an estate in lands without a writing." Again, in the case of *Fairchild v. Fairchild*, 64 N. Y. 471, *CHURCH, C. J.*, uses the following language: "Real estate purchased as partnership property is not within the prohibition of the statute. In the first place it is not the case where the consideration is paid by one person, and a conveyance taken in the name of another. The consideration is paid by all. It is not, therefore, within the letter of the statute. But a more substantial reason is that property thus held is regarded as personal property, for the purpose of paying debts and adjusting the equities between the partners, and the individual member holding the legal title is a trustee for the partnership in respect to the property as personalty; and when the debts are paid, and the claims of the several members as between themselves paid, the trust for the partnership is discharged, and a trust results to the other members of the firm, and the heirs of such as have died, in the remainder, by operation of law, which is saved by section 50 of the statute; and the holder of the legal title then becomes a trustee of such remainder, as real estate, for the benefit of persons interested." *Traphagen v. Burt*, 67 N. Y. 30; *Wormser v. Meyer*, 54 How. Pr. 189; *Bissell v. Harrington*, 18 Hun, 81. This same rule has been adopted in *Indiana*. *Holmes v. McCray*, 51 Ind. 358. Also, in *Bopp v. Fox*, 63 Ill. 540; *Wallace v. Carpenter*, 85 Ill. 590. In *Allison v. Perry*, 22 N. E. Rep. 492, decided in October last, the same court declares that "the law does not require that the agreement of copartnership shall be in writing to enable the firm to purchase lands. Where a partnership is constituted under a parol agreement, it may be shown that its property consists of land, and it may own, possess, and enjoy the same."

In this case the partnership was entered

into for the purchase of coal lands, and the development of the same, with a view to profit. This doctrine is adopted by the supreme court of Iowa in many well-considered cases. *York v. Clemens*, 41 Iowa, 95. In *Richards v. Grinnell*, 63 Iowa, 44, 18 N. W. Rep. 668, it is held that, "while the decisions are conflicting, the decided weight of authority, as well as sound reason and correct principles, supports the conclusions reached in this case, that a contract of partnership for the purpose of dealing in real estate is not void under the statute of frauds because it is not evidenced by any writing, but rests in parol; and, after the dissolution of such partnership, either partner may establish his interest in the partnership without such interest being evidenced by any such written contract." In the course of the opinion, *ROTHROCK, C. J.*, says: "We think the cases above cited are in accord with the decided weight of authority, and in our opinion they are founded upon sound reason and correct principles. It is everywhere held that, where land is held by a partnership, it is, as between the parties, and as to the creditors of the firm, to be treated as personal property. Such being the law, it would seem to follow that the statute of frauds can have no application to lands thus held and owned." In *Pennybacker v. Leary*, 65 Iowa, 220, 21 N. W. Rep. 575, *BECK, J.*, says, in the following language: "It will be observed that the lands, as we have before stated, were not purchased by the contract for the copartnership, but by a subsequent purchase made in pursuance thereof. The case, then, assumes the aspect of the purchase of lands by a copartnership. While the title of the lands was under this purchase vested in defendant, they were really held by him in trust as partnership property. Plaintiff's interest in the lands is that of a partner, as prescribed by the contract of copartnership." A like doctrine has been adopted by the supreme court of California. In *Coward v. Clanton*, 21 Pac. Rep. 359, in the course of the opinion, *WORKS, J.*, says: "The defendant contends in this court that, conceding that the contract was one of partnership, as it was in parol, it was within the statute of frauds, and cannot for that reason be enforced. It was held by this court in an early case that a partnership the object of which was to deal in real estate could not be formed by a contract resting in parol. *Gray v. Palmer*, 9 Cal. 616, 639. The question seems not to have been very thoroughly considered, and the case is clearly against the great weight of authority." The same doctrine prevails in Oregon. *Knott v. Knott*, 6 Or. 142. Also in Montana. *Hirbour v. Reeding*, 3 Mont. 13. To the extent of holding that a partnership entered into to share the profits realized from speculation in lands, the rule has been recognized in Connecticut, Missouri, and Minnesota. *Bunnell v. Taintor*, 4 Conn. 568; *Snyder v. Wolford*, 33 Minn. 175, 22 N. W. Rep. 254; *Hunter v. Whitehead*, 42 Mo. 524. The numerous authorities cited clearly establish the proposition that a partnership entered into to trade

in lands can be established by parol. It therefore follows that the admission of the testimony offered by appellee in the court below to establish a copartnership for the purpose of acquiring a lease of the "Felicia Grace" and carrying on the business of mining thereon was not error.

It has already been said that upon the facts proven the nature of the partnership was that of a mining partnership. But whether it was a mining or a general partnership is immaterial in the discussion of the question now presented. That question is suggested in the consideration of the authority of Meagher to dispose of interests in the lease. For the purposes of this case, it is not necessary to determine to what extent the real estate belonging to the copartnership is converted into personal property, nor when, in equity, it ceases to be regarded as personal property, and becomes real estate. It is sufficient to say that the real estate of a mining partnership is, in equity, treated in precisely the same manner as the real estate of a general or commercial partnership. *Duryea v. Burt*, 28 Cal. 569, supra; *Settembre v. Putnam*, 30 Cal. 490. Had Meagher any authority to transfer any interest in the leasehold estate except his own, without the authority and consent of his associates? If he could not, then it follows that the transfers made by him must be confined in their effect to his interests alone. This question is determined by principles so well settled as to be elementary. In *Parsons on Partnership*, p. 376, it is said: "No partner, and no proportion of the partners, can sell or transfer the real estate of the firm outright for money, or by way of mortgage to secure a debt, or to assignees in trust for debts, without the consent or authority of the other partners. On the first point, that he who happens to have the legal title cannot sell the real estate without the consent and authority of the rest, so as to give title to a grantee having notice, \* \* \* we are quite sure that must be the law; and, if he make a mortgage to secure a debt or an assignment in trust for creditors by which the legal title would pass, it seems that equity will not sustain the transaction, even supposing it free from taint of fraud." 1 *Bates, Partn.* §§ 408-405.

Finally, it is contended that appellee abandoned his interest, and that Meagher had a right to treat the same as forfeited. This proposition is entirely untenable. There is no evidence to warrant it. The claim is predicated upon the fact that Reed failed to answer the letter addressed to him by Meagher on or about the 7th of June, and that for a period of less than six weeks he gave no attention to the enterprise. This is not sufficient to justify the conclusion that he had abandoned, or intended to abandon and forfeit, his interest. If in the month of July, 1884, instead of uncovering a valuable deposit of mineral, the parties had discovered that the property was absolutely barren, and had instituted an action against appellee for the contribution of his share of the expense, could he then have been heard to say, in defense of such an action, that he



had abandoned the enterprise in the month of June, and that he was therefore not liable? Certainly not. The language of the chancellor in the case of *Hartman v. Woehr*, 18 N. J. Eq. 383, is suggestive in this connection: "They deny that he is or ever was a partner, on the ground that he has never complied with the partnership agreement by paying up his share of the capital. The position taken on their part is that until that is paid up he is not admitted as a partner. But this agreement was for a partnership to commence immediately, and to continue for five years. The partners each agreed to pay in \$10,000 of the capital, but it was not a condition precedent. The complainant, by his deed, paid up at the time of the agreement \$5,667 of his share, and the defendants accepted it, and used, and continued to use, the property in the partnership business. Neither of them paid up his share at that time, but at intervals of weeks or months afterwards; but the business of the partnership, the erecting of the brewery, and manufacture of beer, went on. Each contributed some capital and labor. The existence of a partnership does not depend upon the fact that each partner has in all things complied with his agreement. If the contract has been made, property and labor contributed, and the partnership business commenced or carried on to any extent, there is a partnership. The defendants had a remedy if he did not comply with his engagement. They could have asked for a dissolution, and paid him back the amount he put in, and formed a new partnership. But under this agreement he was a partner for five years, unless the partnership was sooner dissolved." So in this case Meagher and his associates had the right to demand that appellee perform his agreement and contribute the share of the expense which he was obliged to contribute by the agreement. If he refused to comply with such demand, then they might have assumed that the partnership was at an end, so far as he was concerned. But no demand was made, except so far as such demand may be inferred from letters of June 7 and June 14, 1884. But it affirmatively appears that these letters, except that of June 7th, did not reach the hands of Reed until some time in July, after Meagher had assumed that he had abandoned the enterprise, and had undertaken to sell his interest to other parties. Such conduct on the part of Meagher was entirely unwarranted by the circumstances, and in violation of appellee's rights in the premises.

Many other questions are suggested by the argument of counsel in this case, but it is not deemed necessary to consider them. Many findings of the court have been disavowed by counsel for appellants with great ability, for the purpose of showing that they are not sustained by the evidence. It may be that some of them are unwarranted, but if the conclusions already reached are correct they are sufficient to sustain the decree. The judgment should be affirmed.

**RICHMOND and REED, CC., concur.**

**PER CURIAM.** The principal purpose of the partnership, as stated in the exhaustive opinion of Commissioner **PATTISON**, was to carry on the business of extracting and marketing ores during the period specified. This purpose has been accomplished, and it only remains to settle the partnership affairs, and distribute the partnership assets. These assets include no interest in realty, and, in our judgment, the right to a settlement and distribution does not depend upon the legal *status*, under the statute of frauds, of such an interest. The judgment of the court below is accordingly affirmed.

**ELLIOTT, J., dissenting.**

(10 Mont. 107)

**FROMAN v. PATTERSON.**

(*Supreme Court of Montana. Aug. 1, 1890.*)

**MOTION FOR NEW TRIAL—GROUNDS—SPECIFICATION OF ERRORS.**

1. Under Code Civil Proc. Mont. § 295, which declares that "a new trial is a re-examination of an issue of fact," and section 296, subd. 6, providing that a new trial may be granted because the evidence is insufficient to justify the verdict, or because "it is against law," it is no ground for a new trial that the "judgment is against law."

2. A notice of motion for a new trial is not sufficient which merely states that it will be asked because the evidence is insufficient to justify the verdict, for section 296, subd. 3, requires that the "statement shall specify the particulars in which such evidence is alleged to be insufficient."

3. Under Code Civil Proc. Mont. § 296, subd. 7, allowing a new trial for "errors in law occurring at the trial, and excepted to by the party making the application," a new trial cannot be granted where no such exceptions were raised at the trial.

Appeal from district court, Beaverhead county; **WILLIAM H. HUNT**, Judge.

*Forbis & Forbis*, for appellant. *Word & Smith*, for respondent.

**HARWOOD, J.** The appeal herein is from an order of the trial court granting a motion for new trial on the application of plaintiff. The first objection urged by appellant is that the statement of the case is insufficient, and for that reason the court was not authorized to vacate the former decision and grant a new trial. The record shows that upon the trial of the cause the plaintiff introduced on his behalf the evidence on which he relied to maintain his case, and all the evidence he offered was received without objection or exception, so far as the record discloses. When the plaintiff rested in the introduction of his proofs, the defendant introduced certain witnesses, who were sworn and testified on behalf of the defendant, and, so far as the record discloses, no objection was made during the trial to the introduction of any evidence offered and received on behalf of defendant. Indeed it does not appear from the record that any objection was made or any exception saved to any matter occurring throughout all the proceedings in the action. This cause was tried to the court without a jury. No findings of fact were made by the court in writing, nor does the record show that any findings in writing were re-

quested by either party. The record shows that after all the testimony was introduced by the respective parties, and "after hearing arguments of counsel for plaintiff and defendant," the court rendered judgment in favor of defendant. On the same day that judgment was rendered the plaintiff, by his counsel, made and served on defendant's counsel a notice of plaintiff's intention to move for new trial, as follows: "To the defendant, William C. Patterson, and to John F. Forbiss: You will take notice that the plaintiff in the above cause hereby gives notice of his intention to move for a new trial herein; that said motion will be based upon a statement of the case to be prepared and filed herein, and for the reason that the judgment is contrary to law." The record further shows that afterwards, on the 28th of February, 1890, a paper denominated "Motion for New Trial" in said action was served on defendant's counsel, which paper, after setting out the court and title of the action, recites as follows: "Comes now the plaintiff in the above cause, and moves the court for a new trial herein for the following reasons: (1) Because the court erred in allowing defendant to introduce proof of his occupancy of the land in controversy named in the complaint. (2) Because the court erred in holding that the receipt of the register and receiver of the United States land-office at Helena would not support an action in ejectment. (3) Because the court erred in rendering judgment for defendant, and dismissing plaintiff's action. (4) Because upon the proof introduced the court should have rendered judgment for plaintiff." The record further shows that an imperfect statement of the case was prepared and served March 1, 1890, on defendant's counsel, containing "all the evidence introduced in the cause;" but this statement does not contain any "specifications of particulars in which the evidence is alleged to be insufficient to sustain the verdict or other decision." Nor does the statement contain any specifications of "errors in law occurring at the trial, and excepted to by the moving party." The only "errors in law" complained of by the moving party which we find specified in the record are the grounds stated in said motion for new trial; but the "errors" there designated were not "errors in law occurring at the trial, and excepted to by the party making the application." According to the record there were no objections made or exceptions saved throughout the trial. It is asserted by respondent's counsel that said "motion for new trial" was attached to the statement of the case when the statement was served, March 1, 1890, and appellant's counsel tacitly admits that fact by saying, as he did in the argument of this appeal, that "the court may take the statement of respondent's counsel as to these facts, and appellant will then stand upon his objection to the sufficiency of the record." Under these agreements we allow said motion for new trial to take its place in the record in lieu of specifications so far as its matter will answer, without however expressing any opinion as to what should be done if ob-

jection was made to considering that paper as answering for such an important part of the statement as the specifications of errors under the requirements of the statute.

Admitting, for the purposes of this consideration, that said "motion for new trial" is part of the statement of the case, and stands in place of specifications of errors, the appellant still contends that the statement is insufficient to raise the questions sought to be brought before the court, and insufficient to authorize the court to vacate the former decision, and grant a new trial. Section 295, Code Civil Proc., provides: "A new trial is a re-examination of an issue of fact in the same court \* \* \* after a trial and decision by a jury, court, or referee." Section 296 of the Code provides: "The former verdict or other decision may be vacated, and a new trial granted, on the application of the party aggrieved, for any of the following \* \* \* causes materially affecting the substantial rights of said party." The causes provided here for vacating "the former verdict or other decision" are stated under seven subdivisions of the last-mentioned section. The causes stated in the first five subdivisions have no application to the case at bar. The sixth and seventh subdivisions appear from the argument of counsel for plaintiff to be causes for which plaintiff seeks a new trial. These causes are declared by statute as follows: "Sixth. Insufficiency of evidence to justify the verdict or other decision, or that it is against law. Seventh. Errors in law occurring at the trial and excepted to by the party making the application." Section 297 of the Code provides as follows: "When the application is made for a cause mentioned in the first, second, third, and fourth subdivisions of the last section, it must be made upon affidavits. For any other cause it may be made at the option of the moving party, either upon the minutes of the court or a bill of exceptions, or a statement of the case prepared as hereinafter provided." Section 298 provides: "The party intending to move for a new trial must within ten days after the verdict of the jury, if the action was tried by a jury, or after notice of the decision of the court or referee, if the action was tried without a jury, file with the clerk, and serve upon the adverse party, a notice of his intention, designating the grounds upon which the motion will be made, and whether the same will be made upon affidavits or the minutes of the court or a bill of exceptions or a statement of the case." It is further provided in the same section as follows: "When the notice for the motion designates as the ground of the motion the insufficiency of the evidence to justify the verdict or other decision, the statement shall specify the particulars in which such evidence is alleged to be insufficient. When the notice designates as the ground of motion errors in law occurring at the trial, and excepted to by the moving party, the statement shall specify the particular errors upon which the party will rely. If no such specifications be made, the statement shall be disregarded on the hearing of the motion." The counsel for

the moving party contends that he made specifications of "errors in law" found in his "motion" for new trial, and that was made part of the statement of the case, and should answer for such specifications as the statute requires in the statement of the case. Grant this for the purposes of this case, and still the record shows that there was an entire absence of any "errors occurring at the trial, and excepted to by the party making the application" for a new trial. Nor did the moving party state in his notice of intention to move for a new trial, as a ground upon which his motion would be made, the statutory cause of "errors in law occurring at the trial and excepted to by the party making the application." Nor did he state any other ground specified in the statute as cause for vacating the verdict or decision, and granting a new trial. The notice of intention to move for a new trial as set forth in this record designates the ground of motion as follows: "For the reason that the judgment is contrary to law." Our statute provides, as one ground for motion for a new trial: "Insufficiency of the evidence to justify the verdict or other decision, or that it is against law." The plaintiff did not state that cause for moving for new trial, but his reason as designated in his notice was "for the reason that the judgment is contrary to law." The clause "or that it is against law," found in the sixth subdivision of section 296, clearly does not refer to the judgment. A new trial is to be "a re-examination of an issue of fact." The clause "it is against law" refers to the "verdict or other decision" of the issue of facts tendered by the pleadings. If the decision of the issue was made by a jury, it is usually termed a "verdict;" if made by a referee, or by the judge trying an issue without a jury, the determination of the issue of fact is usually termed the "decision" or "findings of fact." The very subject provided for by this statute, *i. e.*, "New Trials," is declared by statute to be "a re-examination of an issue of fact in the same court after a trial and decision by a jury, court, or referee." A decision of what, by a court, jury, or referee, is here contemplated? Certainly a decision of the "issue of fact." The judgment is the conclusions of law drawn from the facts found by a judicial investigation. Such conclusions are generally stated in an imperative form. Mr. Hayne, in his work on New Trial and Appeal, (section 99,) says: "The phrase 'against law' used in the statute does not mean that a party can move for a new trial on the ground that the judgment is against law. That a judgment is against law is not ground for a motion for new trial." In *Martin v. Matfield*, 49 Cal. 42, the ground stated in the notice of intention to move for new trial was "insufficiency of the evidence to justify the judgment, and that it is against law." It will be observed that here the ground was much more fully stated than in the case at bar. In that case *WALLACE, C. J.*, in delivering the opinion of the court, said: "The insufficiency of the evidence to justify

the judgment is not a ground for new trial. Such a motion is not directed at the judgment, but at the verdict or other decision of fact; for a new trial is a re-examination of an issue of fact. That a judgment is against law is not ground for a motion for new trial. A verdict or other decision of fact may be set aside, and a new trial granted, if such verdict or decision of fact is against law; that is, if error of law be committed resulting in an erroneous decision of fact. If the decree in this case, as entered of record, be other than that resulting from conclusions of law arrived at by the court below, we cannot correct it upon this appeal, inasmuch as the appeal is taken only from an order granting a new trial." The order was reversed. It should be remarked in passing that the statute of Montana upon this question of practice is like that of California, from which our statute on this question was evidently copied.

In *Brumagim v. Bradshaw*, 39 Cal. 24, Mr. Justice CROCKETT, in delivering the opinion of the court, says: "It is not enough to aver that the verdict is against law, and then offer to support the averment by showing that the verdict is not supported by the evidence, and is for that reason against law. If such a course of proceeding was tolerated, all the other specific grounds for new trial enumerated in the statute might, for the same reason, be condensed into the one ground that 'the verdict is against law,' for in that general sense it would be against law if there was any valid reason whatsoever for a new trial. But the statute, in authorizing a new trial on the ground that the verdict 'is against law,' evidently does not intend to include in that phrase all or any of the other several distinct and separate grounds of the motion which are specified in the act." Hayne, *New Trial & App.* § 99. The whole argument in this appeal, on the part of respondent, who seeks a new trial, is based upon two premises—*First*, that the evidence introduced on behalf of plaintiff is sufficient to sustain his action, and that the evidence introduced on behalf of defendant is insufficient to sustain a finding and decision in his favor. These questions cannot be reviewed in this application for a new trial, because the respondent has not laid the foundation for the consideration by designating the proper grounds, and specifying the particulars wherein the evidence is insufficient. The other premise is that errors of law occurred at the trial, such as are dwelt upon in the "motion for new trial." It is palpable that such alleged errors cannot be considered, for two reasons—*First*, because no exceptions were saved at the trial; and, *secondly*, if such exceptions had been saved the plaintiff gave no notice that he would make "errors in law occurring at the trial and excepted to by the party making the application" one of his grounds of motion for new trial. For the foregoing reasons, the order granting a new trial is reversed, with costs.

BLAKE, C. J., and DE WITT, J., concur.

## IDE v. LEISER.

(Supreme Court of Montana. July 23, 1890.)

SPECIFIC PERFORMANCE—OPTIONS—CONSIDERATION  
—STATUTE OF FRAUDS.

1. Defendant agreed in writing to give plaintiff the option to purchase his land within a given time at a named price, a consideration for such option being stated. The purchase was not completed, and at the end of the time defendant made, on the agreement, and signed, a memorandum extending the option for 10 days, but there was no new consideration. *Held*, that the new option was *nudum pactum* and void.

2. But such memorandum constitutes a continuing offer to sell, and when plaintiff accepts within the time named, and tenders the price, there is a complete contract of sale.

3. Such memorandum is a sufficient compliance with the Montana statute of frauds, (Comp. St. div. 5, p. 632, § 219,) which only requires that the memorandum of sale shall be signed by the seller.

4. A complaint praying specific performance of such contract need not allege that plaintiff has no adequate remedy in damages.

5. Nor need it allege that defendant is the owner of the land when the action is brought where it does allege that he was such owner when he made the offer, and the complaint was filed on the day when plaintiff accepted it.

Appeal from district court, Lewis and Clarke county; WILLIAM H. HUNT, Judge.

The plaintiff pleads the following instrument in writing: "For and in consideration of one dollar (\$1.00) to me in hand paid, I hereby agree to give Frank L. Ide the sole right and option to purchase from me at any time within ten days from the date of this instrument the following described property, to-wit, [describing the property.] I furthermore agree to furnish a good and sufficient deed of conveyance of said property, and of the whole thereof. The price of said property to be one thousand dollars, (\$1,000.) Helena, Montana, September 24, 1889. J. J. LEISER." "I hereby extend the above option for a period of ten days from this date. Helena, Oct. 3rd, 1889. J. J. LEISER." The complaint further sets forth that on October 11, 1889, the plaintiff tendered defendant \$1,000, and demanded a conveyance of the property. That defendant refused to give the conveyance and still refuses. That plaintiff is still willing to pay said \$1,000. Plaintiff demands judgment that defendant make conveyance to him of the real estate described. The defendant demurred to the complaint on the ground that it did not set forth facts sufficient to constitute a cause of action. Demurrer was sustained, and judgment entered for the defendant. Plaintiff appeals from the judgment. The question raised by the record, and discussed by counsel, is whether the instrument in writing pleaded, and the tender of \$1,000 by plaintiff to defendant, October 11, 1889, are sufficient to entitle plaintiff to a conveyance as demanded. No tender of money or demand for a deed was made during the 10 days limited in the original instrument; but were made during the period defined in the extension indorsed on the instrument.

A. C. Botkin, for appellant. McCutcheon & McIntire, for respondent.

DE WITT, J., (after stating the facts as above.) For convenience of terms we will designate the original document pleaded as the first instrument, and the option therein as the first option, and the indorsement extending the time as the second instrument and option. We will not discuss the validity of the first instrument as a foundation for an action for specific performance. We will assume, for the purpose of this decision, that it is good. The option assumed to be granted therein was not exercised within the time limited, and expired October 4. The consideration for this option was one dollar, whether paid by Ide to Leiser, or still a debt owing from Ide to Leiser, is immaterial. That consideration was exhausted by the expiration of the option on October 4. Ide paid his money, the one dollar, and received his goods, the option. Leiser took the one dollar, and delivered a consideration therefor, viz., the option. The transaction was complete, and the terms performed by each party to the agreement.

We come to the second instrument and option. No consideration is named therein, specifically or by reference. The consideration for the first option cannot do service for the second. That consideration was *functus officio* in the first instrument. A consideration determined by the parties to be the consideration for the sale of one article on one day, and so declared in writing, cannot, in the face of such declaration, be construed by the court as a consideration for the sale of another article on another day. The first 10 days' option was a thing of value, and paid for as such. The second was another separate valuable article. Was there any consideration for its sale? We believe the same definitions and distinctions will aid this discussion. There may be (1) a sale of lands; (2) an agreement to sell lands; and (3) what is popularly called an "option." The first is the actual transfer of title from grantor to grantee by appropriate instrument of conveyance. The second is a contract to be performed in the future, and if fulfilled results in a sale. It is a preliminary to a sale, and is not the sale. Breaches, rescission, or release may occur by which the contemplated sale never takes place. The third, an option originally, is neither. The third, an option, originally is neither simply a contract by which the owner of property (real estate being the species we are now discussing) agrees with another person that he shall have the right to buy his property, at a fixed price, within a time certain. He does not sell his land; he does not then agree to sell it; but he does then sell something, viz., the right or privilege to buy at the election or option of the other party. The second party gets, *in presenti*, not lands, or an agreement that he shall have lands, but he does get something of value; that is, the right to call for and receive lands if he elects. The owner parts with his right to sell his lands, except to the second party, for a limited period. The second party receives this right, or rather, from his point of view, he receives the right to elect to buy. That which the second party receives is of value, and in times of rapid inflations

of prices, perhaps of great value. A contract must be supported by a consideration, whether it be the actual sale of lands, an agreement to sell lands, or the actual sale of the right to demand the conveyance of lands. A present conveyance of lands is an executed contract. An agreement to sell is an executory contract. The sale of an option is an executed contract; that is to say, the lands are not sold; the contract is not executed as to them; but the option is as completely sold and transferred *in presenti* as a piece of personal property instantly delivered on payment of the price. Now this option, this article of value and of commerce, must have a consideration to support its sale. As it is distinct from a sale of lands, or an agreement to sell lands, so its consideration must be distinct; although, if a sale of the lands afterwards follows the option, the consideration for the option may be agreed to be applied, and often is, as a part payment on the price of the land. But there must be some consideration upon which the finger may be placed, and of which it may be said, "This was given by the proposed vendee to the proposed vendor of the lands as the price for the option, or privilege to purchase." We have been led into this endeavor to make clear our views of these distinctions, because, in the argument, counsel did not seem to give them as much weight as they seem to us to demand. We refer to the following authorities: *Gordon v. Darnell*, 5 Colo. 302; *Bradford v. Foster*, 87 Tenn. 4, 9 S. W. Rep. 195; *Railroad Co. v. Bartlett*, 3 Cush. 224; *Bean v. Burbank*, 16 Me. 458; *De Rutte v. Muldrow*, 16 Cal. 505; *Johnston v. Trippe*, 33 Fed. Rep. 530; *Thomason v. Dill*, 30 Ala. 444; *Mers v. Insurance Co.*, 68 Mo. 127; *Thorne v. Deas*, 4 Johns. 84; *Burnet v. Biscoe*, Id. 235; *Lees v. Whitcomb*, 5 Bing. 34; *Bish. Cont.* §§ 77, 78; *McDonald v. Bewick*, 51 Mich. 79, 16 N. W. Rep. 240; *Schroeder v. Gemeinder*, 10 Nev. 356; *Woodruff v. Woodruff*, 44 N. J. Eq. 355, 16 Atl. Rep. 4; *Perkins v. Hadsell*, 50 Ill. 216; *Wat. Spec. Perf.* § 200.

Examine the two options granted in the case before us. L. sold I. an option for 10 days from September 24th for one dollar. He then gives an option for another 10 days from October 3d, for what? For nothing. L. transfers this option, this incorporeal valuable something, for nothing. The transfer of the option was *nudum pactum*, and void. But, the point just discussed being conceded, appellant still contends that this second instrument or option was a continuing offer to sell, at a given price, and was accepted by respondent before retracted, and that such acceptance, evidenced by, and accompanied with, the tender of the price, and demand for a deed, constitute an agreement to sell land, which may be enforced in equity. We leave behind now our views of options, and consideration therefor, and meet a wholly different proposition.

Reading the two instruments together we find that on October 3d L. extended to I. an offer to sell his lands at the price of \$1,000. There was no consideration for the offer, and it could have been nullified by L. at any time by withdrawal. But it

was accepted by I., while outstanding, the price tendered, and deed demanded. It must be plain from the previous discussion that we do not hold that the offer, when made, or at any moment before acceptance, was a sale of lands, an agreement to sell lands, or an option. But upon acceptance and tender was not a contract completed? If one person offers to another to sell his property for a named price, and while the offer is unretracted the other accepts, tenders the money, and demands the property, that is a sale. The proposition is elementary. The property belongs to the vendee, and the money to the vendor. Such is precisely the situation of the parties herein. I. offered to sell for \$1,000, I. accepted, tendered the price, and demanded the property. Every element of a contract was present, parties, subject-matter, consideration, meeting of the minds, and mutuality. And as to the matter of mutuality we are now beyond the defective option. We have simply an offer at a price, acceptance, payment or tender, and demand. That this was a valid contract we cannot for a moment doubt. In discussing a transaction of this nature, in *Gordon v. Darnell*, 5 Colo. 304, *BECK, C. J.*, in one of his clear opinions, says: "Its legal effect is that of a continuing offer to sell, which is capable of being converted into a valid contract by a tender of the purchase money, or performance of its conditions, whatever they may be, within the time stated, and before the seller withdraws the offer to sell." *LURTON, J.*, in *Bradford v. Foster*, 87 Tenn. 8, 9 S. W. Rep. 195, says: "Before acceptance, such an agreement can be regarded only as an offer in writing to sell upon specified terms the lands referred to. Such an offer, if based upon no consideration, could be withdrawn by the seller at any time before acceptance. It is the acceptance while outstanding which gives an option, not given upon a consideration, vitality." In *Railroad Co. v. Bartlett*, 3 Cush., 227, we find the following, by *FLETCHER, J.*: "In the present case, though the writings signed by the defendants was but an offer, and an offer that might be revoked, yet while it remained in force and unrevoked it was a continuing offer during the time limited for acceptance, and during the whole of that time it was an offer every instant; but as soon as it was accepted it ceased to be an offer merely, and then ripened into a contract." This case readily distinguishes *Bean v. Burbank*, 16 Me. 458, which may seem to hold a contrary doctrine. It also repudiates *Cooke v. Oxley*, 3 Term. R. 653, and claims that the English case is said to be inaccurately reported, and, in any event, entirely disregarded in the later decisions. See also *De Rutte v. Muldrow*, 16 Cal. 505; *Thomason v. Dill*, 30 Ala. 444; *Goodpaster v. Porter*, 11 Iowa, 161; *Vassault v. Edwards*, 43 Cal. 458; *Black v. Woodrow*, 39 Md. 194; *Bish. Cont.* §§ 77, 78; *Woodruff v. Woodruff*, 44 N. J. Eq. 355, 16 Atl. Rep. 4; *Shirley v. Shirley*, 7 Blackf. 452; *Perkins v. Hadsell*, 50 Ill. 216; *Lowber v. Conitt*, 38 Wis. 176; *Pom. Cont.* § 169, note 1.

We cannot but conclude that the transaction in the case at bar constituted a

valid contract, upon which specific performance may be had. But, conceding that the contract is *per se* good, it is urged that it is void, under the statute of frauds. The statute is as follows: "Every contract for the leasing for a longer term than one year, or for the sale of any lands, or interest in lands, shall be void, unless the contract, or some note or memorandum thereof expressing the consideration, be in writing, and be subscribed by the party by whom the lease or sale is to be made." Section 219, p. 652, div. 5, Comp. St. It is argued that the contract could not be enforced against the plaintiff if he were the party sought to be charged, as he has not signed the instrument in writing, and that if it cannot be invoked against the plaintiff, by reason of the statute of frauds, it also cannot be urged against the defendant. But our statute does not require the writing to be signed by the party sought to be charged, but only by the party by whom the sale is to be made. We have these facts: The party by whom the sale was to be made (L.) signed the memorandum expressing the consideration. The buyer accepted. Not only was the contract complete, but the statute was satisfied. *Bean v. Burbank*, 16 Me. 458; *Vassault v. Edwards*, 43 Cal. 458; *Shirley v. Shirley*, 7 Blackf. 452; *Champlin v. Parish*, 11 Paige, 405; *Clason v. Bailey*, 14 Johns. 484; *Lowber v. Connit*, 36 Wis. 176. We believe that this discussion leaves it clear that these views are not in conflict with *Ryan v. Dunphy*, 4 Mont. 342, 1 Pac. Rep. 710; *Mayger v. Cruse*, 5 Mont. 486, 6 Pac. Rep. 333; *Ducle v. Ford*, 8 Mont. 233, 19 Pac. Rep. 414. The demurrer on the point just investigated should have been overruled.

On behalf of the demurrer it is again argued that the complaint is defective, in that it does not state that the plaintiff has no complete and adequate remedy at law in damages. It is undoubtedly the general rule that "in suits for specific performance the party complaining must not only show the acts relied on as part performance, his willingness and ability to perform his part of the contract, but it must also appear that his position is such that an action at law for damages will not afford him an adequate relief." *Ducle v. Ford*, 8 Mont. 240, 19 Pac. Rep. 414. But actions for the conveyance of real estate are an exception, or perhaps not an exception, but rather the presumption exists, from the nature of the case, that damages are not adequate relief. In *Baumann v. Pinckney*, 23 N. E. Rep. 918, the court says, (VANN, J.): "Thus it happened that the court directed that the complaint should be dismissed, \* \* \* because the plaintiff had an adequate remedy at law. According to a long and unbroken line of decisions the latter ground is clearly untenable. As early as 1835 it was said by Chancellor WALWORTH that a suit in equity against the vendee to compel a specific performance of a contract to purchase land had always been sustained as a part of the appropriate and acknowledged jurisdiction of a court of equity, although the vendor has in most cases another remedy, by an action at law upon the agree-

ment to purchase \* \* \*; the right of the vendee to maintain specific performance is too well settled to require further discussion." And see cases there cited. See also *Pom. Eq. Jur. §§ 221, 1402*; *Story, Eq. Jur. § 746*. We are of opinion that the demurrer on this ground also should have been overruled.

We are again asked to sustain the demurrer for the reason that the complaint does not allege that it is within the power of the defendant to make the conveyance in pursuance of a decree of the court so requiring him; that is to say, the complaint should allege that the defendant was still, at the time of filing the complaint, the owner of the land. The incapacity of the defendant to perform, to be an excuse, must exist at the time of the hearing. If he did not possess the subject-matter at the time of making the contract, this does not constitute a legal impossibility, if he acquired it subsequently, at, or before the hearing. *Pom. Eq. Jur. § 1405*, note 1, cases cited. We do not now know what may be made to appear on the hearing. That is not reached. We examine now only a demurrer to the complaint, which confesses all the facts alleged in the complaint. The complaint alleges that the defendant was the owner on September 24th, when he executed the writing. He has never withdrawn his offer to sell. The offer ripened into a contract October 11th. The complaint was filed the same day. If a person, having executed a contract for the sale of lands, knowingly executes any other agreement to sell or dispose of the same lands to another person, he is guilty of a felony. Section 200, *Crim. Laws*. Must the complaint allege that defendant has not committed a felony? If defendant has parted with the land *ad interim* it is a fact peculiarly within his own knowledge; knowledge which it may well be impossible to come to the plaintiff. "It must be that in an action of this kind the complaint must make a case in which the defendant is at least *prima facie* able to perform." *Joseph v. Holt*, 37 Cal. 256. *ELLIOTT, C. J.*, in *Cottrell v. Cottrell*, 81 Ind. 88, says: "The principal objection urged against it [the complaint] is that the first paragraph does not allege that the ancestor of the appellants had any title to the property, which it is alleged he agreed to convey, and is therefore bad. There are facts stated which show title in the decedent. \* \* \* If the appellee is content with such title as a conveyance from the heirs of the deceased vendor will convey, the appellants should not be allowed to prevent him from securing it. The ancestor had bargained away all the title he had, and, whether that was much or little, the appellee's contract vested in him the right to have that for which he had contracted. It cannot be of importance to appellants whether that title was perfect or imperfect, for the appellee has a right to it, whatever its character may be. If he is satisfied, they cannot complain, for it never descended to them, but had vested in the appellee prior to the death of their ancestor."

In the case before us the plaintiff could preserve the *status in quo* against inno-

cent purchasers from the defendant, by filing a notice of *lis pendens*. It is not necessary to say what might be our views upon the question of the inability of the defendant to perform on the appearance of further facts at the hearing. We are of the opinion under all the circumstances of this case that the complaint shows a *prima facie* case, as to this point, and that the demurrer in this behalf should be overruled. These views seem to us to be the exercise of a sound discretion. *Schroeder v. Gemeinder*, 10 Nev. 369; Pom. Eq. Jur. §§ 860, 1404. The judgment of the district court is reversed, and the cause is remanded, with directions to that court to overrule the demurrer.

BLAKE, C. J., and HARWOOD, J., concur.

(10 Mont. 17)

SCHOOL-DIST. NO. 7 v. PATTERSON *et al.*

(Supreme Court of Montana. July 25, 1890.)

SCHOOL MONIES—APPORTIONMENT—SCHOOL CENSUS.

The Montana school law (Comp. St. Mont. §§ 1886, 1907) requires the clerk of each school-district to take a census at stated intervals of all the children of a given age within his district, and the county school superintendent is then to apportion the school moneys to the several districts according to the number of children they contain. *Held*, that where the census returns, as residents of one district, children whose fathers reside and who attend school in other districts, it is proper for the superintendent to transfer them to the latter districts, and apportion the money accordingly.

Appeal from district court, Gallatin county; FRANK HENRY, Judge.

Luce & Luce, for appellants. Vivion & Cockrill, for respondents.

BLAKE, C. J. This action was commenced by school-district No. 7, county of Gallatin, territory of Montana, against the treasurer of said county, to enjoin him from paying to certain school-districts the sums of money which are specified in the complaint, and obtain a decree for the payment thereof to the plaintiff. The districts which might be affected by the judgment were made parties, and answered. The evidence, concerning which there is no conflict, establishes these facts. The clerk of said school-district No. 7 enumerated between the 20th and 30th days of November, 1888, the children between the ages of 4 and 21 years who are described in the pleadings, and boarded or lived there with their respective mothers in houses which had been rented. The fathers of these children were *bona fide* residents of the districts which appear and deny the right of plaintiff to recover said moneys. The children were attending schools in said school-district No. 7 when their names were given to the clerk by their mothers. The county superintendent of common schools of the county corrected the census reports of the clerks of the districts by crediting or transferring the names of the children to the school-districts in which their fathers lived, and apportioned said moneys accordingly.

Two questions are discussed by counsel, and will be considered by the court. No authorities have been cited, and the par-

ties differ respecting the construction of the statute regulating the subject. Were the children legally enumerated by the clerk of the school-district No. 7? Did the county superintendent have the power to disregard the census which had been taken by this clerk, and apportion the school funds contrary thereto? The following provisions of the "Montana School Law" are applicable to this investigation: "Sec. 1886. It shall be the duty of the district clerk to take annually, between the twentieth and thirtieth days of November of each year, an exact census of all children and youth over four and under twenty-one years residing in the district, and shall specify the number and sex of such children, and the names of their parents or guardians. \* \* \* All children who may be absent from home attending boarding-schools and private seminaries of learning shall be included by the district clerk in the census list of the city, town, or district in which their parents reside, and shall not be taken by the district clerk of the city, town, or district where they may be attending such private institution of learning. He shall make a full report thereof on the blanks furnished for that purpose, under oath, to the county superintendent on or before the first day of December thereafter, and deliver a copy to the school trustees." "Sec. 1869. The county superintendents shall apportion all school moneys to the school districts in accordance with the provisions of this article." "Sec. 1907. All school moneys apportioned by county superintendents of common schools shall be apportioned to the several school-districts in proportion to the number of school census children between four and twenty-one years of age, as shown by the returns of the district clerk for the next preceding school census." The statute makes the clerk liable for neglect through which his district shall fail to receive its apportionment of school moneys. Section 1917. "Sec. 1889. Any board of trustees shall have power to make arrangements with the trustees of any adjoining district for the attendance of such children in the school of either district as may be best accommodated therein, and to transfer the school moneys due by apportionment to such children to the district in which they may attend school. Sec. 1890. Every school, unless otherwise provided by special law, shall be open for the admission of all children between the ages of five and twenty-one years of age residing in that school-district, and the board of trustees shall have power to admit adults and children not residing in the district whenever good reasons exist for such exceptions." Upon the trial, the county superintendent of common schools testified: "All these children attend school in said respective districts when they have school. \* \* \* I transferred all these names to the district in which the father had and made his permanent residence." This testimony was not contradicted. Construing these provisions together, we are satisfied that the "exact census," which the clerk of a school-district is required to take, must be "precisely accurate," and cannot include any person whose



legal residence is elsewhere. The law contemplates that children will attend the schools within their respective districts, and provides expressly for the enumeration of those who are in private institutions of learning. The conditions under which the attendance of children is permitted in the public schools of the districts in which they do not reside are prescribed. In *Lamar v. Micou*, 112 U. S. 452, 5 Sup. Ct. Rep. 221, Mr. Justice GRAY says, in the opinion: "An infant cannot change his own domicile. As infants have the domicile of their father, he may change their domicile by changing his own; and after his death the mother, while she remains a widow, may likewise, by changing her domicile, change the domicile of the infants, the domicile of the children in either case following the independent domicile of their parent." School Directors v. James, 2 Watts & S. 568, Story, Conf. Laws, 46. In *Kennedy v. Ryall*, 67 N. Y. 379, the court observes that, "generally speaking, domicile and residence mean the same thing." The names of the children referred to in the case at bar should have been placed upon the school census of the districts, respectively, where their fathers resided. But the appellant contends that the county superintendent of the common schools should be controlled in the apportionment of said moneys by the returns of the clerk of school-district No. 7. This is his duty when there is no error upon their face, and his action has not been restrained by due process of law; but when the clerks furnish to this officer full reports, similar to the documents which are found in the transcript, and show that some children are the residents of two distinct districts, or that the father resides in a district which is different from that of his children, the mistakes which are apparent should be rectified. The county superintendent is compelled to ascertain from the returns, if possible, the number of the school children in each district before the apportionment of the public moneys can be made. The record demonstrates that this officer, of whom the appellant complains, applied these principles to the reports of the clerks, and was thereby enabled to make a lawful apportionment for every district. It is therefore ordered that the judgment be affirmed, with costs.

HARWOOD and DE WITT, JJ., concur.

BARGER v. HALFORD.

(Supreme Court of Montana. July 28, 1890.)

APPEAL—RECORD—MARRIED WOMEN—SOLE TRADERS.

1. Where the evidence contained in the record on appeal is a mere transcript of the stenographer's notes by question and answer, it will not be considered, and it will be presumed that the findings are supported by the evidence.

2. Where a married woman has complied with all the requirements of Comp. St. Mont. §§ 1433-1438, relating to married women doing business as sole traders, her property, as described in the schedule therein required, is ex-

empt from seizure for her husband's debts, though she may not have filed the list of separate property required by section 1432.

Appeal from district court, Jefferson county; THOMAS J. GALBRAITH, Judge.

It appears from the pleadings that plaintiff was a married woman. On July 8, 1889, she filed in the proper office a declaration of her intention to do business as a sole trader. The law is found in sections 1433-1438, div. 5, Comp. St. On October 16, 1889, plaintiff was the owner and in possession of certain personal property, described by schedule. Defendant, sheriff of Jefferson county, on that day seized such property on writs of attachment against the property of the plaintiff's husband, claiming the same as that of the husband. Plaintiff brings her action of replevin. The case was tried to the court without a jury, and judgment rendered in favor of plaintiff, from which defendant appeals. The findings and conclusions of the court may be briefly stated as follows: Plaintiff had complied with the law, (sections 1433-1438, Id.) and thereby became a sole trader. The attachments were against her husband, and not her. At the time of the seizure plaintiff was the *bona fide* owner of the property. No fraud or collusion is raised in the case. Plaintiff being a sole trader had the right to invest her income in the property mentioned, or otherwise, and the said sole-trader's act protects such investment. The court then finds the amount of damages, and orders judgment in replevin, with damages. But one contention has been made by counsel. Appellant insists that plaintiff's property as a married woman was not protected from her husband's creditors by the sole-trader's act; but that she should have further filed a list of separate property, as provided in section 1432, Id.

*Cowan & Parker*, for appellant. *W. L. Hay* and *Geo. D. Greene*, for respondent.

DE WITT, J., (after stating the facts as above.) The evidence in the statement on appeal is objected to as a transcript of the stenographer's notes by question and answer, and no reason is given why it is in that condition. Such a record we will not consider. *Newell v. Meyendorff*, 23 Pac. Rep. 333, 9 Mont. —, and cases there collated. The findings will therefore be presumed to be supported by the evidence. Whether the married woman's emancipation act, March 3, 1887, does away with the necessity for her to comply with the sole-trader's, or separate property, act, we are not now called upon to decide. This plaintiff did avail herself of the sole-trader's act. As to the question of law that the plaintiff's property was protected from her husband's creditors by virtue of her invoking the sole-trader's act, without relying upon the separate property act, that is not an open proposition in this court. *Shed v. Blakely*, 6 Mont. 247, 11 Pac. Rep. 639, is conclusive, and on that authority this judgment is affirmed.

BLAKE, C. J., and HARWOOD, J., concur

(10 Mont. 87)

**BECKER v. BOARD COUNTY COM'RS YELLOWSTONE COUNTY.**

(Supreme Court of Montana. July 31, 1890.)

**APPEAL—RECORD—REVIEW—ERRONEOUS CLAIM.**

1. Where the statement on appeal is not settled by the trial court it cannot be considered by the supreme court.

2. Where plaintiff has had judgment for a sum equal to that to which the various items of his claim amount when properly summed up, though by an apparent error in calculation a larger sum is claimed, he has recovered all he is entitled to, and the judgment will not be disturbed on his appeal.

Appeal from district court, Yellowstone county; GEORGE R. MILBURN, Judge.

This is an appeal from the action of the board of commissioners of Yellowstone county in disallowing an alleged account of appellant against the county. There are no pleadings in the case except the bill filed by appellant with the board. That bill, as it appears in the record, is as follows:

"Billings, Montana, Dec. 7, 1889.

"The County of Yellowstone, Dr. to E. H. Becker:

Sept. 19, 230 folios Constitution at 1.50	
per folio.....	\$45 00
230 folios Constitution at 50c.	
per folio.....	1,035 00"

Then follows a verification of the bill, and an indorsement as follows:

"Yellowstone County, Dr. to E. H. Becker:

Amount claimed.....	\$1,380 00
Amount allowed.....	\$460 00

"Contingent Fund. Warrant No. B 270. Dec. 7, 1889. FRED H. FOSTER, County Clerk."

Section 765, Comp. St. div. 5, provides that when an appeal shall be taken from the action of the board of county commissioners in allowing or disallowing an account, the clerk shall transmit to the district court, with the papers, a return of the proceedings of the board in the matter. The return in the case shows that the claim of E. H. Becker for printing the constitution, amounting to the sum of \$1,380, was allowed in the sum of \$460 for the publication in two issues of the Billings Gazette. From this action of the board the plaintiff appealed to the district court. The appeal is taken from the disallowance of a portion of the claim; that is, the disallowance of \$920, which is the difference between \$1,380 claimed and \$460 allowed. There was no question about the sum of \$460. The claim at the trial upon the record upon the account, which took the place of the pleadings, was for \$920 more than the board had allowed. A verdict was rendered by jury for the defendant. The plaintiff moved for a new trial. The motion was denied. No appeal was taken from the order denying this motion. An appeal is prosecuted from the judgment.

O. F. Goddard, for appellants. Henri J. Haskell, Atty. Gen., and Jas. R. Goss, for respondents.

DE WITT, J., (after stating the facts as above.) The record in this case does not

commend itself to the unqualified approval of the court. There purports to be a statement on motion for a new trial. There is nothing to indicate where it commences or ends, except that at a point in the transcript respondent's attorney admits that the foregoing statement is correct and true. The judge nowhere settled it. Raymond v. Thexton, 7 Mont. 299, 17 Pac. Rep. 258. The statement, or that which we have tried to ascertain was intended as such, is a transcript of the stenographer's notes by question and answer, apparently containing every syllable that fell from the lips of counsel, court, and witnesses, whether material or not. The order in which papers are inserted is as follows: Account, order of the board of commissioners, appeal from the board, instructions on the trial in the district court, verdict, evidence, exhibits introduced on the trial, stipulation of counsel, specifications of particulars, admission of service of statement, admission by defendant's attorney that statement is correct, stipulation for hearing the motion for new trial at chambers, order denying the motion, notice of motion for new trial, admission of service of the notice, notice of appeal, and undertaking on appeal. The exhibits are not engrossed in the evidence at their appropriate place, but are referred to with such notes as, "Here copy Exhibit B;" "Witness handed paper," etc. The exhibits then appear after all the evidence. The record appears to be a skeleton draft, with directions to the engrosser as to how to fill in the superstructure. The engrosser, instead of constructing a perfect work, has simply piled up the material in a disorderly mass as it came to his hand. That this is not an adherence to chronological order does not require extended discussion. The court will not consider such a record. This court has expressed this view before in language which seems to us not wholly uncertain. Newell v. Meyendorff, and cases there collected, 23 Pac. Rep. 333; and Barger v. Halford, ante, 699, (this term.) The fact that the judge of the district court never settled the statement, of course removes it from our consideration, and these criticisms may be gratuitous; but if the rules of practice in those matters are not clear, we have, perhaps not unwisely, been led into the domain of *dicta* to make them so. If the judge who presides in the seventh district had had opportunity to settle the statement, it would probably have been free from the rather apparent objections which we have noted. With no order on motion for new trial to review, and no statement on appeal before us, we have to examine only the judgment, and to consider only the judgment roll. The account, which takes the place of a complaint, and must be treated as the pleading, charges for 230 folios, at \$1.50,—\$345; and 230 folios, at 50 cents,—\$1,035; the total of which sum is \$1,380. The inconsistency between the items and the footing is manifest. In this disagreement, we must rely upon the items. We then find the claim to be 230 folios, at \$1.50,—\$345; and 230 folios, at 50 cents,—\$115; total amount, \$460. The pleading, there-

fore, claims \$460. The claimant was allowed \$460 by the board. He was allowed all he claimed, and the judgment of the district court was properly in favor of the defendant board, which judgment we hereby affirm.

BLAKE, C. J., and HARWOOD, J., concur.

**MARCUM et al. v. COLEMAN et al.**

(Supreme Court of Montana. July 29, 1890.)

**CHATTEL MORTGAGE—MORTGAGOR'S POSSESSION—AFFIDAVIT OF GOOD FAITH.**

Comp. St. Mont. § 1538, provides that no mortgage of chattels shall be valid as against any one but the parties thereto unless possession be delivered to the mortgagee or unless it provides the possession may be retained by the mortgagor, and it is accompanied by an affidavit "of all the parties thereto, or, in case any party is absent, an affidavit of those present, and the agent or attorney of such absent party," that the mortgage is made in good faith, etc. A mortgage under which the mortgagor remained in possession of the mortgaged chattels purported to be made between "S. W. of the first part \* \* \* and M. & L. of the second part." *Held*, that an affidavit is sufficient which recites that "S. W. and M. & L., the parties to the foregoing chattel mortgage, being severally and duly sworn, each for himself" made oath to the required facts.

Appeal from district court, Deer Lodge county; DAVID M. DUFFEE, Judge.

*W. J. Galbraith*, for appellants. *Dixon & Drennon*, for respondents.

HARWOOD, J. This is an action of claim and delivery for the recovery of the possession of 65 head of horses, described in the complaint. At the time of the alleged wrongful taking complained of, the defendant Lew Coleman was the sheriff of Deer Lodge county, and defendant James Johnson was his deputy. As shown by the record, the possession of said property was taken by said sheriff and his deputy under certain valid writs of attachment and execution duly issued in certain actions at law by two creditors of Samuel Ward to recover payment of debts. The plaintiffs in this action base their claims to the possession of said property upon a chattel mortgage, executed and delivered to them by said Samuel Ward, prior to the levy under said writs. All the facts involved in this action are made certain by a concise statement of facts agreed upon with reference to the pleadings, and the point of controversy submitted to the court for determination is concisely expressed in said agreed statement. We quote therefrom: "The validity of plaintiffs' mortgage is not disputed, except as to the sufficiency of the affidavit thereto, and the fact of defendants being officers, etc., and of the regularity of the process under which they levied upon the property in controversy, is not disputed. The question of law submitted to the court upon which it is agreed that the case may be decided is whether or not the affidavit of good faith, etc., made to the plaintiffs' chattel mortgage, as shown by the copy thereof attached to the complaint, is sufficient to comply with the laws of Montana territory in force when said mortgage was

made, and to make said chattel mortgage good and valid as against the rights of the creditors of the mortgagor, where the possession of the property remained with the mortgagor after the execution of the mortgage."

The statement of facts shows that Samuel Ward executed to Marcum and Lennon, about the 12th day of September, 1887, the chattel mortgage in question, and "that at and before the date of the execution of said chattel mortgage the plaintiffs herein were partners doing business under the firm name and style of Marcum & Lennon." The affidavit in question reads as follows: "Territory of Montana, county of Deer Lodge—ss.: Samuel Ward and Marcum and Lennon, the parties to the foregoing chattel mortgage, being severally and duly sworn, each for himself says that the said chattel mortgage is made in good faith to secure the amount named therein, and without any design to hinder or delay the creditors of the said mortgagor. Subscribed and sworn to before me this 12th day of Sept., A. D. 1887. T. B. MANNIX, Justice of the Peace. SAMUEL WARD. MARCUM & LENNON." The statute requiring a chattel mortgage to be accompanied by an affidavit provides as follows: "No mortgage of goods, chattels, or personal property shall be valid as against the rights and interests of any other person than the parties thereto, unless the possession of such goods, chattels, and personal property be delivered to and retained by the mortgagee, or the mortgage provide that the property may remain in the possession of the mortgagor, and be accompanied by an affidavit of all the parties thereto, or, in case any party is absent, an affidavit of those present, and of the agent or attorney of such absent party, that the same is made in good faith to secure the amount named therein, and without any design to hinder or delay the creditors of the mortgagor, and be acknowledged and filed as hereinafter provided." Section 1538, Comp. St. Turning to the mortgage in question to find who the "parties thereto" are, we find that the instrument recites as follows: "This indenture, made the 12th day of September, 1887, in the year of our Lord one thousand eight hundred and eighty-seven, between Samuel Ward, first part, of Helmville, Mont., and Marcum & Lennon of the second part." We further notice, by a careful examination of the mortgage, that throughout the instrument wherever the mortgagees are referred to, except in one instance, they are termed the "parties of the second part." It is insisted by counsel for respondents that the combination of names, "Marcum and Lennon," appearing in the mortgage, and in the affidavit thereto, is the designation of the partnership firm of Marcum & Lennon, and hence the affidavit does not show that all the parties to the mortgage joined in the affidavit in person, if present, or, if absent, by agent. In the case of *Hardware Co. v. Sullivan*, 7 Mont. 307, 16 Pac. Rep. 588, McLEARY, J., in delivering the opinion of the court says: "But even if the mortgage had been made between the firms of Maxwell & Price on the one hand, and Hoge, Brownlee & Co. on the

other, still we could not go beyond the affidavit and look to the mortgage itself to support or explain the affidavit, unless the mortgage had been referred to in the affidavit. The affidavit must stand of its own strength, or fall of its own weakness." The case of *Leopold v. Silverman*, 7 Mont. 266, 16 Pac. Rep. 580, is referred to as authority for that declaration, and again, in the case of *Baker v. Power*, 7 Mont. 326, 16 Pac. Rep. 589, the same language is quoted with approval. We approve that proposition as based upon sound reason. The affidavit is the verifying condition required by statute to accompany the mortgage, where possession of the chattels is left with the mortgagor, and must be made by all the parties thereto, either in person or by agent, and must show, under the sanction of an oath, the required facts independently of the mortgage. In that sense the affidavit alone will be weighed, and found sufficient or wanting according to its own terms. The language above quoted from *Hardware Co. v. Sullivan* must have been used in that sense, and is not to be construed to deny that a comparison of the affidavit with the mortgage to find whether "all the parties" to the mortgage join in making the required affidavit either in person, if present, or by agent, if absent. This is conclusively shown by an examination of the case, where the language quoted was used, *supra*, for we find the learned judge saying: "It will be observed by reference to the chattel mortgage set out in the transcript that the parties thereto are described as William T. Price and James A. Maxwell, partners under the firm name of Maxwell & Price, parties of the first part, and William L. Hoge, Malcolm B. Brownlee, Francis E. Sargeant, Marcus Daly, and R. C. Chambers, partners under the firm name of Hoge, Brownlee & Co., parties of the second part."

Looking to the mortgage in the case at bar, and to the affidavit accompanying it, we find in neither any reference to the fact that a copartnership firm, under the name and style of Marcum & Lennon, is in existence. In the mortgage the name of Samuel Ward is stated as the first party, and Marcum and Lennon as the parties of the second part. In the affidavit it is recited that "Samuel Ward and Marcum and Lennon, the parties to the foregoing chattel mortgage, being severally duly sworn, each for himself, says." We must look to evidence *allunde* these two instruments to explain the fact that a partnership exists between the parties of the second part to said mortgage of the name and style of "Marcum & Lennon." That would clearly be contrary to the doctrine held in the cases above cited and quoted from. Under these decisions then, in determining the sufficiency or insufficiency of said affidavits, we must discard the fact that a firm existed composed of the plaintiffs under the firm name of Marcum & Lennon, because that fact does not appear in describing the parties of the second part in the mortgage or in the affidavit. The affidavit in question is attacked on the ground that the names "Marcum and Lennon" set forth in the affidavit is the name

of a copartnership firm, composed of the mortgagees, and that a copartnership existence cannot take an oath any more than a corporation, as a corporate existence, could appear before an officer, and be sworn. But if we dismiss from consideration the fact that such a copartnership existed, the argument against the sufficiency of said affidavit based on that ground cannot apply. It is admitted that the mortgage in question is valid in all respects except as to the legal sufficiency of the affidavit accompanying it. The mortgage, as we have seen, describes the mortgagees as "Marcum and Lennon," without reference to the fact that that combination of names represented a copartnership. The magistrate certifies in the affidavit that "Samuel Ward and Marcum and Lennon, the parties to the foregoing chattel mortgage, being severally duly sworn, each for himself says," etc. In passing upon this affidavit, under the rules of construction laid down in sections 629 to 634, inclusive, Comp. St., and in the cases cited, *supra*, it does not seem reasonable to us to hold that where the justice certified that "Samuel Ward and Marcum and Lennon," the same parties named in the mortgage as the party of the first part and the parties of the second part, "being duly sworn, each for himself, says," should be construed to mean that only one of the latter parties appeared to take the oath, or that only one appeared, and he undertook to swear for the two, or that only one appeared, and he undertook to swear for a copartnership firm, which is not mentioned either in the affidavit or mortgage. Such a construction we believe would be contrary to the reasonable import of the language used by the magistrate in certifying the affidavit. We therefore hold that the affidavit is sufficient. The construction placed upon the affidavit in the case at bar is supported by the case of *Randall v. Baker*, 20 N. H. 335. The facts involved in that case as well as the law requiring the affidavit are very much like the facts in the case at bar and the statute governing. The order denying plaintiffs' motion for new trial is reversed, and judgment in favor of defendants is hereby set aside, and said action is remanded for further proceedings in conformity to the stipulations of parties, and the views herein expressed.

BLAKE, C. J., and DE WITT, J., concur.

HELENA LUMBER CO. v. MONTANA CENT. RY. CO.

(Supreme Court of Montana. July 30, 1890.)

MECHANICS' LIENS—ENFORCEMENT—PLEADING.

In an action to foreclose a mechanic's lien for materials furnished in the erection of depot buildings for a railroad company the complaint alleged that the land sought to be subjected to the lien was "appurtenant and necessary to the convenient and ordinary use of the depot buildings and appurtenances." Defendant answered alleging that it had long since had its road in operation; that the land in question became part of its property long before the erection of the depot buildings; and that it was incident to its franchise, and indispensable to the operation of its

road. Held, that this allegation was not admitted by the complaint, and that it was error to strike out a replication denying it.

Appeal from district court, Lewis and Clarke county; WILLIAM H. HUNT, Judge.

The action is for the foreclosure of a mechanic's lien. The complaint alleges that the defendant is a corporation organized under the laws of the state, and doing business therein. There is no allegation that it owned or was operating any railroad; that the co-defendants, McKay and others, were a partnership, under the firm name of McKay & Co., and the contractors of the railway company in the erection of a depot building. Paragraph 4 of the complaint is as follows: "That at all the times hereinafter mentioned said defendant, the Montana Central Railway Company, was and now is the owner of that certain tract of land situate, lying, and being in Ottawa gulch, [describing it,] in Lewis and Clarke county, Montana territory, which is occupied by, and appurtenant and necessary to, the convenient and ordinary use of the depot buildings and appurtenances of the Montana Central Railway Company at the town of Marysville, together with the said depot building and appurtenances erected thereon." The complaint then alleges the erection by said contractors of a certain depot building on the real estate above described for the exclusive use and benefit of the railway company; that plaintiff sold and delivered to said McKay & Co. material of the value of \$376.74, for the depot building, which was used in and incorporated into the building. Then follow allegations of the filing of a lien against the land and building. Plaintiff demands a money judgment against both the contractors and the railway company, and prays a decree of foreclosure of the lien against said premises. The answer of the Montana Central Railway Company, which is the only defendant which seems to have appeared, contains some denials which are not material to this inquiry, and then sets up a separate defense in paragraph 5, which is in full as follows: "And for a separate defense defendant alleges that its railway extends, and did prior to October 1, 1888, extend, and was in operation, through the counties of Cascade, Lewis and Clarke, and Silver Bow, in said state, and that the same was completed and in operation long prior to the time the depot building mentioned in plaintiffs' complaint therein is alleged to have been constructed, and that the ground covered by said depot, and appurtenant thereto, and necessary for its use and enjoyment, had been acquired by said company, and that the same had become a part of its entire property long prior to the construction of said depot building, to-wit, since the 10th day of October, 1888, and that the same is incident to its franchise, and useful and indispensable and necessary, and facilitates the successful operation of said railroad." To this matter set up in paragraph 5 the plaintiff demurred on the ground that it did not set forth facts sufficient to constitute a defense to the action. The demurrer was overruled, and the plaintiff filed the following replication:

"Plaintiff in replication denies that defendant's railway was completed or in operation long prior, or at any time prior, to the said time said depot building was constructed, and denies that the same was completed or in operation at any time prior to several days after the last item of material was furnished for said depot building, as set forth in the complaint herein. Plaintiff further denies that the ground upon which said depot building stands, and the ground appurtenant and necessary for its use and enjoyment, is incident to the franchise of said defendant, and denies that the same is indispensable or necessary in the successful operation of said road." The defendant moved to strike out the replication for the reason that the facts alleged in the replication were admitted and alleged in the complaint. This motion was sustained. The replication being stricken out, defendant moved for judgment on the pleadings. This motion was granted, and judgment accordingly entered for the defendant. The plaintiff appeals (1) from the order overruling the demurrer to paragraph 5 of the answer; (2) from the order striking out the replication; (3) from the judgment.

*Leslie & Craven*, for appellant. *McCutch-son & McIntire*, for respondent.

DE WITT, J., (after stating the facts as above.) The first point on the appeal we will not consider. The plaintiff pleaded by replication after the demurrer to the answer was overruled. If the striking out of the replication were correct, judgment on the pleadings properly followed. If the replication should have been allowed to stand, the judgment must be reversed. To that inquiry we will address ourselves. It is not very clearly alleged in paragraph 5 of the answer that defendant had any railroad, or that the depot building was necessary or incident to any railroad franchise. But the overruling of the demurrer was a declaration of law by the court that the allegation that the land was necessary and incident to the franchise constituted a defense, if true. If this were a defense by way of new matter, the plaintiff had the right to deny it in a replication. He did so. There is no reason why this replication should not stand, and the issue thus framed be tried, unless plaintiff had admitted in its complaint what it denied in the replication. Paragraph 4 of the complaint, cited in full in the foregoing statement of facts, is the portion for examination. The language is grammatically awkward, but, as we are enabled to construe it, it alleges that the land described is necessary to the use of the depot building, not that the land or building is necessary to the use of the railroad franchise, or incident thereto; nor does it allege that defendant had any railroad or railroad franchise. Therefore, when defendant in its answer alleges that the land against which the lien is invoked is "incident to its franchise, and useful and indispensable and necessary, and facilitates the successful operation of said railroad," and the court holds, in overruling the demurrer, that this matter is a good defense, the plaintiff has admitted nothing

in its complaint which precludes it from denying the truth of this material matter in the answer. We are of opinion that the replication should have been allowed to stand. The judgment is therefore reversed, and the case remanded to the district court for further proceedings in accordance with these views.

BLAKE, C. J., and HARWOOD, J., concur.

(10 Mont. 90)

NORTHERN PAC. RY. CO. v. PATTERSON,  
County Treasurer.

(Supreme Court of Montana. Aug. 1, 1890.)

ERRONEOUS TAXATION—INJUNCTION—PLEADING.

A bill praying an injunction against the sale of land for taxes on the ground that part of it is exempt, and that there was an irregular assessment and an overvaluation of the rest, is bad on demurrer where it fails to allege that complainant appeared and made such objections as required by St. Mont. 15th Ex. Sess. p. 92, § 23, before the board of county commissioners sitting as a board of equalization as therein provided.

Appeal from district court, Gallatin county; FRANK HENRY, Judge.

*Cullen, Sanders & Shelton, Armstrong & Hartman, and F. M. Dudley*, for appellants. *H. J. Haskell*, Atty. Gen., and *Vivion & Cockrill*, for respondent.

BLAKE, C. J. This action was commenced by the appellant to obtain an injunction to restrain the county treasurer of the county of Gallatin, in this state, from selling certain lands, blocks, and lots, by reason of the taxes which had been levied thereon in the year 1889, or collecting the same, and also a decree that said taxes should be adjudged void. The complaint alleges that the plaintiff is a corporation under the act of congress entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget sound, on the Pacific coast, by the northern route," and approved July 2, 1864. The second and third sections of this act are set forth, and describe the public lands which are granted to the railroad by the United States. The particular acts of the plaintiff are then alleged, showing that all the conditions of the statute have been performed by the corporation. "The lands described in the schedule marked 'Schedule A' \* \* \* are situated on and within the distance of forty miles of the plaintiff's said line of railroad, as the same was so definitely fixed and described in the plat thereof, duly filed with the commissioner of the general land-office, as aforesaid, and that said lands are in the county of Gallatin, Montana." It is further alleged that "the lands so granted to said plaintiff, \* \* \* if any there are, in said county, have never been segregated from the public lands, have never been identified, and that the boundaries \* \* \* have never been ascertained or determined." It is also alleged that the officers of the United States have "failed and refused to certify said lands \* \* \* to the plaintiff, or to certify any lands in the county of Gallatin to said plaintiff, \* \* \* but have refused and failed to certify or patent said lands solely because said lands have not been identified as

lands passing to said plaintiff under said grant, as hereinbefore alleged." It is further alleged: "In the year 1889, the officers of the said county of Gallatin authorized by the laws of the territory of Montana to assess property therein for the purposes of taxation and to levy taxes thereon pretended to assess all the said parcels of land described in the Schedule A \* \* \* to the said plaintiff for the purposes of taxation, and pretended to levy certain taxes thereon, to-wit, the territorial, county, town, and other taxes for that year; \* \* \* that all the said \* \* \* taxes were and are illegal and void for the reason that said lands so taxed were exempt from taxation and assessment by the territory of Montana." The second cause of action describes certain lots and blocks in the town of Moreland, county aforesaid, and contains the following allegations: "That prior to the first Monday in August, A. D. 1889, said plaintiff furnished a list of said lots under oath, as required by law, to the assessor of said Gallatin county; that said assessor did not assess said lots and blocks of land as required by law, and did not determine and fix the true value of such lots and blocks, and enter or cause to be entered the same opposite such lots and blocks, as required by law, but assessed and valued all of said lots and blocks together as one parcel of land; that said assessor did not assess said lands at the valuation returned by said plaintiff, but increased the same, and did not place upon said assessment roll the valuation of said lots and blocks as returned by said plaintiff; but said assessor did wrongfully and falsely take and subscribe an oath, and attach the same to the said assessment roll, wherein and whereby said assessor did swear that the value of said property was returned in said assessment roll as set forth in said statement made and returned to said assessor by said plaintiff." The third cause of action relates to certain lots and blocks of land in the town of Gallatin, county aforesaid, which are described in Schedule C. The other allegations are similar to those which have been recited respecting the second cause of action. It is also alleged that the county treasurer, the respondent, has advertised the foregoing lands, blocks, and lots for sale, through the failure of the appellant to pay said taxes. A demurrer to each cause of action was sustained by the court below, and judgment was afterwards entered against the plaintiff.

The statute which was in force when the assessments that are complained of were made provides as follows: "Sec. 22. The board of county commissioners of each county shall constitute a board for the correction of the assessment roll and the equalisation of the assessed value of property, and on the third Monday in the month of September of each year said board shall meet at the office of the county clerk at the county-seat, and may adjourn from time to time as deemed necessary. Public notice of the time and place of the meeting of said board shall be given by the county clerk by publication for at least two successive weeks in a newspaper

published in said county, if there be one; otherwise, by notices posted in five public places immediately prior to the meeting of said board of equalization; but no notice of an adjourned meeting of said board shall be required. Any person feeling aggrieved by any valuation or amount of property listed, or by any other fact appearing on such assessment, may apply to such board for the correction thereof; and if, in the opinion of said board, any valuation is too high or too low, as compared with other valuations by the assessor of similar classes of property, it may equalize the same; but if such valuation results in any increase, the party affected thereby shall be given reasonable notice of the intention to increase such valuation, with opportunity to appear, which notice may be sent by mail, with postage thereon prepaid." St. 15th Ex. Sess. p. 92. It appears from the transcript that the plaintiff elected to stand upon its complaint, and declined to amend the same, when the demurrers were sustained. We must assume that every fact which is material to its demand for equitable relief has been pleaded. It is clearly shown that the appellant never applied to the board of equalization created by the statute for any redress, or sought any remedy, until this action was commenced, February 17, 1890. The brief of the appellant considers the propositions relating to the lots and blocks in the towns of Moreland and Gallatin, and says: "It is conceded by the company that these lands are not exempt from taxation, and the sole question arising with reference to each is whether the defects in the levy of the taxes are such as to render the taxes void, and entitle the plaintiff to the relief prayed for." The complaint does not allege that the appellant has paid or tendered any sum of money to meet its liability to taxation upon the property to which the title is admitted. The discussion has embraced matters of national as well as local importance concerning the effect of the act of congress incorporating the appellant, and the ownership of the lands mentioned in Schedule A, but we do not express an opinion thereon. The determination of one inquiry regarding the sufficiency of the complaint restricts this investigation. In *Bank v. Kimball*, 103 U. S. 732, Mr. Justice MILLER says: "We have announced more than once that it is the established rule of this court that no one can be permitted to go into a court of equity to enjoin the collection of a tax until he has shown himself entitled to the aid of the court by paying so much of the tax assessed against him as it can be plainly seen he ought to pay; that he shall not be permitted because his tax is in excess of what is just and lawful to screen himself from paying any tax at all until the precise amount which he ought to pay is ascertained by a court of equity; and that the owner of property liable to taxation is bound to contribute his lawful share to the current expenses of the government, and cannot throw that share on others while he engages in an expensive and protracted litigation to ascertain that the amount which he is assessed is or is not a few dollars more than it

ought to be; but that before he asks this exact and scrupulous justice he must first do equity by paying so much as it is clear he ought to pay, and contest and delay only the remainder. *State Railroad Tax Cases*, 92 U. S. 575. This bill attempts to evade this rule by alleging that the tax is wholly void, and therefore none of it ought to be paid." The case of *Railroad Co. v. Carland*, 5 Mont. 146, 8 Pac. Rep. 134, was brought by the plaintiff in this action to restrain the county treasurer of Custer county from collecting a tax which had been assessed upon "twenty miles of railroad and rolling stock." The complaint conformed to the doctrine of *Bank v. Kimball*, supra, and alleged that the tax upon the personal property of the corporation had been paid, and "that the plaintiff, before the commencement of this action, appraised at its true value the rolling stock on said twenty miles of road, and has tendered to the defendant the taxes thereon, amounting to the sum of \$440, and brings the money into court." Page 153. Upon this ground alone we can sustain the ruling of the court below upon the demurrer to the second and third causes of action. If we concede the position of the appellant that the lands which are described in the Schedule A are not subject to taxation, and that it cannot be required to pay or tender any sum of money in payment of any tax thereon, we assert that the statute, supra, has prescribed an ample legal remedy, which must be exhausted before the equitable powers of the court are resorted to. We have seen that no action of this nature has been had before the board of equalization of the county of Gallatin, and this statutory proceeding has been ignored.

A reference to the authorities leads to the conclusion that this conduct of the appellant compels us to decide adversely to its appeal. In *Investment Co. v. Charlton*, 13 Sawy. 25, 32 Fed. Rep. 192, Mr. Justice DEADY said: "But on the hearing the defendant made the objection that conceding the error an injustice of the assessor, the remedy of the plaintiff in the first instance was an appeal to the county board of equalization to correct the same, and that, unless it appears that it has resorted to this means of redress without avail, it cannot have relief in a court of equity." \* \* \* But the plaintiff having neglected to avail itself of this means of redress cannot maintain a suit for relief in this court. It is no excuse for this neglect that the board of equalization as well as the assessor were committed to the rule of taxing mortgages, which were generally owned by non-residents, at their face or cash value, and the property in lands, which generally belonged to residents of the county, at much less than such value. Notwithstanding this, it was the duty of the plaintiff, if dissatisfied with the assessment, to pursue the mode prescribed by the statute relating to assessments for its correction, when, if it failed, it might have taken the matter before the circuit court of the state on a writ of review, (*Rhea v. Umatilla Co.*, 2 Or. 298.) or brought this suit to restrain the county from collecting the illegal portion of the



tax." In *Bourne v. Boston*, 2 Gray, 494. Mr. Justice BIGELOW says: "The plaintiff was not legally taxable for the property held by him as trustee, but he was taxable for the property of his ward in the city of Boston, and therefore a portion of the tax which in this action he seeks to recover back was rightly assessed to him. This would seem to bring the case within the principle, now well settled by the authorities, that where a person is liable to taxation for personal and real estate in a town or city his sole remedy for an over-taxation caused by an excessive valuation of his property, or by including in the assessment property of which he is not the owner or for which he is not liable to taxation, is by an application to the assessors for an abatement." In *Railroad Co. v. Scanlan*, 44 Tex. 649, Mr. Justice MOORE in the opinion says: "But if the law was in force, and appellant's property was being assessed under it, from the petition it does not appear that the appellant had taken the proper steps to secure a correction of the assessment if it was erroneous or excessive, or had placed itself in the proper attitude to ask the interposition of a court of equity for relief if it was in danger of suffering injury therefrom. Although the tax may have been illegally assessed, and the action of the sheriff in collecting it unauthorized, it does not follow that a court of equity will in all instances interpose to stay his action. A party asking for this extraordinary relief must have used all proper means to obviate the necessity of appealing to the court, and must not himself be in default." In *O'Neal v. Bridge Co.*, 18 Md. 1, the court say: "The ground of the equity is that the property is not taxable at all, and that the assessment had not been made and returned according to law. \* \* \* The answer shows that they had knowledge of the assessment, and no reason is assigned for their not going before the commissioners to have the supposed errors corrected. \* \* \* We have no power to make the correction for the benefit of the public, which the commissioners might have done, and, if the courts of equity were to interfere in such cases, parties taxed, instead of going before the proper tribunal to have errors corrected, and thereby, while protecting themselves, secure to the state or county their just demands against the property, would wait until the time had elapsed, and then by proceeding in equity escape altogether." Mr. High, in his work on Injunctions, says: "The fundamental principle applicable to such cases is that a court of equity is not a court of errors to review the acts of public officers in the assessment and collection of taxes, nor will it revise their decision upon matters within their discretion, if they have acted honestly. Where, therefore, a particular manner is provided by law, or a particular tribunal is designated for the settlement and decision of all errors or irregularities on behalf of persons dissatisfied with a tax, they must avail themselves of the legal remedies thus prescribed, and will not be allowed to waive such relief and seek in equity to enjoin the collection of the tax. And this

upon the ground that where one has a complete and ample remedy at law, and slumbers upon his rights, he is estopped from invoking the aid of equity." Volume 1, (2d Ed.) § 493, and cases cited. See, also, *Stanley v. Supervisors*, 121 U. S. 535, 7 Sup. Ct. Rep. 1234; *Palmer v. McMahon*, 133 U. S. 660, 10 Sup. Ct. Rep. 324; *Merrill v. Gorham*, 6 Cal. 41; *Bank v. Jordan*, 16 Or. 113, 17 Pac. Rep. 621; *Stewart v. Maple*, 70 Pa. St. 221; *Brooks v. Shelton*, 47 Miss. 243; *Davis v. Macy*, 124 Mass. 193; *Preston v. Johnson*, 104 Ill. 625; *Tripp v. Insurance Co.*, 12 R. I. 435; *Cooley, Tax'n*, 527-529; 2 *Desty, Tax'n*, 661-663. In *Railroad Co. v. Carland*, supra, it is stated that the corporation "applied to the board of county commissioners of said county at their December session, 1881, to remit the tax" complained of, "which the board refused to do." It is apparent that the complaint in that case contained the allegations which are necessary and proper according to the principles laid down in the authorities supra, and therefore this court held that the appellant was entitled to the equitable remedy which was prayed for. And it is equally clear that the case at bar does not fall within the doctrine which has been upheld, and that the complaint lacks the essential averments which require courts to interpose the writ of injunction. The judgment is therefore affirmed, with costs.

HARWOOD and DE WITT, JJ., concur.

PEOPLE V. HANNON. (No. 20,674.)

(*Supreme Court of California*. Aug. 22, 1890.)

BURGLARY—POSSESSION OF STOLEN PROPERTY.

On an indictment for burglary it is not error to instruct the jury that, while the possession of stolen property alone is not sufficient proof of defendant's guilt, yet it is a circumstance which, if unexplained, tends to establish it, and which, in connection with other evidence, may be sufficient to satisfy the jury that defendant is guilty.

Commissioners' decision. In bank. Appeal from superior court, city and county of San Francisco; F. W. VAN REYNEGOM, Judge.

*Carso & Gibson*, for appellant. *Geo. A. Johnson*, Atty. Gen., for respondent.

FOOTE, C. The defendant was convicted of burglary in the first degree. From the judgment rendered against him, and an order denying a new trial, he appeals. It is urged in his behalf that the evidence is insufficient to show that he or any one else broke and entered the premises mentioned in the information at the time charged with the intent to commit grand or petit larceny, or any felony, or that he ever entered them at all. We think the evidence, taken all together, direct and circumstantial, is sufficient to justify the verdict of the jury. It is also claimed that the court erroneously instructed the jury that "if the jury believe certain property to have been stolen, proof of its possession is not of itself alone sufficient to justify the conviction of the defendant, but is a circumstance which, if not satisfac-

torily explained, tends to establish guilt; and when taken in connection with other evidence, may be sufficient to satisfy the minds of the jurors of the guilt of the accused. But you cannot find a person guilty upon proof of possession of stolen property alone, without any other evidence to explain its possession." A similar charge was offered in *People v. Fagan*, 66 Cal. 534, 6 Pac. Rep. 394, where it is said: "We think the jury must have understood the court to mean that if the defendants were found in possession of any part of the property described in the indictment soon after such property was stolen, such possession, unless satisfactorily explained, was a circumstance to be considered in connection with other suspicious facts in determining their guilt or innocence. The charge, taken as a whole, would not, we think, carry to the jury the idea that the possession of the stolen goods, unexplained, would of itself be sufficient to justify a conviction." Perceiving no prejudicial error in the record, we advise that the judgment and order be affirmed.

We concur: BELCHER, C. C.; GIBSON, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

85 Cal. 11

LOAIZA v. LEVY, Judge. (No. 13,768.)

(Supreme Court of California. July 14, 1890.)

EQUITY—JURISDICTION—NON-RESIDENTS—RESCISSI—RECEIVERS.

1. The courts of this state have jurisdiction over an action between non-residents to rescind, on the ground of the vendor's fraud, a sale of mining property situated in a foreign country, where the contract of sale was entered into in this state, and where the consideration, consisting partly of money, and partly of notes executed by a citizen of this state secured by mortgages on land within the state, is in the hands of the vendor's agent, a resident of this state.

2. The real object of the action being to compel the restoration to the vendees of the money which they were fraudulently induced to give for the mining property, and the cancellation of the securities likewise procured by fraud, all of which are within the court's jurisdiction, the fact that they have offered, as they were equitably bound to do, to restore to the vendors the title to the mining property, will not deprive the court of jurisdiction on the ground that the action involves the title to land in a foreign country.

3. As the action is virtually *in rem* to compel the restoration of the consideration fraudulently obtained from the vendees, which is still within the state, the superior court has jurisdiction of the action, though the vendors were never personally served with process, and have not submitted themselves to the court's jurisdiction.

4. Under Code Civil Proc. Cal. § 564, subd. 1, which provides for the appointment of a receiver of a fund on the application of any party interested therein, where it is shown that the fund is in danger of being moved or lost, and under subdivision 6, which authorizes the appointment of receivers according to the usages of courts of equity, the superior court properly appointed a receiver of the moneys and securities to prevent their removal beyond its jurisdiction pending the proceedings to determine the rights of the parties.

In bank. Applications for writ of review by Wenceslao Loaiza to set aside a pro-

ceeding in the superior court, city and county of San Francisco; LEVY, Judge.

Code Civil Proc. Cal. § 564, provides: "A receiver may be appointed by the court in which an action is pending, or by the judge thereof, (1) in an action by a vendor to vacate a fraudulent purchase of property, or by a creditor to subject any property or fund to his claim, \* \* \* on the application of the plaintiff, or of any party whose right to or interest in the property or fund, or the proceeds thereof, is probable, and where it is shown that the property or fund is in danger of being lost, removed, or materially injured; \* \* \* (6) in all other cases where receivers have heretofore been appointed by the usages of courts of equity."

*Page & Eells*, and *P. G. Galpin*, (*Wilson & Wilson*, *E. W. McKinstry*, and *Stanly, Stoney & Hayes*, of counsel,) for petitioner. *R. S. Mesick* and *Wm. F. Herrin*, for defendant.

Fox, J. This is a proceeding for a writ of review to set aside certain proceedings in the superior court of the city and county of San Francisco, LEVY, Judge, in an action there pending, wherein the Oro Grande Company, Limited, and the Globe Mining Syndicate, Limited, are plaintiffs, and Manuel Aguayo, Leocadio Aguayo, and W. Loaiza are defendants, and in which action such proceedings have been had as that orders for injunction *pendente lite*, and appointing a receiver, have been made; the plaintiff here claiming that in that case the court had no jurisdiction for such proceeding, and praying that the orders aforesaid be vacated and set aside.

In the action whereof the proceedings are sought here to be reviewed both the plaintiffs are foreign corporations organized under the laws of and resident in England, and the defendants Manuel and Leocadio Aguayo are both citizens and residents of the republic of Mexico, absent from this state, the defendant Loaiza (plaintiff herein) being the only one of all the parties residing in this state, and the complaint showing upon its face that he is a simple stakeholder in the premises. The relief sought is in favor of artificial persons resident in England, and against natural persons, citizens of and resident in Mexico. As between such parties, (it being conceded that personal service of process has not been made upon any of the defendants except Loaiza, and that he is a mere stakeholder,) it is claimed that the courts of this state have not, and can have no, jurisdiction. And the whole question to be resolved in this proceeding is that one of jurisdiction. If the court has jurisdiction, then the errors, if any, which have been or may be committed, are reviewable only on appeal. Looking into the record which has been sent up on return to the writ issued herein, the following facts, briefly stated, appear, it being understood that no answer has been made to the complaint filed in the court below, and that for the purposes of this proceeding the allegations of the complaint, affidavits, and deposition filed, are necessarily taken as true: In 1887-1889, the defendants Manuel and Leocadio Aguayo,

brothers, were partners, owners and in possession of certain mining properties, and other adjuncts thereto, situate in the state of Sonora, in Mexico, and bonded the same for sale; that during this period of time, and with a view to effecting sale thereof, certain mining experts were called upon to make, and did make, an extensive and critical examination of the mines and mining property, as a basis for and upon the basis of which they made reports as to the character and value of the properties; that they were engaged for several weeks in taking samples of earth, rock, and ores from the mines, and making assays thereof; that during all the time they were engaged in taking such samples the Aguayos, for the purpose of insuring high-grade returns from the assays, and thus securing a sale of the mines at a price largely in excess of their true value, persistently, willfully, secretly, and fraudulently, and without the knowledge of the experts, tampered with the samples taken, and mixed with them large quantities of fine gold, or, in the language of the miners, "salted the samples," or caused the same to be done, so that they fraudulently procured grossly exaggerated reports to be made as to the character and value of the mines, and that too without the knowledge of the experts who conducted the examinations and made the reports; that deceived and misled by the false and fraudulent reports so fraudulently procured and caused to be made, and relying upon the truth thereof, the plaintiffs (the corporations above named) in September, 1889, were induced to purchase, and did purchase, said mines and properties from said Aguayos at and for the price of \$1,575,000, depositing therefor in escrow, in San Francisco, \$710,000 in gold coin, and the promissory notes of Alvinza Hayward, a citizen of California, payable at future days, with interest at 6 per cent. per annum, and secured by mortgage upon real estate situate in San Francisco, to the amount of \$865,000, all of which was subsequently delivered in pursuance of the conditions of the deposit, and upon receipt of information that possession of the mining properties had been delivered to the defendant Loaiza, who received the same as the agent and representative of the defendants Aguayos; that these notes and mortgages, and nearly all the money, or its immediate representative in securities in which the same had been invested by Loaiza for account of the Aguayos, remained in the hands of said Loaiza, held for the benefit and account of the Aguayos, and within the jurisdiction of the courts of California, until the commencement of this suit in the superior court, when the transfer thereof pending suit, or the removal of the same beyond the jurisdiction of the court, was enjoined by order of the court, and a receiver was appointed to take possession thereof, and hold the same until the further order of the court. The plaintiffs in said suit, purchasers of the mining properties, did not discover the fraud which had been perpetrated upon them until within one month prior to the bringing of the suit. Promptly upon discovering these frauds they notified the Aguayos

in writing that they "did rescind said purchase and sale," and demanded of said Aguayos "a rescission of the said purchase and sale," and then offered to restore to said Aguayos all the properties which had been conveyed to them, and everything of value which they had received from them, and to surrender the possession of all said properties, and to do and perform all acts and things which might be necessary or proper in order to fully restore to said Aguayos all properties and things of value received from them, as fully and completely as if said purchase and sale had never been made, upon condition that said Aguayos should restore the moneys and things of value received as the consideration for said purchase and sale. This demand and offer being rejected, a bill in equity was promptly filed setting out the facts, renewing the offer, and praying a decree of rescission and of restoration of the moneys and things of value received by defendants from plaintiff as the consideration for such purchase and sale, an injunction pending the action to restrain the transfer of said moneys and securities, or the removal thereof beyond the jurisdiction of the court, and the appointment of a receiver pending the action to take charge of and hold said moneys and securities.

1. It is claimed in argument that this contract was made in Mexico, and can only be rescinded in and according to the laws of Mexico, and that no court has jurisdiction to adjudge a rescission thereof except the courts of Mexico. There is no more in the record to indicate that this contract was made in Mexico than there is that it was made in England, except that the mere act of delivering possession of the property sold was of necessity done in Mexico. The internal evidences furnished by the record all tend to show that the entire contract of purchase and sale was made in San Francisco. There the deposit in escrow was made of everything that was to be given in consideration of the purchase and sale pending actual delivery of possession. There the consideration was finally delivered to and received by the agent of the Aguayos, and there the consideration remained invested and seeking investment until impounded by the court at the suit of the parties defrauded into its delivery. The larger part of that consideration consisted of the promissory notes of a citizen of California, made and payable in California, and to a resident of the state, (for all the notes were payable to the defendant Loaiza,) and secured by mortgage of property in said state, made and executed by the maker of the notes, and recorded in said state. These were certainly executory contracts, and if they could be rescinded at all it could be done in and according to the laws of the state where made, and where they were to be executed.

2. It is also insisted that the court in which said proceeding in equity was instituted has no jurisdiction, because the aid of the courts of this state cannot be successfully invoked in favor of non-resident foreign corporations against non-resident foreigners in an action affecting in any

way title to lands in a foreign state. The unsoundness of this position grows out of the assumption that the object of the action is to compel the Aguayos to accept reconveyance and restoration of the properties in Mexico. Such is not the fact. The real object of the action is to compel the restoration to plaintiffs of so much of the consideration which they were fraudulently induced to give for these properties as may be within the reach of the compulsory power of the court, and for the rescission and cancellation of the executory contracts (the notes and mortgages) procured by the frauds aforesaid, they being confessedly within the jurisdiction of the court. This relief can only be given in equity, and will be given only upon the condition prescribed by the statute and offered by the plaintiffs,—that of restoration by the plaintiffs of the property for which the consideration was given. As to the lands the plaintiffs are to be the actors; the defendants are to be given the opportunity to receive. The plaintiffs have voluntarily submitted themselves to the court, offering to do equity, entitled to relief only as they do equity, and bound to obey the mandate of the court as a condition of receiving the relief which they seek. The non-residence of plaintiffs is not material to the maintenance of the action. They have submitted themselves to the jurisdiction of the court by becoming suitors before it. They are amenable to its process, and must obey its commands before they can obtain relief. If conditions are attached to the relief awarded them, then performance by them can be compelled. *Cleveland v. Burrill*, 25 Barb. 532. Such voluntary appearance and submission made through the officers of the court—the attorneys at law—would be sufficient to enable the court to enforce the performance of an act imposed as a condition of relief; but in this case the plaintiffs are not here by simple representation by counsel. The record shows that they seek the equitable interposition of the court, and in court make the offer of restoration on their part required by our statute<sup>1</sup> in person, through the person of one of their own directors, resident within the jurisdiction and by them made managing director, and their attorney in fact. Through him they not only make the offer, but through him they give all the securities that the court requires—and they are proportionate to the interests involved—for the protection of the defendants. This point, like the next one which will be noticed, is argued as if the object of the action was to compel a reconveyance of the lands in Mexico, and it is only by supposing that such is the object of the action that the cases cited in support of the argument can be held to be in point. But such is not the object of the action. If the parties were reversed, and the Aguayos were suing the English companies for reconveyance and redelivery of possession, on the ground of frauds committed by the English companies, resulting in a failure of consideration, then some of the authorities cited would sup-

port the proposition that the court here would have no jurisdiction to enforce its decree for a reconveyance and redelivery of property in Mexico, unless it first got jurisdiction over the persons of the defendants. The object of this action is to have the court use its compulsory process only to affect property within its jurisdiction, and then only upon the party seeking the aid of this process voluntarily, or in compliance with conditions which the court may impose personally, and in accordance with the laws of Mexico, doing whatever may be necessary to restore title and possession of the property there situate.

Counsel have cited numerous authorities in support of their argument in this behalf. We refer to a few of those upon which most reliance seems to be placed, by way of showing the distinction between the cases cited and the one here under consideration, and the reason why the rule there established does not apply to the present case. *Smith v. Insurance Co.*, 14 Allen, 336, was an action brought in Massachusetts by a citizen and resident of Alabama against a life insurance company of New York to compel the latter to restore to him certain rights under a policy of insurance upon his life, which the company claimed had been forfeited. This was an action *in personam*, pure and simple. There was neither person nor property in Massachusetts to be affected by the judgment. All the relief sought was to compel action of a certain kind on the part of a non-resident foreigner, and in a foreign country. The court properly held that it had no power to enforce such a judgment and consequently no jurisdiction to render one. The case bears no relation to the one here under consideration. Great stress is laid upon *Matthaei v. Galltzin*, L. R. 18 Eq. 340, in this connection. That case was brought by the plaintiff, a foreigner, against the Princess Galltzin, also a foreigner, for an accounting of profits made in the working of a mine in Russia, the mine being operated by an English company which was a mere stakeholder in the premises, and made a defendant solely for the purpose of preventing the payment of the profits over to the princess until the accounting was had, the plaintiff claiming that he was entitled to share in the profits by way of commission. The action was purely *in personam*, whether it involved the matter of accounting between plaintiff and the princess, or included the settlement as preliminary thereto of the question of whether or not the plaintiff was entitled to a commission as claimed. The contract relied upon was confessedly made in a foreign country, in relation to foreign property, between parties both of whom were foreigners, and all rights and liabilities under it were personal. We fail to perceive how the case has any bearing upon the questions involved in this case. The conclusion of the court was that "a foreign resident abroad cannot bring another foreigner into this court respecting property with which this court has nothing to do." That is not this case. Here the parties are brought into court to cancel a contract made and

<sup>1</sup> Civil Code Cal. § 1891.

to be executed in this jurisdiction,—the notes and mortgage,—and in relation to property which is subject to the jurisdiction of the court. It is not proposed that the judgment of the court shall make the defendants actors in the disposition of property beyond its jurisdiction, or appoint anybody to act for them in the disposition of such property. We are cited also to an opinion by an able jurist, Mr. Justice SHARSWOOD, in *Coleman's Appeal*, 75 Pa. St. 442. We have carefully examined that case, and as we read it only these points are decided having any bearing upon the questions here involved: (1) That what is called a "foreign attachment" in that state will not lie for a demand founded in tort; that was a matter purely of satutory regulation, as it is here. (2) That, in cases where attachment will lie against a non-resident foreign defendant, the judgment can only be enforced against the property of defendant found within the jurisdiction, unless the defendant has been personally served within the jurisdiction, or has voluntarily appeared; but upon such service or appearance the proceeding against him may end in a judgment which will bind him personally, and may follow and be enforced against him extraterritorially. (3) "Where the claim of plaintiff is for goods or land [within the jurisdiction] in the constructive possession of a non-resident, by his agents or tenants, he has his remedy by writ of ejectment for the land, or by writ of replevin for the goods in like manner, summoning the person in possession as defendant." (4) In equity, "in cases where persons interested are out of the jurisdiction of the court, it is sufficient to state the fact in the bill, and pray that process may issue on their return. \* \* \* The power of the court to proceed to a decree in their absence will depend on the nature of their interest, and the mode in which it will be affected by the decree. \* \* \* If they are to be active in performing the decree, or if they have rights wholly distinct from those of the other parties, the court, in their absence, cannot proceed to a determination against them." (5) That "though it is an undoubted principle that wherever a court of equity has jurisdiction it will go on to make a complete decree, so as to settle the entire controversy between the parties, \* \* \* any subject of property within its reach will [not] give it jurisdiction of the person of a non-resident defendant, so as to authorize \* \* \* a personal decree against him, if he does not appear, for the payment of money." And, after some further consideration, it concludes that branch of the discussion with the words: "We are of opinion that the bill must be confined, at least so far as the interest of the foreign defendant is concerned, to a prayer for a decree affecting only the property in question." There is nothing in these conclusions, or in the reasoning of the learned justice which leads up to them, tending to show that the court whose action is now under consideration has not jurisdiction to proceed in the action before it, and grant the relief prayed, so far at least as it affects the property within this jurisdiction. As

to that property, the defendants will not be called upon to be active in enforcing or carrying into effect the judgment of the court. It may be that no personal judgment can be entered against them on account of moneys which they have secured, which could be enforced against them in the country of their residence; but it can be adjudged, if the proofs shall warrant it, that the consideration paid for the property in Mexico was procured to be paid by fraud, and so much of the money and property as remains within this jurisdiction and has been impounded by the court can be delivered up, and the securities and executory contracts requiring further payment to be made be canceled, without any conflict with the principles laid down in the case cited. We are also cited to *Norris v. Chambers*, 29 Beav. 246, and *Cookney v. Anderson*, 31 Beav. 452. Neither of these cases are in point. In the former the English court sustained a demurrer on two grounds: (1) That there was no privity of contract between the parties plaintiff and defendant; (2) that the purpose of the bill was to decree a lien upon real property situate in Germany. In the other, the reason for holding that there was no jurisdiction was because the purpose of the action was to administer and wind up a trust created under a contract made in a foreign country by foreigners, to be executed wholly in that country, and in relation to property there situate. Neither of the cases are at all parallel to the one here under consideration. Nor is the case of *Moseby v. Burrow*, 52 Tex. 396, in point. No decree is sought in this case compelling the defendants to make conveyance of lands in Mexico. If any conveyance of that land is required it will be required of plaintiffs, who have submitted themselves to the jurisdiction of the court, and as a condition of granting the relief which they seek.

3. Dropping the element of non-residence of plaintiffs, the petitioner here still insists, and the argument, even under other heads, is mainly directed to this proposition, that the court has no jurisdiction by reason of the non-residence of the defendants Aguayos, and of the fact that personal service has not been, and cannot be, made on them within the state. The cases already considered are leading ones among those urged in support of this proposition. Added to them are many others, such as *Belcher v. Chambers*, 53 Cal. 635; *Anderson v. Goff*, 72 Cal. 73, 13 Pac. Rep. 73; *Pennoyer v. Neff*, 95 U. S. 714, and others of that class, all of which discuss the question of the power of the court to render judgment in actions purely *in personam*, without personal service, or appearance of the defendant; or others, like *Hart v. Sansom*, 110 U. S. 155, 3 Sup. Ct. Rep. 588, where the decree was to operate against the defendant *proprio vigore* to annul a deed or establish a title, or to compel the defendant personally to be an actor in the performance of some act prescribed by the decree, whether he desired to perform it or not. It is conceded that the court would have no power to render a decree in such cases, and of such a character, in the absence of the defendant, unless there had been per-

sonal service of process within the jurisdiction to which the court could send its process. But all this argument is based upon a misapprehension of the character and object of the action here under consideration, and of the relation of the parties to each other at the time of the commencement of the action. To a correct understanding of the object of the action, and of the question of the right to maintain it, we must first correctly understand the relation of the parties to each other. The record does not bear out the proposition insisted upon on behalf of the petitioners here, that they are simply persons who were parties to an executed contract which was made and executed in Mexico. The preponderance of the evidence furnished by the record is in favor of the proposition that the contract of purchase and sale was made in San Francisco, within the jurisdiction of the courts of California. One act in its performance was necessarily performed in Mexico,—that of the delivery of the property sold. But that was not the last act in the performance of that contract. The entire consideration of the sale was subsequently delivered, and that delivery took place in San Francisco. It consisted in the delivery of money and of new contracts, executory contracts to be performed in the future, which have not yet been performed, and performance of which is not yet due. These have always been, and still are, within the jurisdiction of our courts. These moneys and executory contracts were delivered in consideration of what is claimed to have been a contract of sale on the part of the Aguayos, now fully executed. But was that a contract at all? In this state—and, until the contrary appears, it will be presumed to be the same in Mexico—it is essential to the validity of a contract that there should be—*first*, parties capable of contracting; *second*, consent; *third*, a lawful object; and, *fourth*, a sufficient cause of consideration. Civil Code, § 1550. To be consent it must be free, mutual, and communicated by each to the other. Id. § 1565. It is not free when obtained through fraud, undue influence, or mistake. Id. § 1567. If not free it may be rescinded by the parties in the manner prescribed by the chapter on rescission. Id. § 1566. Consent is deemed to have been obtained by fraud, undue influence, or mistake, when it would not have been given had such cause not existed. Id. § 1568. The record shows that the consent of the purchasers to make this purchase, and deliver these moneys and securities in consideration thereof, was procured by fraud on the part of the Aguayos, and mistake on the part of the other parties, induced by such fraud, and that it would not have been given had not such cause existed. It therefore shows that there was no valid and binding contract between the parties, and that such as it was it might be rescinded by the parties. The acts of fraud are set out, and they show actual fraud within the meaning of section 1571, Civil Code. It was a misrepresentation of the value of property, knowingly made, and entitled the purchaser to a rescission. *Cruess v. Fessler*, 39 Cal. 336; *Bank v. Hiatt*,

58 Cal. 234. Having been induced to enter into this contract by fraud, and through mistake induced by such fraud, the parties could either ratify the same and sue for damages, or rescind. 1 Whart. Cont. § 282; 2 Add. Cont. \*1218; *Alvarez v. Brannan*, 7 Cal. 503; *Pence v. Langdon*, 99 U. S. 578; Civil Code, § 1689; *Burkle v. Levy*, 70 Cal. 254, 11 Pac. Rep. 643; *Fish v. Benson*, 71 Cal. 440, 12 Pac. Rep. 454; *Colton v. Stanford*, 82 Cal. 398, 23 Pac. Rep. 16. If the suit were for damages it could not succeed and end in a judgment which could be enforced against the persons of defendants without personal service or appearance. But it is not for damages. It is upon and after rescission, and to enforce rescission, so far as the means of enforcing it are within the jurisdiction of the court. It does not require mutual consent of the parties to rescind. Under section 1689, either party may rescind when consent was given by mistake, or obtained by fraud. According to the record, the purchasers did actually rescind, and rescind promptly, before the action was brought, and did all that is required of them by section 1689, which gives them the right, and section 1691, which prescribes the mode, of rescission. They did not restore, because restoration was not accepted, but they offered to restore, and in the action they again offer to restore, everything of value received by them under the contract. This offer, with the prompt and proper notice, makes the rescission complete, and entitles them to the aid of a court of competent jurisdiction in securing to them the results and fruits of the rescission. To secure those results and fruits is the object of the action they have brought. Those results and fruits are the restoration of the moneys and things of value which they gave in consideration of the purchase. Most of those moneys, or the securities in which they have been invested, and the other things of value which were so given, are all ear-marked, so that they can be traced and identified, and were within the jurisdiction, and are now within the possession, of the court in which the action was brought. That the court has jurisdiction to afford the relief sought is supported by ample authority. See cases already cited, and *Fratt v. Fiske*, 17 Cal. 380; *Watts v. White*, 13 Cal. 321; *Morrison v. Loda*, 39 Cal. 381; *Bartfield v. Price*, 40 Cal. 535; *Herman v. Haffenegger*, 54 Cal. 161; *Marston v. Simpson*, Id. 189; *Fitz v. Bynum*, 55 Cal. 459; *Henderson v. Hicks*, 58 Cal. 364; *Collins v. Townsend*, Id. 608; *Hart v. Kimball*, 72 Cal. 283, 13 Pac. Rep. 852; and *Dunn v. Daly*, 78 Cal. 640, 21 Pac. Rep. 377,—in all of which this right of rescission upon offer to restore is recognized. We concede, as claimed by petitioner and decided in *Bohall v. Diller*, 41 Cal. 532, that the rescission must be *in toto*, and in this case it seems to have been so. The offer was to restore everything of value on the one side, and the demand that everything be restored on the other. The offer must be made good whenever the demand is complied with.

Incidentally, some authorities have already been cited tending to sustain the jurisdiction of the court in cases of this

kind. The following may be referred to in addition: In *Rourke v. McLaughlin*, 38 Cal. 196, this court holds that specific performance in equity will be decreed whenever the parties, or the subject-matter, or so much thereof as is sufficient to enable the court to enforce its decree, is within the jurisdiction of the court, and cites the case of *Penn v. Lord Baltimore*, 1 Ves. Sr. 444, where specific performance of a contract for lands in America was decreed in England, and *Ward v. Arredondo*, Hopk. Ch. 213, a case in many respects parallel to the one here under consideration, and in which the jurisdiction of the court was sustained. In *Boswell's Lessee v. Otis*, 9 How. 348, the supreme court of the United States says: "Jurisdiction is acquired in one of two modes: First, as against the person of the defendant, by the service of process; or, secondly, by a procedure against the property of the defendant within the jurisdiction of the court. In the latter case the defendant is not personally bound by the judgment beyond the property in question, and it is immaterial whether the proceeding against the property be by attachment or by bill in chancery." In *Cooper v. Reynolds*, 10 Wall. 318, the same court held, in a case where there was no personal service and the defendant was not within the territorial jurisdiction of the court, that the seizure of the property or the levy of the writ of attachment on it was the one essential requisite to jurisdiction, and that it unquestionably made the proceeding purely *in rem*. In *Galpin v. Page*, 8 Sawy. 124, Mr. Justice FIELD held that proceedings which are in form personal suits, but which seek to subject property brought by existing lien, or by attachment, or by some collateral proceeding under the control of the court, and those which seek to dispose of property, or relate to some interest therein, but which touch the property or interest only through the judgment recovered, while not strictly proceedings *in rem* so far as they affect property in the state, are treated substantially as such proceedings. In *Pennoyer v. Neff*, 95 U. S. 727, which has become the leading case on the subject of jurisdiction acquired by publication, the supreme court of the United States says: "Substituted service by publication, or in any other authorized form, may be sufficient to inform parties of the object of proceedings taken, where property is once brought under the control of the court by seizure, or some equivalent act. The law assumes that property is always in the possession of its owner, in person or by agent; and it proceeds upon the theory that its seizure will inform him not only that it is taken into the custody of the court, but that he must look to any proceedings authorized by law upon such seizure for its condemnation and sale. Such service may also be sufficient in cases where the object of the action is to reach and dispose of property in the state, or of some interest therein, by enforcing a contract or a lien respecting the same, or to partition it among different owners, or, when the public is a party, to condemn and appropriate it for a public purpose. In other words, such service may answer

in all actions which are substantially proceedings *in rem*. But where the entire object of the action is to determine the personal rights and obligations of the defendants, that is, where the suit is merely *in personam*, constructive service in this form upon a non-resident is ineffectual for any purpose." In *Windsor v. McVeigh*, 93 U. S. 279, where the same question was considered, the court says: "The theory of the law is that all property is in the possession of its owner, in person or by agent, and that its seizure will, therefore, operate to impart notice to him." The same principle is sustained in *Heldritter v. Oilcloth Co.*, 112 U. S. 301, 5 Sup. Ct. Rep. 135, where the court adds to what had been said before that jurisdiction may be acquired by the mere bringing of the suit in which a claim is sought to be enforced against property situate within its territorial jurisdiction; that this may by law be equivalent to a seizure, being the open and public exercise of dominion over it for the purposes of the suit. Even in the case of *Arndt v. Griggs*, 10 Sup. Ct. Rep. 558, cited by petitioner, the court says: "It [the state court] cannot bring the person of a non-resident within its limits,—its process goes not out beyond its borders,—but it may determine the extent of his title to real estate within its limits, and for the purpose of such determination may provide any reasonable method of imparting notice." If the state court has such power with reference to title to real estate held by a non-resident, how much the more will it have the same with reference to personal property situate within its jurisdiction. And the real and primary purpose of the action here under review is to determine the title and right to possession of the moneys and securities now within the jurisdiction of the court, secured from the plaintiffs in the action by fraud, under a contract which they were by law authorized to rescind, and did rescind, upon discovery of the fraud. Our statute says that in such a case the person who gains a thing by fraud is an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it. Civil Code, § 2224. This being so, it cannot be that the arm of equity is so short, or so weak, that the fraudulent trustee,—he who has become trustee by fraud,—by remaining beyond the jurisdiction of the court, can prevent the court from seizing upon the subject of the trust within its jurisdiction, and restoring it to the defrauded *cestui que trust*. That the court has such jurisdiction as is here claimed for it is fully sustained in *Felch v. Hooper*, 119 Mass. 52, where the case is clearly distinguished from that of *Spurr v. Scoville*, 57 Mass. 579, cited by petitioner; in *Bank v. Stelling*, 9 S. E. Rep. 1028; *Quarl v. Abbott*, 102 Ind. 233, 1 N. E. Rep. 476; in *King v. Vance*, 46 Ind. 251, where the court says: "The defendant may be brought in by publication, and when thus notified a defendant is before the court for all purposes except the rendition of a personal judgment;" and in *Martin v. Pond*, 30 Fed. Rep. 15, where Mr. Justice BREWER says: "It may be conceded that notice to the defendant is necessary to divest him



of his rights and interest. But the publication is notice,—it is equivalent to the personal service of summons."

4. It is specially insisted on the part of petitioner that the court had no jurisdiction to appoint a receiver; but the argument in support of that contention is based almost entirely upon the proposition that the court has no jurisdiction generally. If it has general jurisdiction in the case, as we conclude that it has, then error in the exercise of that jurisdiction would be reviewable only on appeal. The appointment of a receiver, however, might in some cases be more than error, even when the court had general jurisdiction. The case might be one in which there was no authority to appoint a receiver. But we do not think that this is such a case. The authority to appoint a receiver in such a case is clearly given in both the first and sixth subdivisions of section 564 of the Code of Civil Procedure. See, also, *Ex parte Cohen*, 5 Cal. 496; *People v. Norton*, 1 Paige, 17; *Verplanck v. Insurance Co.*, 2 Paige, 440; *West v. Swan*, 3 Edw. Ch. 420; *Von Roun v. Superior Court*, 58 Cal. 358; *Railroad Co. v. Superior Court*, 55 Cal. 453. Such an appointment in no way affects the title of any party to the property involved, but simply preserves the property and keeps it within the jurisdiction until the rights of the parties can be determined. Satisfied, as we are, that the superior court, defendant here, has jurisdiction to proceed in the case before it and here brought under review, and that thus far it has not acted in excess of its jurisdiction, the writ must be dismissed. So ordered.

We concur: BRATTY, C. J.; SHARPSTEIN, J.; MCFARLAND, J.; PATERSON, J.

85 Cal. 102

CALIFORNIA BANK v. SAYRE *et al.* (No. 13,597.)

(*Supreme Court of California*. July 30, 1890.)

PROMISSORY NOTE—RATIFICATION.

Defendant, being informed by a third person that he had deposited her note with plaintiff as collateral, told such third person that she had signed no such note, but she did nothing more about it, and paid no attention to plaintiff's notice that the note was due. Held, that her silence did not amount to a ratification.

Commissioners' decision. In bank. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, Judge.

*Dooner & Burdett*, for appellant. *Wells, Guthrie & Lee*, for respondent.

HAYNE, C. This was an action upon a promissory note. The trial court gave judgment against one of the alleged makers, but not against the other, and the plaintiff appeals. The ground of the decision in favor of the defendant referred to "was that her name was signed to the note without her knowledge or authority." The appellant attacks the finding in this regard as not sustained by the evidence; but we think that there is sufficient evidence to sustain it. The only question that can be raised is whether she ratified the signature. With reference to this question there is evidence to the effect that she

first learned of the signature of her name, to the note in an interview with the agent of the payee in February, 1889, which was about nine months after the execution of the note; that on that occasion she informed him that the signature was not hers; that he informed her that her note had been deposited with the plaintiff as collateral, and referred her to it; that she did nothing further in the matter, and paid no attention to the notice from the plaintiff that the note was due. There is evidence tending to contradict some of the testimony above referred to; but in view of the conflict it must be assumed that the evidence tending to support the judgment is true. It is argued, however, that the failure of the defendant to repudiate the signature, or to notify the plaintiff that she would not be bound by the note, amounted to a ratification. But, while such a rule might apply under certain circumstances, we think that where, as here, there is no element of estoppel, the mere silence of the party does not amount to a ratification. *Reubin v. Cohen*, 48 Cal. 545; *Hendrie v. Berkowitz*, 37 Cal. 113. The other points do not require special notice. We therefore advise that the judgment and order appealed from be affirmed.

We concur: BELCHER, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

85 Cal. 370

SHEERER v. CUDDY *et al.* (No. 13,592.)

(*Supreme Court of California*. Aug. 4, 1890.)

VENDOR AND VENDEE—BONA FIDE PURCHASER.

One who purchases real estate is bound to know who is in possession thereof, and is chargeable with notice of the occupant's title; and therefore a purchase of premises, occupied in part by third persons under an unrecorded lease, cannot be heard to say that he is an innocent purchaser, though he in fact was ignorant of the occupancy.

In bank. Appeal from superior court, Los Angeles county.

*Braunsseau & Hatch*, for appellants. *Williams & McKinley, McComas & Fisher, L. F. Fisher, and W. T. Williams*, for respondent.

WORKS, J. John Bryson, being the owner of certain real estate, leased certain of the rooms in the building thereon to the appellant Los Angeles Lodge No. 42, F. and A. M., for the term of 10 years, by a written lease. The lodge took and held actual possession of these rooms, but the lease was not recorded. Subsequently, and while the lodge was in possession, Bryson sold and conveyed the property to the plaintiff, and his deed was duly recorded. Whether the plaintiff had actual notice of possession of the premises by the said appellant or not, is one of the controverted questions in the case, but it is a conceded fact that he knew of it soon after his purchase, and that he received and collected the rents for the premises from the lodge for six months thereafter, at the rate agreed to be paid in the lease, and that the lease was recorded during this time, and three months' rent was collected

by the plaintiff after the lease was recorded and he had actual knowledge of its contents. After receiving the rents he commenced this action in ejectment against the appellants, the other defendants being officers of the lodge. The court below found that, as against the claim of the appellants, the respondent was a *bona fide* purchaser for value. Whether he was or not depends upon whether the circumstances were such as to put him upon such inquiry as would have disclosed the rights of the defendant Los Angeles Lodge, as between it and Bryson. As between Bryson and the lodge, the lease was binding without being recorded. Civil Code, § 1217. As against the plaintiff it was void if not recorded, unless he had notice of its existence, or such notice as should put him upon such inquiry as would disclose its existence. Civil Code, §§ 1214, 1217. That the lodge was in the actual possession of the property at the time of the plaintiff's purchase is an undisputed fact in the case, but the plaintiff testifies that he did not know it was in possession, and that when he looked at the house before purchasing it the doors of these rooms were locked, and he did not know that they were occupied. We think the finding of the court below that under these circumstances, admitting the truth of the plaintiff's testimony, he was a *bona fide* purchaser, was not sustained by the evidence. The actual possession of the premises by the appellant was sufficient to put the respondent upon inquiry as to the nature and extent of its claim. *Pell v. McElroy*, 36 Cal. 268; *O'Rourke v. O'Connor*, 39 Cal. 446; *Moss v. Atkinson*, 44 Cal. 3, 17; *Hunter v. Watson*, 12 Cal. 363; *Lestrade v. Barth*, 19 Cal. 660, 675; *Dutton v. Warschauer*, 21 Cal. 610. The effect of such possession, and the diligence required of the vendee to ascertain the extent of the claim of the party in possession, is thus clearly stated in *Pell v. McElroy*, supra: "The fact of open, notorious, and exclusive possession and occupation of lands by a stranger to a vendor's title, as of record, at the time of a purchase from and conveyance by such a vendor out of possession, is sufficient to put such purchaser upon inquiry as to the legal and equitable rights of the party so in possession, and such vendee is presumed to have purchased and taken a conveyance from the vendor with full notice of all the legal and equitable rights in the premises of such party in possession and in subordination to these rights, and this presumption is only to be overcome or rebutted by clear and explicit proof on the part of such purchaser, or those claiming under him, of diligent, unavailing effort by the vendee to discover or obtain actual notice of any legal or equitable rights in behalf of the party in possession. And, when the location of the lands is such as to render personal application to and inquiry of the occupant practicable, a purchaser failing to make such application and inquiry is no more entitled to be regarded a purchaser in good faith than if he had so acquired and ascertained the real facts of the case." Whether the respondent knew of the appellant's possession or not is immaterial. It was

his duty to know who was in possession of the property before making the purchase, and his purchase without ascertaining the fact must be regarded as the strongest evidence of bad faith on his part. The burden of making the proper inquiry was cast upon him by the mere fact of actual possession on the part of the appellant. If it were allowed that, by failing to acquaint himself with the fact of possession on the part of another than the vendor, the vendee could avoid the effect of the rule above stated, he could purposefully avoid any inquiry on the subject, and thereby evade the rule and its consequences entirely. There are other questions of minor importance presented by the record, but as the determination of this one is decisive of the case they need not be considered. Judgment reversed, and cause remanded for a new trial.

We concur: BEATTY, C. J.; SHARPSTEIN, J.; MCFARLAND, J.; FOX, J.; THORNTON, J.

88 Cal. 36; 3 Cal. Unrep. 283

BOOTH *et al.* v. PENDOLA *et al.* (No. 13,267.)  
(Supreme Court of California. Aug. 1, 1890.)

MECHANICS' LIENS—ENFORCEMENT—PLEADING—JUDGMENT.

1. In an action by subcontractors to enforce a lien for materials furnished in the erection of a building, the contract for which, between the owner and contractor, was never filed for record, a judgment for plaintiffs cannot be supported where the complaint does not allege the reasonable value of the materials, and there is no finding as to such value, though the complaint does allege the amount agreed to be paid by the contractor.

2. Where the materials were furnished at the same time for two buildings of the same owner, while it is not necessary to file separate claims on each building, the subcontractors are not entitled to a joint lien on both buildings for the entire amount claimed.

In bank. On rehearing. For former report, see 23 Pac. Rep. 200.

*Cope & Boyce*, for appellants. *Thomas, Butcher & Putnam*, for respondents.

PATERSON, J. This is an action brought by plaintiffs, having several liens of mechanics and material-men, against property owned by Pendola, deceased, in his life-time. The findings show that Pendola entered into a written agreement with one Hamilton, on March 29, 1887, for the construction of the Western Hotel in the city of Santa Barbara, and on the 15th of June entered into another contract with said Hamilton to build a cottage near said hotel, and on the same lot. Neither of these contracts was recorded. Belt & Co. furnished materials for both buildings, for which Hamilton agreed to pay a reasonable price. The court finds that the reasonable value of the materials furnished by them was \$363.99. On May 2, 1887, Hamilton entered into an agreement with Backus & Heyl, by the terms of which the latter were to paint the hotel for the sum of \$365, and the cottage for the sum of \$135. The court finds that of these sums \$131.71 remain unpaid. Lightner & Buckingham furnished materials for, and performed certain work on, the cottage, for which Hamilton was to pay the sum

of \$335, and performed certain work on and furnished material for the hotel, for which they were to receive the sum of \$975, of which the sum of \$535.35 remains due and unpaid.

1. The complaint alleges that Hamilton agreed to pay Backus & Heyl the sums of \$365 and \$135, above referred to, and that he agreed to pay Buckingham & Lightner the sum of \$975 for work done on and materials furnished for the hotel, and \$335 on account of the cottage, but it is nowhere alleged, nor does the court find, what was the value of any of the materials furnished, or of any of the work performed. Such allegations and findings were necessary, and the judgment cannot be supported without them. The contract between the owner and Hamilton was never filed for record. It was void, and while it is doubtless true that the contract price agreed upon between Hamilton, the agent of the owner, and the material-men and laborers, is *prima facie* evidence of the value of the materials furnished and labor performed, and would support a finding of value, we think that an allegation and a finding on the subject are essential to support a judgment in actions of this character.

2. The claims of lien filed by Backus & Heyl and Lightner & Buckingham both segregate and specify the particular amounts claimed to be due on each building. We do not think it was necessary for the claimants to make and file separate claims on each building; it was proper to state the amount of the claim on each building in the notice of lien, and the claimants are entitled to a lien on each building for the amounts respectively due thereon, but we do not think such claimants or their assignees are entitled to a joint lien on both buildings for the entire amounts respectively claimed by them. All other points made by appellant, and worthy of consideration, were noticed by Mr. Justice McFARLAND in the former opinion herein, and we are satisfied with the conclusions therein reached. Judgment reversed, and cause remanded for a new trial, with directions to allow the parties to amend their pleadings as they may be advised.

We concur: BEATTY, C. J.; WORKS, J.; SHARPSTEIN, J.; FOX, J.

85 Cal. 205

SCHNEIDER v. BROWN *et al.* (No. 13,517.)  
(Supreme Court of California. Aug. 1, 1890.)

TRESPASS—INJUNCTION—IRREPARABLE INJURY.

1. In a suit to restrain a trespass the complaint alleged that defendant had entered on plaintiff's land, and had torn up the soil and destroyed the crops, threatening and intending to dig a ditch across it 20 feet wide and 3 or 4 feet deep; that such ditch would cut off from the main body of the tract some 10 acres, which, thus separated, would have little or no value; and that such ditch would divert a large quantity of water over plaintiff's land, and interfere with its cultivation. *Held*, that the complaint makes out a case of irreparable injury.

2. A nonsuit for want of proof of plaintiff's title is properly refused where he is shown to be in possession by his tenant under color of title, and there is no evidence to rebut the presumption of ownership thus raised.

Commissioners' decision. In bank. Appeal from superior court, Fresno-county; J. B. CAMPBELL, Judge.

H. S. Dixon and Church & Cory, for appellant. J. H. Daly and S. J. Hinds, for respondents.

HAYNE, C. This was a suit to restrain a trespass upon real property, and for damages. The trial court gave judgment for the plaintiff, and the defendants appeal. The appeal from the order denying a new trial was not taken in time, and must be dismissed. The appeal from the judgment was not taken within 60 days from its rendition, and therefore no question as to the insufficiency of the evidence can be raised. The verdict of the jury was merely advisory, and therefore any error that may have occurred in the instructions is immaterial. *Dominguez v. Dominguez*, 7 Cal. 428; *Sweetser v. Dobbins*, 65 Cal. 529, 1 Pac. Rep. 540. The original complaint was superseded by an amended complaint, and all questions as to the sufficiency of the former drop out of the case. This leaves the question as to the sufficiency of the amended complaint as the main question to be considered. It alleges that the plaintiff was the owner and in possession of half of a quarter section of land, and then proceeds as follows: "That on or about the 29th day of February, 1888, the defendants knowingly, maliciously, and wrongfully came upon said land with a number of teams and men, and began tearing up the soil and destroying the crops growing upon said land, and plaintiff is informed and believes that said defendants are still engaged, and intend to continue, in tearing up the said soil and destroying the crops upon said land; that the defendants threaten and give out, and intend, if not restrained by injunction, to construct a large ditch across plaintiff's land, twenty feet wide and about three or four feet deep, said ditch being constructed near the southern boundary of plaintiff's land, and along the full length for about half a mile on said land, leaving a strip of land between said ditch and said southern boundary, cutting off from the other part of said plaintiff's land about ten acres, which, without defendants' interference, is of the market value of about \$200 per acre, but which, with said ditch and excavation thereon, said land thus cut off from the main body of said land would be of little or no value, and said ditch would prevent the use and cultivation of the land occupied by said ditch and excavation, therefore injuring and destroying the land over which and in which said ditch is constructed, to plaintiff's great damage; and defendants are contemplating and intend to divert a large quantity of water upon and over the land of plaintiff." We think that the foregoing makes a case of irreparable injury within the meaning of the rule on the subject. The case of *Waldron v. Marsh*, 5 Cal. 120, does not lay down the proposition that in no instance would the cutting of a ditch through land produce "irreparable" injury, but only that the ditch in that particular case did not

produce such injury; but the report does not inform us what the circumstances of that particular case were, and therefore it cannot be said that the decision applies. In this case it is alleged not only that the defendants are destroying the plaintiff's growing crops, but that their acts will render valueless at least 10 acres of valuable land, and that they threaten and intend to continue such acts. This seems to us to be all that is necessary. The findings are sufficient. The contract to farm the land on shares did not make Hern a tenant of the plaintiff. The parties were tenants in common of the crop. *Bernal v. Hovious*, 17 Cal. 541. But if Hern be considered a tenant of the plaintiff, the latter would nevertheless maintain the action, because the injury was clearly an injury to the inheritance.

The motion for nonsuit was properly denied. So far as it was based upon the insufficiency of the amended complaint, what we have said applies. So far as it was based upon the alleged want of proof of plaintiff's ownership, it was without merit. The plaintiff was in possession (by his tenant) under color of title, and there was no evidence to rebut the presumption of ownership which this raises. We therefore advise that the appeal from the order denying a new trial be dismissed, and that the judgment be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order denying a new trial is dismissed, and the judgment is affirmed.

85 Cal. 343

PEOPLE ex rel. JOHNSON, Atty. Gen., v. BAGLEY et al. (No. 13,847.)

(Supreme Court of California. Aug. 5, 1890.)

#### MUNICIPAL CORPORATIONS—CHARTERS.

St. Cal. 1883, p. 93, upon the organization, incorporation, and government of municipal corporations, provides (section 4) that any municipal corporation organized prior to January 1, 1880, may reorganize under its provisions. Const. Cal. art. 11, § 8, provides that "any city \* \* \* may frame a charter for its own government consistent with and subject to the constitution and laws of this state," by taking certain steps therein specified for preparing and publishing a proposed charter, which shall become effective when approved by the legislature. Section 6 provides that municipal corporations "shall not be created by special laws, but the legislature, by general laws, shall provide for the incorporation, organization, and classification \* \* \* of cities and towns," etc. Held that, since the act of 1883, although a general law is simply permissive, a city incorporated thereunder may reincorporate in the manner provided by the constitution, and, when the charter so framed is approved by the legislature, it supersedes the old charter, and the council elected under it becomes the true council of the city.

Commissioners' decision. In bank. Appeal from superior court, San Joaquin county; J. G. SWINNERTON, Judge.

Const. Cal. art. 11, § 8, provides that "any city \* \* \* may frame a charter for its own government, consistent with, and subject to, the constitution and laws

of this state," by taking certain steps therein specified for preparing and publishing a proposed charter, which shall become effective when approved by the legislature. Section 6 provides that municipal corporations "shall not be created by special laws, but the legislature, by general laws, shall provide for the incorporation, organization, and classification \* \* \* of cities and towns," etc.

Atty. Gen. George A. Johnson and Carter & Smith, for appellant. F. T. Baldwin and E. I. Jones, for respondents.

GIBSON, C. This appeal is from a judgment entered for defendants upon stipulated facts in a *quo warranto* proceeding prosecuted by the attorney general against them to determine their right to exercise the official powers and functions of the city council of the city of Stockton, of which they claimed, and were adjudged by the trial court, to be the duly-constituted members. The city of Stockton was, prior to the adoption of the constitution of 1879, duly incorporated under a special charter, and continued to exist as such thereunder until the 17th day of December, 1884. On the latter date it became organized as a municipal corporation of the fourth class, pursuant to the provision of an act approved March 13, 1883, and entitled "An act to provide for the organization, incorporation, and government of municipal corporations." St. Cal. 1883, p. 93. The city under that act maintained its corporate organization until the 2d day of March, 1889, when its present charter, framed by its freeholders, and adopted by its electors, in accordance with and pursuant to the amendments to section 8, art. 11, of the constitution of this state, was approved by the legislature. (St. Cal. 1889, p. 577,) and thereby became the organic law of the city in place of the act of March 13, 1883. The portion of the last-mentioned act relative to the city of Stockton provides that the city council shall consist of the mayor and 12 councilmen, 7 of whom shall constitute a quorum for the transaction of business. See sections 601, 620, 621. On the 1st day of January, 1888, by virtue of prior municipal elections regularly held, 12 persons named in the complaint, other than the defendant, became the duly-qualified members of the city council undersaid act, and entered upon the discharge of their duties as such officers. Since then, of the said 12 persons, one has died, and one has resigned, but, as no successor to any of the 12 has been elected or appointed, it is stipulated that unless the defendants elected under the present charter are the legal councilmen, and collectively constitute the city council, then the remaining 10 of the first 12 councilmen are the legal councilmen of the city. The present charter, which, as we have seen, went into effect March 2, 1889, provides that the city council shall consist of five members. At the first municipal election held under it the five defendants were duly elected, and within the proper time duly qualified as members of such city council, and on the 10th day of June, 1889, they each entered upon the office of member of the city

council, and began and still continue to claim and exercise the powers and functions of such office, and collectively since then have claimed to constitute the city council of said city, and have exercised all its powers and functions.

Thus, we perceive, there are two sets of persons claiming to be the councilmen of the city, and to form the city council thereof. The only question arising then is, which of these two sets is the proper one? The persons claiming to be the councilmen under the act of March 13, 1883, were, as conceded, the *de jure* councilmen of the city from the first Monday in January, 1888, until the defendants were elected and qualified to act under the new charter, and, unless the first set of councilmen was superseded as such councilmen by the defendants, they still continue to be such *de jure* officers. The position of the appellant is that the act of March 13, 1883, is a general law and conflicts with the provisions of the present charter in relation to city councilmen, and, as section 6, art. 11, of the constitution provides that "cities or towns heretofore or hereafter organized, and all charters thereof framed or adopted by authority of this constitution, shall be subject to and controlled by general laws," the act of March 13, 1883, must prevail; and he cites in support of his position *Ex parte Ah You*, 82 Cal. 389, 22 Pac. Rep. 929; *People v. Henshaw*, 76 Cal. 436, 18 Pac. Rep. 413; *Thomason v. Ashworth*, 73 Cal. 73, 14 Pac. Rep. 615. There is no doubt and it is not disputed that the conflict mentioned exists. The act of March 13, 1883, provides for 12 councilmen, 7 of whom are necessary to make a quorum for the transaction of business, while the freeholders' charter provides for but 5 councilmen in all, or 2 less than the requisite number for a quorum under the act referred to; hence they are incompatible with each other, and, if the plaintiff's position is correct, then the freeholders' charter in this respect must yield to that statute. The statute in question, as can be seen from its title above quoted, provides for the organization, incorporation, and government of municipal corporations. Under it six separate and distinct classes of such corporations as are defined in the act of March 2, 1883, (St. Cal. 1883, p. 24,) may be organized. It embraces all the municipal corporations that can be created in the state, except those especially provided for in section 8, art. 11, of the constitution, and is as comprehensive as the subject admits of under the constitution, and is, therefore, a general law within the principle of *Thomason v. Ashworth*, *supra*, and the cases there cited. But, although it is a general law, we are convinced that it differs from the general laws held in the above cases cited by plaintiff to affect municipal corporations, whether organized before or after the adoption of the constitution of 1879. An examination of those cases shows that each of the statutes therein considered was mandatory, and in this respect differs materially from the statute of 1883. The statute in question is permissive. Until its terms are accepted it does not require corporations falling within any one of its

six classes to organize, but tenders six separate charters, and permits any one of them to be selected as the charter of a city, at the election of those who come within its purview. This is apparent from the first section of the act, which reads as follows: "Any portion of a county containing not less than five hundred inhabitants, and not incorporated as a municipal corporation, may become incorporated under the provisions of this act, and when so incorporated shall have the powers conferred, or that may be hereafter conferred, by law, upon municipal corporations of the class to which the same may belong." And, also, section 4, which provides that any municipal corporation organized prior to January 1, 1880, may reorganize under the act. But when its terms are accepted that portion of the act relating to the municipality created under it becomes mandatory, and governs such municipality until it is extinguished by being changed into one of a different class under the act by consolidating with some other one, or into one incorporated under section 8, art. 11, of the constitution. We have seen that the city of Stockton elected to and did accept, under the act in question, the charter provided for cities of the fourth class. Now, if the contention of appellant be correct, the city thereby adopted a charter that precludes it from enjoying the benefit of its present or any other charter whose provisions may be inconsistent with those pertaining to a city of the fourth class. Statutes passed under a constitution are subject to and must be controlled by it. They can neither enlarge nor diminish its scope. Therefore the legislature could not abridge the power given in the amendment to section 8, art. 11, of the constitution, to cities containing a population of more than 10,000 and less than 100,000 people, to change their form of government conformably to it. And to hold that any city charter framed, adopted, and approved thereunder must be subject to, and controlled by, the previous charter of the city, when it exists in the form of a general law, to the extent that the latter may conflict with the former, would clearly be such an abridgment. The freeholders' charter, to the extent of such a conflict, would be a delusion that the legislature, if it had the power to affect the constitution, could not be said to have intended. It might in like manner be argued that because the charter adopted by a municipality organized under the act of 1883 is a general law, and would be operative against any subsequent charter of the city if it should consolidate with some other or like municipal corporation, which may be done pursuant to section 4 of the same act, its new charter would have to be consistent with the old one, or be controlled by it. To attempt to so control the new charter of such a municipality in accordance with the rule contended for would, in effect, render section 4 of the act impossible to follow, and, therefore, nugatory; particularly so if both of the cities attempting to consolidate should have charters of a different class under the act of 1883, and should try to consolidate as a city of a class different from either, as

they might do under the same section of the law.

We think the results pointed out which would follow from bringing the act of 1883 within the rule urged by plaintiff are sufficient to show that it does not apply here. It seems clear to us that when the city of Stockton organized as a city of the fourth class, under the permissive act of March 13, 1883, that act then, as far as it applied to cities of that class, became the mandatory organic law of the city, and remained so until the legislature approved a new and different charter adopted by the electors of the city pursuant to the amendment to section 8, art. 11, of the constitution. And that the new charter, when it was approved by the legislature, entirely superseded the former charter under the act of 1883. This being so, the city of Stockton as a city of the fourth class ceased to exist, and passed out of and beyond the scope of the act last mentioned. It therefore follows that the judgment should be affirmed.

We concur: BELCHER, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

35 Cal. 228

PEOPLE V. GUNN. (No. 13,591.)

(Supreme Court of California. Aug. 4, 1890.)

MUNICIPAL CORPORATIONS—CHARTER—REMOVAL OF OFFICERS—PARTIES.

1. Const. Cal. art. 11, § 8, provides that any city of between 10,000 and 100,000 inhabitants may frame a charter for itself, by causing 15 freeholders to be elected "by the qualified voters" thereof, who shall prepare a charter, sign it in duplicate, and return one copy to the mayor, and one to the recorder of deeds of the county, that such charter shall then be published in two daily papers of general circulation in the city for at least 20 days, and that within not less than 30 days after such publication it shall be submitted to a vote of the qualified electors, and if ratified by them and the legislature it shall be the charter of the city. *Held*, that where, in calling the election of freeholders, 1,200 inhabitants, including 300 qualified voters, were omitted, and had no voice in the election; and no copy of the charter was delivered to the mayor, and none to the recorder; and it was not published in any daily paper for 20 days; and the election for ratification was called and held in less than 30 days after the completion of the publication,—there was such a violation of the mandatory provisions of the constitution as to invalidate the charter.

2. Said section of the constitution further provides that after being so ratified by the qualified voters, the proposed charter shall be submitted to the legislature "for its approval or rejection as a whole, without power of alteration or amendment," and, if approved by a majority of the members elected to each house, shall become the charter of said city. *Held*, that since the power of the legislature is so restricted, its vote of approval is not a conclusive determination that the previous proceedings were regular and sufficient, and that question is for the court to determine.

3. Where, in a proceeding to remove the mayor of a city from office, the validity of the city charter is drawn in question, and is the issue upon which the decision of the cause depends, the city itself is a necessary party.

In bank. Appeal from superior court, San Diego county; GEORGE PUTERBAUGH, Judge.

Const. Cal. art. 11, § 8, provides that any city of more than 10,000 and less than 100,000 inhabitants may frame a charter for its own government, subject to the constitution and laws of the state, by causing a board of 15 freeholders "to be elected by the qualified voters of said city," whose duty it shall be to prepare and propose a charter, which shall be signed in duplicate, and one copy returned to the mayor, and the other to the recorder of deeds of the county; that such "proposed charter shall then be published in two daily papers of general circulation in said city for at least 20 days, and within not less than 30 days after such publication it shall be submitted to the qualified electors of such city at a general or special election," and, if it shall be ratified by a majority of those voting, "it shall thereafter be submitted to the legislature for its approval or rejection as a whole, without power of alteration or amendment," \* \* \* and, if approved by a majority vote of the members elected to each house, it shall become the charter of such city," etc.

Att'y. Gen. George A. Johnson and Stanley, Stoney & Hayes, (Hunsaker & Britland, of counsel,) for the People. Jas. P. Goodwin, M. A. Luce, and H. L. Titus, (Garber, Bolt & Bishop, of counsel,) for respondent.

Fox, J. This action is brought under chapter 5, tit. 10, pt. 2, of the Code of Civil Procedure, to remove the respondent from the office of mayor of the city of San Diego, it being charged that respondent has usurped and intruded into and unlawfully exercises such office. Judgment went for defendant on demurrer to the complaint, and from such judgment the plaintiff appeals. The allegations of the complaint, necessary to be considered here, are: (1) That the city of San Diego is, and at all times mentioned in the complaint has been, a municipal corporation of the fourth class, organized, created, and existing under and by virtue of the general law providing for the organization, incorporation, and government of municipal corporations, approved March 13, 1883, and the act to provide for the classification of municipal corporations, approved March 2, 1883. (2) That the defendant claims to have been elected mayor of said city at a pretended election held on the first Tuesday after the first Monday in April, 1889, and at which pretended election he received a majority of the votes cast for mayor; and that claiming title to the office by virtue of such pretended election, and not otherwise, or by other authority, he has obtruded himself into, and ever since held, and now usurps, the said office of mayor, and exercises the functions and duties thereof. (3) It then proceeds to show that said pretended election was one claimed to have been held under and in pursuance of the provisions of a charter pretended to have been framed and adopted under section 8, art. 11, of the constitution, and approved by a joint resolution of both houses of the legislature, and sets out facts which show that such charter was not in fact framed or adopted in accordance with the

requirements of said, or any, section of the constitution, and points out numerous defects in the proceedings, by reason whereof it is claimed, and if the allegations of the complaint are true, and by the demurrer they are admitted to be true, it is correctly claimed that such pretended charter never did become a valid law, and furnished no authority for the holding of such election. The complaint is demurred to on two grounds: (1) That there is a defect of parties defendant, in that the city of San Diego is a necessary and proper party defendant; (2) that the complaint does not state facts sufficient to constitute a cause of action.

1. The authorities are by no means uniform upon the first point made upon this demurrer. Several cases are cited from other states, where proceedings, which in effect would determine the legal existence of a municipal corporation, have been sustained, without making the municipality a party; and that where, as here, the question was directly raised. But we think that the weight of authority in sister states and in England, and the better reasoning, is that whenever the proceeding is such as must test and determine the validity of a municipal charter as such, the municipality, real or pretended, must be made a party. It may be otherwise where the only effect of the proceeding will be to determine the right of some particular person to exercise certain powers under the charter. In this state we are cited to no case, and know of none, where the question of corporate existence was involved, and the question of parties was raised, in which the alleged corporation was not made a party in the first instance, or if not, the court required it to be done, except it be that of *People v. Stanford*, 77 Cal. 360, 18 Pac. Rep. 85,<sup>1</sup> and that was a case of a private corporation. In that case it was expressly held that it would be different in the case of a municipal corporation; that in such a case "it would seem to be proper that a defendant claiming to be a city, \* \* \* and acting as such, should be made a party in an action to determine the validity thereof." In *People v. Riverside*, 66 Cal. 288, 5 Pac. Rep. 350, the municipality was made a party, and held to be the proper party to the proceeding. In *People v. Flint*, 64 Cal. 49, a case of a private corporation, the question was, as here, whether there ever had been a legal incorporation, and the court expressly held that the pretended corporation must be made a party defendant. In *Brooks v. Fischer*, 79 Cal. 173, 21 Pac. Rep. 652; *People v. Parks*, 58 Cal. 624; and *People v. La Rue*, 67 Cal. 526, 8 Pac. Rep. 84, the question of corporate existence was incidentally involved, but in neither of them was any question made as to whether or not the proper parties were before the court. In *People v. Henshaw*, 76 Cal. 436, 18 Pac. Rep. 413, and *Ex parte Ah You*, 82 Cal. 339, 22 Pac. Rep. 929, the question of corporate existence was not involved. In this case, while nominally the proceeding is to oust the defendant Gunn from the office of mayor, it is apparent on the face of

the complaint that the real object of the action is to determine the right of the city of San Diego to exercise the franchise of a municipal corporation under a freeholders' charter claimed to have been adopted by the people, and approved by the legislature. The complaint attempts to make no case against the defendant, except as it is made through the alleged invalidity of such charter. This being its purpose, we are of opinion that the municipality was a proper and necessary party defendant to the proceeding, and hold that the demurrer was properly sustained on that ground. This conclusion necessarily leads to an affirmance of the judgment of the court below, but as new proceedings may be instituted, making the city a party, we deem it proper to state our views on the second ground of the demurrer.

2. In order to show that the charter of 1889 never did become a valid law, and supersede the law under which the corporation theretofore existed, and consequently that the election of April, 1889, was illegal and void, the complaint alleges, (1) that instead of causing the board of freeholders to be elected by the qualified voters of said city, the city council caused them to be elected by only a portion of said qualified voters; that in calling the election therefor a portion of the city, containing a population of more than 1,200, including 300 qualified voters, was omitted, and given no voice in said election; (2) that when such proposed charter was prepared, no copy or duplicate thereof was delivered or returned to the mayor, as required by the constitution; (3) that no copy of such charter was delivered or returned to the recorder of the county, as required by the constitution; (4) that said proposed charter was not published in two daily papers of general circulation, or in any daily or other paper of said city for at least 20 days, as required by the constitution; (5) that the election for the adoption and ratification of said proposed charter was called and held less than 30 days after the completion of such publication, contrary to the requirements of the constitution. It may be that none of these alleged defects exist in fact, but, for the purposes of the demurrer, these allegations must be taken as true. So taking them, the complaint very clearly states facts sufficient to constitute a cause of action, if brought against the proper party. Responsive to this ground of demurrer the respondent claims,—*First*, that the alleged defects are insignificant and immaterial; and cites many authorities, which, it is claimed, support that proposition. But the misfortune is that they are not in point. They all relate to procedure under statutes held to be merely directory. In this case, the procedure was under constitutional provisions expressly declared to be mandatory and prohibitory. Under such provisions, the mode is the measure of power. The acts required by the constitution to be performed are conditions precedent, and necessary to the validity of the legislation which it authorizes, whether that legislation be by the people of a municipality, under article 11, or by the senate and assembly, under article 4

<sup>1</sup> 19 Pac. Rep. 698.



The city of Riverside attempted to incorporate under the general statute on that subject. With reference to it this court held that "the right to enjoy and exercise the franchise of a municipal corporation depends on a compliance with the provisions of the statute which authorizes the organization of such corporations." *People v. Riverside*, 66 Cal. 291, 5 Pac. Rep. 850. And this in discussing alleged omissions similar to and not more important than those alleged to have taken place in the present case. If this strict compliance is required with reference to the provisions of a statute passed by the legislature, around which are thrown none but the ordinary safeguards of construction, which, in fact, are to be construed liberally for the accomplishment of the object and the promotion of justice, how much more strict should be the compliance with the requirements of a constitution, which on its face declares that all its provisions are mandatory and prohibitory, unless otherwise expressly provided? We are not at liberty to say that any constitutional prerequisite to the validity of a law is of no practical service, or to consider the policy of a provision, when its language seems plain and positive. *Weill v. Kenfield*, 54 Cal. 117. The language of Judge Cooley in his work on Constitutional Limitations, (page 78,) quoted and adopted in *State v. Rogers*, 10 Nev. 253, is directly in point, and shows that, even in the absence of a clause making its provisions mandatory and prohibitory, the courts will not hold the provisions of a constitution to be directory or unessential, but will rather hold that wherever it prescribes a mode, that mode is the measure or power. *Second*. It is claimed by respondent that the question of whether or not these alleged defects exist, or the proceedings in the framing and adoption of the charter were regular, has been conclusively determined by the legislature in its preamble to the joint resolution of the two houses in approving the same; and authorities are cited which are claimed to support this contention. But in this case, as in the other, the authorities are not in point. They relate to matters of legislative discretion, and to cases where the legislature is authorized to pass laws only in certain contingencies, such as acts for the creation of new counties, when the constitution provides that no county shall be created with less than a certain prescribed population and the like. In such cases it has been held that the determination of the legislature upon the question of whether the contingency had happened which authorized the passage of the act was conclusive. And in all cases, it may be said that unless there is a constitutional inhibition the determination of the legislature upon the question of the policy of the passage of an act is conclusive. But even in such cases, the courts are not concluded from inquiring into the regularity and constitutional sufficiency of the mode adopted by the law-maker in the passage of the act. In this case the legislature was not the law-maker; it did not frame or pass the law. It simply passed a resolution approving it. It was not charged with

any duty, and to it was not delegated any power, either in framing or adopting the law. Its act was not the enactment of a statute. It was not called upon or authorized by the constitution to adjudicate upon the question of whether the law-makers, the municipal authorities and people of San Diego, had proceeded regularly in the framing and adoption or passage of the law or not. That was a judicial question the determination of which belonged to the judicial department of the government, and to meet which the makers of the law, those upon whom the proceedings prescribed by the constitution devolved, were bound to proceed at their peril. The legislature knew nothing, and under the law could know nothing, of the charter, until it was presented to the two houses, not for enactment, but for approval, by those upon whom the power and duty devolved of framing and adopting it. When so presented, it brought with it the presumption of regularity in what had gone before, and the legislature exercised, as to it, simply the same power which is delegated to the governor with reference to bills framed and passed by the legislature, that of approval or rejection. It had no more judicial power to inquire into and determine the regularity or sufficiency of the precedent steps in the history of the framing and adoption of the measure, than the governor would have to question, inquire into, and adjudicate upon, the history of a legislative bill, when it came to him duly certified for his approval or rejection. The preamble neither added to nor detracted from the resolution of approval. The conditions precedent, which are here alleged to have been violated, were all acts to be performed by the law-maker, not facts to be found by the bodies whose sole function was to approve or reject the law. It now remains for the courts to determine, since the matter is disputed, upon proof of the facts, whether these conditions were performed or not. We are not prepared to say that the first of the objections above noted under this point would of itself be sufficient to defeat the charter, if all the other requirements of the constitution have been complied with. The appointment of freeholders may be likened to the selection of a committee to prepare and draft an instrument to be presented for the consideration and approval or rejection of the body making the appointment. The result of their labors is without force or value, until, having been duly authenticated, and so hedged about as to protect it in two separate places from alteration or change, then accurately published in the manner and for the time required by the constitution, so as to give it the largest publicity, and bring it home to the attention of the people to be affected thereby, and 30 full days after such publication given to the people to digest the same, and deliberate thereon, and then, at an election at which all the electors to be affected by its provisions are given an opportunity to vote, it has been approved by a majority of the voters voting at such election. Then, and not till then, has it been given such vitality as to entitle it to

he presented to the legislature. If there approved by a majority vote of the members of each house, it then becomes the organic law of the municipality, "superceding any existing charter, and any amendments thereof, and all special laws inconsistent with said charter." If all the subsequent proceedings have been in conformity to the constitution, it may then be too late to attack the charter on the ground that provision had not been made for the opening of polls in a given precinct of the city, at the election of the freeholders who drafted the charter, especially if it be not shown, and it is not here contended, that the number of voters thus deprived of the opportunity to vote at that election was sufficient to have changed the result. Even then it is questionable whether the attack ought not to have been made before the submission of the charter, and in the form of proceedings to contest the validity of the election. But the other points of objection to the validity of this charter are, in our judgment, if shown to be founded upon fact, vital, and for that reason the demurrer on this ground should have been overruled, and the defendant put to answer. The demurrer being sustained, however, on the first ground, the judgment must be affirmed, and it is so ordered.

We concur: BEATTY, C. J.; PATERSON, J.

McFARLAND, J. I concur in the judgment, and in all that is said in the opinion of Mr. Justice Fox, except in these particulars: (1) I think that the language of the opinion is too strong on the subject of strict compliance with the provisions of the constitution relating to freeholders' charters. Because the constitution declares the provisions to be mandatory, it does not follow that a substantial compliance with them is not sufficient. The proceedings for the adoption of a charter will probably never be so literally perfect that a critical and hostile eye cannot detect in them some slight defect or irregularity, which ought not to be considered fatal. Whether or not there has been a sufficient compliance with the constitution in any particular case must depend on the particular facts of that case. In the case at bar, some of the alleged failures in the proceedings are clearly material. (2) As to the alleged failure to give certain citizens an opportunity to vote for the freeholders, I think that matter should stand upon the same footing as other elections; that is, that it should be shown that the votes of those excluded might have changed the result. In all other respects, I concur in the opinion of Justice Fox.

85 Cal. 216

GIBSON v. SUPERIOR COURT. (No. 13,642.)

(*Supreme Court of California.* Aug. 2, 1890.)

CERTIORARI—WHEN LIES—SETTING ASIDE DEFULT.

1. Though the court has no jurisdiction to extend the time to answer beyond that allowed by statute, where such extension is attempted to be made, and judgment by default is thereafter entered, the court has jurisdiction to set aside such default, and plaintiff's remedy thereupon is by appeal, and not by *certiorari*.

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2. On petition for a writ of *certiorari* to such ruling the supreme court has no jurisdiction to set aside the order of the trial court granting an extension of the time to answer.

In bank. *Certiorari* to superior court, city and county of San Francisco; J. P. Hoge, Judge.

For proceedings on writ of review, see ante, 152.

*Welker & Welker*, for petitioner. *Smith & O'Keefe* and *J. H. Moore*, for respondent.

WORKS, J. This is an application for a writ of *certiorari*. The petitioner obtained a judgment by default in the court below. The court subsequently, on application of the defendant, set aside the default. Thereafter the petitioner moved the court to vacate the order last named, and his motion was denied. He claimed in support of this petition that his default was properly taken because the time allowed by statute for the defendant to answer had expired, and also the time for which the court below might have extended the time, and that the court had made an order extending the time to answer beyond the time allowed by law. It is insisted that the court below had no power to extend the time beyond the number of days allowed by the statute, and that therefore it had no jurisdiction to set aside the order defaulting the defendant. But this does not follow. It may be conceded that the court has no jurisdiction to extend the time within which to answer beyond the time fixed by the statute, but it had jurisdiction to set aside a default, whether such extension of time has been granted, or attempted to be granted, or not. If the default was set aside on the ground that the time within which to answer had been extended, and the court had no jurisdiction to grant such extension, the order setting aside the default, and the subsequent order denying the petitioner's motion to vacate the same, might for that reason have been erroneous, but there was no want of jurisdiction in the court to make the orders. The remedy of the petitioner, if he has any, is by appeal, not by *certiorari*. We are also asked to set aside the orders made by the court below extending the time within which the defendant might answer, but this we cannot do in a proceeding of this kind, and if it were done it would serve no useful purpose. If the petitioner should appeal his case, and it should appear in the transcript that the order extending time went further than the law allowed, he would be entitled to the benefit, if any, resulting from such facts on the appeal. Writ and motion denied.

We concur: FOX, J.; SHARPSTEIN, J.; McFARLAND, J.; THORNTON, J.

85 Cal. 134

BEARDSLEY v. FRAME *et al.* (No. 12,199.)

(*Supreme Court of California.* July 31, 1890.)

PROOF OF JUDGMENT—ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. Under Code Civil Proc. Cal. §§ 911, 912, a justice's docket containing a minute of a judgment is sufficient proof of the judgment to justify the action of the constable in taking property un-

der execution thereon, where such docket is introduced in an action on the constable's bond for damages for the seizure.

2. Where the inventory filed with an assignment omits certain of the assignor's property and also some of his debts, and such omissions were not made in good faith, the assignment is void under Civil Code Cal. §§ 3461, 3465, declaring it void unless an inventory is filed specifying each creditor, and the amount due him, and all the debtor's property not exempt from execution.

Commissioners' decision. Department 1. Appeal from superior court, Del Norte county; JAMES E. MURPHY, Judge.

*L. F. Coburn and Sawyer & Burnett*, for appellant. *Lucas & Miller*, for respondents.

HAYNE, C. This was an action against a constable and the sureties on his official bond for damages for the seizure of certain personal property claimed by the plaintiff as assignee for the benefit of creditors of one Wicktor Ohlson. The defendants had a verdict and judgment, and the plaintiff appeals. The defendant justified under two writs of execution, one of which was in favor of one Hazletine, and the other of one Hobbs. The proceedings in Hazletine's suit were ruled out, but the proceedings in the Hobbs suit were admitted, and we think properly so. The objection made to them is that there was no proof of the judgment. But the justice's docket containing a minute of the judgment was read and, this was sufficient evidence of the judgment. Code Civil Proc. §§ 911, 912. And if the constable acted under execution upon a valid judgment it was a sufficient justification, and shows that he was not a trespasser. So far as this action is concerned, therefore, it does not matter that the Hazletine judgment was ruled out. But it is contended that at the time the Hobbs judgment was rendered the judgment debtor had already assigned his property to the plaintiff, and this brings up the question of the validity of the assignment. It must be assumed in support of the verdict that the jury found that it was not valid, and we are unable to say upon the record before us that this finding can be disturbed. In the first place it is questionable whether the purpose for which the assignment was made is one sanctioned by law. The statute provides that "an assignment for the benefit of creditors is void against any creditor of the assignor not assenting thereto \* \* \*

(5) If it confer upon the assignee any power which, if exercised, might prevent or delay the immediate conversion of the assigned property to the purposes of the trust." Civil Code, § 3457. And the deed of assignment provides, among other things, that the assignee shall "run the saw and stave mill belonging to the said party of the first part, and saw lumber and staves, employing men to do so, and sell the same, shipping the same to San Francisco, or otherwise, as to the trustee shall seem best, and after paying the necessary expenses therefor, to apply the balance of the receipts arising from said sales to the payment of all of the said debts then due," etc. But there is some evidence tending to show that Hobbs consented to the assignment although he did not sign

the deed, as most of the other creditors did, and therefore we do not rest our opinion upon this ground. We think, however, no sufficient inventory was filed. The statute provides that the debtor must file an inventory specifying "all the creditors of the assignor," and "the sum owing to each creditor," (Civil Code, § 3461,) and that unless such an inventory, or a specified substitute, of which there is no question here, be filed, the assignment shall be void, (Id. § 3465.) The answer set up the fact that the inventory filed was "false and untrue," in that it omitted debts due to Hazletine and Hobbs. The debt of Hobbs was omitted altogether from the inventory, and, while the name of Hazletine appears there, the evidence shows that part of the sum due to him was omitted. The evidence also showed that a debt was due to Snow & Lane of \$300, which does not appear on the inventory. And the debtor himself said, when the inventory was presented to him, "I do not see all of my creditors." The statute further provides that the inventory shall contain a list of all the property of every kind not exempt from execution, etc., (see section 3461, subd. 7.) and there is evidence tending to show that some of the debtor's property was omitted from the list. These omissions of debts and property are not merely trivial matters, but are matters of substance; and, if it be assumed that they were made "in good faith," it is open to question whether the assignee can claim that he stands in the same position as if the statute had been complied with. But, however this may be, it must be assumed from the verdict that the jury did not believe that the omissions were made in good faith; and we cannot say upon the evidence that this finding was unwarranted, there being some evidence of tampering with the inventory after it was filed, which, if it be assumed to be true, as it must at this stage of the proceedings, tended to cast suspicion over the whole transaction. In the view we have taken the other questions are immaterial. It is proper to add, however, that if Hazletine has a valid judgment it might affect certain questions as to the distribution of the proceeds of the execution sale, but would not be material here. We therefore advise that the judgment and order appealed from be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

85 Cal. 174

PEOPLE V. STEWART. (No. 20,655.)

(Supreme Court of California. Aug. 1, 1890.)

ASSAULT WITH INTENT TO RAPE—EVIDENCE—  
OTHER OFFENSES.

On an indictment for assault with intent to commit rape on a female under the age of consent, the admission of evidence that defendant had been guilty of lewd and immoral conduct with other young girls is reversible error.

Department 2. Appeal from superior court, San Diego county; JOHN R. AITKEN, Judge.

*William Darby*, for appellant. *Geo. A. Johnson*, Atty. Gen., for the People.

**McFARLAND, J.** Defendant was indicted for and convicted of the crime of an assault with intent to commit rape upon the person of one Myrtle Collins, "a female child, under the age of fourteen years." He appeals from the judgment and from an order denying him a new trial. The appellant relies, among other grounds for reversal, upon the alleged error of the trial court in admitting evidence tending to show lewd, immoral, and indecent conduct of appellant with persons other than said Myrtle Collins, and tending to show lewd acts and occurrences between appellant and such other persons. The evidence of the prosecution, with the exception of the testimony of Myrtle Collins herself, consisted almost entirely of the testimony of five or six witnesses to the effect that appellant had been guilty of lewd conduct with several other young girls, and tending to show that he endeavored to corrupt said other girls, and that he had sexual intercourse with some of them. This evidence was objected to by appellant, who took proper exceptions to its admission. The admission of this evidence was clearly reversible error. There is no general rule more firmly settled than that the prosecution cannot prove the commission by a defendant of other offenses for the purpose of increasing the likelihood that he committed the particular offense with which he is charged. *People v. Lenon*, 79 Cal. 628, 631, 21 Pac. Rep. 967; *People v. McNutt*, 64 Cal. 116; *People v. Barnes*, 48 Cal. 551. There is an exception to the rule which allows proof of other acts in some exceptional cases, in order to show the intent with which the act charged was done, but this exception does not apply to the case at bar. Moreover, the precise point was decided in *People v. Bowen*, 49 Cal. 654. In that case the court say: "At the trial the court allowed the prosecution, against defendant's objection, to introduce in evidence the declarations of defendant concerning his misconduct with other young girls. The attorney general admits that this was error, and we agree with the attorney general. Judgment and order denying a new trial reversed, and cause remanded for a new trial." And for this reason the same order must be made in the case at bar. And in this case we do not understand the attorney general as seriously insisting that the ruling of the court on this point was not erroneous.

We see no need of examining the other points in detail. We may say, however, that we think the indictment sufficient, and that the rulings of the court in giving and refusing instructions were, taken together, not erroneous. The statute formerly made the age of consent 10 years. An amendment making that age 14 years took effect on May 15, 1889. The prosecuting witness was 14 years old on May 18th of that year. We take these figures to be correct because they are so stated in the instructions and in the brief of appellant. Most of the acts of appellant, as testified to by the prosecuting witness, occurred

before May 15th, and while she was, under the law as it then stood, of the age of legal consent. She testified, however, to some of such acts as occurring between the 15th and 18th, when she could not legally consent. Perhaps, therefore, the instructions should more clearly distinguish those two periods. If appellant did the acts charged between the 15th and 18th of the said month he would be guilty whether the prosecuting witness actually consented or not; but if they were committed before the 15th or after the 18th, then, in order to constitute the offense charged, some force or intimidation would have to be shown, or some want of consent on her part. Judgment and order reversed, and cause remanded for a new trial.

We concur: **BEATTY, C. J.**; **SHARPSTEIN, J.**

(85 Cal. 63)

**FRANKLIN v. SOUTHERN CAL. M. R. Co.**  
(No. 13,552.)

(*Supreme Court of California*. July 28, 1890.)  
**CARRIERS—INJURIES TO PASSENGERS ALIGHTING FROM TRAINS.**

A passenger on a steam motor railway notified the conductor that she desired to alight at a certain station, but was carried beyond it, and upon a switch, where she was allowed to alight. The engine, meanwhile, had been disconnected from the coach, switched onto the main track, and was coming back to connect with the other end of the coach for the return trip, when it struck and injured plaintiff, who was crossing the track to go to her home. No special warning was given, and several witnesses testified that no bell was rung, or whistle sounded. *Held*, it was eminently a case for the jury both as to negligence and contributory negligence, and a verdict in plaintiff's favor would not be disturbed.

In bank. Appeal from superior court, San Bernardino county; **JOHN L. CAMPBELL, Judge.**

*Rolfe & Freeman*, (H. M. Willis, of counsel) for appellant. *Waters & Gird*, for respondent.

**Fox, J.** Action for personal injuries. Verdict and judgment for \$1,750 in favor of plaintiff, from which defendant appeals, the case coming up on the judgment roll, which includes the evidence embodied in a bill of exceptions. On the trial it was admitted that the defendant, a corporation, owns and operates a motor railroad running from San Bernardino to Colton. The proof shows that the road is operated with cars propelled by steam-power. Two points are presented and insisted on upon the appeal: (1) That the court erred in denying defendant's motion for a nonsuit; (2) that the evidence is insufficient to justify the verdict.

1. It was shown on behalf of plaintiff that on the morning of June 30, 1888, she entered the car of defendant at San Bernardino as a passenger to be transported thence to Colton. Owing to some difficulty in making change her fare was not paid in advance, but it was paid at Colton before she attempted to alight from the car. No question is made but that she was a regular passenger, and had all the rights of transportation, care, and protec-

tion that are due to any passenger traveling by the railroad. The road of defendant enters Colton from the north by way of Conn street. At the north-west corner of Conn and Front streets, commonly called "Thompson's Corner," was situated the office of the company for the town of Colton, and that corner was proved, and in argument is conceded, to have been the usual stopping-place for the car. The conductor was notified by plaintiff and her escort of her desire to get off the car at that place. The track of the road continues south along Conn street, across First street, and then turns to the west, on a strip of land known as the "Railroad Reservation," being a strip of open ground lying between First street and the track of the Southern Pacific Railroad Company. This entire strip of ground is used much as a street, the track of defendant's road traversing its entire length, and the place being open in common with Front street, and used by the public in driving vehicles over it to and from the Southern Pacific Railroad depot. At about 140 feet west of the west line of Conn street there is a platform along the southerly side of the track of defendant's road, where the cars of defendant stop to discharge and receive passengers to and from the Southern Pacific depot. About 240 feet west of this platform there is an automatic switch, by means of which the cars of defendant, without stopping, are switched off onto a track running at a distance of between 3 and 4 feet north of and parallel with the main track for a distance of about 180 feet, where it again connects with the main line, which continues still to the west about 90 feet, and enters an engine-house also belonging to or used by defendant. These distances are computed from a diagram accompanying the transcript. Reaching Colton defendant runs its train onto the side track, slackens its speed, uncouples without stopping, and runs the engine forward onto the main track, the brakeman stopping the coach on the side track. Sometimes the engine runs into the engine-house, and sometimes it stops on the main track without going into the engine-house, but it always comes to a stop, and usually remains some little time oiling up, or the like. It then runs down the main track to the eastern end of the switch, runs up the side track, and couples onto the coach, when the train is ready for its return trip. It will thus be seen that this point west of the platform is practically the switching yard of the defendant. When plaintiff and her escort entered the car at San Bernardino, they notified the conductor that they wished to get off at Thompson's Corner. Upon approaching that point, observing that the train did not begin to slow down, they rose from their seats and signaled the conductor, when he asked them if they wished to get off there. To this they answered in the affirmative, but by that time the car had passed that station, and the conductor said he would stop at the next station, which was the platform aforesaid. The train, however, did not stop at the platform, but was run forward and onto the side track, where the engine was un-

coupled, without stopping, and run forward as usual onto the main track west of the switch, the coach being stopped by the brakeman about midway between the two ends of the switch or side track. At that point there was no platform, on either side, for the accommodation of passengers getting off or onto the cars. The coach was divided into two compartments by a dead-wall crossing the same from side to side. The plaintiff and conductor were in the rear or most easterly compartment, and the brakeman on the platform at the west end of the car. From the rear compartment no person could see anything to the west, on either the main or side tracks. As the coach came to a stop the plaintiff rose, and, having in the mean time found some coin, paid the conductor her fare, receiving some small change in return, and immediately went to the rear door and alighted on the south side, her home being across all the tracks of both roads, on the south side, and some little distance therefrom. Her escort stopped a moment to speak to the conductor, and then followed her. As he started to step down from the platform, by leaning forward and looking outside the coach to the westward, he saw the engine coming down the main track and very near to plaintiff, who was at the moment walking away from the platform, and about to cross the main track, less than three feet from the side of the coach. He gave a warning outcry, and simultaneously the plaintiff felt the motion of the atmosphere made by the approaching engine, and, casting her eyes in that direction, saw the engine almost immediately upon her. She threw herself backward to avoid it, but it was too late, and she was struck down by the engine, and dragged several feet, and rolled over once or twice, receiving personal injuries, for which damages are claimed in this action. Some of the witnesses on the part of the plaintiff testify that no bell was rung, or whistle sounded. All testify that they heard none; and there is no pretense that the plaintiff was warned or cautioned by any person of the approach of the engine, or against getting off on that side. The engine made no stay on this occasion at the west end, but, as soon as it had passed the switch, and come to a halt, reversed, and came immediately back down the main track. But a few moments intervened between the time the coach came to a halt, and the time plaintiff was struck by the engine. The evidence presenting this state of facts, at the close of plaintiff's case in chief, defendant moved for a nonsuit on the ground that plaintiff had failed to prove a sufficient case for a jury; that the evidence failed to show negligence on the part of the defendant; and on the further ground that the evidence did show contributory negligence on the part of plaintiff, which was the proximate cause of the injury she received. The court denied the motion, and defendant excepted.

There was no error in denying this motion. The evidence tending, as it did, to prove the material allegations of the complaint, it was a proper case for the jury. *Alvarado v. De Cells*, 54 Cal. 588; *Leahy v. Railroad Co.*, 65 Cal. 150, 3 Pac. Rep. 622.

Negligence is not absolute, but is relative to the circumstances surrounding the case. *Richardson v. Kler*, 34 Cal. 63; *Needham v. Railroad Co.*, 87 Cal. 410. It always relates to some circumstance of time, place, and person, and whether there was contributory negligence in any given case is generally a question for the jury to pass upon and determine. *Jamison v. Railroad Co.*, 65 Cal. 593. It is generally an inference from facts and circumstances which it is the province of the jury to find, and nonsuit on the ground of contributory negligence should only be granted when, giving the plaintiff the benefit of all controverted questions, it is apparent to the court that a verdict in his favor must be set aside. *Schierhold v. Railroad Co.*, 40 Cal. 447. The cases cited by appellant in support of the motion are not parallel cases. They are most of them, if not all, cases of strangers, or persons acting independently, and having no relation to the defendant; cases of persons towards whom the defendant owed no duty other than that which all persons owe to each other under like circumstances of meeting by chance,—not cases involving the duties and obligations of a carrier to a passenger. Carriers owe more than an ordinary duty to their passengers, (*Jamison v. Railroad Co.*, *supra*;) and negligence cannot be imputed to a passenger, such as this plaintiff was, for that she did not anticipate culpable negligence on the part of the carrier. She had a right to act on the presumption that the employees of the defendant would use the degree of care which persons of ordinary prudence are accustomed to employ under the same or similar circumstances. *Robinson v. Railroad Co.*, 48 Cal. 421. In this case the defendant had negligently and wrongfully carried the plaintiff beyond and away from all its usual stopping places, where it was accustomed to receive or discharge passengers, into what was practically its switching-yard, where there were no accommodations for passengers to get on or off its cars, and to a point where defendant knew, though the plaintiff may not have known, that there was special risk and hazard. Under such circumstances, it was defendant's duty to use every precaution for her protection. Whether it did so or not was a proper question to be submitted to the jury; and it was equally for the jury to determine whether she, with such knowledge as she possessed of the peril of the place, and with the presumptions she was entitled to indulge as to the degree of care which the employees of defendant would exercise for her protection, was herself guilty of negligence which proximately contributed to her injury.

2. We have carefully examined the evidence, and find that there is evidence to support the verdict. Indeed, on all the most important points in the case, it seems to be without substantial conflict. The judgment cannot, therefore, be disturbed on the ground of insufficiency of evidence. Judgment affirmed.

We concur: WORKS, J.; PATERSON, J.; McFARLAND, J.; SHARFSTEIN, J.

## PHELAN v. DE MARTIN. (No. 12,761)

(Supreme Court of California. Aug. 18, 1890.)

## SALE TO MORTGAGEE—EVIDENCE.

In an action to quiet title defendant alleged that plaintiff made use of his power as mortgagee to compel her to convey the land to him for an inadequate consideration. The evidence showed that plaintiff held mortgages for \$196,000 on the land, which was worth \$215,000, and that, having foreclosed the mortgages and procured an order of sale, he paid defendant \$19,000 for her equity of redemption; that she was allowed the opportunity to procure money to redeem; and that she was not induced to sell by any false representations of plaintiff, but did so willingly, and believing it to be for her best interests. *Held*, that the transaction was fair, and a valid sale.

In bank. Appeal from superior court, Santa Clara county; SPENCER, Judge.  
*Geo. D. Collins*, for appellant. *D. M. Deluas*, for respondent.

McFARLAND, J. This is an action to quiet title to certain lands in Santa Clara county. Judgment went for plaintiff, and defendant appeals from the judgment upon the judgment roll and a bill of exceptions. The lands in contest were conveyed by deed to plaintiff by defendant in November, 1881. From that time until the commencement of this action, September 29, 1887, plaintiff has been in possession of the premises. The main issue in the case is this: Defendant claims that when she made the deed in November, 1881, the plaintiff held mortgages against the property for large amounts, some of which had been foreclosed, with an order of sale issued, and a sale advertised; that plaintiff used his relation of mortgagee and the power of his mortgages to force her to sell her equity of redemption; that she was poor, and unable to raise the necessary redemption money, and that plaintiff took advantage of these circumstances to compel her to sell for an inadequate consideration; that under this stress she did sell for an inadequate consideration; and that therefore the sale was void. We do not see that there is any important question of law really involved in this case. Admitting that all the contentions of appellant about sales from mortgagors to mortgagees are law,—that is, that they must be shown to be fair, free from undue influence, oppression, or fraud, and for adequate prices,—still the findings of the court, supported by the evidence, bring the sale in this case within the law. The land was incumbered with mortgages to the extent of \$196,000, and the consideration paid defendant was \$19,000. The court finds, among other things, as follows: "That at the time of said conveyance from Francisca L. de Martin to plaintiff, and for a long time before, said Francisca fully understood the character, value, and condition of said property, and was capable of acting understandingly and intelligently in relation thereto, and did so act in and about the property, and said conveyance thereof, and under the independent advice of her attorney, who was skilled in the law, and who did so counsel and advise her honestly, faithfully, impartially, and for her best interests; that plaintiff did not purchase said secu-

titles for the purpose of oppressing said Francisca, or for the purpose of obtaining said premises for less than their fair market value: \* \* \* that plaintiff did not make or cause to be made any false or fraudulent representations to said Francisca in relation to said property, or importune her to make said conveyance; that said Francisca was entirely willing to make said conveyance for said sum of \$19,000, and made the same without importunity from any person, under the belief that it was for her best interests; that said sale by said Francisca to plaintiff for said \$19,000 was greatly to her benefit and advantage, and that said \$19,000 and other property owned by her would have been lost to her if said property had been sold at sheriff's sale under said judgment; that Francisca was given full opportunity to obtain loans upon said property or to sell the same to other persons, if persons could have been found to make such loan or purchase, and that for that purpose plaintiff caused two postponements of the time for the sheriff's sale under said judgments." It is further found that \$215,000, the amount of the liens, and the \$19,000 paid defendant, was a fair value of the property at the time of the conveyance; and, indeed, it is quite apparent from the evidence that said amount could not have been raised on the property from any other source. It is quite clear that if the findings are sustained by the evidence the judgment must stand, and that they are so sustained we have no doubt. An opinion on that question would be mainly a restatement here of the evidence contained in the transcript, which would be a profitless and unnecessary labor. We do not think that section 2889 of the Civil Code was intended to absolutely restrain or does absolutely restrain a mortgagor from subsequently conveying all his title and interest in the mortgaged premises. The judgment is affirmed.

We concur: BEATTY, C. J.; SHARPSTEIN, J.; THORNTON, J.; WORKS, J.; FOX, J.; PATERSON, J.

85 Cal. 203

*Ex parte* CLARK. (No. 20,704.)

(Supreme Court of California. Aug. 1, 1890.)

HABEAS CORPUS—CONVICTION OF ANOTHER OFFENSE PENDING FORMER IMPRISONMENT.

Petitioner was convicted in the superior court of a felony, and sentenced to the state-prison. Before the expiration of his term he was brought out on the order of the superior court of another county, charged before a magistrate with murder, and afterwards duly tried, convicted, and sentenced to be hanged. While in jail awaiting execution of the sentence he applied for the writ of *habeas corpus*. *Held*, that after conviction it was too late for him to claim that the superior court had no power to cause him to be brought out of the state-prison for trial for another offense, and that the warden of such prison was entitled to his custody until he had served his term.

In bank. On application for writ of *habeas corpus*.

Carroll Cook and J. E. Foulds, for petitioner. Geo. A. Johnson, Atty. Gen., for respondent.

WORKS, J. This is an application for a writ of *habeas corpus*. The petitioner was convicted of a felony, and sentenced by the superior court of the county of San Diego to imprisonment in the state-prison at Folsom for a term of years. While so imprisoned he was brought out of the state-prison upon an order of the superior court of the city and county of San Francisco, taken before a magistrate, charged with the crime of murder, and held to answer to the superior court. An information was filed against him by the district attorney. He was tried, convicted, sentenced to be hanged, and is now in the jail of the city and county of San Francisco, awaiting the execution of this sentence. It is contended by the petitioner that the superior court of the city and county of San Francisco had no power to cause him to be brought out of the state-prison for trial for another offense; that the warden of the state-prison is entitled to his custody until the expiration of the term of his sentence to that prison; and that therefore he is entitled to be discharged from custody, or returned to the custody of the warden of the state-prison. The sheriff makes return of the judgment of the superior court of San Francisco, above mentioned, and that he holds the petitioner by virtue of a commitment thereunder. This, it seems to us, is a complete answer to the writ. No matter whether the superior court of San Francisco had the right to order the petitioner out of the custody of the warden of the state-prison or not, he was produced. An information charging him with an offense within the jurisdiction of that court was filed, and the court thereby became and was vested with the power and jurisdiction to try him, and its judgment is valid and binding. Therefore he cannot be heard at this late day to claim, in a proceeding of this kind, that the sheriff has no right to hold him under such judgment. Conceding that the warden of the state-prison might have asserted his right to hold the petitioner under the commitment from the superior court of San Diego county, it is clear to us that the petitioner cannot escape the consequences of a valid judgment rendered against him by showing that another valid judgment had previously been rendered, which had not been fully executed. Writ denied.

We concur: BEATTY, C. J.; THORNTON, J.; SHARPSTEIN, J.; FOX, J.; MCFARLAND, J.; PATERSON, J.

85 Cal. 171

PEOPLE V. HONG TONG. (No. 20,653.)

(Supreme Court of California. Aug. 1, 1890.)

ROBBERY—EVIDENCE—CORROBORATION—INSTRUCTIONS.

On an indictment for robbery the only witnesses for the state testified that while one of them was paying money to the other defendant grabbed it and ran away. Witnesses for defendant testified that at the time of the alleged robbery he was sick, and confined to his bed. The court charged that there might be "another corroborating circumstance in the evidence of flight," and that flight was "a corroborating circumstance which, with other evidence, might be sufficient to justify a verdict against defendant." *Held*, that



this was misleading, as the witnesses were not corroborated by evidence of defendant's flight, because no other witness than they testified to his flight.

Appeal from superior court, Los Angeles county; J. W. MCKINLEY, Judge.

*Brunson, Wilson & Lamme*, for appellant. *Frank P. Kelly*, for respondent.

SHARPSTEIN, J. The defendant, charged with robbery, was tried, convicted, and sentenced to two years' imprisonment in the state-prison. He moved for a new trial—(1) Because the court misdirected the jury in matters of law, and erred in questions of law during the trial; (2) because the verdict is contrary to law and the evidence. The motion was heard upon a bill of exceptions, and denied. This appeal is from the judgment and the order denying the motion for a new trial. The witnesses for the prosecution were two Chinese, Ching Sue and Ah Look, who testified that they met each other in an alley in Los Angeles on the 27th day of December, 1888, about 9 o'clock p. m., when Ching Sue handed Ah Look \$35, and, while counting it over, the defendant grabbed it and ran away. Ching Sue testified that he thought he had never before seen the defendant. He further testified that there were three or four Chinamen with the party who took the money and ran away with him, "two one way and two the other." He did not think that he had ever seen any of them prior to that time. Ah Look, a witness for the prosecution, testified that he had known the defendant by sight a little over a year, but was not personally acquainted with him. His testimony is substantially the same as that of Ching Sue. Both testify that it was quite dark, but there was a light shining through the window of a barber shop sufficient for them to see the features of the person who grabbed the money. Ah Hop, a witness called by the defendant, testified that he was with the defendant from 5 o'clock p. m. until 11 p. m., and that the defendant was ill, and in bed, and that Dr. Hop Seng was there and prescribed for defendant. Defendant substantially testified to the same effect, and also testified that he never knew or saw Ching Sue or Ah Look before he (defendant) was arrested. The witnesses were all Chinese, and, as appears by the record, equally credible. When the court had apparently concluded its charge to the jury, the district attorney said: "I would like to have your honor charge them with the flight of the defendant." The court replied: "I don't know. Oh! the flight at the time of the occurrence?" District Attorney: "Yes, sir." Whereupon the court addressed the jury as follows: "Gentlemen of the jury, there may be another corroborating circumstance in the evidence of flight. While not of itself evidence of guilt, it is evidence which goes to some degree, greater or less, to show guilt. It is a corroborating circumstance which, with other evidence, may be sufficient to justify a verdict against the defendant." From our point of view this appears to be misleading, and liable to prejudice the case of the defendant. In the first place, the witnesses who testified to

the robbery were not corroborated by evidence of the flight of the defendant. No other witness testified to his flight. The testimony of a witness is said to be corroborated when it is shown to correspond with the representation of some other witness, or to comport with some facts otherwise known or established. The evidence of the witnesses who testified to the robbery was in no sense corroborated by their testifying that after committing the robbery the defendant fled. We think any jury would have understood the court to mean that the evidence of the witnesses for the prosecution was corroborated in some degree, greater or less, by evidence of the flight of the defendant. That being so, it is quite clear that the error might, and probably did, affect a substantial right of the defendant, for which he is entitled to a new trial. Judgment and order reversed, and cause remanded for a new trial.

We concur: THORNTON, J.; MCFARLAND, J.

35 Cal. 369

PEOPLE v. COMMON COUNCIL OF THE CITY OF SAN DIEGO *et al.* (No. 13,874.)

(Supreme Court of California. Aug. 18, 1890.)

MUNICIPAL CORPORATIONS—SEPARATION OF TERRITORY—MANDAMUS.

1. Act Cal. March 19, 1889, provides that the council of a city, on receiving a petition, signed by not less than one-fifth of the qualified electors, for the exclusion of certain territory from its limits, shall submit the question of such exclusion to the electors of the corporation, etc. The act further provides for the publication of notice, and for further proceedings. A second act, passed the next day, is identical with this, except as to the newspapers in which the notice was required to be published. *Held*, that a petition for *mandamus* to compel the council of the city of S. to submit such question to the electors is not demurrable for failing to state under which of these two acts petitioner seeks to proceed.

2. It is no defense to the issue of such writ that Act Cal. March 16, 1889, which was enacted to reincorporate the city of S., excludes from its limits the territory now sought to be excluded, since that act, so far as it attempts to effect such exclusion, is a local and special law relating to a municipal corporation, and hence is unconstitutional and void.

in bank. *Mandamus*.

*Atty. Gen. Geo. A. Johnson* and *H. L. Titus*, for petitioner. *James P. Goodwin*, for respondent.

MCFARLAND, J. This is a petition for a writ of *mandamus* to compel the persons composing the common council of the city of San Diego, and the mayor of said city, to submit a certain question to the electors of said city concerning the separation of certain lands from the territory now under the municipal jurisdiction thereof. An alternative writ issued, and the case was heard and submitted upon a demurrer and answer to the petition. We have been urged to decide the case speedily; but no brief has been filed by respondents, and not a very elaborate one by petitioner. On March 19, 1889, an act of the legislature was approved, entitled "An act to provide for changing the boundaries of cities and municipal corporations, and to

exclude territory therefrom." St. 1889, p. 356. This act consists of three sections. On the next day, March 20, 1889, another act was approved, having the same title as the one first above named. *Id.* p. 433. This last act contains only two sections. Section 3 of the first act, and section 2 of the second act, merely contain a provision that the act shall go into effect immediately. Section 1 in the second act is literally the same as section 1 in the first act, except that it does not contain the words, "or, if there is no newspaper published in said corporation, then in some newspaper published in the county in which said corporation is situate." Section 2 of the first act does not appear in the second act; but that section merely provides for certain things to be done in the event that the election shall go against separation or exclusion. All of the first act which is material to the case at bar is contained in section 1 of that act, which, as before said, is identical with section 1 of the second act, with the trifling exception above noted. Therefore the second point of the demurrer, that the petition is ambiguous and uncertain, because it does not state under which of said two acts the election should be called, is not tenable. The two acts are identical. Moreover, when a petition or complaint states facts which, under the law, warrant the relief prayed for, there is no necessity to put the law itself into the pleading. The only other point in the demurrer is that the petition does not state facts sufficient to constitute a cause of action. This point is also untenable, as will appear upon examination of the issues raised by the answer. The demurrer is overruled.

Section 1 of each of the acts above referred to commences as follows: "The boundaries of any city or municipal corporation may be altered, and territory excluded therefrom, after proceedings had as required in this section. The council, board of trustees, or other legislative body of such corporation shall, upon receiving a petition therefor, signed by not less than one-fifth of the qualified electors thereof, as shown by the vote cast at the last municipal election held therein, submit to the electors of such corporation the question whether such territory as is proposed by such petition shall be excluded from such municipal corporation and cease to be a part thereof." The section then proceeds to state the manner in which the question shall be proposed to the electors; how the notice of the election shall be given; the character of the ballots to be used; that the legislative body shall designate the time and places at which the polls will be opened, and the officers of such election, and that it shall meet on a certain day after the election, canvass the vote, and declare the results, etc., and that, if a majority of the votes in the whole corporation, and also a majority in the territory proposed to be excluded, shall be in favor of such exclusion, then such territory shall cease to be a part of such corporation. For the purposes of this case there is no need of any further statement of the details of said acts.

The petition states that the city of San

Diego is a duly-organized and existing municipal corporation; that certain persons named as defendants constitute the common council and mayor of said city and form the legislative body of said city; that the number of votes cast at the last municipal election, held April 2, 1889, was 3,111; that on March 17, 1890, a petition was duly presented to said common council, signed by more than one-fifth of the qualified voters of said city, asking that the question be presented to the qualified voters of said city (at a special election, etc.) of altering the boundaries of said city by excluding a certain described territory known generally as "Coronado Beach;" that said petition was referred by said common council to a special committee, who reported that the petition contained the required number of signers, and recommended that the prayer of the petitioners be granted; but that said common council expressly refused, and continue to refuse, to call any election, or to submit said question to the electors, although requested so to do. The answer first denies, upon information and belief, that the petition contains one-fifth of the qualified electors of the city; but at the hearing it was expressly admitted by respondents in open court that the statement of the petition on that matter is true. (2) The second defense is that respondents are unable to determine under which of the two acts hereinbefore mentioned the petitioner is seeking to proceed. This point has already been decided against respondents, when passing on the demurrer. (3) As a third defense, respondents say that the said act of March 19, 1889, "is unconstitutional and void in this, that it is against public policy." No reason is given, and we see none, for this position. (4) The fourth and last defense set up in the answer,—and the only one at all plausible,—is based upon an act of the legislature approved March 16, 1889, (St. 1889, p. 302.) This act is entitled "An act to amend an act entitled 'An act to reincorporate the city of San Diego,'" and it contains a description of the territory that shall thereafter constitute the said city. And we understand respondents to contend that by said amendatory act Coronado Beach is taken away from the city of San Diego, and therefore there is no necessity for any further action to accomplish that result. This is, in the first place, inconsistent with the answer, which does not deny the averment of the petition that Coronado Beach is now a part of said city. And, in the second place, if said act of March 16, 1889, has the effect claimed, it is clearly unconstitutional. It is an act which is intended to apply to, and, by express language, does apply to, the city of San Diego alone; and if an act directed at and applicable to one particular named municipal corporation alone, and taking away a large part of its territory, is not special and local within the meaning of the constitution, and in violation of the provisions of that instrument about municipal corporations, then it is difficult to imagine an act that for those reasons would be unconstitutional. No argument to the contrary which requires

examination has been suggested. The said act of March 16, 1889, so far as it undertakes to exclude or take away any part of the territory under the municipal jurisdiction of San Diego, is therefore unconstitutional and void. And, this being so, there is no reason why the respondents should not perform the duty specially enjoined upon them by said act or acts of the legislature first above mentioned. It is not contended that *mandamus* is not the proper remedy. Petitioner asks that this court itself order the election, and fix the day therefor. We shall not examine into our authority to do this. It is to be presumed that respondents refused to order the election on account of some honest doubt as to their power in the premises. We shall assume that they will proceed to perform their duty as prescribed by the statutory law immediately upon being informed of this decision. No further action by this court is at present necessary. Let a final and peremptory writ issue as prayed for in the petition.

We concur: BEATTY, C. J.; PATERSON, J.; SHARPSTEIN, J.; FOX, J.; THORNTON, J.

85 Cal. 177

MORE v. CALKINS. (No. 13,565.)

(Supreme Court of California. Aug. 1, 1890.)

MORTGAGES—SALE UNDER POWER—INJUNCTION—RESCISSON OF CONTRACTS.

1. Where part of the amount due a mortgagee is unliquidated and uncertain, and the consideration for the liquidated portion is disputed, a threatened sale of the entire premises covered by the mortgage under a power of sale therein will be enjoined until the equities between the parties can be settled, and the balance due the trustee or mortgagee ascertained.

2. To entitle a person of unsound mind, though not entirely without understanding, to rescind a contract entered into by him before any adjudication of such unsoundness, he must return, or offer to return, everything of value received by him under the contract, as provided by Civil Code Cal. § 1691.

Commissioners' decision. In bank. Appeal from superior court, Ventura county; B. T. WILLIAMS, Judge.

Action by Thomas R. More, administrator, etc., of Alexander S. More, deceased, against J. W. Calkins. There was a judgment in defendant's favor, and plaintiff appeals. Civil Code Cal. § 1691, provides: "Rescission, when not effected by consent, can be accomplished only by the use, on the part of the party rescinding, of reasonable diligence to comply \* \* \* with the following rules: \* \* \* (2) He must restore to the other party everything of value which he has received from him under the contract, or must offer to restore the same upon condition that such party shall do likewise, unless the latter is unable, or positively refuses, to do so." Section 88 provides that contracts made by a person entirely without understanding are void; and section 89 provides that contracts made by a person of unsound mind, but not entirely without understanding, before office found, are subject to rescission.

Barclay, Wilson & Carpenter, L. C. McKeeby, and W. H. Wilde, for appellant. Wright & Day, for respondent.

VANCLIEF, C. This appeal is from a final judgment for defendant on general demurrer to the complaint, and the questions for decision relate to the sufficiency of the complaint as against a general demurrer. A. S. More, having commenced the action in his life-time, died pending a demurrer to his complaint. After substitution of his administrator, Thomas R. More, as plaintiff, the demurrer was sustained, and the administrator filed an amended complaint, a general demurrer to which was also sustained; and it is the sufficiency of this amended complaint which is in question here. After averring the death of the original plaintiff, and the substitution of the administrator, the amended complaint proceeds as follows: "Second. That heretofore, to-wit, on the 7th day of April, 1888, Alexander S. More, deceased, was the owner in fee-simple and in the possession of several tracts of land lying and being in the county of Ventura and state of California, and particularly described in an instrument executed between the original plaintiff in this action and defendant on the day and year aforesaid and acknowledged by the said Alexander S. More, deceased, on the day and year aforesaid, and by the said defendant on the 9th day of April, 1888, and recorded in the recorder's office of Ventura county, state of California, on the day and year last aforesaid at ten minutes past 11 o'clock A. M. of said day, a copy of which said instrument in writing, marked 'Exhibit A,' is here annexed and made a part of this complaint. Third. That said instrument made as aforesaid, acknowledged and recorded as aforesaid, was upon its face a deed by which the said Alexander S. More conveyed the title to the said several tracts of land to the defendant, upon certain conditions and trust therein set forth, but that the same was then, and is now, in law and equity, a mortgage to secure the payment from the said Alexander S. More to the defendant of the sum of \$15,000, by the defendant on the said 7th day of April, A. D. 1888, loaned to the said Alexander S. More, with interest thereon at the rate of 10 per cent. per annum, from date of deed, and for the repayment to the defendant of the sum of about \$43,000, principal and interest, the amount of a mortgage held by Isadore Dreyfus, and due November 5, 1888, which said mortgage the said defendant in the said instrument in writing agreed to assume and pay; and to secure the said defendant the repayment of all taxes which should at any time be paid by him on the said several tracts of lands so conveyed by the said Alexander S. More to the defendant, said taxes and the amount paid upon said mortgage to bear interest at the rate of 10 per cent. per annum; and for the payment by the said Alexander S. More to the defendant of all costs and expenses incurred by the defendant in and about the management and sale of the said several tracts of land aforesaid, and for no other purpose whatever. That on the 5th day of November, A. D. 1888, the defendant did pay to the said Isadore Dreyfus about the sum of \$43,000, principal and interest, on the said mortgage, held and owned by Dreyfus as afore-

said, and from the said 5th day of November, A. D. 1888, the said defendant became and was entitled to have and receive of and from the said Alexander S. More the sum of \$43,000, with interest thereon at the rate of 10 per cent. per annum until paid. Plaintiff alleges upon his information and belief that the whole amount of indebtedness of the said Alexander S. More to defendant, exclusive of taxes paid by the defendant for the said Alexander S. More, and the expenses of the management of the several tracts of land aforesaid, is \$58,000, with interest thereon at the rate of 10 per cent. per annum on \$15,000 from the 7th day of April, A. D. 1888, and on \$43,000 from the 5th day of November, A. D. 1888; and that for said sum of \$58,000, and interest, and taxes paid, and interest, the amount of which is unknown to the plaintiff, and the expenses incurred in the management of the several tracts of land, (the amounts of which are also to the plaintiff unknown,) the defendant has a lien upon. But plaintiff denies that the defendant has a lien upon or title to the several tracts of land aforesaid. *Fourth.* The plaintiff further states that by the terms of said instrument in writing between the said Alexander S. More, deceased, and the defendant, of date April 7, 1888, it was provided that the said Alexander S. More should pay to the defendant the additional sum of \$10,000, which the party of the first part hereby agreed to pay to the party of the second part, without interest, and the plaintiff alleges on his information and belief that there was not prior to the execution of said instrument, at the time or since then, the slightest consideration for that part of the agreement; that he has never received from the defendant or any other person a single farthing as a consideration for that portion of the agreement; and the only consideration for that specific portion of said agreement was as follows: The said Isadore Dreyfus had an option in writing, dated the 5th day of November, A. D. 1887, to purchase the said several tracts of land within one year from the date of said option for the sum of \$103,000, and the defendant was to have and receive from the said Alexander S. More the said sum of \$10,000, in case said Isadore Dreyfus should not elect to buy said several tracts of land, and he, the defendant, should find a purchaser or purchasers for the same, at the same price said Isadore Dreyfus held the option for, viz., \$103,000; and the plaintiff alleges that said Isadore Dreyfus did not elect to purchase said several tracts of land at and for the price aforesaid, and that the defendant has not sold the said several tracts of land or any portion of them, and is not in law or equity entitled to receive the said sum of \$10,000, or any part thereof. *Fifth.* The plaintiff further states upon his information and belief that appurtenant to said tracts of land are certain valuable water-rights, viz., the Sespe creek, Fish slough, and the Hojo or Dudley cañon, and that the several tracts of land and water-rights appurtenant to as aforesaid are very valuable, being of far greater value than the amounts due the defend-

ant; and that the defendant can suffer no loss or injury if the sale of the said several tracts of land is delayed, while the estate of said Alexander S. More would suffer irreparable injury if the sale heretofore advertised should take place, as said estate would be without remedy at law if the defendant were permitted to sell the same. And the plaintiff further alleges that the defendant has been in possession of the said several tracts of land and water-rights since the execution of said instrument; has rented the same to several parties who have paid said defendant rent for the same, or are now indebted to him for rent of said several tracts of land and the water-rights aforesaid; and that said defendant has rendered no account of said rents to the estate of Alexander S. More, or given plaintiff any information concerning the same; and that plaintiff is in ignorance of the amounts of said rents and profits. *Sixth.* The plaintiff further alleges that, disregarding the plaintiff's rights in the premises, the defendant has advertised said several tracts of land and the water-rights appurtenant thereto, to be sold at Santa Paula, in the said county of Ventura, state aforesaid, at public auction for cash, on the 10th day of April; and that said amount of \$10,000, so wrongfully and illegally inserted in said instrument in writing as being a debt of the plaintiff due to the defendant, is demanded, and the defendant is about to sell the said several tracts of land and the water-rights appurtenant thereto to satisfy that said sum of money last aforesaid, as well as the others named in said instrument. *Seventh.* And for a further cause of action the said plaintiff alleges: That at and prior to the date of the execution and delivery of the instrument of writing theretofore referred to, copy of which is hereto annexed and marked 'Exhibit A,' as this plaintiff is informed and believes, the said Alexander S. More was incapable of executing said alleged instrument; that the said Alexander S. More attained his legal majority in the month of June, 1887; that prior thereto and thereafter the said Alexander S. More was of infirm health, and was physically and mentally diseased, so that when he became of age, lawfully to contract debts and make agreements, he was incapable of making lawful contracts by reason thereof; that the agreement and mortgage made to Isadore Dreyfus on the 5th day of November, 1887, was unlawful and void; that therein the said Alexander S. More was incapable of giving his consent thereto by reason of said physical incapacity. That this plaintiff is informed and believes, and on that information and belief alleges: That said Alexander S. More, by reason of his physical and mental condition, and not having proper control of himself, and capacity to act in a reasonable and proper manner, contracted habits of inebriety and further and seriously affected his mental condition, so that he became and was still further incapacitated to make any lawful agreement, or execute any conveyance; that while in this condition the said Alexander S. More executed and delivered to the said J. W. Calkins the said instrument

of writing, whereby the whole administration of his estate and affairs was transferred from himself to said Calkins; that therein the said Calkins induced said More to sanction and authorize the payment of sums of money for which there was no consideration, to-wit, not only all the expenses of the management of said estate by said Calkins, without supervision or control of said More, or of an authorized guardian, but also the payment of the \$10,000 hereinbefore referred to, which was without consideration and void, and by reason of the physical condition, induced by disease and confirmed and rapidly acquired habits of inebriety, the said Alexander S. More was, at the date of the execution of said instrument of writing, *non compos mentis*, and the said instrument of writing was void. And this plaintiff further alleges that since the beginning of this action the said Alexander S. More has departed this life, and that this plaintiff is the administrator of his estate as heretofore set forth; that the said property so described in said instrument of writing is a part of the estate of said Alexander S. More, deceased, and that the plaintiff herein, as such administrator, is entitled to the possession and administration of said estate; that the debts named in and payments required to be made by the said instrument of writing were incurred during the incapacity of said Alexander S. More, and that great and irreparable damage will be done to the estate of said More if the said Calkins be allowed to proceed to sell said property under the provisions of said void instrument of writing. Wherefore the plaintiff demands judgment—*First*, that the defendant render an account of the rents and profits of the said several tracts of land and the water-rights appurtenant thereto, received by the said defendant since the 7th day of April, 1888; *second*, that the said sum of \$10,000, described in said instrument as a non-interest bearing debt, due from the plaintiff to the defendant, be adjudged and decreed to be without consideration, and void, and that the said defendant, his agents and attorneys, be forever enjoined and restrained from collecting the same or any part thereof; *third*, that the said instrument in writing, executed between the said A. S. More and defendant on the 7th day of April, 1888, be adjudged and decreed to be void, and of no effect or virtue in law or equity; and the said defendant be forever restrained and enjoined from selling or disposing of the said tracts of land and the water-rights appurtenant thereto, or either or any of them, by virtue of the authority of said instrument, executed as aforesaid between the said Alexander S. More and the defendant, and such other and further relief as the court may deem just and equitable in the premises, and for costs."

Exhibit A, annexed to the complaint, omitting the description of the lands and other property conveyed and assigned, is as follows: "Alexander S. More to J. W. Calkins. This indenture, made the seventh day of April, 1888, between Alexander S. More of the city and county of Santa Barbara, state of California, the party of the

first part, and J. W. Calkins, of said city, the party of the second part, witnesseth: That the said party of the first part, for and in consideration of the sum of \$15,000 to him in hand paid, the receipt whereof is hereby acknowledged, and in consideration of the agreements and covenants herein entered into by the party of the second part, does by these presents grant, bargain, and convey unto the said party of the second part, [here follows description of lands, water ditches, and contracts:] to have and to hold the aforesaid lands, rights, easements, contracts, claims, demands, and other property hereby conveyed, assigned, or transferred to the party of the second part, his successor or successors and assigns, upon the trusts and confidences, and subject to the powers, hereinafter expressed, to-wit: The party of the second part is hereby empowered and authorized to sell and convey, assign, and transfer, lease, mortgage, or hypothecate any of the aforesaid lands, tenements, and hereditaments, water and ditch rights, and easements, or other property hereby conveyed or assigned, or any part thereof, or interest therein, and to sell and transfer or hypothecate the aforesaid contracts, or either of them, or any interest therein, and any sales of any of said lands, rights, easements, or other property, may be made by the party of the second part, at such price and upon such terms as to cash, or on credit, as he, the said party of the second part, may deem advisable. And the party of the second part is further empowered and authorized to institute and prosecute or defend such suits and actions, or other proceedings at law, as may be by him deemed advisable to protect or secure the rights and interests of the parties hereto, or either of them, in any of the lands or other property herein described, and particularly the rights and interests of the party of the first part, in and to the waters of Sespe creek and Fish slough, and the water-claims and ditch-rights hereinabove mentioned; and the party of the second part may compromise any of said suits, actions, or proceedings upon such terms as he may deem most advisable, and he may join the party of the first part as a party to any of said suits, actions, or proceedings, and the expenses of such suits, actions, or proceedings, paid by the party of the second part, shall be deemed a disbursement for the benefit of the party of the first part thereto, and the payment thereof, with 10 per cent. interest thereon from the time of disbursement, shall be deemed to be secured by these presents. The party of the second part and his successors shall, during the continuance of these trusts, have the sole possession, control, and management of all the lands and other property, rights, and interests hereby conveyed and transferred. And the said party of the second part shall (in the event that Isadore Dreyfus does not exercise his option to purchase the aforesaid property under said contract entered between him and the party of the first part, the 5th day of November, 1887, and does not become the purchaser of the same) proceed with all diligence to sell, under

the powers hereinabove expressed, the aforesaid lands, water-rights, and other rights, easements, and other property as a whole or in parcels as he, the said party of the second part, or his successors in trust, may deem most advisable; and out of the proceeds of such sales, and the rents, issues, profits, and proceeds of said lands, contracts, and other property, the party of the second part, or his successor or successors in trust, shall pay—*First*, the reasonable expenses of the management of said lands and property, and of the execution of these trusts; *second*, to the said J. W. Calkins the sum of \$15,000, with interest thereon at the rate of 10 per cent. per annum, together with the additional sum of \$10,000, which the party of the first part hereby agrees to pay the party of the second part, without interest, also the amount which may be paid out by the party of the second part in satisfaction of the mortgage executed to Isadore Dreyfus and hereinafter mentioned, and the amount of money paid out in the course of the execution of these trusts, and the powers hereby conferred, and for the payment of such taxes and other liens as may be levied on or be imposed upon any of the aforesaid property during the continuance of these trusts, (except taxes and assessments upon this deed of trust, or the debts or other obligations hereby secured,) with interest at the rate of 10 per cent. per annum upon all sums paid out as aforesaid, (with the exception as to taxes and assessments above specified,) and the residue, if any, of the proceeds of said lands, contracts, or other property, and other property and rights, shall be paid over to the said party of the first part, his personal representatives or assigns, and the residue of said lands remaining unsold shall, after the execution of these trusts, be reconveyed to said party of the first part, his heirs or assigns; and the residue, of any other of said property, rights, claims, or interests, then remaining in the hands of said party of the second part, or his successors in trust, shall be reassigned and transferred to the said party of the first part, his personal representatives or assigns; and the party of the second part agrees that in the event that said Isadore Dreyfus shall not exercise his option under the contract of November 5, 1887, above mentioned, to purchase the lands and property in said contract mentioned, and shall not become the purchaser of the same thereunder, he, the said party of the second part, or his personal representatives, will pay and discharge at its maturity that certain mortgage upon said lands executed by the party of the first part to Isadore Dreyfus the 5th day of November, 1887, and recorded in the office of the county recorder of said Ventura county, in Book 9 of Mortgages, p. 613, together with the debt thereby secured; and that he will pay all taxes and assessments which may be levied upon said lands or other property during the continuance of these trusts, having the right to reimbursement for the same as hereinabove specified. In witness whereof the parties have hereunto set their hands and seals the day and year first above

written. [Seal.] ALEXANDER S. MORE.  
[Seal.] J. W. CALKINS."

1. Whether the instrument is merely a mortgage, with power of sale, or a deed of trust conveying the legal title, I think the amended complaint states a cause of action for an accounting before a sale of the property by the defendant, and for a temporary injunction against the sale pending the accounting. "Sales under powers in deeds of trust or mortgage are a harsh mode of foreclosing the rights of the mortgagor. They are scrutinized by courts with great care, and will not be sustained unless conducted with all fairness, regularity, and scrupulous integrity. Upon very slight proof of fraud or unfair conduct, or any departure from the terms of the power, they will be set aside. \* \* \* A sale ought not to be made when the debt is uncertain or in dispute; and, if made, it may be set aside." Perry, Trusts, (4th Ed.) § 602x. "And if there is doubt or dispute as to how much is due, or if the debt is unliquidated, a sale will be enjoined. The amount of the debts must be certain; and, if it is not so, the creditor must file a bill to ascertain the amount, and pray for leave to sell to pay the amount found due." Id. § 602ee. In *Jones on Mortgages* it is said: "When the accounts between the parties are complicated, and the balance due under the mortgage is uncertain, a sale may sometimes be enjoined until the equities between the parties, which should affect the amount due under the mortgage, are settled, and the balance due can be ascertained." Section 1813. The power of a court of equity over sales under powers in mortgages and trust-deeds is exemplified to a considerable extent in the case of *Van Bergen v. Demarest*, 4 Johns. Ch. 37, wherein an injunction was granted at suit of an infant heir of the mortgagor, on the ground that the amount due was in dispute; and, upon the hearing, the sale was subjected to the following restrictions: (1) That the amount due should be computed by a master; (2) that the master be associated with the mortgagee in making the sale; (3) that the further notice of the sale should be given; and (4) that only so much should be sold as the master deemed sufficient, in case a part could be sold without prejudice. In *Cole v. Savage*, Clarke, Ch. 361, a sale was enjoined on the ground that the mortgagee, in his notice of sale, claimed more than was due. See, also, *Draper v. Davis*, 104 U. S. 347; *Kornegay v. Spicer*, 76 N. C. 95; *Capehart v. Biggs*, 77 N. C. 261; *Bridgers v. Morris*, 90 N. C. 32; *Rossett v. Fisher*, 11 Grat. 492; *Curry v. Hill*, 13 W. Va. 370; *Shultz v. Hansbrough*, 33 Grat. 576; *Osburn v. Andre*, 58 Miss. 609; *Dickerson v. Hayes*, 28 Minn. 100, 1 N. W. Rep. 834; *Peck v. Peck*, 9 Yerg. 301; *Johnston v. Eason*, 3 Ired. Eq. 330; *Wilkins v. Gordon*, 11 Leigh, 547; *Sandford v. Flint*, 24 Mich. 28; *Marks v. Morris*, 2 Munf. 407; *Jones, Mortg.* §§ 1859, 1860. The complaint in this case shows that a considerable portion of the demand of defendant, for the payment of which he has advertised for sale all the property described in the instrument, is unliquidated and uncertain; and that \$10,000 of the liquidated portion of his claim is disputed by the

plaintiff on the ground that it is unsupported by any consideration whatever. It also avers that the value of all the property greatly exceeds the amount of the just and lawful indebtedness of the plaintiff to the defendant. The fact that it appears upon the face of the instrument that payment for all loans and advances, and compensation for all services, with extraordinary interest, is provided for, exclusive of the promise to pay \$10,000 without interest, tends to corroborate the averment that there was no consideration for the promise to pay the \$10,000. But for the presumption that there is a consideration for every promise in writing, there would appear to be no consideration for the promise to pay the \$10,000 without interest; but this presumption is disputable, and the plaintiff has disputed it in this case. In addition to this, the extraordinary and almost unlimited power granted by the instrument invites scrutiny as to the honesty and fairness of the transaction, and tends to induce a court of equity to restrict the execution of it to such mode as may do justice to the grantee with the least detriment or inconvenience to the grantor. Upon the facts alleged, and appearing upon the face of the instrument exhibited, I think the court would have been justified in ordering an account to be taken of what was due the defendant, and in controlling the mode of sale as to the notice to be given, the limitation of the amount and portions of the property to be sold, and whether or not it should be sold in parcels; and also in ordering the sale to be made by its own commissioner, if deemed necessary to secure a fair sale, for the highest obtainable price. Pending these proceedings, a sale by the defendant must necessarily have been enjoined.

2. I think the demurrer to the second cause of action attempted to be stated in the complaint, based upon sections 38 and 39 of the Civil Code, was properly sustained. That A. S. Moore was "entirely without understanding" is not directly or indirectly, definitely or indefinitely, stated in the complaint, and therefore the instrument executed by him was not void. Conceding, for the purpose in hand, that it is stated in the second count that A. S. More was of "unsound mind," though "not entirely without understanding," yet it is not stated that the plaintiff or his intestate ever restored or offered to restore, paid or offered to pay, to defendant the money (\$58,000) loaned to and paid for the plaintiff's intestate under the contract; nor is it stated that the plaintiff is ready or willing to restore anything of value received from defendant under the contract; therefore, upon the facts stated, the contract should not be rescinded. Civil Code § 1691. I think the judgment should be reversed, and the cause remanded, with instruction to the court below to overrule the demurrer to the first count of the complaint.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is re-

versed, and the cause remanded, with instructions to the court below to overrule the demurrer to the first count of the complaint.

85 Cal. 90

McPHERSON v. WESTON *et al.* (No. 12,057.)  
(Supreme Court of California. July 30, 1890.)

PLEADING—AMENDMENT—EVIDENCE—RIGHTS OF PURCHASER.

1. Where, in an action on a note, one defendant, a co-indorser thereon, has answered unqualifiedly admitting that he indorsed the note, it is not error to allow him to amend by alleging that for a valuable consideration his co-indorser agreed to hold him harmless on the note, that not being inconsistent with his former admission.

2. Nor is it error to allow a further amendment after plaintiff has rested, setting up the circumstances of the indorsement more fully, where the new matter operates no surprise to plaintiff, it being within the discretion of the court to allow amendments during the progress of the trial, under Code Civil Proc. Cal. § 473.

3. Parol evidence is admissible to show such agreement between defendant and his co-indorser.

4. One who purchased the note after its maturity takes it subject to such agreement, and also to a further agreement by the co-indorser that he would not dispose of such note to a third person, and hence such purchaser can maintain no action thereon against defendant.

5. Such an action is not against the legal representative of a decedent for a claim against the estate, nor does defendant's testimony as to the circumstances of his indorsement tend to establish a claim against the estate of his co-indorser; and hence, though such co-indorser is dead, such testimony is not prohibited by Code Civil Proc. Cal. § 1890, subd. 3, relating to transactions with decedents.

Commissioners' decision. Department 2. Appeal from superior court, Kern county; B. BRUNDAGE, Judge.

*Lewis Shearer and Wm. F. Stewart, (C. W. Cross and H. L. Gear, of counsel.)* for appellant. *Henry E. Highton*, for respondent.

GIBSON, C. This action was brought in the superior court of Kern county to foreclose a mortgage. The cause was tried by the court without a jury, upon the issues tendered by the second amended answer of defendant Robinson, all the other defendants having defaulted, and resulted in a judgment of dismissal of the action in favor of Robinson. After a motion for a new trial was made and the statement therefor settled and filed, the cause was by stipulation of counsel transferred to the superior court of Santa Clara county, which court by its order granted the motion for a new trial. From that order defendant Robinson appeals. The first trial of this case, which resulted in a judgment in favor of defendant Robinson, was had upon his original answer to the complaint, in which he admitted the making of the promissory note, and the execution of the mortgage, and that he and his co-defendant Alexander Forbes, who was the joint payee with himself in the note, indorsed, transferred, and delivered the note and mortgage to Forbes Bros., and at the same time waived demand, protest, and notice of the same, but denied that the plaintiff received the note or mortgage from Forbes Bros. by indorsement for value or otherwise, or that he was the



real party in interest, and averred that Alexander Forbes was the real party in interest, and that the action was being prosecuted in the name of the plaintiff solely for the benefit and convenience of said Forbes, and further averred that plaintiff's cause of action was barred by the statute of limitations. This last defense prevailed in the trial court, but upon appeal it was held that the action was not barred, and that the plaintiff was entitled to maintain the action, and the case was reversed and remanded for a new trial. 64 Cal. 275. Before the retrial the court below permitted the defendant Robinson to file an amended answer, in which, among other defenses, he changed the effect of the unqualified admission in his original answer respecting the indorsement of the note and waiver of demand, protest, and notice of demand made by himself and Alexander Forbes, by averring that at the time the indorsement and waiver were made said Forbes, his joint indorser, agreed with him that he, Forbes, would advance the \$5,000 with the agreement on the part of defendant that he, defendant, would pay Forbes on demand one-half of the sum so advanced, and that in consideration of this promise on his part Forbes agreed to hold defendant harmless on the indorsement; and that defendant should not in any event be required to pay the note or any part of it.

The allowance of this amended answer respondent urges was erroneous, because it permitted the defendant to change his admission in his original answer into a denial, contrary to the rule in *Spanagel v. Reay*, 47 Cal. 608. In that case it was held that an admission in an answer could not, for the purpose of a second trial, be amended by the averment of facts that were inconsistent with, and would completely negative, it. But here the amendment complained of is not inconsistent with the admission, but in harmony with it, and does not negative the admission of indorsement and waiver, but explains how they were made, and what effect they were to have, and therefore does not fall within the rule of that case. It is true that upon the application to amend the answer it was not shown why the matter embodied in the amendment, which we must presume the defendant had knowledge of when he filed his original answer, was not included in the latter. Still, as such new matter tended to show under what circumstances the indorsement and waiver were made without contradicting the admission, and would thereby aid the court in doing complete justice between the parties, we do not think there was any necessity for a showing as to diligence. *Pierson v. McCahill*, 22 Cal. 128. The permission to amend was therefore proper. During the last trial, and after the plaintiff had rested his case, and the defendant Robinson had introduced some evidence, he was permitted to file a second amended answer. This is urged as error, mainly upon the same ground as that against the filing of the first amended answer, which has been disposed of, and that it was too late to grant leave to amend during the trial, and after the

plaintiff had rested. The second amended answer did not deny any of the admissions made in the previous answers, but averred certain facts in addition to those in the first amended answer, showing more fully the circumstances under which the note and mortgage were obtained, and the indorsement and waiver made upon the note.

The granting of an amendment to a pleading during the progress of a trial, in order that a case may be fully and justly determined, rests within the discretion of the trial court. Code Civil Proc. § 473. There is no claim made, neither does it appear, that the new matter operated as a surprise to the plaintiff whereby he was prevented from fully controverting it upon the trial; hence, there was no abuse of discretion in granting leave to file the second amended answer. The respondent contends that in admitting parol evidence in support of the issue tendered by the second amended answer as to the agreement between the defendant Robinson and his co-indorser, under which the indorsement and waiver were made, the court fell into error, because such evidence varied the liability that arose from the indorsement. It is a general rule that between an indorser and a *bona fide* holder of paper regularly negotiated, the liability established by the indorsement cannot be disputed. 2 Whart. Ev. § 1059; 1 Daniel, Neg. Inst. §§ 717, 718; *Martin v. Cole*, 104 U. S. 37. But it may be shown by the indorser that from the way in which his indorsement was procured it would be a fraud upon him to permit its enforcement. 2 Whart. Ev. § 1059, note 2, citing *Dale v. Gear*, 38 Conn. 15; *Benton v. Martin*, 52 N. Y. 570; and *Hill v. Ely*, 5 Serg. & R. 363. See, also, 1 Daniel, Neg. Inst. § 722.

From the findings it appears that on March 23, 1876, E. J. Weston and S. Boushey were the owners of a certain mine which Alexander Forbes and L. L. Robinson desired to purchase on speculation. Between the two latter it was agreed to loan to the two former the sum of \$5,000, to be used in the development of the mine. Forbes agreed to advance the amount of the loan, and to see that the same was expended on the mine, and that it should be either repaid or title to the mine acquired, as developments might render most desirable. Robinson agreed to pay Forbes on demand one-half of the \$5,000, and to aid in disposing of the mine in case title thereto should be acquired, Forbes to have the benefit of all the interest until such time as Robinson should pay the \$2,500. On the date above mentioned the owners of the mine made and delivered to Forbes and Robinson their promissory note for \$5,000, payable one year after date, with interest at 2 per cent. per month, compounded quarterly, if not paid. At the same time, and to secure the payment of this note, the makers of it executed to the payees the mortgage in suit. After the receipt of the note by defendant and Alexander Forbes it was indorsed by them subject to the agreement above stated, and for the purpose of placing said Forbes in a position to perform his part of the contract by placing the legal title to

the note in him, so he could attend to the business in his own name, and enforce the payment of the note; and when the note matured the defendant waived protest thereof for the same purpose, and under the same, and the further agreement that said Forbes should not transfer the note to a third party. Said Forbes, at the times when the note was indorsed and the waiver made, informed the defendant that he, Alexander Forbes, constituted the firm of Forbes Bros., during all of which times the defendant supposed he was dealing with Alexander Forbes individually, under the firm name of Forbes Bros.; but at the time of the indorsement the firm in fact consisted of Charles Forbes and Alexander Forbes. The latter at that time was managing partner, and the former knew of, and assented to, all the transactions between his partner and the defendant Robinson. These facts show that it would be inequitable to permit the note to be enforced against defendant Robinson, and the evidence received in support of them we think clearly within the exception to the general rule above stated. The fact that the note was indorsed to Forbes Bros. can make no difference, as the firm consisted of the co-indorser of defendant, and another who had knowledge of, and assented to, the agreement between the indorsers.

The court further found that Alexander Forbes indorsed the note to plaintiff in the name of Forbes Bros., but not until long after its maturity; and that, although indorsed in favor of plaintiff, the note was not delivered to him, but placed in escrow with the Bank of California, together with a promissory note plaintiff made in favor of said Forbes Bros., covering the amount of the principal and interest due to a certain time upon the note in suit, subject to the condition that the notes were only to be withdrawn on the joint order of said Forbes and the plaintiff; and that no such order was made. And it was further found that the notes so made and placed in escrow by plaintiff was the only consideration he paid for the note sued upon. Now, assuming that the plaintiff acquired title to the note for value by this transaction, which is contrary to the conclusion reached by the learned judge who tried the case, still he took it long after it matured, and, therefore, subject to any defense which the defendant could have interposed against the firm of Forbes Bros. *Wood v. Brush*, 72 Cal. 224, 13 Pac. Rep. 627; *Coghlin v. May*, 17 Cal. 515; *Coye v. Palmer*, 16 Cal. 159; *Folsom v. Bartlett*, 2 Cal. 163.

One of the conclusions of law drawn from the facts showing how the note was indorsed in favor of plaintiff, and placed in escrow with plaintiff's note to the firm of Forbes Bros., was to the effect that, as plaintiff never acquired any equitable title to the note by the payment of a valuable consideration, nor a legal title thereto by delivery prior to or at the commencement of this suit, he is not entitled to maintain the suit. Whether this conclusion is to be regarded as correct or not, we have seen that whatever interest the plaintiff may have acquired in the note was long after

the note matured, and subject to the equitable defense of the defendant Robinson, which was established in his favor, and precludes the plaintiff from recovering upon the note.

It is further urged by the respondent that as Alexander Forbes, who was one of the defendants who defaulted, died before the last trial, the defendant Robinson should not have been permitted to testify to any fact that occurred prior to his death, as the result of the trial might affect the estate of the deceased. Section 1880, subd. 3, of the Code of Civil Procedure, upon which this objection is based, provides that no testimony can be given by the following persons: "Parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted against an executor or administrator upon a claim or demand against the estate of a deceased person, as to any matter of fact occurring before the death of such deceased person." This action is not against the legal representative of the deceased upon a claim against his estate. His legal representative, as far as disclosed by the record here, is not a party to it. And the testimony of defendant was not designed, neither did it tend, to establish a claim against the estate of the deceased, but was introduced for the purpose of resisting a claim against himself. His testimony for such a purpose would have been competent had the legal representative of the deceased, instead of the plaintiff here, been prosecuting the action upon the note against the defendant. *Sedgwick v. Sedgwick*, 52 Cal. 336. There are other points made regarding rulings upon the evidence, but they do not call for special examination. We find no prejudicial error in the record, and, therefore, think the motion for a new trial was improperly granted, and advise that the order granting it be reversed.

WE CONCUR: VANCLIEF, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the order granting the motion for a new trial is reversed.

(85 Cal. 196)

WEYSE *et al.* v. CRAWFORD. (No. 13,523.)  
(*Supreme Court of California*. Aug. 1, 1890.)

TAXATION—ASSESSMENT—STATEMENT OF PROPERTY  
—WAREHOUSEMEN.

1. Plaintiffs made the statement on oath, for purposes of assessment, required by Pol. Code Cal. §§ 3629, 3630, to the effect, that all the property owned or controlled by them was a warehouse and the land on which it was situated. At the assessor's request they also gave him a memorandum of all personalty stored in such warehouse for which they had issued receipts, and of which they informed him they were not the owners. *Held*, that the assessor has no authority to arbitrarily add the value of such personalty to the amount returned by plaintiffs where he has not cited them to appear and answer under oath as to their property, as section 3632 provides he may do if he believes the statement to be false.

2. Property stored in a warehouse for which the warehouseman has issued receipts is not in his possession within the meaning of Pol. Code Cal. § 3639, which requires that for purposes of assessment a person shall state under oath all property belonging to, claimed by, or in the pos-

session or under the control or management of, such person.

In bank. Appeal from superior court, Los Angeles county; A. W. HUTTON, Judge.

P. W. Dooner and Dooner & Burdett, for appellants. C. C. Stephens, S. M. Payton, and E. P. Kelly, for respondent.

Fox, J. This action is prosecuted to secure an injunction restraining defendant, tax collector of the county of Los Angeles, from selling certain real property known as "Naud's Warehouse," for delinquent taxes for the year 1887-88. Judgment for defendant, motion for new trial denied, and plaintiffs appeal. Plaintiffs were the owners and in possession of divers pieces of real property, and among others of that known as "Naud's Warehouse," holding the same as tenants in common, the plaintiff O. G. Weyse being the manager, and having the control thereof. In or about the month of April, 1887, O. G. Weyse, in response to the demand of the assessor, made out and delivered to said assessor a statement under oath, in the form prescribed by law and required by that officer, giving a description of what he claimed and swore to be all the property owned by or in the possession or under the control of himself or his co-tenants on the first Monday of March in that year. This statement included the lot and warehouse in question, with divers other pieces of real estate, and a list of personal property, but did not include any goods, wares, and merchandise on store in the warehouse. Subsequent conferences were had between the assessor or his deputy on the one side, and the plaintiff and his foreman at the warehouse on the other, in reference to the personal property in the warehouse. At these conferences, the officer was shown through the warehouse, and given every opportunity he required to inspect the property, and was told that none of it was the property of plaintiffs; that it was simply property left on storage by different parties, and for which warehouse receipts had been issued in the regular course of business; that the plaintiffs had no interest in it, or control over it, and did not then know who it belonged to, or who held the receipts therefor; but at his request the officer was furnished with a written memorandum of the quantity and character of the property, so far as known to the plaintiffs or their foreman in charge, and of the persons to whom warehouse receipts were originally issued therefor. This memorandum, however, was not sworn to. Under these circumstances the assessor arbitrarily added to the sworn statement made by plaintiffs, and made an arbitrary assessment against them of an item as follows: "Miscellaneous merchandise and grain in Naud's Warehouse, \$50,000." And opposite the item made the following note on the margin of the assessment: "Neglected to return statement, as required by section 3633." Plaintiffs' total assessment for the year, including the item above mentioned, amounted to \$91,500. A general reduction of 10 per cent. was made upon the entire assessment roll of the county, which

left the final assessment of plaintiffs \$82,850, of which the item above quoted amounted to \$45,500. In due time plaintiffs tendered the entire taxes imposed for the year upon all the property given in by them, and all that was assessed against them, except the single item above quoted, with all costs and percentage thereon. The tender was refused, and in due course the tax collector advertised to sell the real property for the tax as delinquent, including the tax levied upon this item of \$45,500. It was to restrain this sale that the present action was brought. This arbitrary assessment, and the accompanying marginal note, was made without authority of law, and is void. The tax levied and imposed upon that assessment never became a lien upon the real or any property of plaintiffs, and plaintiffs never became liable therefor. The error into which the assessor has fallen in this case may be a common one, but it is none the less an error. All proceedings in the nature of assessing property for purposes of taxation, and in levying and collecting taxes thereon, are *in invitum*, and must be *stricti juris*. It is the duty of the assessor to demand from each person liable to assessment in his county a statement to be made under oath, as provided in sections 3629 and 3630 of the Political Code. If he makes that statement, then, no matter how false the assessor may believe it to be, he has no power thereafter to make an arbitrary assessment on the ground of neglect or refusal to return a statement; but if the assessor believes the statement to be false he has a right, under section 3632, to subpoena the party making the statement, and also any other person whom he may suppose to have knowledge upon the subject, and examine him or them on oath, as witnesses are examined, touching any property which is assessable in his county. Or, in the absence of a statement, or an insufficient description of real property, he may cite the party to appear in the superior court for such examination, under section 3634, where a summary hearing is guaranteed to him, and all proceedings will be had at the expense of the tax-payer necessary to secure the requisite information for making a proper assessment. If the property owner neglects or refuses to make and return any statement under oath, or if upon being subpoenaed he refuses to appear before the assessor for examination, or refuses upon proper citation to appear before the superior court for examination, in either of those three cases the assessor has power to make an arbitrary assessment, noting on the margin the reason why it was made, and the board of equalization has no power to reduce such assessment, but he has such power in no other case. In this case the sworn statement was returned, so that there was no power to make an arbitrary assessment for failure to make such return. The assessor did not subpoena the party to appear for examination, or cite him to appear in the superior court; hence there was no power to make an arbitrary assessment for failure to comply with such subpoena or citation; and there is no pretense that it was

made for such a cause. For false return or false testimony upon examination there are other and more severe penalties,—the pains and penalties of perjury; but these can only be imposed after due trial and conviction of having sworn or testified falsely. Hence the assessor is not authorized to impose a penalty for false statement, or false testimony. The power is not given to him to convict or to punish for perjury. The only thing for which he can punish, by arbitrary assessment or otherwise, is for refusing to take the oath. He cannot set himself up as the judge to determine that the oath when taken is false. Still, his powers for the protection of the revenue are ample, for in case of refusal to make the return under oath, or testify when properly subpoenaed, he may not only make an arbitrary assessment, but may also prosecute the offender under section 3632, and recover the penalty therein provided for each and every refusal. If the statement is returned, or the examination had, and the assessor believes that the party has sworn falsely, his remedy then is to complain of and prosecute the offender for perjury; but then he becomes the prosecutor, not the judge.

To our minds, the assessor has also fallen into another error in this case; an error founded upon a misconstruction of the word "possession," as used in the first subdivision of section 3629 of the Political Code. That section and that subdivision requires that the party shall return a statement under oath showing separately (1) "all property belonging to, claimed by, or in the possession or under the control or management of, such person." As we understand the case, there is no dispute about the facts in regard to the property intended to be covered by or included in this arbitrary assessment. It did not belong to, was not claimed by, and was not under the control or management of, the plaintiffs. They were mere naked bailees, without interest in or power over the property. It was in their possession only in the sense that it was stored in their warehouse. They had no insurable or other interest in it; could make no use of it whatever. They had issued their warehouse receipts for it, each receipt showing upon its face that the holder of the receipt was the owner of the property described in it, and there on store. Title to the property itself would pass and re-pass by transfer of the receipt, and it was impossible that the warehouseman should know an hour after the receipt was issued who owned the property. All that he could do for the assessor was to tell him to whom the receipts were issued, and that he did do. It was not done under oath, nor did the assessor require that it should be so done. The word "possession," as used in this section, is one of several forms of expression there used to convey the same idea, another of which immediately follows it, and is in the words "or under the control or management of such person." To make the party liable to assessment his "possession" must be one that carries with it the usual marks and indications of ownership. It is true that, ordinarily, possession of personal

property is *prima facie* evidence of ownership, but it is only *prima facie* so; and even to this there are exceptions to the rule. The presence of a trunk filled with wearing apparel in a guest chamber of a hotel, or of a horse in a boarding-stable, is not even *prima facie* evidence of ownership of the trunk or the horses in the keeper of the hotel or stable. So of a carriage in a repair-shop; and so of grain or goods in a warehouse kept only for the storage of goods for hire, as was the case here. Possession by a factor, who does not purchase on his own account, is not evidence of ownership. *Leet v. Wadsworth*, 5 Cal. 404; *Hutchinson v. Bours*, 6 Cal. 385. Much less would it be such evidence in the case of a mere warehouseman, whose sole business was to furnish store-room for hire, and where the sole evidence of possession was that the property was stored in his warehouse. He was then a mere naked bailee. He was not even an agent for the owner. Had no power over the property, either as principal or agent. Under these circumstances, the duty of the assessor was plain; to assess the property to the owner, if he could ascertain who the owner was; otherwise to assess it to unknown owners, and in that case to proceed at once to collect the tax by seizure and sale in the manner provided by law. We are satisfied that he could not assess it to the warehouseman, or make the tax thereon a lien upon the real property of any person other than the true owner. Judgment and order reversed, and the case remanded for further proceedings in accordance with this opinion.

We concur: PATERSON, J.; MCFARLAND, J.; SHARPSTEIN, J.

I concur in the judgment: THORNTON, J.

85 Cal. 274

Ex parte KUBACH. (No. 20,680.)

(*Supreme Court of California*. Aug. 4, 1890.)

ORDINANCES—VALIDITY—EIGHT-HOUR LAW.

An ordinance of the city of Los Angeles provides that "eight hours' labor constitutes a legal day's work" where the same is performed under a contract with the city; and that any one engaged in performing such a contract who "shall demand, receive, or contract for more than eight hours labor in one day" from any person, or who shall employ Chinese labor, shall be guilty of a misdemeanor, and shall be subjected to a fine. *Held*, that this is an attempt to prevent persons from employing others in a lawful business beyond certain limits, and the ordinance is unconstitutional, and void.

In bank. Petition for writ of *habeas corpus*.

*Geo. M. Holton*, for petitioner. *C. McFarland* and *Albert Crutcher*, for respondent.

PER CURIAM. This is an application for a writ of *habeas corpus*. The petitioner was tried and convicted of a misdemeanor under the following ordinance of the city of Los Angeles: "The mayor and the council of the city of Los Angeles do ordain as follows: 'Sec. 1. Eight hours' labor constitutes a legal day's work in

all cases where the same is performed under the authority of any ordinance, resolution, or contract of the city, or under the direction, control, or by the authority of any officer of the city acting in his official capacity, and a stipulation to that effect must be made a part of all contracts to which the city, as a municipal corporation, is a party. Sec. 2. It shall be unlawful for any contractor, by himself or through another, when having labor performed under any contract with the city, to demand, receive, or contract for more than eight hours' labor in one day from any person in his employ or under his control, with the promise or understanding that such persons, so laboring over eight hours, shall receive a sum for said day's work more than that paid for a legal day's work. Sec. 3. It shall be unlawful for any contractor by himself or through another, when having labor performed under any contract with the city, to employ Chinese labor thereon. Sec. 4. Any person or persons violating any of the provisions of this ordinance shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine of not less than \$10, nor more than \$50, for every such offense." It is claimed in support of the petition that this ordinance was unconstitutional and void. We think this objection is well taken. It is simply an attempt to prevent certain parties from employing others in a lawful business and paying them for their services, and is a direct infringement of the right of such persons to make and enforce their contracts. If the services to be performed were unlawful or against public policy, or the employment were such as might be unfit for certain persons, as for example, females or infants, the ordinance might be upheld as a sanitary or police regulation, but we cannot conceive of any theory upon which a city could be justified in making it a misdemeanor for one of its citizens to contract with another for services to be rendered because the contract is that he shall work more than a limited number of hours per day. Mr. Cooley, in his work on Constitutional Limitations, says: "The general rule undoubtedly is that any person is at liberty to pursue any lawful calling, and to do so in his own way, not encroaching upon the rights of others. This general right cannot be taken away. It is not competent, therefore, to forbid any person, or class of persons, whether citizens or resident aliens, offering their services in lawful business, or to subject others to penalties for employing them. But here, as elsewhere, it is proper to recognize distinctions that exist in the nature of things, and under some circumstances to inhibit employments to some one class by leaving them open to others. Some employments, for example, may be admissible for males and improper for females, and regulations recognizing the impropriety and forbidding women engaging in them would be open to no reasonable objection. The same is true of young children, whose employment in mines and manufactories is commonly, and ought always to be, regulated. And some employments, in which integrity is

of vital importance, it may be proper to treat as privileges merely, and to refuse the license to follow them to any who are not reputable." 5th Ed. p. 745. For these reasons we hold the ordinance, so far as it attempts to create a criminal offense, to be void, and that the petitioner should be discharged. It is so ordered.

85 Cal. 155

**SPOTTS V. HANLEY et al.** (No. 12,675.)  
(Supreme Court of California. Aug. 1, 1890.)

APPEAL—ASSIGNMENT OF ERRORS—EJECTMENT—EVIDENCE.

1. Assignments of error based on the insufficiency of evidence to sustain the findings of the court cannot be considered where they fail to specify the particulars wherein the evidence is insufficient.

2. In ejectment defendants offered in evidence the record of a judgment in favor of the administrator of one from whom they derived title against plaintiff's tenant for possession of the land in controversy. Plaintiff objected to its admission on the ground that he was not a party to the action. Held that, while the judgment was not admissible as bearing on the title, it was admissible to show where the right of possession was from the service of summons in the action.

3. The possession of the administrator under such judgment may be added to that of defendants in order to make the length of time required for title by adverse possession, though defendants claim under a deed from the intestate's heir.

4. The failure of the court to find as to the effect of such judgment on plaintiff's right to claim title to the land is not reversible error where the evidence shows adverse possession in defendants for a sufficient length of time to bar plaintiff's action.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; M. A. EDMONDS, Judge.

T. Z. Blakeman, for appellant. *Mastic, Belcher & Mastic*, for respondents.

FOOTE, C. This action is in ejectment for certain lots of land in blocks 11 and 12, lying in that portion of the city and county of San Francisco called the "Potrero Nuevo." The defendants had judgment rendered in their favor by the court, which tried the action without the intervention of a jury. The appeal here prosecuted is from an order refusing to set aside that judgment and grant a new trial. The appellant seems to rely mainly for a reversal of the order upon three grounds: *First*, the evidence was insufficient to warrant certain of the findings; *second*, that the court failed to find upon a material issue raised by the pleadings; *third*, that the court committed error in overruling "the plaintiff's objections to the judgment roll, (Plate v. A. J. Taggart being received in evidence,) and in admitting the same in evidence." The plaintiff claims title in his intestate, Dyson, derived from one George Treat, who he maintains was, in the year 1850 and for some time thereafter, in the actual possession of the whole of the Potrero Nuevo, which is a peninsula containing about 1,100 acres of land, bounded on three of its sides by Mission creek, the bay of San Francisco, and Precita creek, and the marshes which adjoin those creeks, and on the end or neck thereof by a stone-wall. The alleged prior possession of the plain-

tiff's intestate, as giving him title under the Van Ness ordinance, seems to be the main ground relied on by the plaintiff to support his contention of his right to recover in this action.

Passing for the moment the question as to whether the specifications of particulars as to the insufficiency of the evidence to support the findings are of such character as to admit of an examination of the evidence in the transcript, it seems that the facts relied on to uphold the claim of the plaintiff are: That George Treat repaired and partially rebuilt a stone-wall and fence across the neck of the Potrero, from Mission to Precita creek, and placed a gate in the wall, through which cattle and horses were admitted, and pastured upon the peninsula above referred to. About the year 1852 this land was settled upon by "squatters," who possessed themselves of various portions of it, and maintained such possession in spite of the efforts of Treat and his grantee, Dyson, to dispossess them. About the year 1856 this whole parcel of land appears to have been divided into blocks and lots, as part of the city of San Francisco. In the year 1852 it seems that Bowman, through whom the defendants claim, entered upon a tract of land contained within the limits of the Potrero, and including the land in controversy here, of about 150 acres in extent, and that his entry was adverse to, and in defiance of, the claim of Treat, and there is evidence which tends at least to show that at first he put up the kind of fences then in use by the "squatters" generally,—that is, "skeleton fences,"—and that he excavated small ditches along the lines of his claim; the westerly side of his claim being bounded by the stone-wall across the neck of the Potrero and one of the creeks above mentioned, the northerly and easterly sides being the fences and ditches common to Bowman and others, "squatters or settlers," who adjoined him on those sides, and the southerly side was bounded by a fence placed there by Bowman between his claim and that which Treat claimed.

When Bowman first erected these inclosures they were slight and insecure, like those of all others who, like himself, claimed the land around which they erected them, but by the year 1854 these inclosures were of as substantial a character as the then condition of the country and the surroundings warranted. They were certainly sufficient to show that Bowman claimed and exercised dominion and control over the land which they surrounded. In the language of the witnesses Bowman's inclosure was "as good as men could make on the Potrero," and "the whole tract was inclosed very well for the times." Bowman and his family lived within this inclosure and upon his claim, in a house which he erected for that purpose, until some time in 1855, when he moved away, having in February, 1854, conveyed his claim to one Stewart. During the time of Bowman's occupancy he kept cattle, horses, and hogs, plowed some of the lands, and had certain buildings thereon, which he rented to others. After

the year 1854, when there was a dispute and some violence between Treat and Bowman as to their conflicting claims, Bowman seems to have remained in peaceable possession until he left in 1855, and delivered possession of the land to Stewart. For it seems that after the dispute and fight between Bowman and George Treat in 1854, when Bowman's house was torn down, that nevertheless Bowman "continued to live there until about the spring of 1855, and C. V. Stewart, his partner and grantee, succeeded him on the place." Then Harvey S. Brown became interested with Stewart, "and they both attended to the property, and watched it, and kept whatever right they had against parties coming on without due process of law, and that was the condition of things." It would thus appear that there was evidence which tended to show that the occupation of the land in question by Bowman and Stewart was exclusive; that all other persons not claiming under them were kept off; and that no interference was attempted of their possession thus maintained after 1854. And it is clear that Bowman stood his ground and maintained his possession after his house was pulled down by Treat and his friends, and that he was not driven off, and did not give up possession to Treat, but that Treat was defeated in his effort to dispossess Bowman by the strong hand, and that no such effort was afterwards made. With reference to the northerly 125 feet of the block 11, denominated the "Sedgely Tract," and described in findings 14 and 15, there was no dispute in the evidence, and it does not seem to be doubted in the appellant's brief that in the year 1861 it was separately inclosed by the grantees of Bowman, viz., Joseph Sedgely and I. W. Shaw, from whom the defendants here, Sedgely and Center deraign their title, and that from that time to the present they and their grantees have continuously kept and maintained actual and exclusive and adverse possession of the whole of that parcel of land. On the 5th of January, 1854, Bowman conveyed to one Francis Altvater a portion of his claim on the "Potrero Nuevo," (the whole of the same being, as before stated, about 150 acres in extent,) which portion included a triangular-shaped piece of block 11, involved in this controversy. On the 1st of December, 1859, Stewart and Pratt, who had succeeded to Bowman's title, and were in possession of the land they conveyed, deeded to Altvater block 16, in contest here. Upon these conveyances being made to him, Altvater took and maintained possession of the lands therein contained, and immediately after the last conveyance just mentioned he inclosed the land, consisting of block 16, and all of block 11 except the Sedgely tract, and all the portion of the street called "Columbia" lying between those blocks, and thereafter, and up to the time of his death, he held and maintained actual, exclusive, and adverse possession of all the land within the inclosure he had thus made. He died on the 3d of December, 1863. At that date an individual named Riley was in possession of the last-described premises as the ten-

ant of Altvater. On March 7, 1864, evidently by collusion with this tenant, Dyson, the plaintiff's intestate, and without the knowledge or consent of Altvater's heirs or representatives, made an arrangement by which, after purchasing certain personal property which Riley had to sell, he placed one Taggart in possession of the premises as his (Dyson's) tenant. On the 9th March, 1865, one Plate, the administrator of Altvater's estate, commenced an action of ejectment against Taggart. On August 22, 1865, Taggart answered the complaint, and on the 27th December, 1875, judgment passed for the plaintiff. Thereupon, on the 28th of December, 1875, by virtue of a writ of possession duly issued, Taggart was ejected by the sheriff, and the plaintiff in the action placed in possession of the premises sued for. Defendants herein deraign title from the son and heir of Altvater, and ever since the date of the ejectment of Taggart have maintained actual, exclusive, and adverse possession of the premises. The present action was commenced on the 27th December, 1880. One of the plaintiff's propositions is that upon the evidence he is entitled to recover because the possession of Robert Dyson, his intestate, and Dyson's grantor, George Treat, of the whole 1,100 acres of the "Potrero Nuevo," inclosed by the bay of San Francisco and Mission and Precita creeks upon three sides, and a stone-wall and fence across the peninsula, was such as that he has title to it conferred by the Van Ness ordinance. Of course if Bowman and his grantee, and not Dyson and his grantor, Treat, had this possession, that contention of plaintiff must fail.

Conceding that the first specification of particulars, of the insufficiency of the evidence to sustain the decision, is full enough to enable us to understand the subject presented, that is, that it is there claimed that the evidence being insufficient to show that Bowman ever took possession, etc., of the 150 acres of the Potrero Nuevo, which includes the land in controversy, and that therefore the evidence is insufficient to show that he ever took possession, etc., of the two blocks of land in controversy, upon the principle that as the greater includes the less he could not have taken possession of the smaller tract unless he took possession of the larger, yet we do not see how, under the decisions of this appellate court, the remaining specifications of the particulars in which the evidence is insufficient to sustain the decision can be considered. The eighth specification is: "There was no evidence to sustain or justify the second, third, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, and seventeenth findings of fact, or either of them." Just such specifications were condemned in *Parker v. Reay*, 76 Cal. 105, 18 Pac. Rep. 124, approving *Edelbittel v. Durrell*, 55 Cal. 279, in which last it is said, speaking of section 659, Code Civil Proc.: "The purpose of the statute is apparent. It was to direct the attention of the court and counsel to the particulars relied on by the moving party to the end that the evidence bearing on the specifications of error might be in-

serted in the statement and considered by the court." The rest of the alleged specifications do not purport to state wherein in any particular the evidence is insufficient to sustain or justify the decision, but are simply narrations of what the evidence was upon the trial. "It is not necessary that the specification should state what the evidence does show. Such a statement is insufficient if standing alone, and surplusage if joined to a proper specification." *Hayne*, New Trial & App. 432. Here, as we have seen, the specifications stand alone as mere statements as to what the evidence shows, without being joined to a proper specification.

The rule under which the existence or non-existence of *possessio pedis* is determined, which is necessary to confer title under the Van Ness ordinance, is stated in *Brumagim v. Bradshaw*, 39 Cal. 24-50, that "it is the peculiar province of a jury under proper instructions of the court to decide whether or not the acts of dominion relied on, considering the size of the tract, its peculiar condition and appropriate use, were of such a character as usually accompany the ownership of lands similarly situated." When the court sits without a jury it decides questions of fact upon the same basis as the former body. The possession which the law requires, and which, as we think, some of the evidence in the record tends at least to show was the kind of possession which Bowman had, is the subjection of the land claimed to the will of the claimant, and consists in doing as he wishes with the land, and excluding others therefrom. If the proof shows an actual and open occupation of a tract of land marked out by and within visible and defined boundaries, and a subjection of such land to the dominion of the occupant to the exclusion of all others, such proof is sufficient to show a *possessio pedis*, which, if continued long enough, will satisfy the requirements of the law, and establish title whether there be an inclosure or not. *Sheldon v. Mull*, 67 Cal. 300, 7 Pac. Rep. 710; *Howell v. Rogers*, 47 Cal. 291. But the plaintiff seems further to claim that, passing the question as to where the title was when Riley, Altvater's tenant, allowed Dyson's tenant to take possession of the Altvater premises, upon the happening of that event Dyson was in actual adverse possession, and remained by himself or tenants in such possession for such a length of time,—that is, from March 7, 1864, to December 28, 1875,—that his title thereby must prevail, as the defendants only entered and had possession from February, 1876, and this action was begun December 27, 1880, less than five years from the date of such entry and possession, which, as plaintiff contends, cannot avail the defendants under the statute of limitations of five years, because, as plaintiff claims, the possession of defendants since the writ of possession under the Plate judgment was issued, is not connected with Altvater's possession, it being argued that the defendants are not entitled to add Altvater's possession to theirs to make out their five years' continuous adverse possession by adding to their possession that of one who preceded



them, when they did not enter into possession under or through the one who preceded them. That is, it seems to be urged that the administrator, Plate, was entitled to, and had the possession of, the Altvater land, and the son and sole heir could not convey the title and right of possession while the estate remained undistributed, as it is admitted was the case as to Altvater's estate. As it seems to us, however, the administrator's possession and title were not adverse to the heir, and so far as any but creditors were concerned the heir in whom the title vested, subject only to the right of the administrator to dispose of the land to pay debts, had the right to the title and possession, and the right to maintain an action and recover possession as against any one except the administrator. *Brenham v. Story*, 39 Cal. 179-183; *Code Civil Proc.* §§ 1452, 1458. The administrator is in privity with and represents both heirs and creditors, and a judgment in ejectment recovered by or against an administrator is an estoppel in favor of or against the heir and those claiming under him. *Cunningham v. Ashley*, 45 Cal. 483-493; *McLeran v. Berton*, 73 Cal. 329-342, 14 Pac. Rep. 879. This being so, there is no sound reason for declaring that the judgment recovered by the administrator would not inure to the benefit of those to whom the sole heir had conveyed prior to the recovery of such judgment.

We pass then to the proposition advanced by the appellant in his reply brief, viz., that there is no finding upon a material issue raised by the pleading, in this, that the answer pleads the Plate judgment as an estoppel against the plaintiff, and that there is no finding whether it is or is not a bar to the plaintiff's recovery. As one of the grounds given in the notice of motion for a new trial is that "the decision is against law" the point can be considered on this appeal. *Knight v. Roche*, 56 Cal. 17. It is conceded by the respondent that such judgment would not be a bar as against the right of Dyson's representatives to litigate the question as to the title of the land involved in that judgment because Dyson, the landlord, was not joined in the action against the tenant. But suppose, as we must for the purposes of this point, that the plaintiff was entitled to a finding that such judgment was no bar as to his right to litigate the question above referred to, and that he in that respect was not bound by the judgment, yet, under the other findings of the statute of limitations, etc., in favor of the defendants, such a finding would not aid the plaintiff. The failure to make a finding as to a matter which would not affect the result should not be allowed to reverse an order refusing a new trial. But the plaintiff further contends that the order should be reversed because the court erred in admitting the Plate judgment and the writ of possession in evidence, from the fact that neither Dyson nor his representatives were bound thereby. As to the question of title, it is conceded that they are not so bound. But, as to the question of where the actual possession of the Altvater land was from

the date of the service of summons in the Plate suit against Dyson's tenant, it seems to us that the reasons advanced by respondents' counsel in favor of the admission of the evidence objected to are sound. While the judgment is not an estoppel against the plaintiff from setting up his title, if he have any, it is, as it seems to us, taken in connection with the other evidence, admissible to show where the actual possession of the property was. The tenant by the judgment was found not to have had any right of possession from the date of the summons. His possession was that of Dyson only. If he had no right of possession Dyson had none. In other words, Dyson could not maintain title by adverse possession, when the only possession he had was by a tenant, who did not have any adverse possession, but one founded in fraud and collusion. Whatever disturbs the possession of the tenant alone in possession must disturb that of the landlord, who has given his possession for the time being to the tenant. When a landlord holds possession by a tenant, "that possession ceases to be peaceable when the tenant is sued. A claimant of land who brings his action against the party whom he finds in possession thereby stops the running of limitations in favor of the party's landlord. There is such privity between the tenant and the landlord that, for the purpose of stopping limitation, the suit against the tenant is as effectual as if brought against the landlord also." *Read v. Allen*, 56 Tex. 176-180. It was also held in the case of *Read v. Allen*, 58 Tex. 380-382: "A judgment rendered against a tenant and the pleadings upon which such judgment was rendered are admissible for the purpose of showing when the possession of a landlord through a tenant ceased to be a peaceable possession, but as against the landlord for no other purpose." So in *Allen v. Read*, 66 Tex. 18-20, the same principle seems to be announced. In *Newman v. Bank*, 80 Cal. 368, 22 Pac. Rep. 261, it was decided that a co-tenant, although not joined in an action, was entitled to whatever benefit accrued to a co-tenant that was a party to such action as affecting the possession of the premises involved, the ground of the decision being the privity existing between co-tenants as to possession of property held by them, or one of them. As the privity existing between a landlord and tenant makes the possession of the tenant that of the landlord, it seems to us that, as in this case, where the landlord has his possession disturbed, and by judgment such possession is held not to have existed against the plaintiff in the action, it affects the landlord as well as the tenant, and dates from the time when the action was commenced, for the possession recovered in ejectment relates back to the commencement of the action. *Dunn v. Miller*, 75 Mo. 260, 272; *Sedg. & W. Tr. Title Land*, § 748. For these reasons, and perceiving no prejudicial error in the record, we advise that the order be affirmed.

WE CONCUR: BELCHER, C. C.; VANCLIFF, C.

PER CURIAM. For the reasons given in the foregoing opinion the order is affirmed.

35 Cal. 309

*Ex parte KEIL.* (No. 20,684.)

(Supreme Court of California. Aug. 4, 1890.)

## KIDNAPPING—WHAT CONSTITUTES—HABEAS CORPUS.

1. Though a commitment of one charged with the crime of kidnapping is defective in that it does not contain the name of the person alleged to have been kidnapped, this defect is not such as to entitle the accused to be released on *habeas corpus*.

2. Pen. Code Cal. § 207, declares that "every person who forcibly steals, takes, or arrests any person in this state and carries him into another country, state, or county, or who forcibly takes or arrests any person with a design to take him out of this state, without," etc., is guilty of kidnapping. The evidence on which a commitment was issued showed that defendant and others went on board a schooner moored at a wharf in Los Angeles county, and by force took two sailors and carried them to the island of Santa Catalina, 20 miles from the main-land, and detained them there. *Held*, that defendant was not guilty of kidnapping, as the island is in Los Angeles county, and hence there was no design to remove the sailors from the state. McFARLAND and PATERSON, JJ., dissenting.

3. But such evidence shows that defendant is guilty of false imprisonment, and should not be discharged on *habeas corpus*, but may be held on the same commitment until an information is filed against him for false imprisonment.

In bank. Petition for writ of *habeas corpus*.

Max Lowenthal, for petitioner.

BEATTY, C. J. The petitioner in the above-entitled case has been committed on charges of kidnapping and assault with a deadly weapon. He seeks to be discharged on *habeas corpus*, upon the grounds that the warrant of commitment is defective in substance, and that the evidence contained in the depositions shows that he was not guilty of the offense of kidnapping, but, at most, of a false imprisonment.

1. The commitments are defective in form in failing to show the name of the party assaulted and imprisoned, but this defect does not entitle the prisoner to be discharged. Pen. Code, § 1488; *Ex parte Bull*, 42 Cal. 199. Besides, a proper order for holding the petitioner to answer was in every instance indorsed on the depositions by the committing magistrate, and he could, at any time, amend the warrants of commitment so as to make them fully and formally descriptive of the offense proved by the depositions. *Ex parte Branigan*, 19 Cal. 133.

2. The depositions show that the petitioner and others, about midnight of the 26th of February, 1890, went aboard of a schooner moored at the wharf in San Pedro, in the county of Los Angeles, and by threats, display of pistols, and actual force, unlawfully removed two sailors, Bush and Kemp, from the vessel, and conveyed them in an open boat to the island of Santa Catalina, where they were detained for several days, and until they were released by the sheriff of Los Angeles. Kidnapping is thus defined by section 207 of the Penal Code: "Every person who forcibly steals, takes, or arrests any person in this state, and carries him into another country, state, or county, or who forcibly takes or arrests any person, with

a design to take him out of this state, without having established a claim according to the laws of the United States or of this state, or who hires, persuades, entices, decoys, or seduces by false promises, misrepresentations, or the like, any person to go out of the state, or to be taken or removed therefrom, for the purposes and with the intent to sell such person into slavery or involuntary servitude, or otherwise to employ him for his own use, or to the use of another, without the free will and consent of such persuaded person, is guilty of kidnapping." Santa Catalina island is a part of the county of Los Angeles, and there is no evidence in the depositions that the petitioner took or intended to take Bush and Kemp into any other country, state, or county. Petitioner was not guilty of kidnapping therefore, unless he had the "design to take them out of this state," within the meaning of the section above quoted. Whether he had such design or not depends upon whether the channel 20 miles wide between Santa Catalina island and the main-land is, in the sense of the statute, out of the state. The boundaries of California are defined by article 21 of the constitution as follows: "The boundary of the state of California shall be as follows: Commencing at the point of intersection of the forty-second degree of north latitude with the one hundred and twentieth degree of longitude west from Greenwich, and running south on the line of said one hundred and twentieth degree of west longitude until it intersects the thirty-ninth degree of north latitude; thence running in a straight line in a south-easterly direction to the river Colorado, at a point where it intersects the thirty-fifth degree of north latitude; thence down the middle of the channel of said river to the boundary line between the United States and Mexico, as established by the treaty of May 30, 1848; thence running west and along said boundary line to the Pacific ocean, and extending therein three English miles; thence running in a north-westerly direction and following the direction of the Pacific coast to the forty-second degree of north latitude; thence on the line of said forty-second degree of north latitude to the place of beginning. Also, all the islands, harbors, and bays along and adjacent to the coast." That Santa Catalina island is embraced by this description is admitted, but it is contended that the waters of the ocean at all points more than a marine league from the shore are out of the state, and that the state has no jurisdiction over them; and, consequently, that in conveying his prisoners from the main-land to the island, 20 miles distant, the petitioner necessarily took them, and intended to take them, out of the state. This presents a nice and important question, as to which the court is not agreed, and, as its decision is not essential to a disposition of this case, it will be left for future consideration. We are satisfied that whether or not any part of the channel between Santa Catalina and the main-land is, as between the state and the nation, or as between the United States and foreign na-

tions, a part of the high seas, a mere design to take a person across such channel from one part of Los Angeles county to another part of the same county cannot be held to be a design to take such person out of the state within the meaning of the Penal Code, and, consequently, that there is nothing in these depositions to show that the petitioners were guilty of the crime of kidnapping. But it does not follow from this that the prisoners are unlawfully held, or that they should be discharged from custody. The depositions show that they were guilty of false imprisonment, (Pen. Code, §§ 236, 237,) an offense of which the superior court has jurisdiction, and also that some, if not all, of them, were guilty of assault with deadly weapons. This being so, it is the right and the duty of the district attorney to file informations against them for the offenses disclosed by the depositions, regardless of the terms of the commitments. *People v. Vierra*, 67 Cal. 231, 7 Pac. Rep. 640. Pending the filing of such informations their imprisonment is lawful. Writ discharged, and petitioner remanded.

We concur: FOX, J.; THORNTON, J.; WORKS, J.; SHARPSTEIN, J.

MCFARLAND and PATERSON, JJ., (concurring.) We concur in the judgment remanding the petitioner, but we think that a design to take a person across that part of the Pacific ocean which lies between the main-land and the island of Santa Catalina is a "design to take him out of this state" within the meaning of that part of the Penal Code which defines kidnapping.

*Ex parte MILLER*. (No. 20,688.) *Ex parte ERWALDSEN*. (No. 20,685.) *Ex parte ANDERSON*, (two cases. Nos. 20,687, 20,689.)

(*Supreme Court of California*. Aug. 4, 1890.)

In bank. Petition for writ of habeas corpus.

PER CURIAM. Upon the authority of *Ex parte Kell*, ante, 742, (this day filed,) the writs herein are discharged, and the petitioners remanded.

85 Cal. 280

TOILMAN v. SMITH *et al.*, (REED, Intervenor.) (No. 13,531.)

(*Supreme Court of California*. Aug. 4, 1890.)

COMMUNITY PROPERTY—PRIORITY OF MORTGAGES—JUDGMENT—JURISDICTION.

1. At the request of the mortgagor, a certain person paid a first and second mortgage. For the sum so paid and an additional loan the mortgagor gave him a fourth mortgage, there being a third at the time of the payment. The first and second mortgages were not canceled, but were assigned to and retained by the person paying them. There was no agreement or understanding that the first and second mortgages should be considered satisfied. *Held*, that the first and second mortgages were not extinguished, but, together with the remedy thereon, were suspended until the fourth mortgage should become due and unpaid, and that then they would revive and have priority over the third mortgage.

2. A husband and wife in a mortgage covenanted that they owned the premises in fee-simple, and would warrant and defend the same. At this time the wife had a contract only for the land in the name of her agent. Thereafter the land was conveyed to her, the deed reciting that

the premises "have been purchased by the grantee with her own money, and are owned and held as her separate property." In a suit to foreclose the mortgage, the wife's grantor testified that he did not know who furnished the purchase money. The wife testified that her husband told her that the property was bought with her separate funds. *Held*, that the evidence was insufficient to overcome the presumption that the property was community property.

3. In such action it was proper to try the question of whether the property was community or separate property, the rule that adverse titles cannot be litigated in foreclosure applying only to interests not subject to the mortgage.

4. Of two mortgages, one given before the mortgagor acquired title, and the other as part of the same transaction, by which he acquires title, (being for part of the purchase money,) the second mortgage has precedence, the mortgagee having no notice of the prior mortgage.

5. A decree in a foreclosure suit that a certain sum is due plaintiff, and that the mortgaged property be sold and applied thereon, there being no provision for docketing a judgment for any deficiency, is not a personal judgment against defendant.

6. A finding "that the law of said states is the same as the law of this state" is a sufficient finding as to the law of the other states.

7. A court does not lose jurisdiction of a suit to foreclose a mortgage by reason of the fact that pending the suit a new county is created including the mortgaged land.

MCFARLAND, J., dissenting.

Commissioners' decision. In bank. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, Judge.

A. W. Hutton and Victor Montgomery, for appellants. Holloway & Kendrick, for respondent.

HAYNE, C. This was a suit to foreclose a mortgage made in Nebraska by the defendants, W. S. Smith and Eunice W. Smith, his wife, upon property in California, to secure a debt payable in Illinois. One Reed filed an intervention for the foreclosure of two prior mortgages upon the property. The trial court gave judgment for the plaintiff, and the defendant Eunice W. Smith and the intervenor appeal.

1. The former appellant makes a number of points, which we shall consider separately:

(a) We think it clear that there was no misjoinder of causes of action.

(b) It was not error to deny the motion for change of venue. The property was in the county of Los Angeles when the action was commenced, and therefore the suit was properly commenced in that county. The court did not lose jurisdiction of the cause by the creation of the county of Orange. Assuming in favor of the appellant that the case should have been transferred to the latter county, the party entitled to such change should have made a motion therefor. No motion was made until after the case had been decided, and then no notice was given to the respondent. Under these circumstances the motion was properly denied.

(c) The parties stipulated that no personal judgment should be rendered against Eunice W. Smith, and it is said that the judgment was in violation of the stipulation; but no personal judgment was taken against her. The decree adjudges that a certain sum is due to the plaintiff, and that the property be sold

and the proceeds applied to the payment of such sum and the costs and expenses. There is no provision for docketing a judgment for any deficiency that may remain after the application of the proceeds of sale. This is not a personal judgment against the appellant.

(d) It is contended that the court erred in omitting to find what was the law of Nebraska and Illinois. Assuming that such a finding was necessary, (compare Civil Code, § 755,) we think that it was made. After stating that no evidence was introduced as to the law of Nebraska or Illinois, the court "finds that the law of said states is the same as the law of this state." This, we think, was sufficient.

(e) The remaining points on behalf of this appellant are based upon the fact that she was a married woman, and that the certificate of her acknowledgment was defective. It is true that the certificate was defective. The complaint prayed that it be corrected, and the judgment was that it be corrected. It is contended, however, that the evidence was insufficient to justify the decision in that regard, and that certain errors and irregularities occurred; but in our opinion it is immaterial whether the certificate was properly corrected or not. The complaint alleges that the property was community property; and, if this allegation be true, the husband had entire control, and could mortgage the property without the consent of the wife, notwithstanding the fact that the deed was made to her. *Meyer v. Kinzer*, 12 Cal. 252; *Tryon v. Sutton*, 13 Cal. 493; *Kohner v. Ashenauer*, 17 Cal. 581; *Landers v. Bolton*, 28 Cal. 394; *Althof v. Conheim*, 38 Cal. 233; Civil Code, § 172. The court found that the property was community property. It is contended, however, that this finding is not justified by the evidence. The evidence is as follows: At the time of the execution of the mortgage this appellant did not have the legal title to the property. It would seem that she had a contract for a conveyance made in the name of her agent, one Cody. The mortgage, however, contained the following clause: "The said Eunice W. Smith and W. S. Smith hereby covenant with said D. H. Tolman & Co. that they own said premises in fee-simple, and will warrant and defend the same against all claims whatsoever." About a month after the execution of this mortgage the owner of the property (one Darby) made a deed to this appellant, which contained the following recital: "The above-described premises have been purchased by the grantee with her own money, and are owned and held as her separate property." The grantor, however, testified, without objection, that he did not know who furnished the purchase money. The wife testified that the property was purchased with her separate funds, but she also testified as follows: "The only source of information as to whether any of my property or money was used in the purchase of said property is what my husband told me." The husband was not called as a witness. Upon this evidence we think that the finding was correct. The act of 1889 in relation to community property did not take effect

until after the trial, and hence does not apply. By the prior law the presumption was that the property was community property, and this presumption could only be overcome by clear and satisfactory evidence. *Smith v. Smith*, 12 Cal. 224; *Meyer v. Kinzer*, Id. 247; *Ramsdell v. Fuller*, 28 Cal. 42; *Morgan v. Lones*, 78 Cal. 62, 20 Pac. Rep. 248. The testimony of the wife is, in effect, merely that her husband told her that her funds were used in the purchase. Of her own knowledge she knew nothing. The only other evidence is the recital in the deed. This deed, it will be remembered, was made after the execution of the mortgage. The mortgagee, therefore, ought not to be bound by a recital which the mortgagor chose to have inserted in the deed; especially in view of the covenant in the mortgage that both husband and wife were the owners. Furthermore, such a recital does not conclude a creditor seeking to subject the property to the payment of his debt. Compare *Swain v. Duane*, 48 Cal. 360. If it has any force at all, it can only operate as a declaration of the grantor; but whatever force it might have as such is destroyed by the testimony of the grantor that he knew nothing about the matter. Neither of the foregoing pieces of evidence, nor both together, amount to clear and satisfactory proof that the property was the separate property of the wife. The presumption above mentioned must therefore prevail, and the property must be held to have been community property, in view of which all that part of the case relating to the certificate of acknowledgment may be treated as surplusage, and any error that may have intervened in relation thereto is immaterial. It is said, however, that the question whether the property was community or separate property could not be tried in the action; but the rule that adverse titles cannot be litigated in foreclosure has no application. That rule applies to interests which are not subject to the mortgage, but there is nothing to prevent the most hostile interests from being covered by the same mortgage, if the owners so choose; and the question whether any interest is or is not subject to the mortgage is one which must necessarily be tried in every foreclosure suit in relation to it. It would be strange if the defendants' mere assertion that the interest was not subject to the mortgage could prevent a trial of that question. In this case the question was tried, and it was determined that the wife's interest was subject to the mortgage; and, as above stated, this was perfectly proper.

2. The foregoing does not conflict with the decision on the former appeal. 74 Cal. 345, 16 Pac. Rep. 189. There appeared from the record before the court that the property was the separate property of the wife, and the decision related to the certificate of acknowledgment.

3. The trial court found that the two mortgages set up by the intervenor had been paid and satisfied, and upon that theory rendered judgment against him. Before examining the correctness of this finding, it may be premised that the mortgages set up by the intervenor were orig-

nally prior to that of the plaintiff. One (which was given to the Commercial Bank of Santa Anna) was made nearly a year before that of the plaintiff. The other (which was given to Darby, the grantor of Eunice W. Smith, for part of the purchase money) was several weeks later than the plaintiff's mortgage; but it will be remembered that neither Eunice W. Smith nor her husband had any title at the time they executed the plaintiff's mortgage. As against them the after-acquired title became subject to the mortgage, but not as against intervening incumbrancers. Now, as above stated, the Darby mortgage was given to secure part of the consideration of the deed from him to Eunice W. Smith, and was part of the same transaction by which Eunice W. Smith and her husband acquired the property. Darby (the owner) had no notice that his grantee had undertaken to mortgage the property before he had conveyed it. (It is found that he had notice, folio 131; but this finding is directly contrary to the only evidence on the subject, folio 222.) And it seems clear that the instantaneous seisin which Eunice W. Smith and her husband may have had by reason of any momentary interval between the deed and the mortgage did not give priority to the mortgage made when they had no title. Compare *Burns v. Thayer*, 101 Mass. 428; *Smith v. Stanley*, 37 Me. 13. Bearing in mind, then, the fact that the two mortgages set up by the intervenor had priority over the plaintiff's mortgage, we proceed to inquire whether the finding that they were paid and satisfied is sustained by the evidence. The only evidence upon the subject is the testimony of Eunice W. Smith, at pages 70-74 of the transcript. In our opinion, what her testimony shows is simply this: That at her request the intervenor paid to the holder of said two mortgages the sums due thereon; that they were not canceled, but were assigned to the intervenor, who retained them; and that Eunice W. Smith thereupon gave to him a new mortgage for \$8,500, which was intended to cover the sums paid by him upon the old mortgages, and \$4,000 additional, loaned by him to her. In other words, the old mortgages were retired, and a new one (having a longer period to run) substituted in their place; but there was no agreement or understanding that they should be considered satisfied, and they were not canceled, but were retained by the intervenor. This does not, in our opinion, show an extinguishment of the old mortgages. Even if the intervenor had not taken an assignment at the time he paid them off, a court of equity would, for purposes of justice, apply the principle of subrogation. *Matzen v. Shaeffer*, 65 Cal. 81, 3 Pac. Rep. 92; *Gans v. Thleme*, 93 N. Y. 232; *Yaple v. Stephens*, 36 Kan. 680, 14 Pac. Rep. 222; *Bacon v. Goodnow*, 59 N. H. 415. And much more is he entitled to the benefit of those securities, in view of the fact that they were not canceled, but were assigned to him. If nothing else had occurred, it is clear that he would be entitled to enforce the old mortgages. What occurred in addition, viz., the substi-

tution of a new mortgage, did not operate to discharge the old ones, but merely suspended the remedy upon them. It is well settled that, in the absence of an agreement to that effect, the payment of one note by another is only conditional, and not absolute, payment. It extends the time for payment until the maturity of the new note, or, as it is said, "suspends" the remedy upon the old note, but does not extinguish it. *Brewster v. Bours*, 8 Cal. 501; *Griffith v. Grogan*, 12 Cal. 317; *Higgins v. Wortell*, 18 Cal. 333; *Crary v. Bowers*, 20 Cal. 88; *Smith v. Owens*, 21 Cal. 23; *Welch v. Allington*, 23 Cal. 323; *Brown v. Olmsted*, 50 Cal. 165; *Tobey v. Barber*, and notes, 2 Amer. Lead Cases, 225. Now, inasmuch as the remedy upon the debt was suspended, it is clear that the remedy upon the mortgages, which were mere incidents to the debt, was suspended also. And, inasmuch as the new note had not matured at the time of the filing of the complaint of intervention, we think that the intervenor was not entitled to have the old mortgages foreclosed in the present case. See 2 *Daniel*, Neg. Inst. § 1272; *In re Matthew*, 12 Q. B. Div. 506. But, if the intervenor had any rights in the premises, the decree should have saved or provided for them in some appropriate way, and not adjudged that he "be forever barred and foreclosed" of all right in the premises, which in effect adjudged that the intervenor could not enforce the old mortgages in any way, even if the new note should not be paid at maturity. This raises the question whether the old mortgages would be revived, with the debts they were given to secure, in case of non-payment of the new note at its maturity, and whether, if so revived, they would have priority over the plaintiff's mortgage.

In relation to the first branch of the question, it seems clear that all the incidents of the debt ought to be revived with the debt. It is to be observed in this regard that no question of the statute of limitations is involved. The statute had not run on either of the old notes when the complaint of intervention was filed, and the statute is not pleaded or relied upon. Nor is it material that the Code provides that "a mortgage can be created, renewed, or extended only by writing executed with the formalities required in the case of a grant of real property." Civil Code, § 2922. For, in the first place, as long as the statute of limitations has not run, a renewal or extension of the mortgages is not required. They are alive, though "suspended." And, in the second place, the substituted mortgage was executed with the requisite formalities, and, as shown by the cases cited below, it will be treated by a court of equity as an extension of the old mortgages to the extent of the debt secured by them. And we think that, when revived, the old mortgages will have priority over the plaintiff's mortgages. They will stand just where they stood before they were suspended. This is clearly the result of equitable principles; for, as we have seen, the change did not extinguish the indebtedness or the security. It was a change of form

merely, and equity regards matters of substance, and not matters of mere form; and the plaintiff did not part with anything, or alter his position in any way, after the change in the form of the indebtedness to the intervenor. He stands now precisely where he stood before such change; and, so far as this question of priority is concerned, is a mere volunteer. This result, which seems clear upon principle, is in accordance with the authorities. The instances in which a court of equity will, to accomplish the ends of justice, keep alive a security which in form has been extinguished, are frequent and familiar. Thus, where a mortgagor conveys the mortgaged premises to a first mortgagee to satisfy the debt, without the expenses of foreclosure, equity will consider the first mortgage as still subsisting as against subsequent incumbrances. *Brook v. Rice*, 56 Cal. 428; *Smith v. Swan*, 69 Iowa, 412, 29 N. W. Rep. 402; *Silliman v. Gammage*, 55 Tex. 366; *Collins v. Stocking*, 98 Mo. 296, 11 S. W. Rep. 750; *Stantons v. Thompson*, 49 N. H. 272; *Edgerton v. Young*, 43 Ill. 468; *Richardson v. Hockenhall*, 85 Ill. 124; *Lowman v. Lowman*, 118 Ill. 586, 9 N. E. Rep. 245. So, if the owner of the equity of redemption acquires the mortgage, a court of equity will, when the purposes of justice require it, treat the mortgage as still subsisting. *Thompson v. Chandler*, 7 Greenl. 381; *Duffy v. McGuinness*, 13 R. I. 597. So, where a first mortgagee purchases under a foreclosure sale, equity will keep his mortgage alive for the purposes of protection against a second mortgagee. *Carpentier v. Brenham*, 40 Cal. 234. And so where, as in the case before us, one mortgage is substituted for another, equity will keep the first alive when the interests of justice require it. In *Gregory v. Thomas*, 20 Wend. 18, this principle was applied, even in an action at law. There, in answer to an objection that the first mortgage was merged, *Cowen, J.*, delivering the opinion, said: "The argument is against all the books, ancient and modern. Adjudications of several centuries upon such cases, in every variety of form, in England, in this state, and in neighboring states, settle the proposition that a subsequent security for a debt of equal degree with the former, for the same debt, will not, by operation of law, extinguish it." And the principle under consideration was in substance laid down and applied in *Swift v. Kraemer*, 13 Cal. 530. There it was held that where two notes and mortgages were retired, and a new note and mortgage given to cover the old ones, and an additional advance in cash, the retired mortgages would be kept alive as against an intervening homestead, and the court, per *Baldwin, J.*, said: "We regard the cancellation of the old mortgages and the substitution of the new as contemporaneous acts. It was not creating a new incumbrance, but simply changing the form of the old. A court of equity, looking to the substance of such a transaction, would not permit a release, intended to be effectual only by force of and for the purpose of giving effect to the last mortgage, to be set up, even if the last mortgage was inoperative." And so in other

cases. See *Pouder v. Ritzinger*, 102 Ind. 571, 1 N. E. Rep. 44; *Packard v. Kingman*, 11 Iowa, 219; *Flower v. Elwood*, 66 Ill. 438; *Walters v. Walters*, 73 Ind. 425. And, even where there has been a formal release and cancellation of a mortgage, a court of equity will set it aside for the purposes mentioned. *Gieb v. Reynolds*, 35 Minn. 331, 28 N. W. Rep. 923; *Hutchinson v. Swartsweller*, 31 N. J. Eq. 205; *Young v. Shaner*, 73 Iowa, 555, 35 N. W. Rep. 629. And see, also, *Barnes v. Mott*, 64 N. Y. 401. It may be remarked that the transcript does not show whether, at the time the intervenor took his new mortgage, he had notice of the plaintiff's mortgage; but, as above stated, the plaintiff in no manner changed his position after the substitution of a new mortgage for the two old ones, and therefore we do not consider that the question of notice is involved, at least in a case like this, where there was no release or cancellation of the old mortgages. We advise that, as against the appellant Eunice W. Smith, the judgment and order appealed from be affirmed, and that as against the intervenor the order denying a new trial be affirmed, but that the decree be modified in accordance with this opinion, the intervenor to recover his costs of appeal.

We concur: GIBSON, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from, as against the appellant, Eunice W. Smith, are affirmed, and, as against the intervenor, the order denying a new trial is affirmed, the decree modified in accordance with the foregoing opinion, and the intervenor is allowed his costs of appeal.

I dissent. MCFARLAND, J.

85 Cal. 318

CAMPODONICO v. OREGON IMP. CO. (No. 12,606.)

(Supreme Court of California. Aug. 1, 1890.)

APPEAL—PRACTICE—TIME OF FILING POINTS.

The rule of the California supreme court requiring the appellant's points to be filed by a given time does not prescribe, as a penalty for failure to conform thereto, that the judgment shall be affirmed without considering the merits of the appeal, but only that the court may, in its discretion, refuse appellant the privilege of making an oral argument.

In bank. Appeal from superior court, San Luis Obispo county; V. A. GREGG, Judge.

*Graves, Turner & Graves*, for appellant. *Venable & Goodchild*, for respondent.

PER CURIAM. The transcript in this cause was filed December 5, 1889, and the cause was placed on the Los Angeles calendar for April 14, 1890. The appellant's points were not filed until April 8th, 26 days after the time when, according to the rule of the court, they should have been filed. On the day the cause was set for hearing, the respondent moved the court to affirm the judgment without considering the merits of the appeal as a penalty upon the appellant for his failure to comply

with the rule. But the rule prescribes no such penalty, and is not understood to involve any, except that the court may, in its discretion, refuse the appellant the privilege of making an oral argument.

Motion denied.

85 Cal. 49

**STROUSE v. POLICE COURT.** (No. 13,826.)  
(*Supreme Court of California.* July 25, 1890.)

WRIT OF PROHIBITION—WHEN LIES.

Under Code Civil Proc. Cal. § 1103, providing that the writ of prohibition may be issued "in all cases where there is not a plain, speedy, and adequate remedy in the ordinary course of law," the police court will not be restrained from proceeding with the trial of a charge of violating the license laws, as, even if it has no jurisdiction of the case, there is a plain, speedy, and adequate remedy at law, by appeal in case of a conviction.

In bank. Application for writ of prohibition.

*Alfred Clark*, for petitioner.

**PATERSON, J.** A complaint was filed in the police court of the city and county of San Francisco, on April 24, 1890, charging the petitioner with a misdemeanor in having transacted and carried on the business of selling meat without having first taken out a license as required by an ordinance of the board of supervisors. The petitioner was arrested under a warrant issued on said complaint, and in due time entered a plea of not guilty, and another plea challenging the jurisdiction of the court. It is alleged that, notwithstanding his plea to the jurisdiction, the police court threatens to proceed with the trial of the charge against petitioner, and he prays for a writ of prohibition to restrain the police court from proceeding with the trial of the action.

Section 1103, Code Civil Proc., provides that the writ of prohibition may be issued "in all cases where there is not a plain, speedy, and adequate remedy in the ordinary course of law." This is not such a case. If the petitioner should be convicted in the police court he will have a plain, speedy, and adequate remedy at law, by an appeal to the superior court. *Levy v. Wilson*, 69 Cal. 105, 10 Pac. Rep. 272. Application for writ denied.

We concur: **SHARPSTEIN, J.**; **McFARLAND, J.**; **FOX, J.**; **THORNTON, J.**

85 Cal. 206

**Ex parte CHRISTENSEN.** (No. 20,653.)  
(*Supreme Court of California.* Aug. 2, 1890.)

LIQUOR LICENSE—CONSTITUTIONALITY OF ORDINANCE.

1. Under Consolidation Act of San Francisco, § 68, providing that "every ordinance or resolution \* \* \* shall, after its introduction in the board, be published," the publication of an amendatory ordinance is sufficient without the republication of the ordinance amended or affected.

2. Order No. 1589 of the city of San Francisco, as amended by order No. 1845, relative to liquor licenses, provides for the payment of a specified license fee, and declares a violation of the order a misdemeanor punishable by a fine of not more than \$1,000, or by imprisonment for not more than six months, or both. Pen. Code Cal. § 435, provides that any person carrying on a business for

which a license is required by the laws of the state without the license so prescribed, is guilty of a misdemeanor. Section 19 prescribes as a punishment for misdemeanors not otherwise provided for, imprisonment for not more than six months, or a fine not exceeding \$500, or both. Held that, though the punishment provided by the ordinance conflicted with that prescribed by the statute, this portion of the ordinance could be rejected, and that providing for the license could stand, as they were not dependent on each other.

3. So, too, portions of the ordinance in conflict with the provisions of the Code of Civil Procedure relative to evidence may be rejected.

4. The provisions of the ordinance making the issuance of a license dependent upon the permission of a majority of the board of police commissioners, and the approval of adjacent property owners, is not in violation of the federal constitution, there being no question of interstate commerce.

*McFARLAND, J.*, dissenting.

In bank. *Habeas corpus.*

*Alfred Clarke* and *Jennie Laird*, for petitioner. *Geo. A. Johnson*, Atty. Gen., and *David Louderback*, for respondents.

**PER CURIAM.** The petitioner was arrested upon a charge of misdemeanor, consisting in the carrying on of the business of a retail liquor dealer in the city of San Francisco without a license. He contends that the ordinance prescribing the license is void for various reasons:

1. The original order, numbered 1,589, was passed in 1880. In 1866, subdivision 89 of section 10 of this order, which relates to liquor licenses, was amended by order 1845, and it is contended that this amendatory order was not properly passed and published in accordance with the provisions of the county government act. But we do not think that the provisions of the county government act apply to the passage and publication of ordinances of the city and county of San Francisco. It is argued, however, that even under the provisions of the consolidation act the order was not properly passed. The main point seems to be that the amendatory order only, and not the original order, was published. But there is no merit in this position. Section 68 of the consolidation act provides that "every ordinance or resolution, etc., shall after its introduction in the board be published," etc. This only requires the ordinance or resolution itself to be published. It does not require the republication of the ordinance or resolution which is amended or affected. Order No. 1845 was a separate order and was complete in itself, and, in our judgment, it was sufficient to publish it only, without republishing the original ordinance. In other respects it was properly passed.

2. It is urged that the order is in conflict with the general laws of the state. The order provides for the payment of a specified license fee, and declares that violation of the order shall be a misdemeanor, and shall be punishable by a fine of not more than \$1,000, or imprisonment not more than six months, or both. The latest general law on the subject is section 435 of the Penal Code, which is as follows: "Every person who commences or carries on any business, trade, or profession, or calling, for the transaction



or carrying on of which a license is required by any law of this state, without taking out or procuring the license prescribed by such law, is guilty of misdemeanor." And the punishment of misdemeanors, not otherwise provided for, is imprisonment for not more than six months, or a fine not exceeding \$500, or both. Pen. Code, § 19. It is argued that these two provisions are in conflict, and in *Re Sic*, 73 Cal. 143, 14 Pac. Rep. 405, is cited. In the *Case of Lawrence*, 89 Cal. 611,<sup>1</sup> it was held that the words "by any law of the state" included a municipal ordinance. In this view it must be admitted that the punishment provided by the ordinance conflicts with the punishment provided by the statute. But there is no other conflict between the two provisions. There is no conflict as to what the offense is. The provision of the Penal Code simply provides that whoever transacts certain business without a license shall be punished in a certain way. It does not purport to fix the license fee, or provide for its issuance. For that it refers to other laws. Therefore the other laws cannot be in conflict with the Code in so far as it fixes the fee, or provides for the issuance of the license. It is only in conflict with the Code so far as it attempts to prescribe the punishment. This latter, however, may be discarded entirely without affecting the provision that the business shall be licensed in a certain way. If, for example, the order provided no punishment whatever for doing business without a license, but merely provided what the license should be, it would be valid, and the statute would supplement it by making the failure to comply with the order a crime, and providing the penalty. The portion of the ordinance prescribing the penalty may, therefore, be rejected, and the portion of the ordinance providing for the license may stand. For nothing is better settled than that, if the part of a law or ordinance which is invalid is distinctly separable from the remainder, the latter can stand and the former be rejected. The *Case of Sic* is not like that before us. There the law did not refer or relate to the ordinance, but each provision was complete in itself, and provided for the punishment of the same act, and the objection was that if both were valid a man might be punished twice for the same offense. Nothing of the kind could happen under the provisions under consideration here. The complaint is not insufficient under this view. It states the fact that the petitioner was doing business without the requisite license; refers to the original order and to the amendatory order by number; and concludes that his acts are "contrary to the form, force, and effect of the statute in such cases," etc. It is further argued that the provisions of the order are in conflict with the provisions of the Code of Civil Procedure in relation to evidence. This seems to be based upon the fact that the order makes certain provisions in relation to the burden of proof, and as to the effect of certain acts as evidence. It may be considered

that the board has no power to establish rules of evidence for the guidance of courts. But the prisoner has not yet been tried, and it cannot be presumed that the court which is to try him will fall into error. These portions of the order are distinctly separable from the others, and consequently may be rejected without affecting the remainder.

3. It is argued that the order is in violation of the provisions of the federal constitution. This seems to be based upon the fact that the issuance of the license is made to depend upon the permission of a majority of the board of police commissioners, or, if that cannot be obtained, upon the approval of 12 property owners in the block in which the business is carried on. The language of the order on this point is as follows: "No license as a retail liquor dealer or as a grocer and retail liquor dealer shall be issued by the collector of licenses, unless the person desiring the same shall have obtained the written consent of a majority of the board of police commissioners of the city and county of San Francisco to carry on or conduct said business; but in case of refusal of such consent, upon application, said board of police commissioners shall grant the same upon the written recommendation of not less than 12 citizens of San Francisco owning real estate in the block or square in which said business of retail liquor dealer or grocery and retail liquor dealer is to be carried on." The objection is that this makes the license depend upon the arbitrary will and pleasure of the board of police commissioners in the first instance, and of the 12 property owners in the second; and the case of *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. Rep. 1064, and other cases from the federal courts, are cited. But whatever force this objection might have in reference to licenses to carry on the ordinary avocations of life, which are not supposed to have any injurious tendency, it has no force in the present case. It is well settled that the governing power may prohibit the manufacture and traffic in liquor altogether, provided only that it does not interfere with interstate commerce. See *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. Rep. 273. And, if the governing power can prohibit a thing altogether, it can impose such conditions upon its existence as it pleases. There is no ground for raising the question of interstate commerce in this case, and therefore, even if it be conceded that the conditions were arbitrary, they were within the power of the board. The learned counsel in a supplemental communication calls attention to the fact that the supreme court of the United States has just held subdivision 33 of section 10 of this same ordinance to be invalid. We presume that the decision proceeded upon the ground of interstate commerce. But that subdivision may be stricken out, and the rest of the order may stand. The petitioner had been doing business under a license, and it is contended that he was entitled to notice of its withdrawal. But, under the ordinance, a license of this character could be granted for three months only. The petitioner's license expired on June 15th,

<sup>1</sup>11 Pac. Rep. 217.

and was not renewed. The complaint against him was filed June 20th. It thus appears that it was not the case of the revocation of an existing license, but of the refusal to issue a new license after a previous one had expired. In such a case we do not think that notice to the petitioner was necessary. Various other points are made, but we do not think there is any merit in any of them. The prisoner is remanded to the custody of the chief of police.

I dissent: MCFARLAND, J.

#### PRICE v. LUSH.

(Supreme Court of Montana. July 28, 1890.)

##### ELECTIONS AND VOTERS—BALLOTS.

1. Act Mont. March 13, 1889, provides for the printing by the state of ballots containing the names of those whose nominations are certified as required. The certificate is to be filed 20 days before election, and must state the name of the candidate, his business, and the office; and, if by convention, it must designate the party represented, and be signed by the chairman and secretary. In case a convention has given power to fill vacancies to a committee, it must file a certificate stating the cause of the vacancy, the office, the name of the nominee, and the one whose place he takes, and such facts as are required in an original certificate. A certificate purporting to fill a vacancy in a nomination filed less than 20 days before an election stated neither the office, the cause of vacancy, nor the authority to fill it. It did not give the full name of the nominee, nor the name of the one whose place he took. It was signed by no one, nor did it designate the party represented. *Held*, that there was a failure to comply with mandatory provisions, and the name of the nominee could not be printed on the ballots.

2. Though section 15 allows a voter to write or paste on his ballot the name of any one he wishes to vote for, the official publication of the candidacy of one whose nomination is not duly made and certified, and the printing of his name on the ballots, give him an undue advantage, which will avoid his election.

Appeal from district court, Lewis and Clarke county; W. H. HUNT, Judge.

A. C. Botkin, for appellant. Milton S. Gunn, for respondent.

BLAKE, C. J. This is an election contest, involving the right of the respondent to the office of justice of the peace. It is alleged in the statement: That Price, the appellant, is a citizen of the United States and the county of Lewis and Clarke, territory of Montana, and a resident and elector in Marysville precinct, Belmont township, county aforesaid. That an election was held October 1, 1889, in said township, for the office of justice of the peace for the term of three years. "That said L. L. Lush appeared upon the tickets that were voted at said election as a candidate for said office of justice of the peace, as above set forth, and was voted for by the electors of said Belmont township as a candidate for said office." That the ballots were counted by the judges of election for said precinct, and the returns made to the chairman of the board of county commissioners, and that the board of canvassers of said county canvassed, October 16, 1889, the returns, and "declared said L. L. Lush duly elected justice of the peace in and

for said Belmont township." That said Lush was not elected a justice of the peace of said township at said election, and was not entitled to hold said office by virtue of said election. "First. L. L. Lush was not nominated for office of justice of the peace for said Belmont township in the manner required by law, for the reason that the pretended nomination was not made by any organized assembly of delegates representing any party or principle. Second. The certificate of nomination which was forwarded to the county clerk and recorder of Lewis and Clarke county was not in accordance with the requirements of the statute in this, that said certificate did not contain the name of said Lush; it did not contain his business; it did not designate the name of the party or principle which said convention or primary meeting represented; it was not signed by any person whatever as presiding officer or secretary of said alleged convention or primary meeting; nor was there any name or signature attached to said certificate whatever. Third. Said certificate purported to be a certificate of nomination to fill a vacancy which had happened in the nominations for justice of the peace, but failed to set forth the cause of the vacancy, or the name of the person nominated, or the office for which he was nominated, or the name of the person for whom the nomination was to be substituted; nor did it set forth the fact that the committee, or any committee, was authorized to fill any vacancy. Fourth. Said nomination certificate was not filed within 20 days before the election, being filed on the 14th day of September, 1889, and less than 16 days before the election. Fifth. Because said pretended nomination for the office of justice of the peace was not published by the county clerk of said county in any newspaper within the county of Lewis and Clarke, as certified to him under the provisions of the law, and the pretended publication in the Helena Independent of the name of L. L. Lush as a candidate for said office of justice of the peace was without authority of law, and unwarranted by the provisions of the statute, and was in no way authenticated by said county clerk and recorder of said Lewis and Clarke county." This statement was filed October 19, 1889, in the office of the county recorder; November 27, 1889, by the clerk of the court below. Upon the motion of Lush, the statement was quashed, as being "insufficient in law," and upon the ground that it did not set forth "a cause of action under the general election law of the state." Judgment was thereupon entered in favor of Lush, and declared that he was "the duly-elected justice of the peace of Belmont township, Mont." The sixteenth legislative assembly of the territory passed a law entitled "An act to provide for printing and distributing ballots at the public expense, and to regulate voting at territorial and other elections," which was approved March 13, 1889. The sections which relate to this inquiry provide, substantially: "Sec. 2. Any convention or primary meeting \* \* \* held for the purpose of making nominations to public office, and also electors to the

number hereinafter specified, may nominate candidates for public office to be filled by election within the territory. A convention or primary meeting \* \* \* is an organized assemblage of electors or delegates representing a political party or principle." "Sec. 3. All nominations made by such convention or primary meeting shall be certified as follows: The certificate of nomination, which shall be in writing, shall contain the name of each person nominated, his residence, his business, his business address, and the office for which he is named, and shall designate, in not more than five words, the party or principle which such convention or primary meeting represents, and it shall be signed by the presiding officer and secretary of such convention or primary meeting, who shall add to their signatures their respective places of residence, their business, and business addresses. Such certificates, made out as herein required, shall be delivered by the secretary or president of such convention or primary meeting to the secretary of the territory or to the county clerk, as hereinafter required." "Sec. 4. Certificates of nomination for county and precinct officers shall be filed with the clerks of the respective counties wherein the officers are to be elected." The fifth section provides that a certificate of the nomination of a candidate for an office otherwise than by a convention or primary meeting shall be signed by a certain number of the electors. The sixth section provides that no certificate of nomination shall contain the name of more than one candidate for each office. The seventh section requires the secretary of the territory and clerks of the several counties to preserve in their offices for one year all certificates of nomination filed therein under this act, and provides that "all certificates shall be open to public inspection under proper regulations, to be made by the officers with whom the same are filed." "Sec. 8. Certificates of nomination herein directed to be filed with the county clerk shall be filed not more than sixty days, and not less than twenty days, before the election." "Sec. 10. At least ten days before an election to fill any public office other than a municipal office, the county clerk of each county shall cause to be published in one or more newspapers within the county the nominations to office certified to him under the provisions of this act. The county clerk shall make such publications daily, until the election, in counties where daily newspapers are published." The twelfth section provides that, if "any certificate of nomination be or become insufficient or inoperative from any cause," the vacancy may be filled in the manner required for original nominations. "If the original nomination was made by a party convention which had delegated to a committee the power to fill vacancies, such committee may, upon the occurring of such vacancies, proceed to fill the same. The chairman and secretary of such committee shall thereupon make and file with the proper officer a certificate setting forth the cause of the vacancy, the name of the person nominated, the office for which he was nominated, the name of the

person for whom the new nominee is to be substituted, the fact that the committee was authorized to fill vacancies, and such further information as is required to be given in an original certificate of nomination." This certificate shall have the same force as an original certificate of nomination. "Sec. 13. When any vacancy occurs before election day, and after the printing of the tickets, and any person is nominated according to the provisions of this act to fill such vacancy, the officer whose duty it is to have the tickets printed and distributed shall thereupon have printed a requisite number of stickers, and shall mail them by registered letter to the judges of election in the various precincts interested in such election, and the judges of election, whose duty it is made by the provisions of this act to distribute the tickets, shall affix such stickers in the proper place on each ticket before it is given out to the elector."

The statement of contest points out many particulars wherein the foregoing requirements of the statute have not been complied with. Are these provisions directory or mandatory? When this question is decided, the appeal will be determined. The law embraces the leading features of what is termed popularly the "Australian Ballot System." The mode of selecting candidates for public trusts at the hands of the people which has generally prevailed in the United States during the past century has been revolutionized. The territory has duly recorded upon her book of laws this legislation, which has been enforced and interpreted in Great Britain and her colonies. The regulations prescribed for the nomination of candidates, which have been stated, *supra*, are foreign to American jurisprudence, and the rules of construction relating to elections, which have been correctly expounded in *Wells v. Taylor*, 5 Mont. 202, 3 Pac. Rep. 255, and cases there cited, are not applicable to this controversy. The legislative assembly did not incorporate into the act any provision respecting its interpretation. We must accept, then, the doctrine which seems to have been announced by the courts of the Union regarding the construction of the foregoing sections. In *Pennock v. Dialogue*, 2 Pet. 1, Mr. Justice Story says, in the opinion: "It is obvious to the careful inquirer that many of the provisions of our patent act are derived from the principles and practice which have prevailed in the construction of that of England. It is doubtless true, as has been suggested at the bar, that where English statutes, such for instance as the statute of frauds and the statute of limitations, have been adopted into our own legislation, the known and settled construction of these statutes by courts of law has been considered as silently incorporated into the acts, or has been received with all the weight of authority." See, also, *McDonald v. Hovey*, 110 U. S. 628, 4 Sup. Ct. Rep. 142; *Allen v. Bank*, 120 U. S. 84, 7 Sup. Ct. Rep. 460; *Railroad Co. v. Moore*, 121 U. S. 572, 7 Sup. Ct. Rep. 1334; *Hunter v. Lodge*, 14 Nev. 24; *Pratt v. Telephone Co.*, 141 Mass. 225, 5 N. E. Rep. 307. In *Com. v. Hartnett*, 3

Gray, 450, Mr. Justice METCALF, for the court, says: "We do not suppose that any English statutes for the punishment of larceny were ever held to be in force in Massachusetts, (7 Dane, Abr. 168;) yet the provisions of some of them, and the provisions of acts of parliament for the punishment of other offenses, have been enacted by our legislature in every stage of our history. And in such cases, as well as in cases where English statutes respecting civil concerns have been enacted here, it has always been held that the construction previously given to the same terms by the English courts is the construction to be given to them by our courts. It is a common learning that the adjudged construction of the terms of a statute is enacted, as well as the terms themselves, when an act which has been passed by the legislature of one state or country, is afterwards passed by the legislature of another; \* \* \* for, if it were intended to exclude any known construction of a previous statute, the legal presumption is that its terms would be so changed as to effect that intention." The case of *Com. v. Hartnett*, supra, was followed in *Com. v. Taylor*, 132 Mass. 261, and the court asserts that certain statutes "were passed adopting substantially the same language as the English statute; and, if there were nothing more to aid in ascertaining the intention of the legislature, the presumption would be strong that it was intended to adopt the same construction which had been given to the statute in England." In *Adams v. Field*, 21 Vt. 256, the court holds: "When we adopt an English statute we take it with the construction which it had received; and this upon the ground that such was the implied intention of the legislature." This court, in *First Nat. Bank v. Bell*, etc., Min. Co., 8 Mont. 32, 19 Pac. Rep. 403, carried into effect this principle of interpretation concerning a statute, which had been passed originally in the state of California, and adopted subsequently by the territory.

The courts of England have always held that the statutory requirements, supra, are mandatory. In the case of *Queen v. Parkinson*, L. R. 3 Q. B. 11, which was decided in 1867, it appears from the information that "the defendant was nominated in writing for one of the vacant offices (town councillor) by one William Whiting, and that Whiting was not entitled to vote at the election of councillors for the Minster ward, in respect of which he assumed to make the nomination, nor was he on the burgess roll of the St. Mary ward, that the defendant was not nominated as by the statute is required, and by reason thereof was not duly elected a councillor." Judgment was entered for the crown, and Chief Justice COCKBURN, in the opinion, said: "The section clearly requires that the person nominating should be entitled to vote at the election for which he nominates, whether it be for the whole borough, if not divided into wards, or for a particular ward, when the borough is divided." In 1876, the case of *Mather v. Brown*, 1 C. P. Div. 596, was determined, and Lord COLERIDGE, C. J., said: "The question arises thus: At the last

election of town councillors for Southport the petitioner was nominated as a candidate, and the nomination paper was in all respects in proper form, and duly delivered, except that it was not signed with the full Christian name of the candidate, who had signed it "Robert V. Mather," his second Christian name being Vicars; and the question is whether that is a fatal objection. The objection was taken in proper time, and was overruled by the mayor. I feel obliged to hold that the objection was a good one, and ought to have been allowed. The municipal elections amendment act, which passed last year, (38 & 39 Vict. c. 40,) directs, among other things, that the nomination paper shall state the surname and other names of the persons nominated, according to the form given in the second schedule. \* \* \* I repeat that I yield to the objection with great reluctance. \* \* \* It must be remembered that in dealing with cases under these acts we are sitting as a final tribunal of appeal, in the exercise of a duty cast upon us under peculiar circumstances, and as a sort of compromise between conflicting parties in the legislature, and therefore are more especially bound to keep ourselves strictly within the letter of the acts, and to abstain from any attempt to strain the law." In *Howes v. Turner*, 1 C. P. Div. 670, Mr. Justice BRETT says: "The material facts are these: The notice given by the town-clerk under section 1 of the municipal elections act of 1875 (38 & 39 Vict. c. 40) was a bad notice. Though issued in proper time, it gave notice that nomination papers of candidates at the forthcoming election of councillors were to be delivered to him on Saturday, the 23d of October, whereas they should have been delivered to him on the 22d. \* \* \* Here, it is clearly proved that one of the candidates was misled by the error in the notice, an error which even a skillful person might well have committed. It is impossible to say which of the candidates would have been elected if that mistake had not occurred. It seems to me, therefore, that such a defect as has had that result is fatal, and on that ground I think we ought to hold this notice to be so bad as to have rendered the whole election void, and, under the circumstances, to have disqualified the successful candidate from being elected." The candidate who was thus misled delivered his nomination paper to the town-clerk "Saturday, the 23d, which was not in proper time." In *Monks v. Jackson*, 1 C. P. Div. 683, it appeared that the nomination papers of certain candidates were delivered to the town-clerk by the agent of the petitioners and their proposers and seconders. The statute requires the nomination papers to "be delivered by the candidate himself, or his proposer or seconder, to the town-clerk." Lord COLERIDGE, C. J., said: "I am clearly of opinion that this statute is imperative, and not merely directory; \* \* \* and, it appearing on the face of the case that the petitioners were not duly nominated, there is no ground for questioning the election of the respondents." *Burgoyne v. Collins*, 8 Q. B. Div. 452. In the work of Wigmore on Australian Ballot System,

(2d Ed.) 186, 187, we find the following notes of decisions which are reported in volumes that are not at our command: "A nomination made by persons 'not entitled to vote' because of taxes unpaid is not valid, even though at a previous election they were qualified and voted. Ex parte Drew, 9 Sup. Ct. R. (N. S. Wales) 169." "A nomination paper was not filed until after 4 P. M., the prescribed time, on the day of nomination. Held, that the election was void, though no other person was nominated. Reg. v. Miller, 1 Austr. Jur. R. 56, (Victoria, 1876)." "A statute required that nominations be filed 'seven days at least' before election day. Held, that this required 'seven clear days to intervene, exclusive of the days of election and nomination.' Ex parte Hurst, In re DeClewett, 9 Sup. Ct. R. (N. S. Wales) 177." "A statute provided that 'whenever any day provided or appointed by or under this act for any purpose shall in any year happen on a Sunday, New Year's day, etc., or any day proclaimed as a holiday, then such provision and appointment shall take effect as of the following day.' The last day for filing nominations fell on a Sunday. On Saturday, nominations had been made for all vacancies, but on Monday further nominations were accepted. Held, that these were invalid, that statute applying only where a single day was specified for an event, and not where Sunday was one of several days on which an act might be done. Reg. v. Hennessy, ex parte Knight, 5 Austr. Jur. R. 35, (Victoria, 1874)." Mr. Paine considers this matter in his treatise on Elections, and observes: "The proceedings of an election, in England, commence with the nomination of candidates. The nomination is no longer made *viva voce*, in public, but in writing, in the designated room where the returning officer attends, on the day and at the hour specified in the notice. \* \* \* The nomination papers may be delivered to the returning officer during the two hours fixed for the election, and not afterwards. No person nominated after the expiration of the two hours will be entitled to have his name inserted in the ballot papers." Section 427.

We assume upon this hearing that the facts which are properly pleaded in the statement of the contest have been established. The force of these authorities, which construe the English statutes that have been adopted partially by our legislative department, must be recognized. The principle which has called into being this law, that prescribes the conditions for the nominations of candidates for office before the day of election, demands the enforcement of every provision. We are compelled to hold that the respondent was not nominated for the office of justice of the peace of Belmont township in the manner fixed by the statute, and that his name should not have been published in the Helena Independent, or printed on the official ballot, as a candidate therefor. The specifications which are contained in the statement support these propositions. The publication of the candidacy of the respondent, and the printing of his name upon the ballot, gave him a position and

advantage which the law declares he shall not enjoy. If any person has not been nominated in a legal manner, or if the notification of his nomination has not been filed within the period named in the statute, he can announce to the public that he is a candidate for an office. The fifteenth section allows every voter to write or paste on his ballot "the name of any person whom he desires to vote for," but the respondent is not aided by this provision. Our conclusion is that the election of the respondent should be adjudged void, but we cannot direct that a final judgment be entered. It is therefore ordered and adjudged that the judgment be reversed, with costs, and that the cause be remanded, with instructions to overrule the motion of the respondent to quash the statement of the contest.

HARWOOD and DE WITT, JJ., concur.

#### WELLS v. WELLS.

(Supreme Court of Utah. Aug. 30, 1890.)

#### ESTOPPEL—LIMITATIONS.

1. A father gave his son certain land and put him in possession, the son conveying certain land to him in consideration. On account of the son's drunkenness the father conveyed the land to his grandson, said son's child, excepting and reserving from the grant the possession and use of the premises for and during the life of the son, and also of his son's wife, if she should remain his wife until his death. In a suit for divorce by the wife the issue was presented by the pleadings whether the son had a life-estate under the deed, and, while the court did not expressly rule on the question, it, in granting a divorce, enjoined the son from interfering with the property, and made the wife receiver thereof, granting her the possession and rents thereof. Prior to the divorce the son occupied and extensively improved the premises, he and his father construing and acting on the deed as giving the son a life-estate. The father had full knowledge of the divorce proceedings and the order therein, and made no claim to the property for nearly 10 years thereafter. Moreover, after the divorce, the wife continued to occupy the premises and improve them, claiming an estate for the life of her former husband. Held, that the father was estopped from claiming that the deed gave him an estate for the life of his son and wife while at the same time retaining the property conveyed to him by his son at the time of the gift.

2. Under 2 Comp. Laws Utah 1888, §§ 3131-3134, providing that an action to recover real estate or the possession thereof shall be brought within seven years, the father's cause of action was barred, the sum of the adverse possessions of the son and the divorced wife being more than that period.

Appeal from third district court; before Justice HENDERSON.

J. L. Rawlins and Arthur Brown, for appellant. Dickson & Stone, John A. Marshall, and Waldemar Van Cott, for respondent.

ANDERSON, J. The complaint in this case alleges that the plaintiff is the owner and entitled to the possession, rents, and profits of a certain piece of real estate situated in the city of Salt Lake; that on the 14th day of November, 1879, the defendant, Emma Geneva Wells, in an action in the third district court of this territory, wherein she was plaintiff, and her hus-

band, Daniel H. Wells, Jr., son of plaintiff herein, was defendant, was by said court appointed a receiver to manage, lease, and rent said real estate, and apply \$40 per month of said rents to the use and support of herself and child, and hold the overplus of rents, if any, subject to the order of said court; that the plaintiff in this action was not made a party to said divorce proceeding, nor heard therein; that the defendant is still collecting the rents of said property, and appropriating the same to her own use; that he has demanded of the defendant the surrender of the use and possession of said property, which was refused; that plaintiff is in need of the use and possession of said property; that defendant is not in need thereof; and asks that the order appointing the defendant as receiver of said property be revoked, and that she be required to surrender the property to plaintiff. The defendant, by her answer, denies all the allegations of the complaint, except her appointment as receiver of the property, the receipt of the rents thereof for herself and child, and her refusal to surrender the use and possession of the premises to plaintiff, and that plaintiff is the father of her former husband, Daniel H. Wells, Jr. The defendant pleads the statute of limitations in bar of plaintiff's action, and also sets up that in December, 1874, the plaintiff gave said premises to her said husband, Daniel H. Wells, Jr., and put him in possession thereof; that under said gift her husband, in 1875, began the erection of a dwelling-house on the premises, and that plaintiff advised and encouraged him to do so; that on March 22, 1876, plaintiff, for a good and valuable consideration paid to him, deeded said property to his first grandson, Daniel Hanmer Wells, son of defendant and the said Daniel H. Wells, Jr., but excepted and reserved from said grant the use and possession of said premises during the natural life of said Daniel H. Wells, Jr., and during the life of this defendant, if she remained the wife of said Wells, Jr., until his death, and thereafter so long as she lived and remained unmarried; that defendant and her husband continued in possession of the premises from December, 1874, to November 14, 1879, when defendant procured a divorce from her husband on account of his habitual drunkenness, and was appointed receiver to manage and lease and collect the rents of said property for the use of herself and son, the grantee in said deed; that the plaintiff and defendant, and the said Daniel H. Wells, Jr., acted on and construed said deed as giving a life-estate to the said Daniel H. Wells, Jr., and also to defendant for such further time after his death as she did not remarry; that plaintiff knew of said divorce proceedings, and of said decree at the time, and always acquiesced in the same until he began this action; that the dwelling-house was uncompleted at the time of said divorce, and that the defendant thereafter completed said house and improvements with money furnished by herself, and money derived from the rents thereof, and that the same was done with the knowledge and acquiescence of the plaintiff. The cause was tried to the

court, and a judgment rendered dismissing plaintiff's complaint. A motion for a new trial was made and overruled, and the plaintiff brings this appeal from the judgment of the district court, and from the order overruling the motion for a new trial.

The court, in its findings of facts, found that "the defendant and Daniel H. Wells, Jr., were married September 22, 1874, and as issue of said marriage there was born October 2, 1875, Daniel Hanmer Wells, who is the first grandson of plaintiff; that in the latter part of the year 1874 plaintiff gave the premises in controversy to his son, Daniel H. Wells, Jr., and put him in possession of the same; and that the son conveyed certain other real estate situated in Salt Lake City to his father in consideration of said gift; that relying on said gift, and claiming exclusive ownership of said premises, the son began the erection of a dwelling-house, and other improvements thereon, in 1875, which dwelling-house and improvements were partially completed previous to the execution of any deed therefor, and with the knowledge, advice, and encouragement of plaintiff; that a short time prior to March 22, 1876, the said Daniel H. Wells, Jr., became addicted to habitual drunkenness, and the plaintiff determined not to convey the premises to him absolutely, but to convey the same so he, the said Daniel H. Wells, Jr., would have the use of the premises without the power of squandering the same, and in pursuance of such determination plaintiff executed and delivered to his said grandson a deed of said premises dated March 22, 1876; that the defendant and her husband, after the making of said deed, continued in the possession of the premises, the husband claiming an estate for life; and that plaintiff encouraged him in such belief until about June 22, 1889, when this action was begun; that defendant's husband, under such belief as to his life-estate therein, continued to make improvements on said premises, by the encouragement, advice, and acquiescence of plaintiff; that defendant's husband expended a large amount of his means on said house and improvements, which greatly increased its value, and to such extent as to render his reimbursement impossible, but that most of the money expended on said house and improvements was loaned by plaintiff to defendant's husband and charged to him; that defendant's husband held exclusive possession of said premises under his claim of a life-estate therein until November 14, 1879, when defendant was duly divorced from the said Daniel H. Wells, Jr., for his gross and habitual drunkenness, and was appointed by the court receiver of said property, and was authorized to apply the rents to the support of herself and child; that plaintiff knew of said divorce, and the appointment of defendant as receiver of said property, but never in any manner made any claim to said premises until the beginning of this action; that after defendant was appointed such receiver she asserted ownership and possession to the extent of a life-estate in Daniel H. Wells, Jr., and under such claim, and the decree in said divorce

case, has held possession ever since, and has completed said dwelling-house and improvements from the rents thereof, with full knowledge thereof on the part of plaintiff; that plaintiff and defendant's husband have acted on, and practically construed and interpreted, said deed from the time of its date as granting a fee to said first grandson subject to the use and possession of an estate therein for and during the natural life of said Daniel H. Wells, Jr.; that from the latter part of the year 1874 until November 14, 1879, the said Daniel H. Wells, Jr., personally, and since said date the defendant as receiver, has held the open, exclusive, notorious, and continuous possession of said premises, claiming to first own said premises in fee, and afterwards an estate therein for the life of said Daniel H. Wells, Jr., adversely to plaintiff, and with full knowledge thereof on his part during all of said time, and that plaintiff has not been seised or possessed of said premises since the latter part of the year 1874." In the divorce proceedings the plaintiff therein, defendant in this case, alleged in her complaint that she and her husband had by the deed from Daniel H. Wells, Sr., an estate for life in the premises in controversy, with remainder in fee to their infant child, Daniel Hanmer Wells. The defendant by his answer in that case denied that he and his wife, or either of them, had any interest whatever in the property, and alleged that, by the deed, the grantor reserved to himself an estate during the life of his son, and of the plaintiff in that action. The court ordered that the said Daniel H. Wells, Jr., and all persons claiming through him, abstain from selling, leasing, or incumbering the property, or in any way interfering with this defendant's right to manage the same and collect the rents thereof. The deed from plaintiff to his grandson was in the usual form, conveying an estate in fee-simple, with the following clause added, to-wit: "But, nevertheless, excepting and reserving from the said grant the possession and use of the said premises, and every part and parcel thereof, with the appurtenances, for and during the natural life of Daniel Hanmer Wells, Jr., and also of his wife, Emma Geneva, if she shall continue to his death his wife, and shall survive him, and so long as she shall continue thereafter unmarried, and on the death of the said Daniel H. Wells, Jr., or in case the said Emma Geneva shall continue his wife to his death, and survive him, then, on her death or marrying, this exception and reservation shall wholly cease."

Counsel for appellant contend that, by the terms of his deed to his grandson, appellant reserved to himself an estate during the life of Daniel H. Wells, Jr., and during the life of the defendant if she should survive him and remain unmarried; and that Daniel H. Wells, Jr., prior to the divorce was only a tenant at will, and that after the divorce the defendant, as receiver, held the property as her husband had held it. While the deed does not in express terms reserve an estate in the grantor, yet, as an original question upon the construction of the terms of the

deed, we think such would be the fair and reasonable construction of the language used. But in the divorce case the issue was presented by the pleadings as to whether or not Daniel H. Wells, Jr., was seised of a life-estate in the property under the deed, and while the court did not in express terms rule on the question, yet, in appointing defendant receiver of the property and granting her the possession and rents thereof, and enjoining said Daniel H. Wells, Jr., from in any manner interfering with such possession and use, it must necessarily have construed the deed as vesting such estate in him. The court below, in this case, having found that plaintiff had full knowledge of such divorce proceedings, and of the order and decree made therein, and having made no claim to the property for nearly 10 years after the decree was rendered, and that plaintiff and Daniel H. Wells, Jr., had always construed and acted on the deed as vesting in said Wells, Jr., a life-estate in the property, and that defendant and her husband through a long series of years occupied and improved the property with the knowledge and encouragement of plaintiff, we think plaintiff should now be concluded by such construction, and estopped from insisting on a literal interpretation of the terms expressed in the deed, and should not be permitted to take the property from the defendant in its improved condition, which has greatly increased its value, while also retaining the property conveyed to him by his son at the time the gift was made. Such a result would be a fraud on the defendant, such as no court of equity will sanction. *Freeman v. Freeman*, 43 N. Y. 34; *Peters v. Jones*, 35 Iowa, 517; 3 Pars. Cont. 359; *Neale v. Neale*, 9 Wall. 1.

It is contended, however, that the findings of the court that plaintiff gave the premises in controversy to his son in 1874; that the son, and afterwards the defendant as receiver, acting under the belief that a life-estate was conveyed to the son by the deed, expended large sums of money in improving the property, with the consent and advice of plaintiff; and that plaintiff and his son practically construed and acted on the deed as conveying a life-estate to the son,—are unsupported by the evidence. At the trial the plaintiff and defendant and Daniel H. Wells, Jr., and a number of other witnesses testified, and the evidence is all before us, and we have examined it carefully, and think it sustains the findings. But even if upon a reading of the testimony this court might reach a different conclusion as to the facts, or some of them, this would not be ground for reversal. Where a case is tried on oral testimony before the court without a jury, its findings of facts are conclusive in this court on appeal, unless they are so palpably erroneous and unsupported by the evidence as to unmistakably demonstrate that the court committed some oversight, or acted under some mistake, and this rule applies in equitable as well as legal actions.

The statutes of this territory provide that no action for the recovery of real property or for the possession thereof



shall be maintained unless begun within seven years from the time the cause of action accrued. 2 Comp. Laws 1888, §§ 3131-3134. The court found that Daniel H. Wells, Jr., held the premises in controversy adversely to plaintiff from 1874 to 1879, first claiming to own the same in fee, and, after the execution of the deed, claiming a life-estate; and that since November 14, 1879, the defendant has held the premises as receiver under the decree of the district court adversely to plaintiff, claiming an estate therein for the life of the said Daniel H. Wells, Jr., with full knowledge of such adverse claim and holding by plaintiff. The cause of action is therefore barred by the sections of the statute above referred to. The judgment of the district court is affirmed.

ZANE, C. J., and BLACKBURN, J., concur.

### STEELE v. BOLEY *et al.*

(*Supreme Court of Utah*. Aug. 30, 1890.)

#### ADVERSE POSSESSION—RUNNING OF STATUTE—EQUITABLE DEFENSES.

1. The statute of limitations will run against the purchaser of land from the United States in favor of one holding adversely only from the issuance of the patent. Following *Redfield v. Parks*, 10 Sup. Ct. Rep. 83, and overruling *Steele v. Boley*, 23 Pac. Rep. 311.

2. Where, in ejectment, there are both equitable and legal defenses, the equitable should first be considered.

Appeal from first district court; before Justice BLACKBURN.

*Geo. Sutherland and S. R. Thurman*, for appellants. *A. Saxey*, for respondent.

ANDERSON, J. This is an action at law by the plaintiff for the recovery of 20 acres of land situated in Utah county, in this territory, of which he is the patentee. The defendants plead adverse possession of the land for more than seven years prior to the commencement of the action as a defense, and, as an equitable defense and cross-complaint, the defendants aver that in 1876 the plaintiff purchased of one C. W. Wilson his possessory right to 160 acres of public land, of which the 20 acres in controversy are a part, with the intention of entering the same under the land laws of the United States, and agreed with said Wilson, in consideration of his relinquishing to plaintiff his claim on the land, that as soon as he should acquire a patent to the 160 acres from the government he would convey to Wilson or his grantee or successor in interest the 20 acres in controversy; that immediately thereafter Wilson sold his interest in the 20 acres to the defendants, with the knowledge and consent of plaintiff, who advised them to buy the land, and that they might safely purchase the 20 acres and rely on his promise to convey to them; that they took immediate possession of the land, and have occupied and cultivated it ever since, and claimed to own it, and that such possession and occupancy was with the knowledge and consent of plaintiff, who has always recognized their right to the land until he began this suit; that plaintiff made his final proof at the

United States land-office, paid the purchase price, and received a certificate of purchase for the land in 1880, and a patent in 1886, but that ever since then he has refused, and still refuses, to convey the 20 acres to defendants. Defendants ask that plaintiff be adjudged to convey the 20-acre tract to them, and that he be enjoined from the further prosecution of this action, and for general relief. The case was tried to a jury upon the sole question of the adverse possession of the defendants, and a verdict was returned in their favor, and judgment rendered accordingly, no action being taken by the court in reference to defendant's cross-complaint. The plaintiff moved the court to set aside the verdict, and for a new trial, which was granted, and the defendants bring this appeal from the order granting a new trial.

On a former appeal in this case, from an order of the district court sustaining a demurrer to the defendants' answer, it was held by this court that the statute of limitations would run against the holder of a certificate of purchase from the government, and, before the issuance of a patent, in favor of one who is in possession of the land covered by the certificate, and holding adversely to him, from the date of such certificate. *Steele v. Boley*, 22 Pac. Rep. 311. There are numerous decisions to this effect in the state courts. See cases cited by *HENDERSON, J.*, in the former opinion in this case. An examination of those cases will disclose the fact that all, or nearly all of them, are based on statutes which provide that such a certificate is proof of title equivalent to a patent against all but the holder of an actual patent, and the holder, therefore, of such a certificate might maintain ejectment in the state courts of those states against one who had taken wrongful possession of the land described in the certificate, and, if he neglected to do so, the statute would run against him, and in favor of the one in possession. But since the former decision in this court the supreme court of the United States has held that, while the title to public land is still in the United States, no adverse possession of it can, under a state statute of limitations, confer a title which will prevail in an action of ejectment in the courts of the United States against the legal title under a patent from the United States. *Redfield v. Parks*, 132 U. S. 239, 10 Sup. Ct. Rep. 83. In that case the court say: "It cannot be conceded that state legislation can in that manner imperil the rights of the United States, or overcome the general principle that it is not amenable to the statute of limitations or the doctrine of laches." Again the court say: "The plaintiff could not sue or recover in the courts of the United States upon the equitable title evinced by his certificate of purchase made by the register of the land-office. His title, therefore, being derived from the United States, the right of action at law to oust the defendant did not commence until the making of the patent." The decisions of that court are of binding authority upon this court, and, under the authority of *Redfield v. Parks*, *supra*, we must hold that the district court erred in admitting evidence

of adverse possession by defendants prior to the issuing of the patent to plaintiff, and in instructing the jury to find for defendants if they found the defendants had held continuous, open, and adverse possession of the premises in controversy for seven years before this action was begun by plaintiff.

Under our system of practice equitable defenses may be interposed in an action of ejectment, and, if the answer contain all the essential averments of a bill in equity, affirmative relief may be granted thereon. The equitable issues should first be passed upon by the court, for upon such determination as to the relief claimed by a defendant will the necessity of proceeding with the action at law depend. In this case the trial of the legal defense to a jury ignoring the equitable defense and cross-complaint was irregular, but, as no objection was made to this mode of procedure in the court below, nor raised in this court, we do not take the irregularity into consideration in determining this appeal, and only call attention to it for the purpose of settling the practice and securing uniformity in this respect. If the defendants can establish by proper proofs a valid, equitable right to the premises, they should have an opportunity afforded them to do so. The order of the district court granting a new trial is affirmed.

ZANE, C. J., and HENDERSON, J., concur.

#### RUTH v. LONG.<sup>1</sup>

(Supreme Court of Utah. Oct. Term, 1867.)

APPEAL—REVIEW—MATTERS NOT APPARENT ON RECORD.

Where on appeal to the supreme court there is in the record no bill of exceptions or assignment of errors, and no errors of law appear on the face of the record, the judgment will be affirmed.

Appeal from third district court.

*John V. Long*, for appellant. *Z. Snow*, for respondent.

DRAKE, J. This case comes before this court upon an appeal taken by the defendant from the decision of the district court for the third judicial district. Upon looking into the record of the cases, we find it was originally commenced in the probate court of Great Salt Lake county. In the probate court there was an issue of fact joined between the parties, and a trial by jury, and a verdict rendered in favor of the plaintiff for \$563.30. A motion was made by the defendant for a new trial. That being denied, he appealed to the district court, and the case was submitted to the district court upon the record and proceedings of the probate court. The judgment of the probate court was affirmed by the district court, and the defendant appealed to this court. The appeal being perfected, the record is in this court unattended by any bill of ex-

ceptions, and there is no assignment of errors. It is simply an appeal. In this court there can be no trial of issues of fact. If such issues are formed between the parties, they must be tried in some other court. If there are any errors in law arising in the course of a trial in the courts where issues of fact are tried, they must appear upon the records or in the proceedings, by bill of exceptions properly taken and certified and attached to the record, to enable this court to determine whether the judgment of the district court ought to be affirmed or reversed. The plaintiff's complaint filed in the probate court contains a sufficient cause of action, and, if supported by proper proofs upon the trial, would entitle the plaintiff to recover. Likewise the answer of the defendant contains such denials and averments that, if supported by proper evidence on the trial, would overthrow entirely the demand of the plaintiff. Throughout the proceedings in the courts below, as well in the probate court as in the district court, there appears to have been no special or particular exceptions taken to the ruling of the court. In the probate court a motion was made by the defendant for a new trial. The reasons urged in support of that may have been sufficient, not only to justify, but to require the granting of a new trial. The question of a new trial is one which does not usually come before a court of review. The reasons for a new trial can be presented with far greater force to the court where the trial has been had than elsewhere; and, indeed, some of the reasons entitled to great consideration can never be adequately conveyed to another tribunal; and the general conclusion is that if the reasons for a new trial are insufficient to obtain it before the court where the trial was had they must be inadequate before another tribunal, the judge of which had not the benefit of hearing the trial, and of seeing the circumstances which surrounded it. The district courts in this territory, although they have supervisory power over inferior courts, are not to be considered courts of review. They are courts for the trial of facts, as well as the determination of questions of law. Motions for new trials made in inferior courts, if denied, may be supervised in the district court; but, to enable the district court to supervise the decisions of an inferior court upon a motion for a new trial, it should be so set forth, with the reasons in support thereof, that it might be seen that the inferior court had improperly refused a new trial. If a jury, for instance, had rendered a verdict for the plaintiff without any evidence in support of the plaintiff's demand, or if a verdict should be rendered contrary to law and evidence given in court, or contrary to the charge of the court, or should award excessive or inadequate damages, in these and in many other cases a new trial should be granted, if asked for; and if the inferior court should deny the motion, the case being brought to the district court by appeal, its powers of supervision are such that it can and it ought to look into the proceedings of the inferior court and see that justice should be done, and to that

<sup>1</sup> This case filed at October term, 1867, is now published by request, with 16 others, in order that the Pacific Reporter may cover all cases in volume 3, Utah Reports.

end the district court can and ought to give a new trial to the parties, either in the district court or by sending the case back to the inferior court with instructions, or in such other way as the law may provide. When it appears that the parties have had a fair opportunity to prepare for trial, and that issues of fact have been fairly tried by a jury, and a reasonable conclusion arrived at, there can be no good reason for granting a new trial in the same or any other tribunal to try again the same issues. It would be contrary to the genius and spirit of jury trials, and that institution, for which so much has been said, and which is so inseparably interwoven and connected with American jurisprudence, would become a mockery, if no respect were to be paid to the deliberate and well-considered verdict of a jury. Appeals from one court to another are allowed and allowable only for the purpose of furthering justice, not for the hindrance and delay of a party in obtaining his just rights. It is therefore not unreasonable that the party appealing from one court to another should be able to show by the record and proceedings, and by his bill of exceptions, which becomes a part of the record, that some error, or some supposed error, in law has been committed, or that some injustice has been done to him in the court below, before he shall be permitted to delay his antagonist with the costs and proceedings of a new trial. The statute authorizing appeals is so framed that different constructions may arise. In the third judicial district, which is the only one where there has been sufficient business to call for a consideration of the subject, a construction has been put upon the statute in regard to appeals by the chief justice during the four past years, which, from that fact, if no other, is entitled to consideration. If the general construction given to that statute is not in accordance with the best and true interests of the parties litigant, perhaps the best mode of remedying the evil would be to apply to the legislature, and have a more specific, certain, and extended law provided. When statutes have had a construction put upon them, and the people have become acquainted with the decision of courts as to the practice to be adopted in proceedings under the statute, any change or alteration in the construction of the statute or in the rulings of the courts is attended with costs and difficulties. Of all practice an unsettled one is the most disastrous to the attorney and his clients. On this occasion I have thought it proper to express my own views. I am unwilling to overturn entirely a practice already adopted, where it can be essentially complied with without adding any material labor to counsel, or costs to the client. The speedy administration of equal justice and economy in proceedings ought always to be a consideration in practice. After a careful examination of the record and proceedings in this case from the commencement, I am unable to discover any errors, or that any injustice has been done the defendant. Therefore the judgment of the district court must be

affirmed, and the clerk of that court ordered to proceed accordingly.

TITUS, C. J., and McCURDY, J., concurred.

REECE *et al.* v. KNOTT.<sup>1</sup>

(Supreme Court of Utah. Jan. Term, 1861.)

CONSTITUTIONAL LAW—JURY—ACTION ON PARTNERSHIP NOTE—DEBT.

1. The Utah statute which provides that only tax-payers shall be eligible to sit on a jury is in violation of Amend. Const. U. S. art. 7, which declares that "the right of trial by jury shall be preserved."

2. In an action against a partnership on notes purporting to be executed by it, by the assignee of such notes, it is proper to substitute an instruction that plaintiff cannot recover if the original holders of the notes knew that the partner executing them bought the property for which they were given on his own account, and not on the credit of the partnership, for an instruction requested by defendants to the effect that plaintiff could not recover if he himself had such knowledge before he took the notes.

3. In an action of debt it is reversible error to render judgment, not only for the debt sued on, but for damages, as in *assumpsit*, and for interest on the judgment.

Error to second district court.

J. H. Ralston, for plaintiff in error.  
Broadhead & De Wolf, for defendants in error.

CROSBY, J. This was an action of debt commenced in the district court of the second judicial district upon certain promissory notes, amounting in the aggregate to the sum of \$2,600, with interest at 5 per cent. per month from October, 1854, till paid, and praying judgment at the time suit was brought for the sum, alleged due, of \$17,540. The defendants, in answer, deny the indebtedness, but admit that the notes were executed by a member of their firm, not on partnership account, but that they were executed by the said member of their firm, and given to the several payees thereof, for and on account of cattle bought by the said Barnard of the said several payees, on his own account, and for his own individual benefit; and that the said firm name, namely *Reece & Co.*, signed thereto, was without their knowledge and consent, and against the express protest made by one of their firm, the defendant Kinsey, acting for himself and the other members of said firm, J. and E. Reece, both to the said payees of the said notes and the said Barnard, and, the said plaintiff, to whom these several notes were afterwards conveyed, had full notice and knowledge of the fraud thus perpetrated previous to or at the time of purchase of said notes. Judgment was entered by default against the parties not appearing, Enoch Reece, Louis Barnard, and Stephen A. Kinsey, and also on trial against John Reece, for the sum of \$20,045.33. The case was removed to this court by writ of error. The exceptions taken below were: (1) The incompetence of a juror, on the ground of not being a tax-payer, as required by law.

<sup>1</sup> This case, filed at January Term, 1861, is now published by request, with 16 others, in order that the Pacific Reporter may cover all cases in volume 3, Utah Reports.

(2) The court erred in declining to give the jury the instructions asked for by defendant's counsel. In the application by the defendant to bring the case to the supreme court, five separate and distinct points of error were assigned; yet it appears from the record of the proceedings of the court below that there were but two exceptions taken by the defendant.

While all that is necessary to bring a case from an inferior to a superior court, in the absence of any statutory provisions prescribing the forms and rules of procedure, is simply to file the record, (the errors may be assigned in the court above,) still these errors must agree with the exceptions taken below, or else be patent on the record; nor is it the duty of this court to inquire into and inspect the records of the court below, and decide wherein the pleadings are defective, and wherein the court erred in its rulings and opinions, when the law has provided all the means and remedies by which a party can take advantage of such defects and errors in the judgment of the court, or otherwise, at the proper time. *Woods v. Commissioners*, 1 Morris, (Iowa,) 441. If they are not so taken, they are considered waived. The only points, therefore, so far as exceptions are to be considered, are the two thus made. The first exception is as to the qualification of one Kinney to serve as a juror. He was challenged by the defendant below on the ground that he was incompetent, not being a tax-payer, and on his *voir dire* answered as follows: (1) That he did not own taxable property within the territory of Utah that he was aware of, as he did not know what legally constituted taxable property; that he owned a watch, a mining claim, and a tent. (2) That he did not pay taxes within the territory of Utah; that he had never been called upon so to do. Whereupon the defendants by their counsel challenged said Kinney. The court overruled the objection, and allowed the juror to be sworn and sit in the case. The statute prescribing the qualifications of jurors is relied upon in support of the objection as to the competency or eligibility of Kinney as a juror. It is true the statute prohibits any person from acting as a juror unless he is a tax-payer; but the question arises whether this statute is not in conflict with the constitution of the United States, which provides, (article 7, Amend.): "The right of trial by jury shall be preserved." When the framers of the constitution used the word "jury," they used it with reference to its signification at common law, which was a jury of 12 men, and householders. Then has the legislature the right under this constitutional provision to restrict or impair the right of trial by jury by prescribing any terms different from those that constitute a legal jury at common law? If they have a right to say he shall pay taxes before being eligible, have they not the same right to say that he shall possess any amount of property which they may deem proper, and thus virtually have the effect to exclude many good citizens from a seat in the jury-box? Where are we to draw the line if the power to prescribe a property qualification be conceded? Suppose the

legislature should say that before a man was eligible he should be worth \$10,000, (and certainly they have a right to exempt from taxation all property under this amount,) would it not operate, in a country where most of the people are poor, to the entire exclusion of the right of trial by jury? And no matter how oppressive this may seem, yet, if you concede to the legislature the power in the one case, you must grant it in the other. Whenever this question has been raised, it has been decided, we believe, by our highest courts that the legislature has not the right to affix any terms other than those prescribed at common law for the qualification of jurors. The question has often come up where the legislature allowed a less number than 12 men to act as a jury, and where a majority verdict was allowed, and where the defendant in a criminal case was compelled to pay a certain jury-fee before the trial; and in every instance the courts have condemned and set aside such legislation as an infringement upon the clause of the constitution which preserves inviolate the trial by jury.

The defendants' counsel in the court below asked the court to instruct the jury that if they find the plaintiff Knott had notice or knew before he took the notes sued upon that they were given by the defendant Barnard on his private account, and for cattle purchased for himself, and not for the firm, then the plaintiff cannot recover in this action against the defendant John Reece, and they must find for the defendants. The court refused to so charge the jury, but substituted the following: "That if the evidence establishes the fact that the defendant Barnard bought the cattle for which the notes were given on his private account, and not for or upon the credit of the firm, but for himself, of which the vendors were advised or had knowledge at the time of the sale, in such case the plaintiff cannot recover." The substance of the instructions as given were that if these notes were good in the hands of the original payees, James and Jones, they were good also in the hands of Knott, the assignee; whereas those asked for by the counsel for the defendants below would have raised an equity between the makers and the assignee of these notes, which did not exist between the makers and payees. *Story, Prom. Notes*, §§ 72, 178. In both of these exceptions the court must therefore sustain the rulings in the court below. But there is, however, one error patent on the record which is fatal in its nature to the regularity of the proceedings. The judgment is not in accordance with the complaint. That was an action for debt, and the court could have rendered no other judgment upon this complaint but for the original face of the notes and the interest accruing thereon as damages; but in place of this the court has rendered judgment as in *assumpsit* for the debt and damages combined, and has gone on still further in error, and rendered judgment of interest upon the judgment. The contract becomes merged in the judgment, and, in the absence of a statute authorizing a judgment to draw interest, it was manifest error in the court

awarding it. The judgment of the court below is reversed, and the cause remanded.

KINNEY, C. J., concurred.

(3 Utah, 428)

REECE et al. v. KNOTT.<sup>1</sup>

(Supreme Court of Utah. Jan. Term, 1861.)

WRIT OF ERROR—WHEN LIES—PRACTICE—BOND.

1. A writ of error lies at common law from the supreme court to the district courts, though the Utah statutes make no provision therefor.

2. On such common-law writ it does not affect the jurisdiction of the supreme court if the errors assigned in the writ and in the bill of exceptions accompanying it do not agree.

3. There is no law in Utah requiring a party to give bond in order to entitle him to have a judgment against him reviewed on writ of error.

Error to district court, Carson county.

*J. H. Ralston*, for plaintiffs in error.  
*Broadhead & De Wolf*, for defendant in error.

CROSBY, J. In this case a motion to dismiss is filed by defendant's counsel on the following grounds: (1) That there is no statute or authority of law in this territory for granting writs of error by the supreme to the district courts. (2) The first, second, and third grounds of error mentioned in plaintiff's petition are foreign to the record of the case, and cannot for this reason be entertained. (3) Plaintiffs in error failed to give bond with security conditional to prosecute their writ of error to effect, and answer all damage and costs if they failed to make their plea good.

1. It is true that the statutes are lamentably deficient in not having, in accordance with the general usage of other states and territories, enacted laws as to the forms and modes of procedure by which writs of error may be sued out, and appeals taken according to established rules, and by which parties considering themselves aggrieved may seek their remedy in the supreme court. Fortunately, however, at times the common law affords a remedy for insufficient legislation, and thus in a manner prevents the deprivation, which would otherwise occur, of the legal rights of the parties litigant. The writ of error is a writ issued from a superior court to an inferior, commanding it to send up the record, and is a writ allowable at common law.

2. That the bill of exceptions and petition in error do not agree. A petition in error is a statutory provision, and this being a writ at common law, where, not otherwise provided for by statutory provision, it may be issued on application showing cause and without petition or bill of exceptions. All that is necessary is for the parties to assign errors in the superior court. The bill of exceptions simply makes that a matter of record which does not otherwise appear, and is not necessary to give the court jurisdiction of the case on error.

3. That the plaintiffs in error failed to

give bond. There is no law in this territory requiring a bond in order to entitle a party to have his case reviewed on error, and a writ of error does not necessarily operate as a *supersedeas* to the execution. Motion denied.

KINNEY, C. J., concurred.

(3 Utah, 443)

WINTERS v. HUGHES.<sup>1</sup>

(Supreme Court of Utah. Jan. Term, 1861.)

SERVICE OF PROCESS—DISTRICT COURTS—SPECIAL TERMS.

1. Under Rev. Laws Utah, p. 13, § 2, which provides that "when a complaint is filed the court shall issue to defendant a notice containing a copy of the complaint, and the time and place for the investigation thereof," where the notice does not recite the place, and only requires defendant to appear "ten days after the return" of the writ, it is insufficient.

2. Act Utah Jan. 19, 1855, provided that, on petition of not less than 100 legal voters and taxpayers in any judicial district, the judge of the district may hold a special session of court at the time and place specified in the petition. Held, that this was repealed by Act Utah Jan. 31, 1859, which empowered the district court to sit at the county-seat of any county, whenever three-fourths of the electors should petition for such a session.

3. The act of 1855 is void as being a delegation of legislative power which is in conflict with the organic act of Utah conferring such power on the governor and legislature, and provides that courts shall be held at such times and places as may be "prescribed by law."

Appeal from district court, Carson county.

*J. H. Ralston*, for respondent.

KINNEY, C. J. *J. H. Atchison* and *Theodore Winters*, on the 21st day of January, 1860, made their joint and several note for the sum of \$15,000, payable to *Francis J. Hughes* on the 1st day of June following, and, to secure the payment, executed a mortgage deed on a certain mining claim of gold and silver bearing earth and quartz. Only a portion of the note having been paid, a bill to foreclose the equity of redemption of the mortgagors was filed, writ issued and served upon *Winters*, and returned "not found" as to *Atchison*. *Winters* came into court, and his first step in pleading was taken by filing the following motion: "Now comes *Theodore Winters*, one of the defendants in the above-entitled action, and moves to set aside the notice and summons in the said action, for the following reasons: (1) Because the place at which the investigation or trial is to be had is not mentioned in said summons or notice, and the defendant is not informed where he is to appear; (2) because it does not appear from the summons or notice in what clerk's office the summons is filed, or in what county the same can be found." This motion was overruled, to which the defendant excepted. *Winters* then demurred to the complaint for similar reasons, with the additional one that there were not sufficient facts stated to give the

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court jurisdiction. The demurrer was overruled, and exceptions filed. Winters abiding by his demurrer, a decree was rendered against the defendants for the sum of \$10,032, and ordering a sale of the mortgaged property. The following bill of exceptions appears of record: "Be it remembered, that this case came on for trial on this thirty-first day of July, 1860, at the special term of said court held at Carson City, in the said county of Carson, and territory aforesaid, at a town called 'Carson City,' a place distant more than ten miles from the town of Genoa, the county-seat of said county; and the defendant, Theodore Winters, objects to the jurisdiction of the said court to try or render judgment in the said action (1) Because there is no authority of law whereby the said special term of court can be held; (2) because the said court was held at the said town of Carson city, and not at the county-seat of said county." The court overruled the objections, and the said Winters then and there at the proper time excepted. Upon this state of the record, Winters abandoned the cause below, appeals to this court, and assigns for error the overruling of the motion to quash the writ, the overruling of the demurrer, and contends, in addition, that the court erred in overruling the objections set forth in the bill of exceptions.

With the views entertained by this court upon the main question, the right of the judge to hold the court and render the judgment under the then existing laws, it is unnecessary to consider whether the court erred in overruling the motion to quash the writ, and we only do so for the purpose of settling the practice. Section 2 of the Revised Laws provides "that when a complaint is filed the court shall issue to the defendant a notice containing a copy of the complaint, and the time and place for the investigation thereof." Rev. Laws, 133. The notice was issued to the marshal of the territory commanding him to notify the defendants that the plaintiff had filed, in the clerk's office of the district court for the second judicial district, his complaint, and the marshal was further commanded to summon the said defendants to be and appear before the said district court within 10 days after the return-day thereof, and, failing so to do, judgment would be taken by default. This notice was not in compliance with the statute. The legislature can prescribe the manner in which a party may be brought into court, and the method pointed out by law must be substantially followed. Neither time nor place is mentioned, and both are essential under the statute to constitute a legal notice to the defendant. "Ten days after the return" is too vague and indefinite, and is really equivalent to leaving the time blank, for how is the defendant to know when the officer makes his return? Certainly he is not obliged to travel miles at different times to ascertain whether the return has been made. The legislature has very wisely provided that the time shall be fixed in the notice for the appearance of the defendant. This is necessary in order to give him opportunity to prepare for trial, and to inform

him of the precise day on which to appear with his witnesses. The place also is omitted. This could not be done without a direct violation of the law. The statute is peremptory, and must be complied with. All territorial legislation not in conflict with the constitution of the United States, or acts of congress, should be observed and obeyed by the courts, and they have no right in administering the laws to disregard or set it at defiance. We have no hesitation in saying that the court erred in overruling the motion to dismiss the writ. If the defendant had appeared and pleaded without first interposing the motion, the case would be entirely different, but such was not the fact, and his motion was well taken.

But the grand question before us, and the one that has been argued with much ability, is whether the judge, under the then existing territorial laws, had any right to hold the court at all. We have hesitated much before pronouncing a decision which strikes at the very existence of the court, and would willingly avoid a judgment which renders the decree of the court below *coram non judge*. But it is the duty of this court to declare the law as it is, without being influenced by supposed consequences, however serious or startling. Fortunately, the record of the appeal now under consideration is the only one from the second judicial district which properly presents the question of the right of the judge to hold the court. In the other cases no objection was made at the right time to the jurisdiction, and no principle of law is better settled than that, in all courts of general original jurisdiction, if the defendant pleads, he admits the jurisdiction, unless the record itself shows the proceedings to have been *coram non judge*. The objection to the jurisdiction must be first raised in the court below, or it cannot be considered in this court, unless the want of power to hear and determine is clearly apparent upon the record. *Caudill v. Tharp*, 1 G. Greene, 95; *Hotchkiss v. Thompson*, 1 Morris, (Iowa,) 156; *Starr v. Wilson*, Id. 438.

The bill of exceptions in this case fully presents the question. It was objected that the court had no jurisdiction to render judgment, because there was no authority of law for holding a special term of court, and because said court was held at Carson City instead of Genoa, the county-seat of said county. By the act approved January 19, 1855, (Rev. Laws, p. 258, § 4.) it is provided that, upon petition of not less than 100 legal voters and tax-payers residing in any judicial district, the judge of said district shall hold a special session of court at the time and place specified in the petition, unless a remonstrance of like number be seasonably presented. As the record discloses the fact that the court was one of special session, it undoubtedly follows that it was held by virtue of the authority conferred by this statute. The legislature, however, at a subsequent session passed an act, approved January 21, 1859, empowering the district courts to sit at the county-seat of any county within its district, to try cases

arising in such county, whenever three-fourths of the electors in said county should, in writing to that effect, signed by them, petition the judge of the district to hold a term of court in said county: provided that the county court of said county make provision to defray the expenses of said district court. This act contained a repealing clause. Laws 1858-59, p. 8, §§ 14, 17. Two questions are presented by the assignment of errors and the argument: (1) Whether the prior law is repealed by the subsequent; and (2) whether the legislature has the constitutional right under the organic act to provide in this way for holding courts. Are the acts in conflict? Both are intended for the same object, to wit, to provide for holding courts; and if both cannot be sustained the first law must fall. It provides that a special term of court may be held at the time and place mentioned in the petition of 100 legal voters and tax-payers; the other act, that the court shall be held at the county-seat of the county upon the petition of three-fourths of the electors of the county. One law authorizes the petitioners to fix the place; the other requires the court to be held at a place designated by law. One requires but 100 petitioners of the district; the other three-fourths of the citizens of the county. One law makes no provisions for paying the expenses of holding the court; the other requires the county court to provide for paying such expenses. The first act was passed when the population of at least one district was exceedingly sparse, and the accommodations probably at county-seats hardly suited for holding court, and hence a less number of petitioners was required, and they had the right to select the place; but, the county becoming better settled, and county towns increasing in size and wealth, the reason for the law having ceased, the law of 1859 was passed to supersede and take the place of the old law, and we have no doubt it was the intention of the legislature to repeal the law of 1855 by the subsequent one, which embraces the same subject-matter, and provides for the courts to be held at county-seats. The court, then, erred in overruling the plea to its jurisdiction, which presented the question as to the right of the court to hold a special term at a place other than the county-seat.

But the more grave and important question is, could the legislature delegate to the citizen the right which the organic act has conferred upon it as the law-making power?

The act of congress of September 9, 1850, commonly known as the "Organic Act," brought the territory into existence, and conferred upon the people, when assembled in legislative capacity conjointly with the governor, authority to make laws. All legislation must be in conformity with the act. It is from this the right to make laws is derived, and by its provisions the legislature must be governed. It cannot exceed the power given, and ought not to fall short of the requirements it contains. It is enacted that the territory shall be divided into three judicial districts, and a district court shall be held in

each of said districts by one of the justices of the supreme court, at such time and place as may be prescribed by law. Section 9. The term "prescribed by law" means by law passed by the territorial legislature. This construction is apparent without the aid of the sixteenth section; but, as if to prevent any doubt on this subject, it is there further provided, after giving the governor the temporary right until otherwise provided by law to define the judicial districts, and assign the judges to the same, that the legislature at their first or any subsequent session may organize, alter, or modify such judicial districts, and assign the judges, and alter the times and places of holding court. The legislature is designated by congress to fix the time and place. This power is intrusted nowhere else, and it belongs to it exclusively, without the right of delegation. The power thus granted cannot be conferred,—delegated. Congress has provided what the legislature may do, ("fix the time and place for holding court,") and the legislature have no right to say the citizen may fix the time and place, thereby authorizing him to perform legislative functions, and to do what the legislature alone is authorized to do. But the time and place must be prescribed by law. How are they prescribed by law if done by a petition of 100 citizens? We are unable to discover what analogy this bears either to the form or ingredients of law. The petition certainly is not law. The time and place fixed in the petition are destitute of the appearance of law. It is a well-settled principle, recognized and adopted by the highest courts of the country, that the legislature cannot delegate its powers, or even provide for a law to take effect by a vote of the people. If such are the adjudications, if the most solemn legislative enactment cannot become operative when left to and receiving the sanction of the people, depending upon this contingency,—the source of all power in a republican government,—with how much more force of logic can it be said that, when the legislature alone is authorized to fix the time and place of holding court by law, it cannot enact that such time and place may be fixed by the citizen? If the legislature can clothe 100 citizens with this power, it follows, as a legal and logical deduction, it can select a single individual, and clothe him with the same power, and the strange spectacle would be presented of courts, officers, and suitors becoming subject to the caprice of one man. This is the result if the right to delegate is conceded. We deny such right, and declare the act of 1858, under which the court was held when it rendered judgment in this cause, in conflict with the organic act,—void. Thus far we have not referred to the supplemental act of congress passed in 1856 and 1858, as the court below was not held by the authority of either of them. The act of 1856 provides for the judges of the supreme court to fix the time and place in each of the districts for holding court, which, when taken in connection with the organic act and the subsequent acts of 1858, we hold to confer authority only for holding federal courts for



the districts. The act of 1858 authorized the judges to hold courts within their respective districts, wherein, by the laws of the territories, courts may have been or may be established for the purpose of hearing and determining cases other than those arising under the laws of the United States, and provides that the United States shall in no manner be chargeable with the expenses thereof. This law was passed to provide for holding courts in counties, confining such courts entirely to the trial and determination of cases arising under the territorial laws; but it will be observed that such courts must be established by territorial laws. There is nothing in this law in derogation of that clause in the organic act which requires the time and place to be prescribed by law, but rather in affirmation of that provision. Neither of these acts of congress can be cited in support of the judgment. As appears from the record, the court was sitting as a territorial, and not as a federal, court; was holding a special, and not a general, term; and hence it could not have been in session under the act of congress of 1858. It could not have been held by virtue of any power conferred by the act of congress of 1858, because the act only authorizes courts to be held in the counties wherein, by the laws of the territory, courts have been or may be established, and no law of the territory was ever passed, until the session of the legislature just closed, allowing or establishing a court at Carson City in Carson county. We are therefore of the opinion that the court had no right to proceed with the trial, and render a decree, after objection was interposed to its jurisdiction. The decree of the court below is reversed and set aside, and a trial *de novo* awarded.

CROSBY, J., concurred.

HEATH V. WHITE.

(Supreme Court of Utah. Oct. 26, 1867.)<sup>1</sup>

PLEADING—MOTION TO STRIKE OUT—EVIDENCE—  
NEW TRIAL.

1. Where plaintiff sues to recover an agreed price for certain merchandise sold to defendant, it is not error to refuse to strike from the files defendant's answer denying that he is indebted in any manner to plaintiff, on the ground that it states a mere conclusion of law.

2. In such a state of the pleadings it is not error to refuse to receive in evidence, as proof of payment, a note executed by defendant for the price of the property in controversy.

3. After judgment for plaintiff defendant, filed in support of his motion for a new trial his own affidavit that he had learned since the verdict that a certain person would testify that he had on one occasion been told by plaintiff that the matter in controversy had been "settled" by defendant. This person was a stranger to the transaction, and had testified at the trial. *Held*, that a new trial was properly refused.

McCURDY, J., dissenting.

C. H. Hempstead, for appellant. E. D. Hoge, for respondent.

DRAKE, J. This case is brought into this court by an appeal from the judgment of the district court for the third judicial district. The case was originally commenced in the probate court of Great Salt Lake county. An examination of the record and proceedings in that court is necessary to enable us to judge of the correctness or incorrectness of the decision of the district court. We find that on the 10th day of December, 1866, the plaintiff filed his complaint, setting up therein that the defendant was indebted to him in the sum of \$600 for one span of mules, one wagon, and a set of double harness, sold and delivered to the defendant on or about the 30th day of August, 1866, for which he prayed judgment, less the sum of \$200 which had been paid by the defendant. A citation from the defendant was issued, and on the 17th day of December he appeared and filed his answer, in which he emphatically denied being indebted to the plaintiff for any mules, wagon, and harness, or otherwise, at the time of the commencement of the suit, or since. The attorneys for the plaintiff filed a motion to have the answer of the defendant stricken from the files of the court, alleging that the answer did not deny the allegations in the complaint, but set up a conclusion of law, and prayed judgment might be entered in favor of the plaintiff for the amount claimed in the complaint. It is difficult to see from where counsel obtained such notions of practice. The answer of the defendant was a positive denial of his indebtedness to the plaintiff for mules, wagon, and harness, or anything else, at the time the suit was commenced, or since. It was in direct language, and a direct and pointed response to the allegations in the complaint. The facts set up in support of the motion were falsified by the answer there before the court, and in no case can an answer or other pleading be struck from the files, providing such pleading is in decent and decorous language. If, with a decent regard for the dignity and utility of courts, such a practice could be tolerated, we should pass over such demonstrations without remark. The replication of the plaintiff, which then followed, was, to say the least, unnecessary. The office and use of a replication is entirely different from that to which it was applied in this case. The answer was direct and pointed, and put in issue all the material allegations in the complaint, and furnished no grounds for raising any other or new issue. Why a replication should have been filed, simply repeating that the defendant was indebted to the plaintiff as alleged in the complaint, can hardly be accounted for upon any known principles of pleading. It may be questioned whether a replication ought to be used in any case proceeding in the courts of Utah. By the seventh section of the act in relation to the judiciary all technical forms of actions and pleadings are abolished. The second section of the act, "regulating the mode of procedure in civil cases in the courts of

<sup>1</sup>This case, filed October 26, 1867, is now published by request, with 16 others, in order that the Pacific Reporter may cover all cases in volume 3, Utah Reports.

the territory, provides "that any person seeking redress shall make his complaint in writing and under oath." The sixth section of the same act provides "that the defendant shall make his answer in writing, and under oath, after which the plaintiff shall introduce his evidence, which shall be followed by that of the defendant." When the seventh, eighth, and ninth sections of the act in relation to the judiciary, and the first six sections of the act regulating the mode of procedure in civil cases in the courts of the territory, are taken into consideration, a doubt, at least, will arise as to the practice of using any other pleading in the courts of the territory than complaint, answer, and demurrer. It was undoubtedly the intention of the legislature to simplify the practice in legal proceedings. How far that object can be attained must be left for the future consideration of courts. Certainly replications, rejoinders, rebutters, surrejoinders, and surrebutters can be dispensed with if the practitioner chooses to do so. Pleadings of this character were introduced at a time when the practice of the law was considered an occult science, when few were permitted to practice as attorneys and counselors, when a cloud of mysteries were thrown around all legal proceedings, and when human ingenuity was exhausted in mystifying and rendering the practice of the law incomprehensible.

After the pleadings were perfected in this case, the parties proceeded to a trial of the issue by a jury. On the trial witnesses were called by both parties. Books of accounts were introduced by the plaintiff, wherein, under date of August 30, 1866, F. Heath was charged with one span of mules, at \$350; one wagon, \$165; one set of double harness, \$75; and interest, \$10,—making a total of \$600; memorandum, note at 45 days, September 1, 1866, \$300, to be paid by September 20, 1866. In one of the books Frederick Heath was, under date of August 30, 1866, charged with merchandise, \$600; and under date of the 22d of September was credited with cash, \$200. George Stringham, Jr., was called, and testified that on or about the 1st of September, 1866, he, by the order of the plaintiff in writing, delivered to the defendant one span of mules for \$350, one wagon for \$165, one harness for \$75, and interest on the same at \$10, and then there was nothing said about a note in the order. The defendant introduced and gave in evidence a bill of sale from White to Heath of the same articles at the same prices, with same amount of interest added; the total amount the same as charged upon the books of the plaintiff. Below the footing of the bill was entered: "By note at forty-five days, six hundred dollars. It is understood that three hundred dollars is to be paid on or before the twentieth of September, inst. MATTHEW WHITE. September 1st, 1866." The defendant also offered in evidence to the jury a note in the words and figures following: "\$600. Great Salt Lake City, Sept. 1, 1866. Forty-five days after date I promise to pay to the order of Matthew White, six hundred dollars, without defalcation. F. HEATH.

[Stamp—Sept. 1, 1866.] On the back was indorsed the following: "Received, on account of the within six hundred dollars, two hundred dollars, (\$200.) MATTHEW WHITE. Great Salt Lake City, Sept. 22, 1866." The defendant offered to prove by Mr. Halsey that the entry on the back of the note and signature to it was in the handwriting of Mr. White, the plaintiff. Objection was made to the note being offered in evidence, and the objection was sustained by the court, and the ruling excepted to. The case was submitted to the jury, and, after consultation, the jury rendered a verdict of \$400 for the plaintiff. Judgment was entered for the plaintiff against the defendant for \$400, and costs, after which the defendant filed a motion for a new trial, and in support of that motion the affidavit of the defendant was filed, setting forth, in substance, that after the jury had retired to consult upon their verdict he had learned that he could prove by George Stringham, Jr., that on or about the 4th or 5th of December, 1866, in a conversation which he had with the plaintiff, in speaking of the purchase of the property by Heath, he (Stringham) asked White if Heath had settled up with him for the mules, wagon, and harness, to which White replied, "Yes, it is all settled;" and that the knowledge of this evidence did not come to the defendant until after the jury had retired. The motion for a new trial was denied by the court, the defendant excepted to the ruling of the court, and took an appeal to the district court for the third judicial district. After the record and proceedings of the probate court were transmitted to the district court, the argument of counsel was heard, and the case was submitted upon the record and proceedings in the probate court, together with bill of exceptions appended to and made a part of the record. After deliberation, the district court affirmed the judgment of the probate court. The defendant appealed from the decision of the district court to this court.

The errors assigned for the consideration of this court are: The district court erred in affirming the judgment of the probate court of Great Salt Lake county; that it appears from the bill of exceptions attached to the record that in the trial in the court below it appeared in evidence on the part of the plaintiff that a promissory note had been executed by defendant to plaintiff in liquidation of the book-account sued on; that the defendant offered in evidence the said promissory note, as *prima facie* evidence of payment of the debt sued on, and that the court sustained an objection to the admissibility of the note, which was thereon ruled out. The assignment of errors concludes with the following prayer: "That the judgment aforesaid, for the errors aforesaid, and other errors apparent upon the record, may be reversed, and the said cause be remanded for a new trial, and for such other relief as the appellant may be entitled to in law." The argument for the defendant showed that time had been occupied in the preparation, and the case was presented with much zeal and abil-

ity. We listened to it with pleasure, and we have studied his brief with care in connection with the full history of the proceedings before the probate court, as displayed by the transcript of the record, and we are unable to arrive at the conclusions so earnestly sought by the counsel for the defendant. There is throughout the proceedings in the probate court evidently a want of precision. In some parts the proceedings are characterized as being in debt; in others, as being in *assumpsit*. It must not be forgotten that all technical forms of action and of pleading have been abolished in the territory. The declaration or complaint in this case is by no means a technical declaration in debt; neither can the answer be regarded as a technical plea. By the complaint in this case the defendant is informed of the precise nature and extent of the plaintiff's demand without any circumlocution. From the attempted technicality in the defendant's plea or answer has arisen much of the difficulty and perplexity which he has met with in the progress of this case. At the time of filing his answer the defendant unquestionably knew that he had purchased of the plaintiff the articles set forth in the complaint, and at the prices therein stated, with an addition of \$10 interest. The bill of sale, which the defendant produced and made evidence, establishes this fact beyond all controversy. Had he paid for it at the time the suit was commenced, or had he paid in part? If so, he must have known that fact also. Why not, then, in his answer have admitted the purchase, and averred the payment in whole or in part as the truth might be? Instead of adopting this simple mode of pleading, he resorted to a technical form, as he now contends. By this resort he avoided admitting the purchase of the property. As all technical forms of actions and pleadings are abolished, we do not see how he can be benefited by the supposed technicality of his answer; and, moreover, as the statute requires that the answer shall be stated under oath, we think the answer in this case was a fearful approximation to perjury.

It is claimed that the defendant had given his note to the plaintiff in liquidation of the book-account. Liquidation is not payment, and the note of the party given for the purchase price is not payment for the goods bought unless there is some special agreement. If upon the purchase of goods the note of the vendee is given to the vendor, payable at a future day, it extends the credit, and prolongs the time before which a suit may be brought for the purchase money. If the vendor takes the note of the vendee, he may, by disposing of it, enable the vendor to make use of it as a payment. The note in this case was not one negotiable by delivery. To entitle the holder to use it as a negotiable note, it must have the indorsement of the plaintiff upon it. It was made payable to his order. As it was not indorsed, it is not presumable that it had been used or disposed of in the way of business. If the defendant had admitted the purchase of the property, and averred the giving of his note to the plaintiff, payable at a

future day, and that he had, after the giving of it, paid it to the plaintiff or to a third person, if it was a negotiable note he then might have offered the note in evidence on the trial as *prima facie* evidence of payment. He gave no notice in his answer that such a note had been given, or that it was in his possession, or that he intended to make use of it in the trial. A party cannot be permitted to take his opponent by surprise. Judicial proceedings are instituted for the administration of justice, and not for the reward of chicanery. If the defendant had made his pleading properly, he might, if it had become necessary, have used the note in evidence to prove the payment of the \$200 indorsed on it, that indorsement being in the handwriting of the plaintiff. The defendant was not injured in that regard by the rejection of the note as evidence in the trial. The plaintiff had admitted the payment of \$200 in his complaint. If, on the trial of the cause, the court rejects evidence which is strictly legal, it must appear that the party was injured thereby, or it is no cause for setting aside a verdict or for reversing the judgment. If it should be a matter of inquiry how the note could have got into the hands of the defendant unless he had paid it, on examining the testimony produced by the defendant it will appear that upon the bill of sale of the property to Heath, after the articles are enumerated, the prices affixed, the interest set down, and the total expressed, the note at 45 days is mentioned. It is further written "that it is understood that three hundred dollars is to be paid on or before the twentieth inst." The signature of White is there added, and dated September 1, 1866. This bill of sale was produced in court by the defendant in making evidence for himself. He also made it evidence against himself as far as the plain and natural import of the words, taken together, would go. We do not hesitate to conclude that the note was given and received with the express understanding of the parties that the sum of \$300 should be paid on or before the 20th of September. Was this understanding realized? Most clearly it was not realized. We find on the note which was offered in evidence \$200 indorsed as having been received on the original \$600 on the 22d of September, which sum was allowed in the complaint, and is expressed upon the books of the plaintiff. It is to be presumed that the note mentioned remained in the hands of the plaintiff up to the time of receiving the \$200. The defendant having failed to keep and perform his agreement in regard to the payment of \$300, it was competent for the plaintiff to say to the defendant that, as he had not kept his promise to pay the amount of money at the time agreed upon, which was the inducement for receiving the note, he, the plaintiff, was not bound to wait for the payment of his debt until the time mentioned for the payment of the note, and upon the occasion of receiving the \$200 he may have handed the note to the defendant, as would have been his duty if he determined in his own mind that he would relinquish the note, and rely

on prosecuting on the original purchase price. In this way the defendant might have become legally possessed of it; but, with due consideration of the pleadings in this case, we can perceive no other. Throughout the whole of the proceedings the defendant has adroitly avoided acknowledging the purchase and the amount of payment.

The defendant complains that a new trial was not granted him by the probate court. A new trial is, unless regulated by statute, always a question for the especial consideration of the judge before whom the case has been tried. Usually it is not a question for a court of review. But, supposing we could take it under consideration, let us inquire what reason is offered for a new trial. We find in the affidavit of the defendant it stated that after the jury had retired to consult upon their verdict he learned or was informed that in a certain conversation which the plaintiff had with one George Stringham, Jr., about the 4th or 5th of December, 1866, speaking of the purchase of the property by Heath, Stringham asked the plaintiff if Heath had settled up for it, and the plaintiff said "it was all settled up." Such is the substance of the newly-discovered evidence which the defendant expected to produce if a new trial was granted. The defendant alleges in his affidavit that at the time of the trial he did not know that such evidence existed. It may be here observed that the defendant has nowhere laid the foundation for this belief that any such testimony could exist. He does not state how or by whom he had been informed of it. The affidavit of Mr. Stringham, setting forth the conversation, the question of the person, and the reply of the plaintiff, was not produced. There was no sufficient evidence given to the court from which it could reasonably conclude that if a new trial should be granted the newly-discovered evidence could be produced. We asseverate that if Mr. Stringham was put upon the stand as a witness he would testify that he had never had such a conversation with the plaintiff, and that plaintiff never made such a reply. These omissions, if not significant of an unusual degree of cunning on the part of the defendant, are of great importance in considering the application, and, in most cases, insure its refusal. If the defendant had put in a plea alleging payment, the proof of such a conversation might have been properly given. It would have had a tendency to prove the allegation. The true force of the evidence would have been slight. It was a casual conversation, and, from all that appears, between persons having no particular intimacy; and the question was by a person having no interest in the matter, and might perhaps have been considered impertinent. It was, at least, a presumptuous inquiry into the state and condition of the pecuniary affairs of those with whom he had no interest or connection in business. Mr. George Stringham, Jr., was a witness in the trial, and if there had been any reason for proving what the plaintiff had said in this conversation the defendant must have known it; for it

could arise only upon payment having been made, and in that case, by a reasonable diligence, he could have ascertained it, and proved it upon the trial.

It is claimed that the note offered in evidence was improperly ruled out. There was no proper foundation laid in the pleadings for the introduction of this note except to prove the payment of \$200, and to that end it was entirely unnecessary. If, however, the broadest foundation for its introduction had been laid, the party did not put himself in position to have it received. Before the note could have been received in evidence under the circumstances attending it at the trial, the signature to the note must have been proved or admitted to be the defendant's. We think the probate court committed no error in its rulings on the trial, or in refusing a new trial. We find no error in the record and proceedings of the district court. Therefore it is ordered that the judgment and decision of the district court be affirmed, and that the clerk of that court proceed accordingly.

TITUS, C. J., concurred. McCURDY, J., dissented.

#### TERRITORY v. WOOLSEY.<sup>1</sup>

(Supreme Court of Utah. Oct. 24, 1867.)

LARCENY—INDICTMENT—EVIDENCE—GRAND JURY.

1. On an indictment for larceny, defendant, in support of his motion for a continuance, filed an affidavit that an absent witness would testify that on the day of the alleged larceny a certain person offered to sell him the cattle in question, and that in the afternoon defendant told witness that he had bought the cattle from such person, giving in payment a horse which he owned before that, but which was never afterwards seen in his possession. To avoid delay this affidavit was offered in evidence, but was excluded. *Held*, that its exclusion was reversible error.

2. An indictment, which describes the grand jury which found it only as "the grand jury of the people of the United States in the territory of Utah," is fatally defective under Act Utah Jan. 21, 1853, which requires that the grand jurors shall be residents of the county for which they are summoned.

3. Where the indictment recites only that the grand jury were sworn to inquire into crimes, it is fatally defective, as the same act provides that they shall be "sworn to present indictments by the agreement of at least twelve of their number."

Appeal from third district court.

Zerubbabel Snow, for the Territory.  
Hempstead & Thurman, for the respondent.

TITUS, C. J. On the 22d of December last, the defendant above named was tried by jury in the probate court of Great Salt Lake county, in the territory of Utah, on an indictment which the record brought here alleges was found by "the grand jury of the people of the United States, in the territory of Utah, summoned, called, impaneled, sworn, and charged to inquire into crimes and offenses committed in the body of the county of Great Salt Lake," charging the said defendant with larceny

<sup>1</sup> This case, filed October 24, 1867, is now published by request, with 16 others, in order that the Pacific Reporter may cover all cases in volume 3, Utah Reports.

in stealing, "on the fourteenth day of October, in the year of our Lord one thousand eight hundred and sixty-six, at the West Jordan range, in the county of Great Salt Lake, in the territory of Utah," a "light roan steer" and a "heifer," etc. This is the description of the property and offense in the first count of the indictment, and it is continued in the second with but little variation. The jury returned a verdict of "guilty;" and on the 22d of January, 1867, the probate court, overruling a motion in arrest of judgment, sentenced the defendant to six months imprisonment at hard labor in the Utah penitentiary. From this judgment of the probate court, an appeal was taken to the district court of the third judicial district of Utah, in which the said judgment was reversed on the 15th of March, 1867; and, from its judgment of reversal, an appeal brings the record here, which was submitted to this court without formal argument. Previous to the trial, the defendant, on the 19th of December, 1866, moved the probate court to continue his cause, in consequence of the absence of a witness of the name of W. B. Cadwell, of Great Salt Lake city, who, it was alleged by the defendant, would be procurable at a future time, and would prove, among other things, "that, some six weeks or two months before," he was going across the Jordan to look for a horse, when the said Cadwell met a William Schofield, who was driving two beef animals, one a stag, of roan color, and the other a red heifer; that the said Schofield offered to sell "these cattle" to the said Cadwell, but differed in reference to the kind of pay to be given; that the said Cadwell returned to the city some time in the afternoon of the same day, and met the deponent, who then and there informed the said Cadwell that he had purchased the cattle from the said Schofield, giving a certain dark bay or brown horse for the said cattle; that the said Cadwell knew the defendant owned such a horse "before, and" never afterwards "saw" him in possession of the defendant; "that the said facts were material to the defense;" and "that he" could "not prove" them "by any other person." To avoid delay, it appears by the record that the counsel for the prosecution agreed to submit the affidavit containing this statement of facts to the jury, as evidence on the trial. The probate court, however, excluded it as irrelevant, and exception was taken, as appears by the record, to this exclusion.

The attention of this court was directed to two other errors apparent on the record: One, that the indictment does not allege that the grand jurors were taken from Great Salt Lake county; the other, that the oath administered to these grand jurors, and, which is set out in the indictment, was not such as is required by the statutes of Utah. Taking these exceptions in the order of their statement, the evidence, which the record shows to have been excluded, appears to have been vitally material to the case. It would have shown that at or about the time of the larceny alleged in the indictment, a man of the name of Schofield offered to sell cattle of the same description as those alleged to

have been stolen, to William B. Cadwell; that but for their disagreement as to the medium or manner of payment, Cadwell would himself have bought the cattle; that as it was, the defendant himself purchased them, in the same direction, and not far from where the larceny is alleged in the indictment to have been committed; and that he spoke to Cadwell the same day of his purchase, and of his giving in exchange for them a horse which Cadwell knew he owned before, but not after, the transaction. Such facts as these certainly ought to have been submitted to the jury, with the favorable notice of the judge, tending, as they did to prove that the defendant acquired the cattle alleged to have been stolen by honest purchase, and not by felonious taking. By no rule of law or common sense known to the administration of justice ought such evidence to have been withheld by the probate court, and its act in doing so divests its subsequent proceedings in the case of all validity. For this error of the probate court, if no other were apparent on the record, its judgment in this case ought to be reversed.

As a further exception, however, it appears that the indictment purports to set out the qualifications of the grand jurors, and does it in such a manner as to show that it was not competent by the statutes of the territory of Utah. And as a still further exception, it appears that the oath, which the indictment shows to have been administered to the grand jury in the case, was defective in one or more of the essentials required by the same statutes. The "act regulating the mode of procedure in criminal cases," approved January 21, 1853, provides: "Sec. 17. When necessary, the court shall issue an order requiring an officer to summon fifteen judicious men, residents of the county, for a grand jury, who shall be sworn to inquire faithfully into offenses, and present indictments by the agreement of at least twelve of their number against offenders, who shall be prosecuted, and the foreman shall have power to swear witnesses, and compel their attendance." When an officer or any body of officers of the court is referred to merely by title it is not necessary to detail the mode of appointment, the qualifications, the powers, or the duties of the officer or officers of the reference. And when any function or procedure of the court is to be stated on the record with the mere ordinary conditions of its exercise, details are wholly unnecessary. But when the record of any case shows an actual want of the requisite qualifications in any officer or officers of the court, or an essential defect in its procedure, this is always such error as must expose its proceedings to reversal by any court charged with the duty of revision. Now, the record of this case, which describes, the grand jury, and to some extent purports to set out its qualifications, absolutely omits to state that those composing it were "residents of the county" of Great Salt Lake, which comprised the jurisdiction of the court, and constituted the very body for and over which the grand jurors were charged to inquire. As this qualification, "residents of the county," is

thus required by the very letter of the Utah statute, as well as by the example of every known judicial system of which the jury is an element, its omission from this description of the grand jury is a fatal error. From all that appears in the record, the grand jurors, or some of them, may have been residents of some other county of Utah, or even of some neighboring state or territory. Where the title "grand jury" or "grand inquest" alone is given, without any detail of qualifications, the legal requisites might be presumed; but in the face of partial and defective statements of qualification, this court cannot imply any essential as belonging to the grand jury, of this, or any other case.

The indictment also states that the grand jury "were summoned, called, impaneled, sworn, and charged to inquire into crimes," etc. The statute, however, requires that they shall be sworn "to present indictments by the agreement of at least twelve of their number." The record of this case shows that neither by the oath, nor in any way, was the grand jury instructed in this essential of duty, nor that at least 12 of the number did agree to the indictment. From all that appears, it may be inferred that 4, 5, 6, or any number less than 12, may have found the indictment in the present case. And this is the omission of a most essential requisite, for all experience shows that 4, 5, 6, or any number less than 12, of 15 men, would be more likely to combine in permitting a guilty man to escape, or in making an innocent one suffer, than a large number of the same body. Against a defective and erroneous oath which the record of the case shows to have been administered to the grand jury, this court cannot presume that at least 12 men concurred in the indictment under consideration. And for this reason, if for no other, the district court's judgment of reversal ought to be sustained. For the foregoing reasons, the judgment of the district court reversing the judgment of the probate court in the present case ought to be affirmed, and the county of Great Salt Lake ought to pay the costs of the same.

DRAKE and McCURDY, JJ., concurred.

(3 Utah, 483)

BRANNIGAN *et al.* v. PEOPLE.<sup>1</sup>

(*Supreme Court of Utah*. July 22, 1869.)

GRAND JURY—MURDER—INDICTMENT—EVIDENCE—INSTRUCTIONS.

1. Seventeen men do not constitute a lawful grand jury under Rev. Laws Utah, c. 35, § 5, which required the marshal to summon "twenty-four eligible men to serve as grand jurors," and provides that "said twenty-four men shall constitute a grand jury."

2. Nor is the grand jury a lawful one where six of its members were summoned from the bystanders as talesmen, and no proper return was made of the mode of summons, as sections 8 and 9 prescribe a specific mode of summoning grand jurors by writ of *venire*, and also a specific mode of return of the writ.

3. It is error to refuse to allow a plea in abatement based on such illegalities in the constitution of the grand jury, after defendants have withdrawn their demurrer to the indictment.

4. An indictment alleging that defendants did "feloniously, deliberately, willfully, and of their malice aforethought" kill deceased, sufficiently charges murder in the first degree under Rev. Laws Utah, c. 23, § 5, defining such murder "willful, deliberate, and premeditated killing."

5. On an indictment for murder in the first degree it is error to exclude the testimony of a witness that defendants were authorized by the marshal to rearrest deceased, as such evidence has a direct bearing on the question of malice.

6. Under Rev. Laws Utah, c. 80, § 12, providing that the court shall "instruct the jury on the law and equity of the case," it is error to fail to instruct as to the different degrees of murder, and as to manslaughter; and such error is not cured by the fact that counsel read to the jury the statutory provisions on those subjects.

7. On a joint indictment of several persons for murder, a verdict finding "the prisoner guilty" is fatally defective, and a subsequent recital in the record on appeal that the verdict found "the prisoners guilty," being a copy of the first form, will not warrant the presumption that the first form, which was certified by the clerk, was a clerical error.

Appeal from third district court.

R. N. Baskin and J. W. Towner, for appellants. Zerubbabel Snow, for the People.

HAWLEY, J. Upon inspection of the record in this case, we find it to be incomplete in many respects, and it fails to present, in most of its formal and in some material particulars, what a record should, in order that the facts and proceedings it assumes to present may be understood. This has arisen in part from the careless and incomplete manner in which the same was kept in the court below, and also in transcribing same. It is true, the judge is charged with the supervision of all the proceedings of record, but the practice of leaving all the details of the entries to the clerk has been universal. The transcript is wholly the work and responsibility of the clerk below, and we regret the necessity of stating that the transcript in this case could hardly be more faulty. It is hoped that in future there will be no occasion for remarks of this nature. It is a familiar rule of law that statutes that operate beneficially upon those whom they immediately concern are to be construed liberally; but enactments of the opposite character, taking away rights, or working forfeitures, or creating hardships of any kind, are to be construed strictly. The law delights in the life, liberty, and happiness of its subjects, and deems statutes which deprive any one of them of these, in a sense, odious, and therefore all penal statutes must be construed strictly. And the degree of strictness will depend somewhat on the severity of the punishment they inflict. Such statutes are to reach no further in their meaning than their words. No person is to be made subject to them by implication, and all doubts concerning their interpretation are to preponderate in favor of the accused. Bearing these principles and rules in mind, we will proceed to the examination of the record under review in this case. See 1 Bish. Crim. Law, §§ 223-225. All indictments must be found

<sup>1</sup> This case, filed July 22, 1869, is now published by request, with 16 others, in order that the Pacific Reporter may cover all cases in volume 8, Utah Reports.

and presented by a lawful grand jury. Chapter 35, § 5, of the statute provides that the marshal shall summon for a "grand jury" for the district court "twenty-four eligible men to serve as grand jurors," and it further provides that "said twenty-four men shall constitute a grand jury."

1. The record of this case discloses the fact that there were only 17 grand jurymen impaneled, who found the indictment, and made the presentment against the plaintiffs in error. The intention of the legislature is too clearly expressed in the statute to be misunderstood. It requires in express terms that "twenty-four eligible men shall constitute a grand jury." Can the number under this statute be less than 24? It is claimed on the part of the people that inasmuch as the common law was in force at the time of the adoption of the first amendment of the constitution of the United States, which, by article 5, provides that "no person shall be held to answer for a capital, or otherwise infamous, crime, unless on a presentment or indictment of a grand jury;" and that inasmuch as the number constituting a grand jury at that time by the common law was fixed to be a number not less than 12, nor more than 23, thereby the lawful number became the common-law number by constitutional provision, and must so remain, though legislature otherwise provides. If this were so, then the common-law number could not be changed by statute of congress, or that of a state. If such is the fact, then all our legislatures, from that of the national government to the territorial, as well as all our judges, have misconceived this constitutional provision, and have disregarded it; for the common law has been otherwise, in various ways, invaded than in the matter of the grand jury. It is unquestionably true that, in the absence of a statute providing for a different number, the common law would control the number. It must, however, be remembered that the constitution of the United States does not adopt the common law as a part of itself. If it did, the number of a grand jury would be thereby prescribed by that of the common law. The common law, at the time of the adoption of the constitution, must be regarded as in place of a statute under the constitution. Congress and the several states, and also the territories under congress, have the right to provide by statute a different number. If a different rule prevailed, it would put at end all legislation, and we should, in almost every particular, be under the common law, instead of the vast statutory provisions that now incumber our national and state legislative records. In Louisiana the number of the grand jury must not exceed 16. In California it must not be less than 17. In Arkansas it must not be less than 16. In Iowa it is fixed at 10. See 1 Bish. Crim. Proc. § 854, and notes. That congress and the state have the right to supersede the common-law rule, and provide a new rule by which a greater or a less number than that of the common law may be provided, there cannot be a question. By the organic act of the territory of Utah, § 6,

the legislature of the territory has jurisdiction of "all rightful subjects of legislation consistent with the constitution of the United States, and the provisions of the organic act." \* \* \* And the laws passed by the legislative assembly and governor shall be submitted to the congress of the United States, and if disapproved shall be null, and of no effect." The statute fixing the number of a grand jury at 24 was approved January 21, 1859, and was never disapproved by congress; and, by the operation of law, and of the organic act of this territory, it became a law. If the statute fixed the number less than 12, instead of less than 23, there would exist a stronger reason for questioning its validity, for thereby individual liberty and life would be placed in greater peril than by the common law; but, in fixing the number at 24, individual liberty and life are more strongly guarded, and thereby the intent and spirit of the constitutional safeguard are respected and upheld, instead of being weakened. But it is said that, while it is the duty of the marshal to summon 24 grand jurors, not more than 23 can be impaneled, as otherwise a complete jury of 12 might dissent, and therefore the finding would be void. To support this decision, 1 Whart. Crim. Law, § 465, and the notes thereto, are cited. On examination of these authorities, we find that they all rest upon the statutes of their several states; and, while they would be controlling there, yet they would not be in a state or territory where a different statute was provided. Section 11, c. 35, of the statutes of this territory provides that "when the grand jury, or any twelve of them, have, upon to them good and sufficient evidence, found a bill of indictment, indorse thereon the words, to-wit, 'A true bill,' and their foreman officially signs his name to said indorsement, and also note, or cause to be noted, on the bill of indictment the name or names of the witnesses upon whose evidence it was found." It is a lawful indictment. This provision effectually disposes of the difficulty named in the objection last stated. We must therefore hold, in the language of the statute, a legal grand jury in this territory to be "twenty-four eligible men, and that said twenty-four men shall constitute a grand jury," and that said "grand jury, or any twelve of them," may find and present an indictment under the laws of this territory against those who may violate the same. It also appears from the record in the bill of exceptions, and the transcript of proceedings, that six of the said grand jury that found the said indictment were taken from the bystanders as talesmen, and were not summoned by writ of *venire* as required even by the common law, and in direct and open violation of the statute of this territory. Chapter 35, §§ 8, 9, prescribe a specific mode of selecting, by writ of *venire*, both the grand and petit jurors,—and also prescribes a specific mode of return to be made of said writ to the court, to-wit: "Said officer shall return said list, or lists, and writ to said district court at the time specified, and shall specify the persons summoned, and the manner in which such



were summoned." It does not appear from the record, by the return of the marshal to said grand jury writ, that any of the said provisions of the statute were complied with; nor does it appear from his return that he had lawfully selected and summoned the said grand jurors who found and presented the said indictment. But it does appear from the record that one and all of these provisions were wholly omitted and disregarded. It may be said that it is too late after verdict to look into the record. This is true as to matters of mere form of regularity, but not so when it appears upon the face of the record, as in this case, that the indictment by which the prisoners were charged and tried for their lives was found by an unlawful grand jury.

2. It is further claimed and assigned by the plaintiffs in error that the indictment charges murder only in the second degree, and that the verdict is "guilty of murder in the first degree." The statute, on page 51, c. 22, provides as follows: "Sec. 4. Whoever kills any human being with malice aforethought, either expressed or implied, is guilty of murder. Sec. 5. All murder which is perpetrated by means of poison, or lying in wait, or any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration or attempt to perpetrate any arson, rape, robbery, mayhem, or burglary, is murder in the first degree, and shall be punished with death. Sec. 6. Whoever commits murder otherwise than as set forth in the preceding section is guilty of murder in the second degree, and shall be punished by imprisonment for life, or for a term not less than ten years. Sec. 7. Upon the trial of an indictment for murder, the jury, if they find the defendant guilty, must inquire, and in their verdict declare, whether he be guilty of murder in the first or second degree. But, if such defendant be convicted upon his own confession in open court, the court must proceed by the examination of witnesses to determine the degree of murder, and a ward sentence accordingly." The indictment charges that the killing of Russell was by the plaintiffs in error, and that they committed the crime "feloniously, deliberately, willfully, and of their malice aforethought." If it is necessary, to sustain a verdict of murder in the first degree, to charge in the indictment what is declared by statute to be murder in the first degree, it cannot be contended that the identical words of the statute must be used, providing the charge is made in language equivalent to that named or specified by the statute. The word "premeditated" is left out of the averment in the indictment, and in its proper place are substituted the words "and with malice aforethought." While these words in their meaning must be construed strictly, yet they must not be so cramped as to deprive them of their true meaning and effect. They must be taken to convey such meaning as our language, and the courts, give to them. Webster says: To premeditate is "to think, consider, or resolve in the mind beforehand; to have formed in the mind by previous thought or meditation; previously

contrived, designed, or intended; deliberate; willful;" that is, "premeditated" includes within its meaning "meditation" and "deliberation." He says that "aforethought is premeditated; prepenae; as malice aforethought;" that is, aforethought includes premeditated; malice aforethought is malice premeditated; and that malice premeditated is malice aforethought. He uses them interchangeably. Bouviers says "premeditation" is "a design formed to commit a crime, or to do some other thing, before it is done. A deliberation, and a continual persistence, which indicates more preversty than will;" that is, premeditation is more than will, and includes deliberation. He says: "Aforethought is premeditated; prepenae; that is, aforethought includes premeditation." Both of these standard authors give substantially the same or equal force and effect to the meaning of the word "aforethought" that they do to the word "premeditated." While there may possibly be found a shade of meaning as between those two words differing one from the other, there is not found such a substantial legal difference as to be, in our judgment, reason to disturb for that cause the judgment of a court in even a criminal proceeding where the penalty is death. Murder in the first and second degree is not two offenses, and therefore, under our statute, the indictment should include proper averments to charge murder in the first degree; at least, this seem to be the better practice, although the case cited in 34 Cal. 217, (People v. Nichols,) and that in 27 Cal. 507, (People v. King,) seem to have established a different rule, or, at least, have given a greater liberty in drawing indictments; but, not having these two authorities before us, we cannot determine the law as laid down by them, but our position is fully sustained by 2 Blsh. Crim. Proc. §§ 572-574.

3. The plaintiffs in error further claim, by their assignment in error, that they had a right to plead in abatement after their withdrawal of their demurrer by leave of the court. It is also said and insisted, on the other hand, that the plea in abatement did not come in apt time, and, therefore, that it could be pleaded only by leave of the court, and that the court in its discretion had a right to reject it. In civil proceedings we recognize the right of the court to exercise its discretion in admitting a dilatory plea after demurrer, or after a plea in bar has been filed; but in a capital case the rule is different. By a plea in abatement, the question may be tried whether or not the grand jury finding the indictment, or any member thereof, was ineligible, or that there were too many members or too few, or that it was otherwise incompetent, or that there was a departure from the statute in selecting or in summoning and impaneling of the grand jury. When the grand jury is about to be selected, impaneled, and sworn the accused may be wholly ignorant of the fact, or in actual confinement, and has not the physical capacity to make challenges. He is never brought up and confronted with the grand jurors, nor is he served with a list of the persons who are to compose the

grand jurors. Chief Justice HOPKINS, in the case of *State v. Williams*, 5 Port. (Ala.) 130, said: "Where men are without authority no person is bound to appear and except to their want of authority." See 1 Blsh. Crim. Proc. §§ 748, 749, and notes, and sections 721, 722; 1 Whart. Crim. Law, 526; Gould, Pl. c. 2, § 43, and note 6. The plea in abatement in this case avers "that the persons purporting to act as a grand jury, by whom said indictment was found and returned, consisted of the number of 17 only, and not 24, as required by law; that said 17 persons acting as a grand jury, by whom said indictment was found, were not summoned as required by statute in such cases made and provided, nor was any one of them drawn from the list of names made by the county court in pursuance of the statute in such cases made and provided; that the officer, to-wit, the territorial marshal, to whom the *venires* issued by the clerk of the court for a grand and petit jury to serve at the term of said court at which said indictment was found and returned was delivered and directed, did not, nor did any one for him, proceed to the clerk of the county court of Salt Lake county, or any other county in Utah territory, and, in connection with him, the said clerk of said court, or any one else, draw said jury, nor the persons aforesaid, by whom the said indictment was found, nor any of them, from the box containing the aforesaid list of names selected as aforesaid by the county court, as by law it was required to be done, but that, on the contrary, said marshal, by his deputy, served and returned 24 persons to serve as grand jurors, who were not drawn from the list aforesaid, in the box aforesaid, in the manner aforesaid, among whom were 11 of the 17 persons aforesaid, the remaining 6 having been taken as talesmen from the by-standers; wherefore they pray judgment of said indictment, and that, by the court here, the same may be dismissed and quashed,"—which said plea was sworn to by all the defendants to the said indictment, and filed May 18, 1869. By reference to the thirty-fifth chapter of our statute, it appears that the law required to be done what this plea in abatement alleges was not done. The record (on page 23) shows that when this plea was tendered "the court held that, it not being filed in apt time, it could not be filed or entertained," whereupon exception was taken thereto. The motion in arrest of judgment assigns as one of the reasons therefor the disallowance of said plea in abatement by the court, and also shows that the court required the plaintiffs in error to either plead guilty or not guilty. It is true that this plea, and the rulings of the court below, and the exceptions thereto, as aforesaid, are not embraced in the bill of exceptions, but they are all found in the record; and the said plea in abatement is as much a part of the record as the indictment, the same being, with the indictment, attached to the record, and filed in this court as a part of the same. After verdict, objection for the first time to the manner of drawing or selecting the grand jury, if it had been a lawful one, and had the return of the marshal indorsed upon the *venire*, not

shown that the grand jury had been lawfully selected and summoned, could not have been raised; but all these questions were raised by the said plea in abatement, and in apt time. In capital cases a court of review will look into the records, when upon their face it appears that material errors have been committed, and injustice done, even though the bill of exceptions does not formally incorporate them. The office of a demurrer, in a capital case especially, is not properly a plea. It is for the only purpose to test the quality of the indictment, and to ascertain if there is a case presented in law the defendants are bound to further answer. See Gould, Pl. c. 2, § 43. But the withdrawal of the demurrer by leave of the court swept the record clear, and left the plaintiffs in error at liberty to interpose any plea known to the law other than that of guilty or not guilty.

4. The plaintiffs in error further assign, as ground of error, that they offered to show, by witness Josiah Hosmer, (the United States marshal,) that they (the prisoners) "were at the time of said homicide authorized by him, as United States marshal of Utah territory, to rearrest the said Calvin T. Russell." "Said testimony," the record states, "was not offered as to jurisdiction, but as reflecting on the question of malice, and as a foundation for the testimony of other witnesses, by whom they expected to prove that the defendants, at the time of said homicide, were attempting to arrest the said Calvin T. Russell, who resisted said arrest, and was trying to escape when killed," and that the court refused to allow them so to do, on the ground that said United States marshal "had no right to give such authority except to a legally qualified deputy." There cannot be a question but that this offer should have been allowed; for any evidence even tending to show that the plaintiffs in error did not kill Russell "willfully, deliberately, and with malice aforethought," or by which their punishment might have been reduced to that of murder in the second degree, or to that of manslaughter, was material, and proper to go to the jury. It is urged on the part of the people that inasmuch as no question was actually put to the witness there was no exclusion of any evidence. We fail to comprehend any difference, in effect, between the ruling out of a proper question and the refusal to allow proper proof to be made.

5. They further assign that the court erred in the instructions given to the petit jury in this: (1) Because said instructions did not cover all the questions of the law in the case; and (2) because they were calculated to mislead the jury. Chapter 30, § 12, of the statute, on page 65, provides that "the court shall instruct the jury on the law and equity in the case, and give them such other instructions as may be necessary." Chapter 22, on page 51, provides as follows: "Sec. 4. Whoever kills any human being with malice aforethought, either expressed or implied, is guilty of murder. Sec. 5. All murder which is perpetrated by means of poison, or lying in wait, or any other kind of will-

ful, deliberate, and premeditated killing, or which is committed in the perpetration or attempt to perpetrate any arson, rape, robbery, mayhem, or burglary, is murder in the first degree, and shall be punished with death. Sec. 6. Whoever commits murder otherwise than as set forth in the preceding section is guilty of murder in the second degree, and shall be punished by imprisonment for life, or for a term of years not less than ten years. Sec. 7. Upon the trial of an indictment, the jury, if they find the defendant guilty, must inquire, and in their verdict declare, whether he be guilty of murder in the first or second degree.

\* \* \* Sec. 11. Any person guilty of manslaughter shall be punished by imprisonment not more than ten years nor less than one year, and by fine not more than one thousand nor less than five hundred dollars." The instructions given by the court were as follows: "If the jury believe from the evidence, beyond a reasonable doubt, that all the defendants acted in concert, and took part in shooting at the said Russell, and if you further find from the evidence, beyond a reasonable doubt, said Russell was murdered as charged in the indictment, all of the defendants are equally guilty, although only one of them discharged the ball which killed said Russell; but if you have a well-founded, reasonable doubt as to whether either one of the defendants took part in such shooting and acted in concert with the others, you will acquit such defendant. The form of your verdict will be 'Guilty' or 'Not guilty.' If guilty, you will find whether in the first or second degree, or manslaughter, and you will determine whether all or any one of the defendants are guilty as above instructed, and the degree of each of the defendants' guilt." These instructions, being all that were given, fail to give the whole law of the case, or to state what murder is, and fail to define and to state to the jury the different degrees of murder, or to state what the penalty is under each degree. They also fail to state to the jury what manslaughter is, or what the penalty is therefor. No rule of law under the evidence was given to the jury by which they could arrive at an intelligent understanding of the law controlling the evidence, and, as a matter of course, they were not prepared to bring in a proper or lawful verdict, in the absence of full instructions from the court upon the law and equity of the case. See *Craft v. State*, 3 Kan. 451. The people insist that, because counsel for the people and for the defendants in their arguments read and discussed the law to the jury, therefore the jury were fully instructed, etc. The record shows as follows, to-wit: "That on the trial of the said case the counsel for the people and the counsel for the defendants having in their arguments of the case read and discussed the law to the jury," etc. It is a sufficient answer to say that, in this territory, the jury must receive the law from the court, and not from the counsel in the case.

6. The record on page 30 certifies the verdict of the jury, as returned by the jury and recorded, in the following words: "We, the jury, find the prisoner guilty of

murder in the first degree, as charged in the indictment. MANLY BARROWS, Foreman." On page 31 of the record the verdict is recited by the clerk in the following words: "We, the jurors, find the prisoners guilty of murder in the first degree, as charged in the indictment. MANLY BARROWS, Foreman." If the first form of the verdict of the jury, above given, is the true verdict, as it is certified to be, then certainly it is void for uncertainty; for it could not be known from it which of the three prisoners was so found guilty. But counsel insist that the second form above given, which only purports to be a recital of the first form given, corrects the error. We cannot see how the original verdict can be corrected by a mere copy made from it. Can we presume, as against the three prisoners condemned to be shot to death, that the last form, which is only a recital from the first and original certified form, is the correct form and precise wording of the verdict, and that the first form above certified is a clerical error, and that, too, in opposition to the record itself, and the certificate of the clerk? No verdict so defective and fatal in form and in substance can be corrected or changed by presumptions against the prisoners in a capital case, or that of any other. If there were no other errors than this in the record, we should, upon proper showing, send the record back, and order a new and complete one to be made, so that if it was a clerical error it might be corrected, though such a resort in a case like this might be deemed censurable. When a jury brings in a defective and void verdict, it is in the power of the prisoner or prisoners, as well as that of the people or prosecutor, at the time of its rendition, in the presence of the jury, to have it set right. If the prisoner or prisoners, in such case, choose not to interfere, and suffer a defective verdict to be entered by failing to interpose, objection is thereby waived to being put a second time in jeopardy for the same offense. In such cases the verdict is simply set aside as a nullity, and a new trial is ordered. The court cannot make the verdict what it should be. See 1 Bish. Crim. Proc. § 842; 1 Bish. Crim. Law, §§ 844-850. But the general effect of an uncertain verdict is fatal to it. See 1 Archb. Crim. Prac. 666, note a; also 3 Grah. & W. New Trials, 1378, and cases there cited. From the views above expressed, it follows that the judgment in the case under review must be reversed and annulled, and remanded to the court below for a new trial, and for further and other proceedings according to law.

STRICKLAND, J. I fully concur in the above opinion of Associate Justice C. M. HAWLEY upon all the points discussed by him in the foregoing entitled case.

DAVIES v. CITY OF LOS ANGELES *et al.*  
(No. 13,803.)

(Supreme Court of California. Sept. 15, 1890.)

CONSTITUTIONAL LAW—CITY CHARTERS—STREET  
ASSESSMENTS.

1. Const. Cal. art 11, § 8, provides for the preparation and adoption of a charter for any

city, which shall be submitted to the legislature, and adopted by it, or rejected, "without power of alteration or amendment;" but requires such charter to be "consistent with and subject to the laws of the state;" and section 6 provides that all charters "shall be subject to and controlled by general laws." *Held*, that St. Cal. 1889, p. 70, providing for the opening and widening of streets within municipalities, being a general law, is applicable to the city of Los Angeles, though its charter was framed under said section 8. BEATTY, C. J., and Fox, J., dissenting.

2. St. Cal. 1889, p. 70, is entitled, "An act to provide for laying out," etc., "any street," etc., "within municipalities, and to condemn and acquire any and all land and property necessary and convenient for that purpose." *Held*, that provisions therein for the condemnation of land and for assessments on other lands to pay therefor are the means by which the object of the act, the laying out, etc., of streets, is to be accomplished, and hence the act is not unconstitutional because the subject of assessments is omitted from its title.

3. Such statute provides for publication of notice of the resolution of the city council to undertake the improvement, with a description of all lands to be affected; of notice of the filing of the report of commissioners appointed to consider the improvement, and of the confirmation of their report; and also of notice of the assessments made against land, and of their sale in case of delinquencies. And provision is made for the appearance of parties aggrieved to state the objections at each stage of the proceedings. *Held*, that the fact that personal service of notice on the parties to be affected is not required does not render the statute objectionable as a taking of property without due process of law. BEATTY, C. J., dissenting.

4. The provisions of the act for a lien on land for benefits assessed against it are not rendered invalid by the mere fact that, as the improvement may never be completed, the benefits may never accrue.

5. Nor are the provisions for assessments void because the amount thence arising may be greater than is needed, for the act itself provides for refunding the excess. BEATTY, C. J., dissenting.

6. Such act is not in violation of Const. Cal. art. 11, § 18, as delegating municipal functions to a special commission, as the commissioners therein provided for are merely the agents of the municipality, and their acts are not binding or effective until they are approved and confirmed by the city council.

In bank. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, Judge.

C. McFarland and Wells, Guthrie & Lee, (Horace G. Platt and Pierson & Mitchell, amici curiæ,) for appellants. John Haynes, (Cameron H. King and Henry E. Highton, amici curiæ,) for respondent.

WORKS, J. This is an action by the respondent against the city of Los Angeles and W. E. Morford, street superintendent of said city, to declare void an assessment made against the respondent's property for the payment of the expenses of opening and widening a certain street in said city, and to enjoin the enforcement thereof. There was a demurrer to the complaint, which was overruled, and, the defendants standing on their demurrer and refusing to answer, judgment was rendered accordingly, and the defendants appeal. The proceedings complained of were had under and in conformity to the act of the legislature of 1889, providing for the opening and widening of streets. St. 1889, p. 70. It is not only contended that

the statute referred to was not fully complied with, but the statute itself is attacked on the ground that it is unconstitutional; and it is further claimed that, as the special charter of Los Angeles contains ample provisions for the opening and widening of streets, the statute is not applicable to that city. The latter of these propositions is mostly relied upon, apparently, by counsel for the respondent, as it is much more fully and elaborately argued than other questions presented in his brief. But the point is made that the statute is unconstitutional on several grounds, and these points are supported by the attorneys, who are interested in other cases involving the same questions, and who have for that reason been allowed to file briefs.

As the question whether the statute in question or the special charter of Los Angeles shall prevail is presented by counsel for respondent alone, it will be first considered. The learned counsel has presented his views in support of the charter as the prevailing and only law in force in the city with great clearness and ability, but his whole argument is, in our opinion, in the face of direct constitutional provisions, and a number of decisions of this court. His contention is that the charter of the city contains provisions covering the entire subject embraced in the act referred to; that the provisions of the two are wholly inconsistent and irreconcilable, and cannot stand together; that a charter prepared and approved as this was, under the provisions of the constitution, cannot be altered, amended, annulled, repealed, or superseded by any act of the legislature, general or special; and that, therefore, proceedings of this kind cannot be taken under the statute but must be had under the charter. Section 8, art. 11, Const., as amended, provides: "A city, or consolidated city and county, containing a population of, etc., may frame a charter for its own government, consistent with and subject to the laws of this state, by causing a board of fifteen freeholders, who shall have been, for at least five years, qualified electors thereof, to be elected by the qualified voters of such city, or city and county, at any general or special election, whose duty it shall be, within one hundred days after such election, to prepare and propose a charter for such city, or city and county. \* \* \* And, if a majority of such qualified electors voting thereat shall ratify the same, it shall thereafter be submitted to the legislature for its approval or rejection as a whole, without power of alteration or amendment; and, if approved by a majority vote of the members elected to each house, it shall become the charter of such city, or, if such city be consolidated with the county, then of such city and county, and shall become the organic law thereof, and supersede any existing charter or amendment thereof, and all special laws inconsistent with such charter. \* \* \* All courts shall take judicial notice thereof. The charter so ratified may be amended, at intervals of not less than two years, by proposals therefor, submitted by the legislative authority of the city, or city and county, to the qual-

fied voters thereof, at a general or special election held at least sixty days after the publication of such proposals, and ratified by at least three-fifths of the electors voting thereat, and approved by the legislature, as herein provided for the approval of the charter." This section provides, in terms, that a charter framed under it shall be "consistent with and subject to the laws of this state." And section 6, art. 11, further provides that "all charters framed or adopted by authority of this constitution shall be subject to and controlled by general laws." The language of this latter section is plain and unambiguous, and cannot be explained away by any reasoning, however ingenious. It makes all charters framed or adopted under the constitution subject to and controllable by general laws. *Thomason v. Ashworth*, 73 Cal. 73, 14 Pac. Rep. 615; *People v. Henshaw*, 76 Cal. 436, 18 Pac. Rep. 413; *Ex parte Ah You*, 82 Cal. 339, 22 Pac. Rep. 929. See, also, *Brooks v. Fischer*, 79 Cal. 173, 21 Pac. Rep. 652. The question before us was carefully and thoroughly considered in the cases cited, and it is conclusively shown that a charter like the one under which the city of Los Angeles exists is subject to general laws, and that a statute like the one now attacked is a general law, within the meaning of the constitution. It is useless to discuss the propriety of allowing the legislature to interfere by general laws with the local affairs of a city. The constitution so provides, in plain terms, and, so far as the courts of the state are concerned, this must settle the controversy. If the power given the legislature to enact laws of this kind is an evil affecting the rights of the city governments, the remedy is by amendment of the constitution. The courts cannot override a plain constitutional provision, however objectionable it may seem to parties interested. The only question about which there could be any reasonable doubt is whether the statute under consideration is a general law or not, and that question has been firmly settled by several well-considered cases, above cited, and should be equally beyond controversy in the courts of this state. It is contended that although the statute is general in its terms, and made applicable to all cities, it was, in fact, passed for the purpose of affecting the improvement of a certain street in the city of San Francisco; but we must be governed by the language of the act, and not by any outside showing as to the intent and object of its passage. Counsel concedes that the decided cases give a "construction to these provisions wholly inconsistent with that for which I [he] contend," but attempts to show that the precise question involved here has not before been presented in such form as to make a decision of it necessary. Perhaps the precise question now before us has not been presented in the same form that it is now presented, but the precise principle here involved has been presented, and decided adversely to his contention, which is the same thing in effect.

It is urged upon us that the statute is unconstitutional so far as it gives authority to assess the property of persons with-

in the assessment district, because the subject of such assessment is not included in the title of the act. The title of the act is as follows: "An act to provide for laying out, opening, extending, widening, straightening, or closing up in whole or in part any street, square, lane, alley, court, or place within municipalities, and to condemn and acquire any and all land and property necessary or convenient for that purpose." We think this point is not well taken. The subject of the act, and the only one, is the laying out, opening, extending, widening, straightening, or closing up streets, squares, lanes, alleys, and courts, or places, and all of the provisions of the act relating to the condemnation of lands, and assessments of other lands to pay therefor, are the means by which this one object of the statute is to be accomplished. Therefore the title of the act, instead of containing less than is necessary, contains more than the constitution requires. *De Witt v. San Francisco*, 2 Cal. 289, 299; *People v. Briggs*, 50 N. Y. 553, 563; *Brewster v. City of Syracuse*, 19 N. Y. 116.

It is further contended that the statute is unconstitutional because it provides for taking property without due process of law, because the notice provided for may be given generally by posting, and no personal notice to each of the parties interested is required or authorized. Section 2 of the act provides that before ordering the work to be done the city council shall pass a resolution declaring its intention to do so, describing the work of improvement, and the land deemed necessary to be taken therefor, and specifying the exterior boundaries of the district of lands to be affected or benefited by said work or improvement, and to be assessed to pay the damages, costs, and expenses thereof. Section 3 provides for notice of the passage of such resolution as follows: "The street superintendent shall then cause to be conspicuously posted along the line of said contemplated work or improvement, at not more than three hundred feet in distance apart, but not less than three in all, notices of the passage of said resolution. Said notices shall be headed, 'Notice of Public Work,' in letters not less than one inch in length, shall be in legible characters, state the fact of passage of the resolution, its date, and, briefly, the work or improvement proposed, and refer to the resolution for further particulars. He shall also cause a notice, similar in substance, to be published for a period of ten days, in one or more daily newspapers published and circulated in said city, and designated by said city council; or, if there is no daily newspaper so published and circulated in said city, then by four successive insertions in a weekly or semi-weekly newspaper so published, circulated, and designated." Sections 4 and 5 provide when and how the owners of either the property to be taken or that to be assessed may appear and object to the improvement, and for a hearing of such objections by the city council. Following sections provide for the appointment of commissioners to determine the value of the land to be taken, the amount of expenses, and that

such commissioners shall determine the value of the land taken, fix the amount of expenses, assess the benefits to the several tracts of land within the district, and that they report their proceedings to the city council. Section 13 provides for notice of the action of the commissioners as follows: "Said report and plat shall be filed in the clerk's office of the city council, and thereupon the clerk of said city council shall give notice of such filing by publication or at least ten days in one or more daily newspapers published and circulated in said city; or, if there be no daily paper, by three successive insertions in a weekly or semi-weekly newspaper so published or circulated. Said notice shall also require all persons interested to show cause, if any, why such report should not be confirmed, before the city council, on or before the day fixed by the clerk thereof, and stated in said notice, which day shall not be less than thirty days from the first publication thereof." Section 14 provides for objections to be made by parties interested, for a hearing of such objections, and a decision by the city council. The report of the commissioners, as confirmed or corrected, is required by section 15 to be certified to the street superintendent by the clerk, and by section 16 notice by the street superintendent is required as follows: "The superintendent of streets shall thereupon give notice by publication for ten days in one or more daily newspapers published and circulated in such city, or city and county, or by two successive insertions in a weekly or semi-weekly newspaper so published and circulated, that he has received said assessment roll, and that all sums levied and assessed in said assessment roll are due and payable immediately, and that the payment of said sums is to be made to him within thirty days from the date of the first publication of said notice. Said notice shall also contain a statement that all assessments, not paid before the expiration of said thirty days, will be declared to be delinquent, and that thereafter the sum of five per cent. upon the amount of each delinquent assessment, together with the cost of advertising each delinquent assessment, will be added thereto." The same section provides for the sale of the lands assessed if the assessments are not paid. It is further provided by section 18 that in case any owner of land neglects or refuses to accept the amount allowed him as damages, or objects to the report as to the necessity of taking his land, proceedings may be taken to condemn the same under the law of eminent domain. Thus it will be seen that notice of every material step to be taken as against either the owners of land to be taken or of lands to be assessed is required to be given, and an opportunity to be heard at each step of the proceedings is provided for. Therefore, if constructive service is sufficient in this class of cases, the objection made to the statute on this ground is without foundation. *Spencer v. Merchant*, 125 U. S. 345, 8 Sup. Ct. Rep. 921. It must be borne in mind that two proceedings are contemplated and provided for in the act, one against the property to be condemned for

the use of the street, the other to assess other property benefited by the improvement. This action is not by the owner whose land has been condemned. If the notice provided for as against him or his property is not sufficient, it cannot avail the respondent in this case, because a perfect means of condemning property is provided for, as we have seen, by section 18, and this object may be accomplished, and the statute be valid, conceding that the notice provided for as against the owner whose land is to be taken is insufficient. So the question is reduced to this: Is notice by posting and publication sufficient as against the land to be assessed, or must personal notice be given? As to this question, it seems to us there is no room for controversy. The legislature has the undoubted right to say what notice shall be given in this class of cases, so long as the notice required to be given is reasonable, and the proceeding is not arbitrary, oppressive, or unjust, and the notice provided for need not be a personal one. *Lent v. Tillson*, 72 Cal. 404, 413, 14 Pac. Rep. 71; *Scott v. City of Toledo*, 36 Fed. Rep. 385, 396. The notice provided in this case is sufficiently definite. The property to be affected must be designated in the resolution of intention, and the notice must refer to this resolution for particulars. This being so, the notice is sufficient to call to the attention of parties interested that the improvement is contemplated, and, by a reference to the resolution which becomes, by reference to it, a part of the notice, it is sufficient to apprise them that their property is included within the district, and will be affected by such proceeding. In this the notice differs materially from the one condemned in *Boorman v. Santa Barbara* 65 Cal. 313, 4 Pac. Rep. 31.

The next point urged against the statute is that it "authorizes an assessment for benefits and a sale and conveyance on delinquency, while the improvement supposed to confer the benefits is hypothetical, and may be incapable of materialization." In support of this objection to the law, it is contended that the benefits that will result to the land assessed must be rendered certain before the lien is imposed, and that the statute does not require this to be done. But, although counsel attempt to show that the benefits to result need not be made certain, under the statute, they fail to convince us that there is or may be any greater uncertainty under this statute than any other which leaves the amount of benefits likely to result to property from a proposed improvement to the mere judgment of parties upon which the duty of making the assessment devolves. In this connection it is contended that the benefit to result to property affected is left in uncertainty, because, under the statute, the work may never be accomplished. But the assessment of benefits is made upon the theory that the work is to be accomplished, and if it is not it is quite certain that no benefit could result. Such a contingency could hardly invalidate the statute.

Again, it is claimed that the "provisions of the act admit of an assessment for benefits largely in excess of the amount need-

ed." We are not convinced of the truth of this contention. But if, as is contended might be the case, the expenses should prove to be less than has been estimated by the commissioners in any given case, and the assessments are therefore too high, the act provides for refunding the excess. To hold that the assessment would be invalid, and the statute authorizing it void, because the expenses incurred and the amount assessed did not, or might not, correspond exactly, would defeat every law of this kind. The amount to be assessed depends upon the amount found by the commissioners to be necessary to meet the expenses of the improvement, and not upon the actual expenses as shown by the completion of the work. The fact that it may subsequently appear that they erred in estimating the amount cannot invalidate the assessment, or otherwise avail the owners of the property assessed, after the report of the commissioners has been made and confirmed by the city council.

Again, it is contended that so much of the statute as provides for the assessment of the value of the property taken is invalid for various reasons. For the purposes of this case this point may be conceded. The statute itself recognizes the fact that by such a proceeding the property owner cannot be compelled to part with his property. It is only a means by which the value of the property may be ascertained, and, if the amount thus fixed is satisfactory to the owner, and he voluntarily conveys to the city for that sum, the object sought is accomplished without the expense of condemnation proceedings. It is simply a means provided of agreeing to a conveyance of the property for the purposes of a street, the commissioners acting as the agents of the city. If the owner voluntarily conveys the property, the title thus obtained is as good as one procured by a condemnation proceeding, and the expense of such proceeding is avoided. Of this the owner of property assessed can have no reason to complain. But, if the owner is not satisfied, and refuses to make the conveyance, then it is provided that the property may be condemned as in other cases. We are unable to see how these provisions can affect the validity of the statute, or the liability of the respondent to pay the assessment made against him. So it is claimed that the provision in the statute that the city may enter upon the land and proceed with the work before the damages are paid is contrary to section 14 of article 1 of the constitution. But this does not concern the party whose property has been assessed. It is a question affecting the rights of the city and the party whose property is sought to be taken.

Finally, it is contended that the statute is in violation of section 13 of article 11 of the constitution of this state, because it delegates to a special commission the power to perform municipal functions. But conceding, without deciding, that the opening or widening of public highways within a city are municipal functions, it does not appear that any such functions were delegated to this commission. The

commissioners are simply made the agents of the municipalities to assist them in opening streets. They act under the direction of the city authorities, and their acts are not binding or effective until the same are approved and confirmed by the city council. Therefore, the act done is the act of the city, at last, and not of the commissioners. The case of *Mellon v. Pittsburgh*, 81 Leg. Int. 212, is not in point. The provision of the Pennsylvania statute, held in that case to be invalid, delegated to the commission named therein independent powers. They were not subject to the control of the municipal authorities in the performance of their duties, and it was upon this ground that the act conferring such powers upon them was held to be in violation of a section of the constitution of that state similar to if not identical with ours. But the complaint contains an allegation that the property within the assessment district was not all assessed. This allegation rendered the complaint sufficient. *People v. Lynch*, 51 Cal. 20; *Moulton v. Parks*, 64 Cal. 181; *Dyer v. Harrison*, 63 Cal. 447; *Diggins v. Brown*, 76 Cal. 318, 18 Pac. Rep. 373.

Numerous briefs have been presented in this case, some by attorneys not of counsel in the case. They have shown great ability, industry, and ingenuity in the attempt to break down this statute. We have given all of these briefs our careful attention, realizing the importance of the questions presented, and have endeavored to notice and pass upon every point made. After this thorough presentation and examination of the case, we are constrained to hold that the statute under consideration is valid; that it is in force within the limits of the city of Los Angeles. But the allegation in the complaint that the property was not all assessed rendered it sufficient, and the demurrer should have been overruled. Judgment affirmed.

We concur: THORNTON, J.; MCFARLAND, J.; PATERSON, J.

Fox, J. I concur in the judgment, but do not concur in what is said in support of the proposition that the act of 1889 is in force in the city of Los Angeles. Of the written laws of this state there are four classes, each established in a different mode, and by a different body or branch of the government, and each equally binding upon the courts within its appropriate sphere:

(1) The first of these is the constitution. This is established by the people of the whole state, acting in their collective capacity, and as to all other state laws is the supreme law of the land. The mode of establishing all other written laws of the state, or of any part of the state, is that, and that only, which is prescribed or permitted by this supreme law so established by the people. This law, in its operation upon the people as individuals, and upon every department of the government which is established by it, is made by its own terms mandatory and prohibitory, except when otherwise within it expressed. Const. art. 1, § 22.



(2) The general statute laws of the state. By the constitution it is ordained that these must be established by the legislative department of the state government. The mode and manner of their passage is prescribed in sections 15, 16, art. 4. It must be by bill, and requires the concurrent action not only of the two houses of the legislature, but of the governor; or, if he refuses to concur, then a consideration of his reasons, and reaction thereon by both houses, and the concurrence of two-thirds of all the members elected to each house. Thus acting, the legislative department may establish necessary and appropriate laws upon all subjects, and for all purposes not in conflict with or prohibited by the constitution, and must establish laws upon certain subjects, and for certain purposes named in the constitution. The term "general laws," as used in all constitutions or statutes, has both a general, or common, and a technical, or restricted, meaning. In which sense it is used depends in each particular instance upon the context, and the general scope of the instrument, or of that part of the instrument in which it is found. In one of these senses that is held to be a general law which applies to and operates upon all of a given class of places or persons; in the other, that is a general law only which applies to and operates upon all persons and in all places alike.

(3) Municipal charters, framed and adopted by the people resident within the municipality affected, acting directly, and in the manner prescribed in section 8, art. 11, of the constitution. Such charters may be said to be general laws in that they apply to and operate upon all people within the territorial limits of the municipality alike; but they are special and local in that they have no force or effect outside of such territorial limits. Their establishment by the legislative department of the state government is expressly prohibited by the constitution. Article 11, § 6. For the establishment of these laws, the constitution takes from the legislature and delegates to the people of the municipalities respectively, when they shall see fit to exercise it, the power to frame and adopt the law, and in that way to establish a special and local law such as the legislature is forbidden to establish; the general law-making department of the state government having no power in the premises as such, but the members of the two houses of the legislature being required to express their assent to or approval of the instrument as a whole, without alteration or amendment, before it becomes an established law. When so established and approved it is valid law, — a part of the written law of the state, — as much so, and as binding upon the courts, as any act of the legislature; but, unlike an act of the legislative department of the state government, that department has no power ever to alter or amend it. Alterations or amendments of it, like alterations or amendments of the constitution, can only be made by the people by whom the original was adopted. So far as it is not in conflict with the constitution or the general laws of the state, and

by that I mean laws which operate upon all persons and in all places alike, it is beyond the reach of the legislature, and "supersedes any existing charter and all amendments thereof, and all special laws inconsistent with such charter." Article 11, § 8. In my judgment the word "special" as there used includes all laws which are not general in the broadest sense; that is, all laws which do not operate upon all persons and in all places in the state alike.

(4) The remaining class of written laws consists of municipal ordinances established by the legislative departments of the respective municipalities, and in the manner prescribed by their respective charters, or by the general law in cases where municipalities are acting under general law.

In dissenting from the opinion of my associates in this case, I concede that the several cases cited by Mr. Justice WORKS, heretofore decided by this court, contain expressions which in form justify the conclusion reached in his opinion; but this is the first time in which a case has come before the court directly involving a conflict on matters purely local and municipal between the provisions of a special charter framed and adopted by the people, as authorized by the constitution, and the provisions of an act of the legislature which is a "general law" only in the narrow and restricted sense of being a law which on its face applies to all municipal corporations. Being so, it furnishes the first and only opportunity which we have had of taking a broad and comprehensive view of the provisions of the constitution affecting municipal corporations. There can be no doubt that the court has always been correct in its expressions indicating that municipal corporations acting as such under the general municipal incorporation law must be governed by and conform to general laws of this class, which on their face affected and were framed to apply to all municipalities, for that is not only in conformity with the express provisions of the constitution, but also with the general interpretation of statutes. One act of the legislature will always repeal another and earlier which is in direct conflict with it on the same subject, unless expressly provided otherwise. But, under the constitution, an act of the legislature will not repeal, and cannot repeal by implication or in express terms, the provisions of a special charter like that of Los Angeles, and other municipalities having charters framed and adopted by the people, and approved by the members of the two houses, unless it is done by force of some express provision of the constitution itself. I do not accede to the proposition that the court has been heretofore correct in holding that municipalities, acting under special charters granted by the legislature, before the adoption of the present constitution, and at a time when municipalities could only be established in that way, were governed by and their charters must yield to the provisions of laws which are general only in the sense that they apply to municipalities generally, and not elsewhere; but the court has so often so held, in considering

statutes like the one sustained in this case by the leading opinion, that if this were the case of such a corporation I might hesitate about expressing my dissent at any length, at this late day, to a decision which only reaffirmed opinions expressed by the first justices elected under the present constitution. But this is not such a case. As before said, the question now comes up for the first time for the interpretation of what may be called a "constitution charter," and if the court cannot correct what I conceive to be the errors of the past it can, and think it ought, at least to refuse to perpetuate those errors as against these new charters which are expressly authorized and protected by the constitution. What I conceive to be the error of the past, and the error now proposed, grows out of what, in my judgment, is a misinterpretation of the term "general laws," as found at the close of section 6 of article 11 of the constitution. The closing words of that section are: "Cities or towns heretofore or hereafter organized, and all charters thereof framed or adopted by authority of this constitution, shall be subject to and controlled by general laws."

It is said that the common law of England is made up of "general customs" and "particular customs," the former being those customs which prevail throughout the realm, and the latter those which prevail in particular places. It would have been better for us, and we should have fallen into less of error, if we had retained those descriptive words of the early law-writers in the same sense in which they used them, and said of our own statute laws: They consist of—(1) General laws, which are such as prevail throughout the state, and operate upon all persons, and in all places, alike. (2) Particular laws, which are such as apply to a particular class, or particular classes, of persons, or in particular places, but not to all persons and in all places. (3) Special laws, which are such as are passed for the accomplishment of some special purpose, or for the benefit of some particular person. Of these perhaps relief bills are the most common example. (4) Local laws, which are such as apply in some particular place only. With such a classification as this, we should never have fallen into such confusion as now prevails as to the meaning of the term "general laws," and the court would from the beginning have interpreted that term as used at the close of section 6, as above quoted, as I believe it ought now to be interpreted. If we give to this term, as is given to it in the opinion of Mr. Justice WORKS, and in the cases which he cites, an interpretation which includes anything less than the entire state, and all persons and all places in it, we make section 8 of the same article of the constitution a farce and a snare. Undersuch an interpretation it is worse than folly for the people of a municipality to avail themselves of the express permission of the constitution, and frame and adopt for themselves a municipal charter which the constitution forbids the legislature to alter or amend; for, if this interpretation is to prevail, the legislature may do indirectly

what it is expressly forbidden to do directly. To so hold is to impute to the framers of the constitution an absence of intelligence, or a degree of duplicity, which I cannot conceive to be possible. On the other hand, to construe the term "general laws," as used in this place and in this connection, as meaning only those laws which apply throughout the state, governing all persons and all places in the state, makes the constitution in this regard one harmonious whole, and secures to the people one of the very objects had in view in calling the convention which framed the constitution,—the right of local self-government as to matters purely local and municipal, a right which is utterly defeated by the prevailing construction. The same rule should be applied in construing the words quoted by Mr. Justice WORKS from section 8, to the effect that these charters must be "consistent with and subject to the laws of this state." Of course that refers to general laws, since the legislature is forbidden to pass special or local laws for the government of municipalities, and since by the same section of the constitution these charters, which are both special and local, supersede "all special laws in conflict therewith." When the constitution says in section 8 that the charter framed and adopted in accordance with the provisions of that section must be "consistent with and subject to the laws of this state," it means the same laws as those meant in section 6, where it says that they "shall be subject to and controlled by general laws." In *Thomason v. Ashworth*, 73 Cal. 73, 14 Pac. Rep. 615, and *People v. Henshaw*, 76 Cal. 436, 18 Pac. Rep. 413, the charters under consideration were special charters, passed by the legislature, and subject to alteration and amendment, under the constitution under which they were passed, at the will and pleasure of the legislature. Even if it be true that since the adoption of the present constitution such charters are to be controlled by general laws of the restricted character which apply only to particular places,—namely, to municipalities, and not to the state at large,—laws such as I have herein suggested should be designated as "particular laws," and not as "general laws," it does not follow that section 8 of article 11 of the constitution should be destroyed and rendered worse than nugatory by holding that charters established under its provisions should also be subject to that limited kind of general laws. *Ex parte Ah You*, 82 Cal. 339, 22 Pac. Rep. 929, is not in conflict with these views, for there the court was acting, not upon the provisions of the charter generally, but upon the single provision of such a charter establishing a police court. That provision may be void, and the balance of the charter be valid. If void, as in the more recent case of *People v. Toal*, ante, 603, (decided during the current month,) I felt compelled to concede it to be, it was not so because of conflict with a law of the class here under consideration, but because of conflict with the constitution itself, the language of the constitution being that such courts must be established, not "by law," but "by the legislature." Another

clause of the constitution provides that such courts shall have such jurisdiction as is conferred upon them "by law." Under the constitution, therefore, the court must be established by the legislature, but, being so established, I have no doubt jurisdiction might be conferred upon it by one of these charters, in cases arising under the charter, or under municipal ordinances passed in pursuance thereof. *Brooks v. Fischer*, 79 Cal. 173, 21 Pac. Rep. 652, was, it is true, a case in which the same charter here under consideration was involved. But there the question was as to the validity of the charter as a whole, the real question being as to whether it had been properly approved by the legislature. It was suggested that even if properly approved it was still invalid, because some of its provisions were in conflict with the provisions of some of this class of mis-called general laws. It was correctly held that a conflict of some particular provision of a charter with such a law would not vitiate the whole charter, and, in discussing that question, it was merely assumed that the ruling in the former cases might apply to these charters, but without deciding that they would do so.

Entertaining these views, I am clearly of the opinion that the act of 1889, under which the proceedings complained of in this case were had, does not apply to municipalities acting under charters framed, adopted, and established as provided in section 8, art. 11, of the constitution, and is not in force within the limits of the city of Los Angeles.

BEATTY, C. J. I concur in the judgment, and in the main in the opinion of Justice Fox. For the reasons set forth in the dissenting opinions of Justice McKINSTRY in *Thomason v. Ashworth*, 73 Cal. 73, 14 Pac. Rep. 615, and in *People v. Henshaw*, 76 Cal. 453, 18 Pac. Rep. 413, I think those cases, and the case of *Ex parte Ah You*, 82 Cal. 339, 22 Pac. Rep. 929, were erroneously decided, and that the provisions of the charter of Los Angeles with respect to the opening and widening of streets apply in that city to the exclusion of the statute of 1889. I think, moreover, that the statute is unconstitutional on two grounds: *First*, it does not, when tested by the liberal doctrine of *Lent v. Tillson*, 72 Cal. 404, 14 Pac. Rep. 71, provide for any proper notice to owners of property affected; and, *second*, it permits assessments upon the property supposed to be benefited in excess of the benefits.

85 Cal. 614

BIGELOW v. CITY OF LOS ANGELES *et al.*  
(No. 13,301.)

(Supreme Court of California. Sept. 11, 1890.)

INJUNCTION—EVIDENCE—REMEDY AT LAW.

On application for an injunction against the erection of a bridge by a city, the affidavits as to the effect of the structure on plaintiff's property were conflicting. Plaintiff had stood by until the greater part of the work was completed, and disclaimed any intention of permanently enjoining the construction of the bridge, but she only desired to secure the amount of damages occasioned to her property before the work was completed. There was no claim that defendant was

unable to respond in damages. *Held*, that the injunction was properly denied.

In bank. Appeal from superior court, Los Angeles county; LUCIEN SHAW, Judge. *Wells, Guthrie & Lee*, for appellant. *C. McFarland, S. C. Hubbell, and Chapman & Hendrick*, for respondents.

PATERSON, J. This is an action to restrain the city of Los Angeles and the California Bridge Company from erecting a bridge and viaduct across the Los Angeles river on First street within the city limits. The hearing of the application for a preliminary injunction was had upon the pleadings and affidavits. Thereupon the court denied the application, and vacated the preliminary order, which it had made, restraining the defendants from further proceedings pending the hearing of the motion. The material allegations of the complaint are denied in the answer of the city, and also in the complaint of intervention which the court allowed to be filed on behalf of the Los Angeles Cable Railway Company; and the affidavits used on the hearing are very conflicting as to the size, height, and effect of the structure. The showings made by all parties evidently left the court in doubt as to the probable effect of the viaduct upon the property of the plaintiff; and, as the plaintiff had stood by until the greater part of the work had been completed, and was endeavoring only to secure the amount of damage occasioned to her property before the work was completed, and disclaiming any intention of perpetually enjoining the defendants from constructing the bridge, the court deemed it best to let the work go on, there being no claim that the defendant is unable to respond in damages. In this conclusion we think the court was right; but, whether right or wrong, there was no such abuse of discretion as would warrant us in setting aside its order. "It accords with the theory of our system that the supreme court shall have the benefit of the judgment of the district [now superior] court at the final hearing below, and, except in a clear case, we ought not to anticipate the final judgment \* \* \* by our action on appeal from the order granting [or denying] the preliminary injunction." *Patterson v. Supervisors*, 50 Cal. 345; *Middleton v. Franklin*, 3 Cal. 238; *White v. Nunan*, 60 Cal. 406. The fact that the work sought to be enjoined is one of a public nature, one which affects the public convenience, and that there is no doubt of the ability of the defendant to respond in damages, are important matters to be considered in determining the right to an injunction. *Real Del Monte Consolidated G. & S. Min. Co. v. Pond G. & S. Min. Co.*, 23 Cal. 84; *Logansport v. Uhl*, 99 Ind. 531; *Payne v. English*, 79 Cal. 540, 21 Pac. Rep. 952; *Crawford v. Bradford*, 23 Fla. 404, 2 South. Rep. 782; *Omaha Horse Ry. Co. v. Cable Co.*, 32 Fed. Rep. 727. Counsel for appellant seems to fear that, unless the city is compelled to make compensation before the work is completed, plaintiff will be left without a remedy for the damages sustained by her, the provisions of the Code with respect to eminent domain being the only procedure

prescribed for assessing the damages. In *Reardon v. San Francisco*, 66 Cal. 506, 6 Pac. Rep. 317, the court said: "If compensation has not been had in condemning the land for the street under the statute for such condemnation, it can be recovered in an action." The question as to what damages are recoverable by abutting owners in cases of obstructions in public streets by municipal corporations acting in behalf of the state for the better convenience of the public is not necessarily before us on this appeal. The subject, we may say, however, in thus passing over the point, was thoroughly and carefully considered in *Reardon v. San Francisco*, supra. Other points made by appellant do not require notice. Order affirmed.

We concur: FOX, J.; MCFARLAND, J.; SHARPSTEIN, J.

THORNTON, J. I concur in the judgment.

85 Cal. 610

ROSENBERG *et al.* v. FORD. (No. 13,548.)  
(Supreme Court of California. Sept. 11, 1890.)

MORTGAGES—CONSIDERATION.

A wife joined her husband in executing a mortgage of the homestead, declared on community property, to secure notes made by the husband. He shortly afterwards died, and she became his administratrix, and published the notice required by law to creditors to present their claims within four months. The holders of the notes and mortgage failed to present them within the prescribed time, so that they became barred; but the administratrix, in ignorance of this fact, executed another mortgage to secure these notes and others made by her. *Held*, that this mortgage was without consideration in so far as it secured the husband's notes secured by the first mortgage.

In bank. Appeal from superior court, Plumas county; G. G. CLOUGH, Judge.

*Goodwin & Goodwin*, for appellant *F. B. Whiting and Ben. Morgan*, (W. W. Kellogg, of counsel,) for respondents.

PER CURIAM. This action is for the foreclosure of a mortgage. It appears that the appellant and her husband, in his lifetime, executed a mortgage to secure certain notes, made by the husband, upon a homestead declared upon community property. The husband afterwards died, and the wife qualified as the administratrix of his estate, and published the notice required by law for creditors of the estate to present their claims within four months of the publication of the notice. The holders of the notes and mortgage failed to present them, or either of them, within the time prescribed by the notice for allowance or rejection. After such neglect on their part, they obtained another mortgage from the defendant, Mrs. Ford, securing the payment of other notes, the amounts of which were made up of the original debt of the husband, and of the sum of \$292, borrowed by the wife prior to the time she gave the second mortgage and notes. At the time she thus executed that mortgage and the notes it secured, she did not know that the first mortgage and notes were barred for the want of presentation, etc., but executed them in ignorance and mistake as to

the law upon such a matter. It is also alleged in the answer that she believed the first mortgage and notes to be valid, and the plaintiffs represented them so to be, and that she was liable to pay, satisfy, and discharge them when she executed the last notes and mortgage; but it is not alleged that at such time the plaintiffs knew that they were invalid, and concealed such knowledge from her. Several months after the execution, by the defendant, of the notes and mortgage now under consideration, she, for the first time, discovered that they were barred; and, as soon as she learned such to be the law, she notified the plaintiffs that she had executed these obligations under such mistake of law, and that they were invalid, except as to the sum of \$292, and interest thereon, which was what she had herself individually borrowed of them. It is further alleged in the answer that, except as to the \$292, and interest, the notes and mortgage were without consideration as to the defendant. The conclusion of law, from the findings, is that the consideration for the execution, by the defendant, of the promissory notes and mortgage set forth in the complaint, is, in all respects, adequate and sufficient in law, and that said mortgage is a valid and binding lien upon the property and premises therein described. Assuming, as we must under the decision in *Camp v. Grider*, 62 Cal. 20, affirmed in *Bollinger v. Manning*, 79 Cal. 7, 21 Pac. Rep. 375, and *Association v. King*, 83 Cal. 443, 23 Pac. Rep. 376, that the failure to present for approval and allowance the first notes and mortgage operated as a bar to the foreclosure of the mortgage, it then becomes important to determine whether the execution of the last notes and mortgage, so far as the amount of the first notes is concerned, was based upon an adequate consideration. It is argued for the appellant that the notes first given were for the husband's debt alone, and the wife's joining in the first mortgage was to secure the payment of that debt, she not being liable on the debt, or receiving, so far as the record shows, any consideration whatever for the execution of the mortgage; that, when the notes became barred, they were debts of her husband, not hers; that, when the mortgage was barred, it was one (as to the debt secured thereby) on which she was a surety merely; that she was not bound, either legally or morally, to pay the debt of her husband, or to resecure its payment after it was barred; that she could obtain no benefit by so doing, but would be prejudiced, since, by the non-presentation of the claims of the plaintiffs, she was precluded from having the debt paid out of the estate, leaving out the homestead; that the notes of the husband were executed and the debt contracted before the execution of the first mortgage, which she signed at the request of her husband, and that the debt was not contracted on the faith that she would sign it; that there was no legal obligation for her to execute notes and a mortgage in lieu of those already barred; that there was no benefit conferred on her by the execution of the second mortgage,

except to the extent of the \$292, which was a separate and distinct consideration from the first notes and mortgage; that she had received nothing, by way of consideration, out of that which her husband received as the basis of the first notes; that she had once jeopardized the homestead to secure the payment of those notes, and the plaintiffs, by their own negligence, had not only gotten the first notes and mortgage barred, but had deprived the defendant of her statutory right to have the mortgage first satisfied out of property of the estate other than the homestead; that she received nothing beyond the \$292, and the plaintiffs cannot be said to have been prejudiced, so far as her conduct was concerned, to any extent, so as to make it a sufficient moral consideration to support a new contract from her to the promisee to pay the debt of another; that the notes and mortgage the plaintiffs gave up were of no value; that their collection was not enforceable either against the homestead or the estate; and that the plaintiffs, as promisees, were certainly not prejudiced by getting new notes and a new mortgage in lieu of those that were barred. The further point is made that, from the allegations of the answer, it appears that both parties were under a mutual misapprehension as to the law when the notes and mortgage now under consideration were executed, and that there is no finding upon the issue made. We think the appellant is right in both of these contentions, and that, for these reasons, the cause must be reversed. The mortgage, so far as it covered the amount included in the former mortgage on the homestead, was without consideration. The debt was not the debt of the appellant. She was under no personal obligation, either legal or moral, to pay it, and the failure to present it as a claim against her husband's estate released the homestead property. Judgment reversed as to the amount included in the original mortgage, and affirmed as to the balance, and the court below is instructed to modify the judgment accordingly; the respondents to pay the costs of this appeal.

PATERSON, J., dissenting.

85 Cal. 530

PEOPLE V. AH OWN. (No. 20,645.)

(Supreme Court of California. Sept. 10, 1890.)

GAMBLING—CRIMINAL PROSECUTION—OPINION  
EVIDENCE.

1. On an indictment under Pen. Code Cal. § 330, for playing the game of "tan," where the policeman who arrested defendant has testified that he did not see defendant engage in the game that was being played, it is error to allow him to testify that from the position defendant occupied at the table, he supposed that he was the banker, since that is a mere opinion of the witness.

2. An instruction that the jury should find defendant guilty if they found from the evidence, either that he himself directly played or conducted the game, or that he aided and abetted others in so doing, is not prejudicial to defendant.

In bank. Appeal from superior court, Sacramento county; JOHN W. ARMSTRONG, Judge.

A. L. Hart, for appellant. Geo. A. Johnson, Atty. Gen., for the People.

SHARPSTEIN, J. The information charges that "the said Ah Own, on the — day of February, A. D. 1888, at the city of Sacramento, in the said state of California, and before the filing of this information, did then and there willfully, unlawfully, and feloniously play, carry on, open, cause to be opened, and conduct, as owner, for gain, a certain banking game known as and by the name of 'tan,' said game being then and there played with certain devices, to-wit, buttons, checks, and Chinese coin, and other money, and other representatives of value, contrary to the form, force, and effect of the statute in such case made and provided, and against the peace and dignity of the people of the state of California." Section 330 of the Penal Code reads as follows: "Every person who deals, plays, or carries on, opens, or causes to be opened, or who conducts, either as owner or employe, whether for hire or not, any game of faro, monte, roulette, lansquet, rouge et noire, rondo, tan, fan-tan, stud-horse poker, seven and a half, twenty-one, or any banking or percentage game played with cards, dice, or any device, for money, checks, credit, or any other representative of value, is punishable by fine of not less than two hundred nor more than one thousand dollars, and shall be imprisoned in the county jail until such fine and costs of prosecution are paid, such imprisonment not to exceed one year; and every person who plays or bets at or against any of said prohibited game or games is guilty of a misdemeanor." Under the information it was incumbent on the prosecution to prove that the defendant played, carried on, opened, or caused to be opened, and conducted, as owner, a game of "tan." To prove that allegation the prosecution placed upon the witness stand the police officer who arrested the defendant and made the complaint against him before the committing magistrate. The witness testified, in substance, that, on the night of the 21st of February, 1888, he arrested the defendant; that on the night of the arrest, at about 9 o'clock, he was passing along and noticed that the front door of the house in which the arrest was made was closed; that he walked around the house quickly; that there was a little counter in front where the Chinese have a little store; that he jumped over the counter, and pushed himself into the room where a game of "tan" was being played; that, when he got into the room, the Chinaman that was dealing dropped his stick, and, with the players, ran to the back end of the room; that the defendant occupied a chair which witness called the "banker's chair;" that the defendant was behind the table; that the witness reached and caught defendant and held him, and obtained some of the money that was on the table in front of him. The witness then gave a description of the game of "tan." On his cross-examination the witness testified, in substance, that, at the time he went into the room, he saw the game in operation; that one man had a stick in

his hand, pulling the buttons out; that the witness did not know who he was; that he did not see the defendant doing anything, but only saw him occupying the position which he had previously described; that he did not see the defendant conduct the game, nor did he see him take into his hand any instrument with which the game was conducted, nor did he see him take into his hand any of the money that was on the table or in the drawer. The following cross-examination was thereupon conducted: "Question. Did you see him do anything towards playing the game of 'tan'?" Answer. Well, my judgment was— Q. You need not state your judgment. I asked you the fact. Did you see him do anything towards conducting the game of 'tan,' or any other game? A. Well, about the position that he occupied— Q. I do not ask you about the position. I am asking you about the fact, and I ask you to give an impartial statement of the fact without putting your judgment in. A. I have stated what I saw." The last foregoing question was thereupon repeated to the witness, to which he answered, "No." "Q. You saw him sitting there in a chair? A. Yes. Q. And that is all that you saw? A. And his moving and trying to get away." The witness then gave a description of the room, of the persons in it, the surroundings, the instruments for playing the game, etc., and thereupon the judge asked the following question: "Could you tell from the position at the table whether he was the man who received and paid out the money?" Counsel for defendant objected to the question as being irrelevant, and as involving an inference of the witness. The court overruled the objection, defendant excepted, and the witness answered: "Yes, he occupied the position of the man that paid the money." The witness on his further cross-examination stated, among other things, that he supposed that the defendant was the banker from the position he occupied, and that if there had been some other person in that room who was not interested in the game, and had been occupying that place, and had been sitting in that chair for a moment to rest, he, witness, would naturally have supposed that he was the banker, and would have prevented him from running a banking business under such circumstances. And after some further statements of like import, the district attorney asked the following questions: "You stated that if you should go into the room where 'tan' had been carried on, and saw a man in that position, that you would say that he was the banker. Would you say that, if you did not see the implements of the game, the buttons, and the lead, and the money, and the stick, and the money in the drawer ready to pay off the debts,—would you say that, if you did not see them?" Counsel for defendant objected to the question as being argumentative and calling for an inference of the witness. The objection was overruled, defendant excepted, and the witness answered, "No." It is clear that the court, by overruling the objections to these two ques-

tions, admitted evidence of the opinion of the witness upon facts which were in evidence before the jury, and upon which the jury were as competent as the witness to form an opinion; and a jury should not be influenced by the opinion of any one not more competent to form one than themselves. As a general rule the opinion of witnesses is not admissible in evidence. They must speak to facts within their knowledge. "A witness can testify of these facts only which he knows of his own knowledge,—that is, which are derived from his own perceptions,—except in those few express cases in which his opinions, or inferences, or declarations of others, are admissible." Code Civil Proc. § 1845. This case, obviously, is not within the exception to the general rule.

We think the court erred in overruling the objections to the questions which called for the opinion or inferences of the witness upon facts to which he had testified, and that it is an error of a character which imports injury to the appellant. *Rice v. Heath*, 39 Cal. 609; *Spanagel v. Dellinger*, 38 Cal. 278; *Sweeney v. Reilly*, 42 Cal. 402; *Ponce v. McElvly*, 51 Cal. 222. Among other instructions to the jury the court gave the following: "Every person who deals, plays, carries on, or causes to be opened, or who conducts any game of tan played within any device for money, checks, credits, or other representative of value, is guilty of a crime; and all persons concerned in the commission of a crime, whether it be a felony or misdemeanor, and whether they directly commit the act constituting the offense, or, being present, did aid and abet in its commission, are principals in such crime so committed. And if you find from the evidence, beyond a reasonable doubt, that the defendant did deal, play, carry on, or cause to be opened or conducted, either directly himself, or aided and abetted some other person in dealing, playing, carrying on, or conducting, a game of tan with any device for money, checks, credits, or other representative of value, at the time and place mentioned in the information, you should find a verdict of guilty; but otherwise you should acquit him. The word 'play' as used in this instruction does not refer to such persons as play or bet at or against the game; that is, those who are on the outside betting or playing at the game." While this instruction is justly obnoxious to unfavorable criticism, we fail to see that appellant could be prejudiced by it. We purposely refrain from expressing any opinion as to the sufficiency of the evidence to justify the verdict of the jury, because a retrial must be had. Judgment and order reversed, and cause remanded for a new trial.

We concur: MCFARLAND, J.; WORKS, J.; FOX, J.; PATERSON, J.

35 Cal. 542

HEWLETT v. PILCHER et al. (No. 18,450.)  
(Supreme Court of California. Sept. 10, 1890.)

RES ADJUDICATA—ISSUE OUT OF CHANCERY.

1. Defendant conveyed land to N., who afterwards conveyed to P., and he mortgaged it to plaintiff. Defendant then sued and had the

conveyances to N. and P. set aside, on the ground that they had colluded and obtained the conveyances from him by fraud. Held that, in a suit by plaintiff to foreclose the mortgage, this judgment is not admissible to show fraud as against plaintiff.

2. Where issues are submitted to a jury, but the court afterwards adopts their verdict and finds on all the issues, errors in the instructions given become immaterial, as the correctness of the judgment may be tested by the evidence alone.

In bank. Appeal from superior court. Calaveras county; C. V. GOTTSCHALK, Judge.

*Geo. D. Shadburne*, for appellants. *Geo. R. Williams*, (*Jas. G. Maguire*, of counsel,) for respondent.

**WORKS, J.** The appellant Watson, being the owner of certain real estate, conveyed the same to one Newstadt, who subsequently conveyed the same to one Pilcher. Pilcher mortgaged the property to the respondent. After the execution of the mortgage, Watson brought an action against Newstadt and Pilcher to set aside the conveyance by him to Newstadt, and the conveyance from Newstadt to Pilcher, on the ground that they had colluded together, and procured the conveyance from him by fraud, and procured a judgment against them setting aside said conveyances. This action was brought by the respondent to foreclose his mortgage, and Pilcher and Watson were made parties defendant. Judgment was rendered for the plaintiff, foreclosing the mortgage, and the defendant Watson appeals from the judgment, and the order denying him a new trial. The answer of Watson denied the material allegations of the complaint, and by way of affirmative defense alleged that he, the defendant, was the owner of the mortgaged property at the time the mortgage was given, and that Pilcher, the mortgagor, had no title thereto. There was no allegation that Newstadt and Pilcher procured the conveyance from the defendant by fraud, but it was averred, in general terms, that the plaintiff took the mortgage for the purpose of defrauding the defendant, that he took the same knowing that the property had been procured from the defendant by fraud, and that the plaintiff had not taken the proper precautions to ascertain the true condition of the title. On the trial the defendant offered in evidence the judgment roll in the case of the defendant against Newstadt and Pilcher, in which the conveyances above mentioned were declared fraudulent, and set aside. The evidence was objected to and excluded, and this is claimed to have been error. We do not think so. The plaintiff was not a party to that judgment, and was not bound by it in any way. As against him, it was necessary for the defendant to allege and prove that the conveyances referred to were fraudulent, and that the plaintiff had knowledge of the fact, or sufficient information to put him upon inquiry. The fraud was not alleged in the answer, and, if it had been, the judgment against Newstadt and Pilcher was not competent to prove it as against the plaintiff. But it is claimed that it was competent to prove title in the defendant. It

was competent to prove his title at and from the time the judgment was rendered, but the plaintiff's mortgage was taken prior to the rendition of the judgment, and the plaintiff admitted the defendant's title from the date of the judgment. Notwithstanding the deed from the defendant to Newstadt was procured by fraud, it conveyed the legal title, and a mortgage taken from Newstadt's grantee would be a valid lien upon the land, as against the claim of the defendant, if the mortgagee had no notice of the fraud, and the judgment subsequently recovered setting aside the deeds could not affect this lien. *Randall v. Duff*, 79 Cal. 115, 19 Pac. Rep. 532, and 21 Pac. Rep. 610. It is contended that the findings of the court are contradictory, and that some of them are not sustained by the evidence; but we think otherwise. Certain instructions were asked by the defendant, and refused, and certain instructions given which it is claimed were wrong, and this is assigned as error. We are unable to say that these instructions were erroneously refused, conceding that they state the law correctly. It is stated in the bill of exceptions that other instructions were given by the court. For what we know from the record the instructions given may have included the propositions contained in those refused. As the appellant is bound to show error, and the instructions given are not before us, we must presume that they correctly and fully charged the jury as to the law of the case. Again, this was an equity case. Certain special issues were submitted to the jury, but the court finally adopted the findings of the jury, and found on all of the issues. This being so, the refusal to give instructions is not cause for a reversal of the case. If the findings are not sustained by the evidence, they may be tested by the evidence. If erroneous conclusions are drawn from them, the question may be presented in this court, and, in either event, the question whether the court erred in giving or refusing instructions becomes immaterial. *Sweetser v. Dobbins*, 65 Cal. 529, 4 Pac. Rep. 540. The question of fraud, discussed by the appellants' counsel, does not arise, for the reason that fraud is neither alleged nor proved. Judgment and order affirmed.

We concur: **BEATTY, C. J.**; **FOX, J.**; **SHARPSTEIN, J.**; **MCFARLAND, J.**; **THORNTON, J.**

(85 Cal. 574)

**GOLDMAN v. ROGERS.** (No. 13,145.)

(*Supreme Court of California.* Sept. 10, 1890.)

**EJECTMENT—EVIDENCE—ISSUE OUT OF CHANCERY.**

1. Where, in a suit to quiet title, there is an issue out of chancery, it is sufficiently shown that the court adopted the verdict of the jury by recitals in the judgment that the court made its findings of fact and conclusions of law in part from such verdict.

2. The verdict of the jury on an issue out of chancery being a part of the judgment roll in the suit under Code Civil Proc. Cal. § 670, such verdict is sufficiently identified by the certificate of the clerk that the record on appeal is a "correct transcript of the issues submitted, and answers thereto, and verdict of the jury thereon."

3. Plaintiff in ejectment claimed the land under an execution sale, and defendant, the wife of



the execution debtor, alleged in her cross-complaint that she had bought the land with money belonging to her separate estate. *Held*, that where a jury have found that she did buy it with her own money a finding on the issue of her marriage to the execution debtor is unnecessary.

Commissioners' decision. In bank. Appeal from superior court, Tulare county; C. H. MARKS, Judge.

*Chas. G. Lamberson and Lamberson & Taylor*, for appellant. *Cosper & Boller*, for respondent.

BELCHER, C. C. The plaintiff brought this action to recover possession of two lots of land in the town of Tulare, the complaint being in the ordinary form in ejectment. The defendant, by her answer, denied all the averments of the complaint, and then, by way of cross-complaint, set up that she purchased the lots on the 25th day of July, 1882, and received a good and sufficient bargain and sale deed thereof, in her own name, which was afterwards recorded, and that she "paid therefor money owned by her in her own exclusive right;" that ever since the date of her purchase she had been the owner of the lots, and in the actual and exclusive possession thereof; that the plaintiff claimed an estate or interest in the property, adverse to her, under and by virtue of a deed made to him by a constable, under date of December 31, 1886, in pursuance of a sale of the property under an execution issued on a judgment against one H. G. Rogers, but that the plaintiff had no estate, right, title, or interest whatever therein; wherefore she prayed that her title be quieted. The answer to the cross-complaint denied that the defendant purchased the lots at the time named, or at all, or that she "paid for said land, or any portion thereof, with money owned by her in her own exclusive right, or owned by her at all;" and it alleged that the property was purchased by H. G. Rogers, who was, at the time, the husband of defendant, and paid for with money earned by him, and which was their community property, and that plaintiff had acquired the title of H. G. Rogers under an execution sale, and was the owner of the lots. When the case came on for trial, special issues were framed and submitted to a jury, and a verdict was returned in favor of the defendant. The court then made further findings, and gave judgment for the defendant, from which the plaintiff appeals on the judgment roll. The court found that the plaintiff obtained a judgment in a justice's court against H. G. Rogers, and, under an execution issued thereon, caused the lots to be sold on the 22d day of December, 1885; that he bid them in, and on the 31st of December, 1886, obtained the constable's deed for them, and that this was his only title; that H. G. Rogers and the defendant were married in 1878, and, at the time the judgment above named was obtained, and the lots levied on sold and conveyed by the constable, they were husband and wife; that on the 25th day of July, 1882, the defendant obtained a deed for the lots in her own name, and thereupon went into, and ever since had been in, possession of the

same; that at the time of the purchase of the lots defendant had money which was her separate property; and "that all the allegations and averments of defendant's cross-complaint are true, and all the allegations and averments of the plaintiff's complaint and the denials and allegations of plaintiff's answer to defendant's cross-complaint are untrue." And the jury found that the lots were wholly paid for by the defendant with money which she had at the time of her marriage, and which was her separate property.

1. It is argued for the appellant that the verdict of a jury in an equity case is merely advisory, and has no force or effect until approved and adopted by the court; that there is nothing in the record here to show that the verdict of the jury was adopted by the court, and hence there is no finding upon the material issue as to whether or not the lots were paid for with money which was the separate property of the defendant; and that, for the want of such finding, the judgment should be reversed. This position is not sustained by the record. The findings of the court recite: "And the court and jury having heard the proofs of the respective parties, and considered the same, and the records and papers in the cause and the arguments of the respective attorneys thereon, and the cause having been submitted to the jury upon certain special issues of fact raised by the pleadings and proofs in said case, and to the court upon other remaining issues raised therein, the court now finds the following facts," etc. And again: "The jury in this action having found a verdict in favor of the defendant herein upon the special issues submitted to them, which said special issues, as submitted, and the verdict of said jury, are on file in this action; therefore, as conclusions of law from the foregoing facts, and from the verdict of the jury upon the special issues of fact submitted to them, the court now hereby finds and decides," etc. And the judgment also recites: "This cause having been regularly called and tried by the court and jury, and the jury having found their verdict in favor of the defendant upon special issues of fact submitted to them, and the court having made its findings of fact and conclusions of law therefrom, and from the verdict of the jury on said special issues of fact, and the decision thereon in writing having been duly rendered by the court, which are on file in this cause," etc. From these recitals it very clearly appears, we think, that the court did adopt the findings of the jury. It was not necessary that the word "adopt" be used in order to show an adoption.

2. It is contended that the verdict of the jury "cannot be considered for the further reason that it does not appear by any indorsement thereon to have ever been identified as such a verdict, or filed as such, and does not appear to have been recorded or entered upon the minutes of the court." But the clerk of the trial court certifies "the foregoing to be a full, true, and correct transcript of the issues submitted and answers thereto, and verdict of the jury thereon, in the foregoing

entitled action, as appears from the originals thereof on file in my office, and of the whole thereof." This was a sufficient identification of the verdict. It was a part of the judgment roll, (Code Civil Proc. § 670,) and will be presumed to have been properly recorded and entered by the clerk in the minutes of the court, as required by section 628 of the Code.

3. It is further contended that the findings of the court in regard to the marriage relation of the defendant are contradictory, and, being so, that they cannot support the judgment. This contention is based upon the following facts: The property was purchased in July, 1882, and the plaintiff alleged in his answer to the cross-complaint that it was purchased by "one H. G. Rogers, who was at such time the husband of defendant." The court found that H. G. Rogers and the defendant were married in 1878, and that at the time the judgment was obtained against him, and the property levied on sold and conveyed by the constable, they were husband and wife. It also found that all the allegations of plaintiff's answer to the cross-complaint were untrue.

Now conceding, without deciding, that there was a conflict in the findings in regard to the defendant's marital relations in 1882, still the question is, was that issue, in view of the other findings, at all material? The defendant was sued in ejectment as a *feme sole*, and the question was, did she own the demanded premises, or did the plaintiff own them? If the property was bought and paid for by defendant with money which she had at the time of her marriage in 1878, and which continued to be her separate property, then clearly she was the owner, and was entitled to have judgment entered quieting her title as against the plaintiff, whether at the time of her purchase she was the wife of H. G. Rogers or not. In our opinion, when the verdict of the jury was returned and adopted by the court, the issue referred to became immaterial, and it was not essential that there be any finding upon it. The facts found sustain the judgment, and there was no necessity to go further and find on other issues. We find no prejudicial error in the record, and advise that the judgment be affirmed.

We concur: HAYNE, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

85 Cal. 598

WILSON *et al.* v. MORTON *et al.* (No. 13,447.)

(Supreme Court of California. Sept. 10, 1890.)

STATUTE OF FRAUDS—CONTRACTS—ACTIONS—EVIDENCE.

1. A contract by which defendants agree to pay plaintiffs a certain sum per acre for all land that plaintiffs shall examine and advise defendants to buy is not one for the purchase or sale of real estate, and hence is not required to be in writing by Civil Code Cal. § 1624.

2. In an action on such contract it is not error to exclude evidence offered by defendants to show that they had employed and paid other persons to advise them in regard to the same land.

PATERSON, J., dissenting.

In bank. Appeal from superior court, Tulare county: WILLIAM W. CROSS, Judge. N. O. Bradley, G. E. Lawrence, and T. M. McNamara, (Stephen M. White, of counsel,) for appellants. Oregon Sanders and W. A. Gray, for respondents.

PER CURIAM. Plaintiffs alleged that defendants agreed to pay them fifty cents an acre for all lands in the county of Kern which they should examine and advise defendants to purchase, and which should be afterwards purchased by defendants; that in pursuance of the agreement they examined 14,020 acres of land, and advised defendants to purchase the same; that all of said lands were purchased and were afterwards sold by defendants, whereby defendants became indebted to plaintiffs in the sum of \$7,010. The jury returned a verdict in favor of plaintiffs for \$3,520. Judgment was entered for that amount. A motion for new trial was denied, and defendants appealed. The contract was not one required by the statute of frauds to be in writing. Section 1624 of the Civil Code does not apply. Plaintiffs are not claiming commissions as defendants' agents, or brokers, for the sale or purchase of real estate. The compensation claimed by them is for services rendered in pointing out property purchased by the latter, and for advice given them. We think the evidence is sufficient to sustain the verdict. While it is not clear to us how the jury, under the evidence, took 11 sections as the basis of the verdict, we should not disturb the verdict on the ground that there is no evidence to support it.

We see no error in the ruling of the court excluding the evidence offered by defendants to show that they had employed and paid other parties to assist them in selecting a portion of the lands described in the complaint. If the evidence was not wholly incompetent, it was so uncertain and immaterial that it could not have aided the jury in determining the issues between the parties. Judgment and order affirmed.

PATERSON, J., (dissenting.) The defendants, in their answers and in their testimony, flatly denied that they had ever employed plaintiffs, or either of them, to examine any lands or advise them in relation thereto. In corroboration of their own testimony they offered to show that they had employed and paid other parties to assist them in selecting the lands described in the complaint. The questions propounded to the witnesses Oaks and Root for this purpose were objected to, and ruled out. I think the questions were proper, and should have been allowed. The fact that defendants were advised by other parties, if shown to be true, would not of course be a defense to plaintiffs' claim if the contract was made and the services were performed as alleged by them; but it was a circumstance which the defendants were entitled to have before the jury in determining the issues. If the defendants could have proved to the entire satisfaction of the jury that they had been fully advised by Root and Oaks as to the character of the lands prior to the time of the alleged contract with

plaintiffs, and had paid them 50 per cent. of what the land was worth for this assistance, it would be for the jury to say, in determining the conflict of evidence, whether they had also paid plaintiffs 50 cents per acre for their services; and, if the sum of the two compensations amounted to the entire value of the land, the fact that defendants had paid Root and Oaks would have been an important factor in determining whether they had also engaged the services of plaintiffs. The deductions to be drawn from ordinary business transactions, free from taint of fraud or collusion, are often of great aid in such cases. *Sedgwick v. Sedgwick*, 56 Cal. 214. The fact that defendants did not specify in the questions asked just how many acres the witnesses had pointed out, in no way affects the question of the admissibility of the evidence. Counsel cannot be expected to sum up the whole case in one question. Subsequent questions would have developed the fact as to quantity, and how much, if anything, was actually paid to Root and Oaks.

THORNTON, J., (*concurring*.) I find no error in the record, and concur in the judgment.

(35 Cal. 535)

PEOPLE v. WARD, Justice of the Peace.  
(No. 20,639.)

(*Supreme Court of California. Sept. 10, 1890.*)  
JUSTICES OF THE PEACE—MISCONDUCT—DISTRICT ATTORNEY.

1. Pen. Code Cal. § 1885, provides that "the court may either of its own motion or on the application of the district attorney, and in furtherance of justice, order an action or indictment to be dismissed." Section 1886 provides that "neither the attorney general nor the district attorney can discontinue a prosecution except as provided in the last section." *Held*, that on an indictment of a justice for taking jurisdiction of a criminal proceeding after it has been dismissed before another justice of the same township by order of the prosecuting attorney, and brought before a justice of another township, it is error to instruct that the district attorney has authority to dismiss a criminal prosecution before a justice of the peace.

2. An indictment which avers that defendant took jurisdiction of such prosecution for the sole purpose of making the acquittal of accused a bar to another pending prosecution for the same offense, but does not aver that he intended to acquit accused, or that he acted from corrupt or partial motives is not sufficient, under Pen. Code Cal. § 758, punishing "district, county, township, or municipal officer" for willful or corrupt "misconduct in office."

In bank. Appeal from superior court, Solano county; A. J. BUCKLES, Judge.

*Spencer & McEnerney*, for appellant.  
*O. P. Dobbins* and *J. M. Gregory*, for respondent.

MCFARLAND, J. The defendant was indicted for, and convicted of, misconduct in his office of justice of the peace, and judgment was rendered removing him from office for causes stated in the judgment. He appeals from the judgment, and from an order denying a new trial. The defendant had been justice of the peace at Vacaville township, Solano county, for many years, and the evidence shows him to have been a man of exceptionally good character for

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truth, honesty, and integrity. This case arises out of the prosecution of one Dayton G. True for the alleged petty offense of stealing three dollars from one F. C. Chapman, and from certain supposed conflict of jurisdiction, and somewhat unpleasant feeling, between the justices of the peace of said township and a justice of the township of Suisun, in said county; and, leaving out of view, for the present, questions about the sufficiency of the indictment, we think that the jury were erroneously misled, to the prejudice of the defendant, by the instructions of the court on the power of the district attorney in criminal prosecutions. True was first arrested on a warrant issued by R. LONG, also a justice of the peace at Vacaville, where the alleged offense appears to have been committed, if at all. The interest taken in the prosecution and defense of True seems to indicate that questions were involved which do not usually arise in ordinary cases of larceny of as small an amount as three dollars. A trial took place before Justice LONG and a jury, which lasted two or three days. The district attorney of the county assisted in the prosecution, and it appears, from uncontradicted evidence, that, while the jury were out considering their verdict, the district attorney said that if the jury did not agree he would go before GILLESPIE, a justice at Suisun, because he knew that he could get a jury at Suisun that would convict True. The jury did fail to agree, and were discharged. True's attorney asked to have the case set again for another trial, and the district attorney objected. On April 15, 1889, LONG set the case for a trial on April 22d, and on April 17th made an order for 40 jurors. In the mean time the district attorney had moved and asked that the case before Justice LONG be dismissed for the purpose of commencing it again before GILLESPIE, at Suisun, and LONG had refused to dismiss it. On April 15th, the district attorney sent a note to LONG requesting him to immediately dismiss the case, which he again refused to do. But on April 15th, and while the case was still pending before LONG, at Vacaville, another complaint for the same offense was made by Chapman, at the instance of the district attorney, before Justice GILLESPIE, at Suisun, on which True was again arrested, and taken to Suisun. True's attorney then went before the superior judge of the county on a writ of *habeas corpus*, and also on a writ of prohibition, seeking, on the one, to have True discharged, and, on the other, to prohibit GILLESPIE from proceeding in the case, on the ground that he had no jurisdiction because the case was pending before Justice LONG, at Vacaville. The judge denied both writs. Owing, we suppose, to some language used by the judge in passing on the question, a telephone message was sent to LONG, at Vacaville, to the effect that the superior court had ordered him to dismiss the case. He supposed that this message came from the district attorney; but it was not sent by him, although with his knowledge. Thereupon, on April 18th, LONG made on his docket the following order: "By order of Superior Judge BUCKLES the case of *People v. Dayton G. True* is hereby dismissed."

On April 19th, True's attorney caused a complaint to be made against True for the same offense, before the defendant in the case at bar, F. P. Ward, justice at Vacaville. Upon this complaint, which was a sufficient one, defendant issued a warrant, upon which True was arrested and brought into court. He pleaded "not guilty" and his attorney vigorously insisted upon a speedy trial. The main witnesses who had testified against True in Long's court, viz., Long himself, Chapman, and Harley, were in court. Long was examined. Chapman was put on the stand, but refused to testify, and was fined for contempt, although the fine was afterwards remitted; and Harley left the court-house, and refused to return and testify, although a constable notified him to come, without, however, having a subpoena. Judgment was afterwards, on the same day, entered acquitting True. There is no pretense that the defendant, Ward, acted in the premises corruptly, or with an improper purpose of acquitting True. Indeed, the original prosecutor, Chapman, said that he believed that Ward would be as liable to convict True as to acquit him; that he would have acted honestly, and given an honest judgment. He thought, however, that the district attorney should have been present. There was evidence tending to show that the defendant, Ward, knew of the previous proceedings in the case, as above stated.

Under these circumstances the court instructed the jury, among other things, as follows: "I instruct you that the district attorney is the law officer of the county, the attorney for the people in all criminal matters, and, as such, it is his duty to institute and conduct to a judicial determination criminal proceedings in the justices' courts of this county. Incident to these duties as district attorney, he has the right to control the prosecution of such cases, and has the right to move the dismissal of any criminal proceeding, in any justice court of this county, when, in his judgment, public justice demands it; and it is the duty of the justice, before whom such proceedings are pending, to enter a dismissal upon the motion of the district attorney. The district attorney is amenable to the law, as all officers are, and, should he exercise the functions of his office corruptly, there is a remedy by which he may not only be deprived of his office, but punished for such corruption or willful misconduct in office." Instruction 4. "I instruct you that, whenever the district attorney may find that justice demands it, he has the right, and it is his duty, to institute criminal proceedings in any justice court in the county, even if it be in a court remote from the residence of the defendants, and in another township, other than the one in which the crime is alleged to have been committed; and therefore I instruct you that the district attorney, if he believed that justice could not be done in the case of the People v. True in the township of Vacaville, for any cause whatever, had a right, and it was his duty, to dismiss the proceedings in said township, and bring them in Suisun township." Instruction 5.

Whether or not it is the duty of a district attorney to endeavor to remove a prosecution from one justice's court to another court, "remote from the residence of the defendant," in order that he may more readily obtain a conviction, or whether it is his duty to commence a prosecution in a second court before it has been ended in the first, are questions not necessary to be here determined. But we find no authority for the proposition that "it is the duty of a justice, before whom such proceedings are pending, to enter a dismissal upon the motion of the district attorney." The general provisions on the subject are contained in sections 1385 and 1386, Pen. Code, and are as follows: "1385. The court may, either of its own motion or upon the application of the district attorney, and in furtherance of justice, order an action or indictment to be dismissed. The reasons of the dismissal may be set forth in an order entered upon the minutes. 1386. The entry of a *nolle prosequi* is abolished, and neither the attorney general nor the district attorney can discontinue a prosecution, except as provided in the last section." The only other statutory provision bearing on the subject to which our attention has been called is contained in the county government act, to the effect that the district attorney, when not engaged in the superior court, "must attend upon magistrates in cases of arrest, when required by them." It is clear, therefore, "the court" alone has the power to dismiss a criminal action. The instruction of the court on this point was erroneous, and that the error was prejudicial to appellant is obvious. The jury were thereby taught that the district attorney had full control over the prosecution, and the different courts in which, at various times, it has appeared; and they may well have believed that, if appellant knew of its previous history, and the action of the district attorney in the premises, he entertained the last complaint against True for the alleged purpose of thwarting the designs of a superior officer. That appellant had jurisdiction to try True, notwithstanding the pendency of the case before the justice at Suisun, must be taken to be the law of this case—*First*, because the prosecution had set the precedent; and, *second*, because the court instructed the jury as follows: "I instruct you that the defendant, Ward, had a legal right to entertain the criminal complaint against True, and to try the case, and render his judgment thereon, although such judgment would be a bar to another prosecution for the same offense." For this reason, therefore, the judgment would have to be reversed. We have discussed the foregoing questions because they are of general interest; but we are satisfied that the indictment in this case is not sufficient, and that the demurrer to it should have been sustained. It is drawn under section 753, Pen. Code, which provides for an accusation by the grand jury against any "district, county, township, or municipal officer" for willful or corrupt "misconduct in office." Assuming that it will lie against a judicial officer, still, when, as in the case at bar, it is against

such an officer, it must contain averments showing judicial misconduct. To remove a judicial officer for misconduct in office is a grave proceeding; and to do so without proper averments and proofs is to strike a blow at the independence of that important department of the government. The act charged must have been done in the discharge of judicial functions, and must be charged to have been done with corrupt, partial, malicious, or other improper motives, and with knowledge that it was wrong. In *Jacobs v. Com.*, 2 Leigh, 709, which was a prosecution of justices of the peace, the court of appeals of Virginia say: "It is a well-established principle that a judicial officer cannot be prosecuted criminally for any judgment rendered by him, however illegal, unless rendered from some motive of malice, partiality, or corruption. Much less can a prosecution be carried on when the act done is within the pale of his lawful authority, without such corrupt motives. In indictments of this character, it is usual to charge the judgment or thing done corruptly, wickedly, or maliciously." It is further held, in this case, that there must be an averment that the defendants knew the act charged against them to have been wrong. In *State v. Ross*, 4 Ind. 541, an indictment against a justice of the peace was held defective because it "did not state that he knew his decision to be in violation of law." See, also, *Triplett v. Munter*, 50 Cal. 644. Now, in the case at bar, there is no averment whatever of any illegal act by appellant. He had full jurisdiction and authority to do all the acts charged, and there is no averment of any corrupt or malicious motive. There is no averment that he entertained the complaint against True for the purpose of acquitting him, and there is no averment that he knew what he did to be unlawful or wrong. In fact, as before stated, there is no averment that he did any unlawful act. Indeed, the apparent theory of the indictment is that he did a lawful act with an unlawful intent. But assuming that there can be a crime consisting of intent alone, without any unlawful act, still the indictment, upon that theory, is entirely insufficient. The only averment on that point is this: The indictment, after reciting the facts above stated, and somewhat more in detail, concludes as follows: "That the said action of said F. P. Ward, as justice of the peace of said township, was done knowingly and willingly, and for the express purpose of making the said acquittal, by him, of said defendant a bar to the further prosecution of said Dayton G. True, for the same crime of petit larceny, before the said justice of said Suisun township." Of course, either the acquittal or conviction of True would have been, by operation of law, a bar to any other prosecution, and the averment that the appellant intended the necessary legal consequence of the judgment is of no significance. But, as before said, there is no averment that appellant intended to acquit True, or that he acted from corrupt, malicious, or partial motives, or that he knew his acts to be unlawful. It was found necessary to put important things

into the judgment which are not in the accusation. For these reasons, we think the indictment insufficient. Judgment and order reversed, with directions to the superior court to sustain the demurrer to the accusation.

We concur: PATERSON, J.; FOX, J.; SHARPSTEIN, J.; WORKS, J.

85 Cal. 535

BOAS v. FARRINGTON. (No. 12,964.)

(Supreme Court of California. Sept. 10, 1890.)

VENDOR AND VENDEE—CONTRACT—ABSTRACT OF TITLE.

The contract between plaintiff and defendant for the purchase, by the former, of the latter's ranch, provided for payment in three installments, and further contained the following stipulations: "Title to be good, or the money to be refunded, party of the first part (defendant) to furnish abstract of title to said land." Defendant furnished the abstract shortly after plaintiff had made the first payment. Held that, where such abstract failed to show a good title, plaintiff was entitled to recover the money already paid, even though defendant, as a matter of fact, had a good title.

Department 1. Appeal from superior court, Santa Clara county; FRANCIS E. SPENCER, Judge.

*Archer & Bowden*, for appellant. *Marcius Rosenthal*, (E. F. Preston, of counsel,) for respondent.

WORKS, J. One Rosenthal and the appellant entered into the following contract: "This agreement made the 20th day of August, 1887, between William Farrington of Santa Clara county, state of California, the party of the first part, and Joseph Rosenthal of the city and county of San Francisco, state of California, the party of the second part, witnesseth: The party of the first part has this day agreed to sell, and deed, by bargain and sale deed, his ranch in Santa Clara county, bounded as follows: On east by Quito road; south by lands of Mitchell, Neva, and Cox; west by Campbell's creek; north by lands of T. Scully, and a short portion of the Saratoga avenue, containing about 210 acres,—together with all improvement thereto belonging for the price of two hundred and fifty dollars per acre, payable as follows: Five thousand dollars on the signing of this agreement, twenty-one thousand two hundred and fifty dollars on the 20th day of September, 1887, and the balance on or before two years; with interest at 8 per cent. per annum, payable semi-annually, with bond and mortgage secured on the within-described premises; title to be good, or the money to be refunded; party of the first part to furnish abstract of title to said land. Witness the hand of party of the first part this 20th day of August, 1887, at San Jose, Cal." Rosenthal paid the \$5,000, and thereafter the appellant furnished the abstract provided for in the contract. The abstract failed to show a good title to the land in the appellant. Rosenthal demanded a return of the \$5,000, which was refused. His claim therefor was assigned to the respondent, who brought this action to recover this sum of money. The court below rendered judgment for the plaintiff,

and this appeal is by the defendant, from the judgment, and comes upon the judgment roll. The court below found that the abstract furnished by the appellant did not show a good title in him, but that, as a matter of fact, he had a good title to the property. The whole controversy on this appeal turns upon the proper construction to be placed upon the contract above set out. The appellant contends that the contract did not require him to furnish an abstract showing a good title, or at most that he was not bound to furnish it at the time the defective one was furnished, or at any time before the time for the final payment of the purchase money; and that, as it appeared at the trial that he had a good title to the property, he was entitled to judgment. We cannot so construe the contract. It is apparent, from the terms of the agreement, that the question of title was to be determined before the respondent's grantor could be required to make the second payment, as, at that time, the subsequent payments were to be secured, and the whole matter closed up, but, if this were not so, and the appellant was not bound by the terms of the contract to furnish the abstract until a later day, he waived this right, and did furnish it before Rosenthal offered to rescind. Certainly, when the abstract was furnished, the purchaser had the right to act upon it, and, as it failed to show a good title in the vendor, the vendee was not bound to lay out of the use of his money, and pay the whole balance of the purchase money before he could recover back any part of what he had paid. If the vendor had a good title, as the court below found he had, he should have furnished an abstract showing it, and upon it being called to his attention, either by the demand for a rescission or otherwise, that it was defective, he should have at once caused a perfect abstract to be furnished. He did neither; and in his answer stands by the abstract furnished by him, and asserts that it was a good one. If the abstract was a good one, it showed that his title was bad. It is too late now for him to assert that he was not bound to furnish an abstract at all, or that he was not bound to furnish it at the time he did. Judgment affirmed.

We concur: PATERSON, J.; FOX, J.

35 Cal. 555

MCLEAR V. HAPGOOD *et al.* (No. 13,720.)  
(Supreme Court of California. Sept. 10, 1890.)

APPEAL—REVIEW—WEIGHT OF EVIDENCE—ESTOPPEL.

1. In a suit to restrain defendants from diverting the waters of a stream which plaintiff claims by adverse user, where two witnesses and plaintiff himself testify that such user exists, and there is put in evidence a written agreement between plaintiff and defendants that the latter shall pay him for the use of the water during seasons when there is not enough for all parties, a finding that plaintiff is the owner of the water will not be disturbed on appeal.

2. Plaintiff is not estopped from claiming the water by a recital in the agreement that defendants are "the owners of the surplus waters."

Commissioners' decision. In bank. Appeal from superior court, Plumas county; G. G. CLOUGH, Judge.

*J. C. Black*, for appellants. *Goodwin & Goodwin*, for respondent.

HAYNE, C. This was a suit to restrain the defendants from diverting the waters of a certain stream. The trial court gave judgment for the plaintiff, and the defendants appeal. The plaintiff's right is based upon adverse user. His testimony, and that of the witnesses Theilbar and Rebecca King, tends to show such user; and it was shown that the defendants agreed in writing that they would pay the plaintiff for the use of the water during seasons when there was not enough for all parties. This agreement was in force during a limited period only, but it was a clear acknowledgment of the plaintiff's right. This evidence was at least sufficient to raise a substantial conflict, and, therefore, the finding as to the ownership of the water cannot be disturbed. It is contended, however, that the plaintiff is estopped, by a recital in the agreement referred to, from denying the defendants' right to the water. But the recital was that the defendants were "the owners of the surplus waters," etc. The defendants contend that the word "surplus" was interlined without their knowledge after the execution of the agreement. But the word was entirely in accord with the tenor of the agreement. For, if the defendants were the owners of the water, why should they have agreed to pay the plaintiff for it? And the plaintiff distinctly testified that the word was in the agreement before he signed it. The most that can be said is that the evidence in relation to the matter was conflicting. The recital, therefore, did not estop the plaintiff; and there is no sort of foundation for a claim of equitable estoppel. The plaintiff, therefore, must be held to be the owner of the water to the extent claimed; and there was sufficient evidence that there was not enough for both parties. Finally, it is urged in the reply brief that the findings are conflicting. The position in this regard is that the sixth finding is in conflict with the others. But we do not think so. There is no dispute about the ownership of the "water ditch" mentioned in that finding. The ownership of this ditch is entirely distinct from the right to divert the water of the stream; and to say that the latter is an incident of the former is to assume the whole question. It is not contended that the findings are contradictory in any other respect; and we deem it sufficient to say that we have examined the findings, and find no material conflict therein. The other matters do not require special notice. We therefore advise the order appealed from be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is affirmed.

35 Cal. 557

MCLEAR V. HAPGOOD *et al.* (No. 13,189.)  
(Supreme Court of California. Sept. 10, 1890.)

CONTINUANCE—SURPRISE.

Defendant moved for a continuance on the ground of surprise, in that there was a material

alteration in an instrument executed by him, and introduced in evidence by plaintiff, as he expected to show by a witness, to obtain whose attendance the continuance was asked. He saw the instrument with the interlineation coming from plaintiff's possession the day before he moved for the continuance, and he did not make such motion as soon as plaintiff's evidence was in, but proceeded to examine witnesses as to the execution of the instrument. *Held*, that it was not error to refuse the continuance.

Commissioners' decision. In bank. Appeal from superior court, Plumas county; G. G. CLOUGH, Judge.

*J. C. Black*, for appellants. *Goodwin & Goodwin*, for respondent.

HAYNE, C. This is a separate appeal in the same case as No. 13,720, (*McLear v. Hapgood*, ante, 788, just decided.) The only ground relied upon here is that the defendants were surprised by the discovery, at the trial, of a material alteration in a document introduced in evidence by the plaintiff, viz., the interlineation of the word "surplus" in such document. The position is that, if the defendants could have shown that this word was inserted after the execution of the document, the plaintiff would be estopped by the recitals of the instrument, and that their motion for a continuance should have been granted for the purpose of enabling them to obtain the evidence of experts, and of the defendant D. A. Block, in relation to the matter. It is the rule, however, (subject to but few exceptions,) that a party claiming to be surprised must move for a continuance at the earliest practicable moment. He is not ordinarily allowed to wait until he sees how the case is going before he makes his motion. In the present case it appears that the document in question was introduced as part of the plaintiff's case; that the defendant, who appeared *in pro. per.* and for his co-defendants, saw the duplicate agreement coming from the hands of the plaintiff, and saw the interlined word "surplus," on the day before he moved for a continuance; that, being so informed of the facts, he did not move for a continuance at the time the document was introduced in evidence, or at the close of the plaintiff's case, but proceeded to open the case for the defendants and himself, took the stand, and "testified as to the circumstances attending the signing of said contract," and "placed upon the witness stand defendant Joseph Hapgood, and his son Nathan Hapgood, and interrogated them fully as to the circumstances attending the signing of the agreement." Such being the case, we cannot say that there was an abuse of discretion in refusing the continuance. We therefore advise that the judgment be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

WILLARD v. DILLARD, Judge. (No. 20,692.) (*Supreme Court of California*. Aug. 26, 1890.)

In bank. Petition for writ of *mandamus* to the superior court, Santa Barbara county; R. M. DILLARD Judge.

*J. W. Taggart*, for petitioner. *R. B. Canfield*, for respondent.

BEATTY, C. J. Let the alternative writ of mandate issue in this cause as prayed, commanding the said respondent, upon two days' notice to the district attorney of the said county of Santa Barbara, to proceed to settle, and to settle, the bill of exceptions in the case of *People v. May Willard*, in which case an appeal has been taken from the judgment rendered in said superior court to this court, or that he show cause before this court, at the opening of the court on the first day of the October term thereof, in the city of Los Angeles, why he has not settled the same.

85 Cal. 363

PEOPLE v. ROSS. (No. 20,678.)

(*Supreme Court of California*. Aug. 26, 1890.)

CRIMINAL LAW—FORMER JEOPARDY—REMARKS OF COUNSEL.

1. The commencement of the trial and the discharge of the jury, without defendant's consent, on account of the sickness of one of the jurors, do not constitute jeopardy, and evidence of such proceedings is not admissible in support of a plea of former jeopardy on another trial for the same offense.

2. On a criminal trial the counsel for defendant refused to reply to the opening argument of the prosecuting attorney after the evidence was in, and the latter claimed the right to argue the case further to the jury, which claim the court denied. The prosecuting attorney then remarked in the presence of the jury that "the defense was endeavoring to prevent the prosecution from arguing the truth of the charge." *Held*, that this was not prejudicial to defendant.

In bank. Appeal from superior court, San Joaquin county; JOSEPH H. BUND, Judge.

*A. V. Scanlan*, for appellant. *Atty. Gen. Geo. A. Johnson*, for the People.

SHARPSTEIN, J. The commencement of the trial of the defendant, and the discharge of the jury, on account of the sickness of one of the jurors, without the consent of the defendant, did not constitute jeopardy or an acquittal of the defendant of the crime for which he was on trial; and evidence of that proceeding was not admissible to support a plea of once in jeopardy or former acquittal in a subsequent trial, upon the same or another information, filed against him for the same offense. Nearly a century ago KENT, J., speaking for the supreme court of New York, in *People v. Olcott*, 2 Johns. Cas. 301, said: "All the authorities admit that when any juror becomes mentally disabled, by sickness or intoxication, it is proper to discharge the jury; and whether the mental inability be produced by sickness, fatigue, or incurable prejudice the result must be the same." The unanimity of authorities upon that question remains the same to this day. The question is now too well settled to admit of argument. It is not an open one in this court.

The only other exception presented by the record is to a remark made by the district attorney, which is presented as follows: "After the introduction of all the evidence admitted in the case, the assistant district attorney argued the case to



the jury, and the attorney for the defendant declined to reply, whereupon the assistant district attorney claimed the right to argue the case to the jury, which claim the court denied. The assistant district attorney thereupon stated to the court, and in the presence and hearing of the jury, that 'the defense was endeavoring to prevent the prosecution from arguing the truth of this charge to the jury,' to which statement defendant then and there excepted, and which statement defendant assigns as error." There was no occasion for the remark, and it would have been better for the district attorney to have refrained from making it, but we cannot see how the defendant's case could be prejudiced by such a piece of *badinage*. Judgment and order appealed from affirmed.

We concur: BEATTY, C. J.; MCFARLAND, J.; FOX, J.; PATERSON, J.; THORNTON, J.; WORKS, J.

85 Cal. 390

HUSE v. DEN et al. (No. 12,729.)

(Supreme Court of California. Aug. 30, 1890.)

DEEDS—DELIVERY—SALES BY EXECUTORS—SUBROGATION—IMPROVEMENTS.

1. The grantor in a deed of trust, made to effect a settlement in favor of his wife and children, was named as one of the trustees therein. The deed was duly executed and acknowledged, and the other trustee, who was present at its execution, consented to act. The deed remained in the possession of the grantor, but he had it recorded, and afterwards in his will he recognized it as an existing trust. *Held*, that there was a sufficient delivery of the deed.

2. Purchasers of land at void sales by executors can claim no rights of subrogation where they know that the land was subject to a trust, and that the executors had no authority to sell, and where the purchase money was applied to various purposes, indiscriminately with money arising from sales of personality.

3. Under Code Civil Proc. Cal. § 741, in an action to recover land from purchasers at a void sale by executors, no allowance for improvements can be made, except as an offset for damages claimed for withholding the possession.

Department 2. Appeal from superior court, Santa Clara county; FRANCIS E. SPENCER, Judge.

Henry E. Highton and Phillip G. Galpin, for appellants. Oliver P. Evans and T. B. Bishop, for respondents.

MCFARLAND, J. This is an appeal by defendants Hollister et al. from an order denying a new trial. There is also another appeal by the same defendants (No. 12,728) from the judgment rendered in the action. The transcripts in the two appeals are substantially the same; and, as the points in the two are similar, they have been argued and submitted together. The subject-matter involved is the ownership and right of possession of two tracts of land, each being part of the Rancho Dos Pueblos in the county of Santa Barbara—one containing 2,785 acres, and the other 112 acres. The main issue, as to the ownership, is between the heirs of Nicholas A. Den, deceased, and Hollister et al., who claim as purchasers from the executors of said Den, deceased, these purchases having been made without any orders of the probate court. The judgment of the court be-

low was in favor of the heirs, and against the purchasers, who appeal. The case has been in this court before. It was first decided in the lower court in favor of the purchasers, but, upon appeal, the judgment was reversed in this court, and the cause remanded. After some amendments to the pleadings it was tried again, with the result as above stated. When the case was here before, the history and facts of the case were so fully stated in the opinion of the court that we do not deem it necessary to restate them here. See *Hill v. Den*, 54 Cal. 6. And many of the questions involved were decided at that time and have become the law of the case. We will therefore notice the new features which the present appeals present.

1. An important document in the case is a deed of trust, embracing one undivided half of the rancho, executed by said Nicholas A. Den and wife to himself and one R. S. Den, on September 16, 1851. This deed was attacked on the first trial as invalid and inoperative for various reasons then presented, but this court held that deed to create a perfectly valid and operative trust for the purposes which it declared, (54 Cal. 19, 20;) and such must now be held to be the law on that point. On the first trial, however, while the appellants here denied the effect of this deed as claimed by the heirs, they admitted its due execution, but, before the second trial, they amended their pleadings so as to deny its execution. Therefore, the point as to its execution was not before this court on the former appeal. But at the second trial the court below found that it was delivered, and we think the finding is based on sufficient evidence. There is no dispute that the instrument was signed and acknowledged by Nicholas A. Den and his wife; but it is contended that there was no sufficient delivery, because there was no formal and physical handing of it over to the other trustee, R. S. Den. But R. S. Den was present when it was prepared, signed, and acknowledged, and consented to become one of the trustees therein, and act as such. It remained afterwards in the possession of Nicholas A. Den, who caused it to be recorded in the recorder's office a month or two afterward, and was among his papers at the time of his death, and in his will he referred to it, and recognized it as an effectual vesting of the property mentioned in it in the grantees in trust. The intent of the grantor is the main thing to be discovered. Here the grantor was himself nominally one of the grantees. The deed was intended to be a deed of settlement for the benefit of his children, and was in the nature of a covenant to stand seised for the benefit of the *cestui que trust*. It was formally acknowledged and recorded. The other grantee was present, and accepted the trust, and the grantor recognized it in his subsequent will. These circumstances were sufficient to warrant the court in finding a complete execution of the instrument.

2. Nicholas Den died on March 8, 1862, leaving a widow and 10 children. He, also, left a will, which was duly probated, in which Jose Maria Hill, Charles E. Huse, and Alfred Robinson were named as exec-

utors. Robinson afterwards resigned as executor, and Hill and Huse undertook, without any order of the probate court, to sell and make conveyances of land of the estate to Hollister and others, under which conveyances appellants claimed the legal title at the first trial. But this court, on the former appeal, construed the will, and held that it gave no power to the executors to sell the real property, that such sale could have been made only under an order of the probate court, and that the sales and conveyances attempted to be made were void. 54 Cal. 21, 22. This ruling was not only clearly correct, but is the law of the case. It is urged, however, that although the sales by the executors were void, still the doctrine of estoppel *in pais* may be invoked by appellants. But the facts and pleadings on that point are substantially as those on the former appeal, and this court then held that "there is no foundation here for the claim of an estoppel *in pais*. The rules which govern in such cases have been so often laid down here that they do not require repetition." This ruling, adopted by the court below, meets our approbation, and is also conclusive on the point. 54 Cal. 23.

3. The point that the heirs were barred by the statute of limitations was also made on the former appeal, and decided adversely to appellants, this court holding that "the statute of limitations has no application." 54 Cal. 23.

4. The appellants make the point, which does not appear clearly to have been made at the former trial and appeal, that, upon the doctrine of subrogation, they are entitled to be reimbursed the amounts paid by them at the void sales. On this point we agree with the findings and opinion of the learned judge of the court below. When one purchases land at a void judicial sale, in entire ignorance that it is void, and in good faith pays money thereon which is applied to the satisfaction of a lien or incumbrance upon the land, it has been held, in some cases, that he should be put in the place of the creditor, to the extent, at least, that his money has satisfied the lien. But in the case at bar the purchasers knew of the deed of trust and the will; knew of the want of power of the executors to sell without an order of the probate court; were warned not to purchase without the order and sanction of said court; and purchased in the face of this knowledge and caution. They were not, therefore, ignorant purchasers in good faith, to whom the doctrine of subrogation would, under any circumstances, apply. Moreover, their payments were not made to the heirs who are parties here, but to the executors and trustees, who used the money indiscriminately with other moneys received from sales of personal property and other lands for various purposes. As said by the court below: "Neither by allegation in the pleadings, nor in the evidence, has any successful attempt been made to segregate the various payments or applications of these heterogeneous funds." For these reasons we think the court was right in rejecting this claim of

subrogation, and, therefore, it is not necessary to examine the question whether such a claim was not within the exclusive province of the probate court, and whether a court of equity, under our system, has jurisdiction to enforce payment of claims against an estate of a deceased person.

5. Appellants contend that they should have been allowed for the value of their improvements made on the land. Without entering into the discussion of the question whether any such allowance can be made to one who has not been a purchaser without knowledge and in good faith, we think it clear that under our statute, and former decisions in this state, such allowance can be made only as an offset for damages claimed for withholding possession. Code Civil Proc. § 741. Such allowance was made in the case at bar. The court found that the value of the improvements placed on the land was in excess of the value of the rents and profits, and therefore allowed respondents no judgment for rents or damages. This was all that appellants were, under any view, entitled to demand.

We have thus referred to all the main points in the case, and see no others necessary to be noticed in detail. We find no error committed by the court below. This case has been very elaborately and ably presented in the various briefs of counsel. A great many authorities have been cited and discussed. It would be impossible for us to review those authorities in an opinion without exceeding all reasonable bounds. We have therefore given only our conclusions. The order denying a new trial is affirmed.

We concur: SHARPSTEIN, J.; THORNTON, J.

HUSE v. DEN *et al.* (No. 12,726.)

(*Supreme Court of California.* Aug. 30, 1890.)

Department 2.

Henry E. Highton and Philip G. Galpin, for appellants. Oliver P. Evans and T. B. Bishop, for respondents.

PER CURIAM. This is an appeal from a judgment, and on the authority of *Huse v. Den*, ante, 790, (No. 12,720, this day decided,) the judgment is affirmed.

85 Cal. 633

COLUSA COUNTY v. HUDSOON. (No. 13,494.)

(*Supreme Court of California.* Sept. 11, 1890.)

HIGHWAYS—CONDEMNATION—DAMAGES.

1. On proceedings to condemn a right of way for a public highway, where the owner of the land claims damages for the additional fencing required, it is a question for the jury whether the land is worth fencing for any use to which it may be put.

2. Such owner is entitled to compensation for a private road which he had laid out and graded through his land, and which was taken for a public road.

In bank. Appeal from superior court, Colusa county; E. A. BRIDGEMAN, Judge.

B. F. Howard, A. G. Dyas, and McKune & George, for appellant. H. M. Albery, for respondent.

BEATTY, C. J. This is a proceeding to condemn a right of way for a public road. After the usual proceedings for viewing and laying out the road, and refusal of the defendant to accept the compensation awarded by the commissioners and board of supervisors, this action was commenced by the district attorney, and tried by the court and a jury, to which were submitted several special issues concerning the question of damages and benefits. The jury awarded \$50 for the value of the land to be taken for the proposed road, \$100 as damages to the land not taken, and found that the land not taken would be benefited in the amount of \$50. Upon this verdict and additional findings by the court, a decree was entered condemning the land for the right of way, awarding the defendant \$100 damages; and that being the precise sum previously awarded by the board of supervisors and refused by the defendant, the plaintiff had judgment for the costs of the proceeding, amounting to over \$200. Defendant moved for a new trial. His motion was overruled, and the appeal is from that order. It appears from the bill of exceptions that the defendant's land is a mile in length, by a quarter of a mile in width, containing 160 acres, and extending across a high ridge of hills; that prior to the laying out of the proposed highway the defendant had a private road graded through his land from end to end, and crossing the ridge on the same route; that the highway was laid out 20 feet in width, on each side of the center of said private road. The evidence as to the character and value of defendant's land, the uses to which it is adapted, and the necessity of fencing it for any use of which it is susceptible, is very conflicting. Some of the witnesses for the plaintiff think the land is not worth more than a dollar and a quarter an acre; others put it higher, some estimating it at four dollars. But those who put this valuation upon it base their estimate upon the value of the timber, for which it is worth as much without as with an inclosure. The plaintiff himself values the land at seven dollars an acre for agricultural and horticultural purposes, to which he says it is adapted, and says that it is necessary for these purposes, as well as for grazing, to fence it. It appears, however, that although he had resided on the land four years he had never attempted to inclose more than two or three acres prior to the service of summons in this proceeding, though about that time he commenced, and at the date of the trial had partially completed, the inclosure of forty acres more. He says that it is and has been his intention to inclose the entire tract; that the cost of such exterior fence would be from twelve to fifteen hundred dollars; and that the cost of the additional fencing which would be rendered necessary by the opening of a public road through the land would be at least \$1,000. The plaintiff's witnesses generally say that defendant's land is valuable only for grazing and the timber that may be cut from it; that for grazing purposes it might be useful to fence it, but that the owner could afford

none but the cheapest kind of a fence. And several of them testify that any fence sufficient to turn stock would cost more than the land is worth, and consequently that with or without the proposed highway the defendant could never afford to inclose it. The defendant objected to all testimony tending to prove that his land was not worth fencing, and excepted to the rulings of the court admitting it. Upon these exceptions, and upon exceptions to the charge of the court to the jury to the effect that, if they found from the evidence that his land without the proposed road was not worth fencing for any purpose to which it could be put, no damages could be allowed for cost of fencing, defendant presents the principal question involved in his appeal. He contends, as we understand his contention, that he is the sole judge whether it is necessary or profitable to fence his land, and that it cannot be left to a jury to say that the land is not adapted to any purpose that would pay for the cost of fencing; that, having shown that some of the land is susceptible of cultivation, and all of it adapted to grazing, for which purposes fencing is useful, the cost of erecting and maintaining a fence on each side of the proposed highway is an essential item of damage caused by the opening of it, and must be allowed notwithstanding the opinion of witnesses and the finding of a jury that if the highway were not opened the land would not for any purpose justify the expense of inclosure. The authorities do not sustain this contention. Whatever may be the facts of this case, it is easy to suppose such a case as the witnesses for the plaintiff testify to.—a case in which a tract of land is not worth inclosing for any use to which it can be put. As such land will never be fenced except in obedience to some whim of the owner, which the legislature is not bound to regard, it is evident that the opening of a highway through it will not involve the necessity of erecting fences, the only effect would be to make an inclosed lane through uninclosed land, and it would be absurd to allow the cost of erecting and maintaining such fences as an item of damages. If such a case may arise, it follows necessarily that its existence must be left to the determination of the tribunal established by the constitution and the laws for the estimation of the damages to be awarded for property taken for public use. Every objection that can be urged against the submission of such a question to the decision of a jury can be urged with equal effect against the whole scheme and doctrine of the law of eminent domain. It may be true that the finding of a jury upon the question of the necessity of fencing will, in some cases, operate most unjustly against the owner of the land. It is equally true that the finding as to the damages in any case may be unjust. But the necessity of taking private property for highways and other public uses is paramount, and must always remain so; and, until some better and safer method of ascertaining the compensation to be awarded to the owner is devised, we must be content to abide by the verdict of an

impartial jury, notwithstanding the possibility that injustice may sometimes be done. As to this particular question, the law is correctly stated in Lewis on Eminent Domain, § 498, as follows: "Where by taking a part of a tract additional fencing will be rendered necessary in order to the reasonable use and enjoyment of the remainder, as it probably will be used in the future, and the burden of constructing such additional fence is cast upon the owner of the land, then the burden of constructing and maintaining such fence, in so far as it depreciates the value of the land, is a proper element to be considered in estimating the damages. In some of the cases cited an allowance was made for the cost of fencing as a specific item, and the language of many of the decisions seems to warrant the same view; but this is clearly not correct, unless such an allowance is required by the statute under which the proceedings are had. It is a question of damages to the land as land. If, in view of the probable future use of the land, additional fencing will be necessary, of which the jury or commissioners are to judge, and the owner must construct the fence if he has it, then the land is depreciated in proportion to the expense of constructing and maintaining such fencing. Nothing can be allowed for fence as fence. The allowance should be for the depreciation of the land in consequence of the burden thus cast upon it." *The case of Butte Co. v. Boydston*, 64 Cal. 110, which is cited and relied on by both appellant and respondent, is in perfect accord with the foregoing statement of the law. The only point there decided was that the defendant was entitled to prove, if he could, the necessity of fencing, and if he did prove such necessity that the cost of additional fencing rendered necessary by the opening of the road was an item of damages. Aside from the point decided, all that was said in the opinion of the court is consistent with, and in fact implies, the proposition that the question as to the utility or necessity of fencing the land is for the jury. We see no error in the rulings of the superior court in relation to this question.

The other principal question in the case relates to the claim of the defendant for compensation for his private road, the value of which, as an improvement, he offered to show. The superior court excluded all evidence as to the value of this road, holding, in effect, that the land to be taken must be valued without any reference to the existence of the road, and just as if it were so much grazing land wholly unimproved. In this we think the court erred. If a man had constructed a bridge across a stream on his own land, and for his private use, and if the county should lay out a highway to cross on that bridge, it would scarcely be contended that the county could condemn the bridge for the public use, without paying its reasonable value. We do not see that there is any distinction in principle between the bridge in the case supposed, and the defendant's graded road in this case. The grade is there. It must have cost something, and is no doubt of some

value. The county proposes to take it and use it as a part of the highway. If its existence will make the construction of the highway any less expensive, the county will get the benefit, and ought to pay the value. The fact that defendant will have a public way in place of his private road is no answer to this proposition. He will enjoy the highway in common with the general public, and must pay his share of the cost. In so far as the highway is a benefit to him, he is chargeable, and has been charged, with the value of the benefit. If he contributes to the construction of the road and improvement in the shape of a mile or more of grading, he is entitled to the value of that improvement, and it was error to exclude evidence as to such value. We see no other error in the record, but for the reasons stated the order appealed from must be reversed, and the cause remanded for a new trial. It is so ordered.

We concur: MCFARLAND, J.; PATTERSON, J.; WORKS, J.; FOX, J.; THORNTON, J.; SHARPSTEIN, J.

85 Cal. 623

McGRATH v. WALLACE *et al.* (No. 13,302.)  
(*Supreme Court of California.* Sept. 10, 1890.)

ADVERSE POSSESSION—INTERUPTION.

One in possession of land under a tax-deed, which was insufficient to vest the title in him, cannot claim title by adverse possession where it is shown that, within the time required to perfect such title, there was a judgment against his tenant, in possession of part of the land, in favor of a grantee of the former owner, under which such grantee was put in possession.

Appeal from superior court, Sacramento county; JOHN W. ARMSTRONG, Judge.

*F. D. Ryan and R. B. Wallace*, for appellants. *Ed. M. Martin and Clinton White*, for respondent.

Fox, J. The action is to quiet title, accompanied with a prayer for possession, the complaint alleging that defendants are in possession, claiming an interest in the property, but without right. Judgment for plaintiff, from which, and an order denying a motion for new trial, defendants appeal. Defendant Mary A. Wallace became the owner of the property in fee, April 23, 1862. In 1865 the property became delinquent for taxes. Suit was brought under the statute then in force for the recovery thereof, resulting in a judgment and order of sale. At the sale Eli Mayo became the purchaser. The court finds that these proceedings were insufficient to divest the title of Mary A. Wallace. But under these proceedings, and a writ of assistance issued therein, Mayo was put into possession in August, 1865, and "from that time until March, 1878, (except for a short space of time, during the latter part of 1875 and the first of 1876, when John H. Reeves had possession of the front portion of said property,) said Eli Mayo had the open, notorious, actual, continuous, and exclusive possession and use of said property, claiming to own it as against the whole world. On March 28, 1878, Mayo conveyed the property to plaintiff, who entered into posses-

sion thereof, and continued in the open, notorious, actual, continuous, and exclusive possession and use thereof, claiming to own the same, until about January, 1883, when the defendants ousted her." This quotation is from the findings. This action was commenced in August, 1883.

Even if it be true, as matter of law, that the proceedings culminating in the sale for taxes in 1865 were insufficient in law to divest the title of the defendant Wallace, they did culminate in a judgment and decree of court, ordering a sale of the property, followed by a sale, a failure to redeem, and in due time a sheriff's deed and a writ of assistance, under which the purchaser was put into possession. He entered under color of title, claiming to be the owner, and his subsequent continuous possession, of the character found by the court, was sufficient to give him perfect title, unless there was some other fact the existence of which defeated the running of the statute of limitations in his favor. The court finds that Mary Wallace was, and continued to be, a minor until May 2, 1875. The statute therefore did not commence to run in favor of Mayo until after that time, but it did commence to run in favor of himself and his grantee at that time, and nearly eight years elapsed after that before the possession thus acquired, claimed, and held was interrupted by the defendants, as appears from the finding. But this finding is attacked on the ground that it is not supported by the evidence. In addition to what is already quoted, the findings further show that on May 6, 1876, Mary A. Wallace conveyed the property to Theodore Le Roy, who began an action against John H. Reeves as defendant, in the circuit court of the United States, for the possession of said lot. According to the preceding finding, Reeves was then in possession of the front part of the lot. This suit terminated in a judgment in favor of plaintiff therein, August 9, 1878. The court finds that "in 1879 the marshal went through the form of executing this judgment, but the proceedings taken were not sufficient to constitute a change of possession of the property, nor was the plaintiff's possession of the property disturbed thereby." The evidence bearing upon the question consists of that of Eli Mayo, plaintiff's grantor, who showed possession from 1865 to 1876, and tax-receipts for that period. He says: "In 1875 I moved a house onto the lot, and gave possession to Reeves. He never had possession of the whole lot; never of the rear of it." He also says that he paid some of the taxes after 1876, but does not say that he paid them all, or for what years, or produce receipts therefor. Mrs. Reeves testifies that she and her husband lived on the lot a few months, and at that time Mr. Harnett had houses on the rear portion of the lot, and there was a cross-fence between them. The evidence also shows the introduction of the judgment roll in *Le Roy v. Reeves*, showing service of summons on Reeves May 18, 1876, which record is followed by uncontradicted evidence that, when the marshal went to put the plaintiff in possession under the judgment, the lot was fenced, but otherwise vacant,

and the marshal put plaintiff's agent in possession of the lot. This suit, judgment, and the execution of the same, constituted in law such an interruption of the possession of plaintiff as prevented her from acquiring title by prescription, under the statute of limitations. The possession must have been continuous. *San Jose v. Trimble*, 41 Cal. 536. Even if she had paid the taxes during all that period, that alone, in view of this interruption of possession, would not have given her title. The finding is therefore not supported by the evidence, and as she had no paper title, but relied, and must rely, upon the statute of limitations for title upon which to recover, the judgment and order appealed from must be reversed, and the case remanded for new trial. A complaint *quia timet* counting upon title alone, as this one does, is not supported by evidence of prior possession insufficient to make title under the statute of limitations. Plaintiff in such a case must stand upon title, and this may be defeated by the defendant in possession showing an outstanding title in a third person, without connecting himself with it. *Cranmer v. Porter*, 41 Cal. 466. This rule applies to all the parties; but on the trial, before the final decision of the case, but some time after the submission thereof to the judge for decision, the defendant Wallace applied to the court, upon notice, for leave to open the case, and allow her to supply an omission which it was claimed had been inadvertently made at the trial, and introduce a deed from Le Roy to herself of the property, thus bringing the record title back to herself, and which deed was made before the commencement of this action. The court, in the exercise of its discretion, denied the motion, and this is claimed to have been error. The granting of the motion was a matter resting in the discretion of the trial court, and its ruling would not be disturbed in this court, unless there was a clear abuse of discretion. As the case must be reversed on other grounds, and the omission is not likely to occur a second time, it is not necessary to determine whether there was an abuse of discretion or not. We do not deem it necessary to discuss other points made in the briefs of counsel. Judgment and order reversed.

WE CONCUR: PATERSON, J.; THORNTON, J.; SHARPSTEIN, J.

WORKS, J. I concur in the judgment on the following grounds stated in an opinion prepared in this cause by Mr. Commissioner HAYNE:

"The trial court gave judgment for the plaintiff, and the defendants appeal. The complaint was probably intended as a complaint in a suit to quiet title, and is sufficient as such. It may also be assumed for the purposes of this opinion to be sufficient as a complaint in ejectment upon title. We shall consider these different aspects of the case separately.

"1. The judgment cannot be sustained as a judgment in ejectment upon title.

"(a) It is clear that the plaintiff had no paper title. The findings show that

'on April 23, 1862, the defendant Mary A. Wallace became the owner in fee-simple by means of a proper conveyance to her of the property in controversy;' and that the property was sold for taxes in 1865 to one Mayo, to whom a deed was made. But it is further found that 'the proceedings culminating in the execution and delivery of said deed to Eli Mayo were not sufficient to vest title in him, or to divest the title of the defendant Mary A. Wallace.' This left the paper title in Mary A. Wallace, who retained it until 1876, when she conveyed it to one Le Roy, in whom, so far as the record shows, it is still outstanding.

"(b) The plaintiff did not show a title by adverse possession. The findings show that in August, 1865, Mayo was put in possession of the property under a writ of assistance, and that 'from that time until March, 1878, (except for a short space of time during the latter part of 1875, and the first of 1876, when John H. Reeves had possession of the front portion of said property,) said Eli Mayo had the open, notorious, actual, continuous, and exclusive possession and use of said property, claiming to own it as against the whole world. On March 28, 1878, Mayo conveyed the property to the plaintiff, who entered into possession thereof, and continued in the open, notorious, actual, continuous, and exclusive possession and use thereof, claiming to own the same until about January 9, 1883, when the defendants ousted her.' If the foregoing were the only facts in relation to the matter, there could be no doubt that the plaintiff had acquired a title by adverse possession, upon which she could maintain either an action of ejectment or an action to quiet title. The foregoing, however, are not the only facts in relation to the matter. The findings show that 'the defendant Mary A. Wallace was a minor until May 2, 1875.' The plaintiff's possession before that date, therefore, does not count. And in April, 1878, a statute was passed requiring the payment of all taxes 'which have been levied or assessed' as a condition of adverse possession, (Code Civil Proc. § 325;) and, after this statute went into effect, it was necessary that the plaintiff should have paid the taxes. It is not contended that there is any sufficient affirmative showing as to the payment of taxes. The findings are silent upon the question, and the evidence does not show any payment after 1878. The plaintiff introduced tax-receipts up to 1876, at which period a showing of such payment was not necessary, but none subsequent to that date. And the fact that Mayo testified that he paid some of the taxes after 1876, is insufficient as a showing of payment after 1878. Now, assuming in favor of the plaintiff that it is not necessary that the findings should affirmatively show that taxes were not levied or assessed, and consequently that, so far as the findings are concerned, the plaintiff has a title by adverse possession, yet, upon the evidence, it must be held that the showing is insufficient. For under the latest decision in the matter it must be held that the burden is upon the party claiming by adverse possession to show either that he has

paid the taxes or that none have been assessed. *Reynolds v. Willard*, 80 Cal. 605, 22 Pac. Rep. 262. It must be held therefore that *Reynolds v. Willard* overrules *Oneto v. Restano*, 20 Pac. Rep. 743, upon this point, and establishes the rule to be followed. In this view the evidence showed no title in the plaintiff by adverse possession.

"Upon the record before us, therefore, it must be held that the plaintiff had no title, but a mere naked prior possession. This is not sufficient to support a complaint upon title alone. As a matter of course, evidence of possession raises a rebuttable presumption of title. But here such presumption is rebutted by proof that the title is outstanding in Le Roy. It is equally true that as against a mere trespasser prior possession is a sufficient foundation for the action. But where prior possession alone is relied on as the foundation of the action it must be alleged in the complaint. Possession without title is clearly not title, though as above stated it is some evidence of title. And hence, a complaint which counts upon title alone is not supported by evidence of prior possession, if it affirmatively appears that the plaintiff has no title. In other words, where the plaintiff relies upon title alone it is sufficient for the defendant to show that the title is outstanding in a third person without connecting himself with it. *Cranmer v. Porter*, 41 Cal. 466. If, therefore, the action is to be considered as in ejectment, the judgment must be reversed.

"2. The same result would follow if the complaint be considered to be a complaint to quiet title; for we do not understand that a mere naked prior possession is sufficient to maintain the action. We do not think that one who has no kind of interest in the property, and who may not even be in possession at the commencement of the action, can require all persons who claim an interest in the property to disclose the nature of their claims, and have them judicially determined. Compare *People v. Center*, 66 Cal. 555, 556, 5 Pac. Rep. 263, and 6 Pac. Rep. 481. This is not in conflict with *Pennie v. Hildreth*, 81 Cal. 130, 22 Pac. Rep. 399. One of the points decided in that case was that an administrator had sufficient interest to maintain the action, of the correctness of which we have no doubt; but it was also decided in that case that the denial of the plaintiff's allegation of ownership raised a material issue, and this was put upon the ground that the plaintiff must have some interest in the property. In this regard the court said: 'The basis of his right right to require the adverse interest to be produced, exposed, and judicially determined is his own interest in or ownership of the land. This is the one thing necessary for him to prove in order to make out his case.' 81 Cal. 132, 22 Pac. Rep. 400. This language is not inconsistent with what was previously said in the case, viz., that it was not necessary that the plaintiff should have title; for that refers to the whole title. The court went on to say that the statute was broad enough to cover 'every interest or estate in lands

of which the law takes cognizance.' But this is a very different thing from saying that it covers a case where the plaintiff has no interest whatever. It may be conceded, without affecting the decision in this case, that any interest which the law recognizes as such is sufficient foundation for a suit to quiet that interest. This would not be in conflict with *Von Drachenfels v. Doolittle*, 77 Cal. 295, 19 Pac. Rep. 518. All that was decided in that case was a question of pleading. The plaintiff there filed a complaint to quiet title in the usual form, and under it sought to have a decree that defendant should convey to him the legal title. The court held that this could not be done. The theory of the action was that the defendant had some claim which was invalid and void as against the plaintiff, and it was manifestly in contradiction of the pleading to maintain that the defendant's claim was not invalid or void, but on the contrary was the legal title, and that a conveyance of it should be decreed. It is not necessary in this case, however, to decide what interest the plaintiff must have to maintain the action. All that it is necessary to hold is that he must have some interest, and that a mere prior possession without right is not such interest."

#### MASON V. UNION PAC. RY. CO.

(Supreme Court of Utah. Aug. 30, 1890.)

#### SURVIVAL AND CONTINUANCE OF ACTION—WRONGFUL ACT CAUSING DEATH.

2 Comp. Laws Utah 1888, § 3187, provides that an action does not abate by the death of a party where the cause of action survives or continues, but may be continued by his personal representatives. Section 2961 provides that "whenever the death of a person shall be caused by wrongful act, \* \* \* and the act \* \* \* is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then \* \* \* the person who \* \* \* would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured." \* \* \* Section 2962 provides that such action shall be brought by the personal representatives. Held that, where a person sued for a wrongful ejectment from a train, and, pending an appeal by the defendant, died from the effects of the ejectment, his administrator could not continue the case, the cause of action of decedent consisting of defendant's wrongful act, and the wrongful act coupled with the death constituting the representatives' cause of action. ANDERSON, J., dissenting.

Appeal from first district court; before Justice HENDERSON.

Thos. Maloney, for appellant. Williams & Van Cott, for respondent.

ZANE, C. J. This suit was commenced by the late George S. Mason to recover damages, as alleged, in consequence of having been forcibly and unlawfully removed from a car of the defendant by its agents; and afterwards, upon motion of plaintiffs' counsel, the name of Jesse G. Mason, administrator of his estate, was substituted with the consent of defendant's counsel. The plaintiff's counsel also moved the court for leave to amend the complaint so as to show that George S. Mason died from the wrongful acts complained of.

This motion the court denied, and, on motion of the defendant, dismissed the case. From the order denying leave to amend, and dismissing the suit, the plaintiff has appealed to this court, and assigns the same as error.

The question for our consideration and decision is, did the action survive? Section 3187, 2 Comp. Laws Utah 1888, declares that "an action \* \* \* does not abate by \* \* \* death, if the cause of action \* \* \* survive or continue. In case of the death \* \* \* of a party, the court on motion may allow the action \* \* \* to be continued by or against his representatives." While this law makes it the duty of the court to continue actions that survive in the name of the representative of the deceased party, it does not indicate those that do survive. At common law, actions founded in tort, and in form *ex delicto*, do not survive. Chitty states the rule thus: "In the case of injuries to the person, whether by assault, battery, false imprisonment, slander, or otherwise, if either party who received or committed the injury die, no action can be supported either by or against the executors, or other personal representatives." 1 Chit. Pl. 68. And in *Broom's Legal Maxims* (page 909) the rule is laid down as follows: "It is, however, to actions in form *ex delicto* that the rule *actio personalis moriturcum persona* is peculiarly applicable; indeed, it has been observed that this maxim is not applied in the old authorities to causes of action on contracts, but to those in tort which are founded on malfeasance or misfeasance to the person or property of another, which latter are annexed to the person, and die with the person, except where the remedy is given to the personal representatives by the statute law, it being a general rule that an action founded in tort, and in form *ex delicto*, was considered as *actio personalis*, and within the above maxim." But the plaintiff's counsel further claims that the action commenced by the late George S. Mason survived, and that the court should have continued it under section 4198, of the above named statute, viz.: "Actions for the recovery of any property, real or personal, or for the possession thereof, and all actions founded upon contracts, may be maintained by and against executors and administrators, in all cases in which the same might have been maintained by or against their respective testators or intestates." This section relates to the recovery of property, and to actions founded on contracts. It does not embrace those founded on torts against the person. The allegation of the complaint is that the decedent offered to pay his fare to the conductor before he forcibly and wrongfully put decedent off the defendant's train. There was no contract to violate. The trespass complained of was not against or upon personal or real property. The allegations of the complaint showed a trespass against plaintiff's person; no invasion of contract or property rights appeared. Therefore the provisions of the section have no application to this case. The appellant also relies upon the following sections of the



above statutes. Section 2961: "Whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would, if the death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or the company or corporation which, would have been liable if death had not ensued, shall be liable to an action for damages notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony." Section 2962: "That every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount received in every such action shall be distributed by direction and decree of the proper probate court to such persons, otherwise than creditors, as are by law entitled to distributive shares of the estate of such deceased person, and in such proportions as are prescribed by law." Section 3179: "When the death of a person not being a minor is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death. \* \* \* In every action under this and the preceding section, such damages may be given as, under all the circumstances of the case, may be just." These sections give to the personal representatives or heirs a right of action against the person whose wrongful act or neglect causes the death of another, when the deceased, if he were living, could maintain one. If the person sustaining the direct injury from the wrongful act or neglect had a right of action for it, his heirs have one for their injury for his death caused by the same act or neglect.

The common law gives a person injured without his fault a right of action to recover compensation from the person whose negligence or wrongful act produced it, and, if death follows from such negligence or wrongful act, the statute gives his heirs a right of action to recover compensation from the same person for the injury in consequence of his death. George S. Mason brought this action in his life-time, to recover damages for the wrong done him by the defendant. That action was to remunerate him for his loss estimated in money; but the action authorized by the statute for the benefit of his heirs would be to recover a sum of money to pay their loss in consequence of his death, the value that his life would have been to them. The object of the latter action would not be to obtain the amount estimated in money that the decedent might have obtained for himself, and remuneration for his physical and mental suffering. The question is, can the action by the heirs be regarded under the law as a continuation of the action of the decedent? The language of the act does not manifest an intention to continue the common-law right of action given to recover compensation for the loss to the decedent; but it does manifest an intention to give the heirs in their own name, or in the

name of the personal representatives, a right of action to recover compensation for their loss in consequence of the decedent's death. The statute does not continue a right of action given to the decedent in his life-time to compensate his loss in consequence of the defendant's wrongful act against him. It gives the heirs a right of action to remunerate their loss, in consequence of death occasioned by the same act. While the wrongful act of the defendant for the injuries of which George S. Mason sued, invaded his rights, and the law gave him a right of action to redress the consequences of that invasion to him, that act did not in a legal sense invade the rights of his heirs, and therefore they had no wrong from that act simply, to redress by an action. Their legal rights were not invaded until death ensued, and then the statute gave them instantly a right of action to redress the losses following that invasion of their rights. The wife or the children do not succeed to the husband's or father's cause of action; that dies with him. But, immediately upon his death, a new cause of action arises in their favor. The statute then gives them a new cause of action. It does not revive or continue the husband's or father's cause of action. *Whitford v. Railroad Co.*, 23 N. Y. 465; *Hegerich v. Keddie*, 99 N. Y. 258; 1 N. E. Rep. 787. The statement that the wrongful act alone constitutes the cause of action, and that the death simply affects the rule of damages, is a mere assumption of the point in dispute—the existence before the death of the right of action in favor of the heirs. The wrongful act constituted a cause of action in favor of George S. Mason, while living, but not in favor of his heirs under the statute. The right of action at common law in favor of the decedent was based on one fact,—the wrongful act; but the right under the statute in favor of the heirs is based on two,—the wrongful act and the death.

Law-writers and courts of very high authority have affirmed that the cause of action under statutes similar to the one applicable in this case consists alone of the negligence or the wrongful act, while others, whose opinions are entitled to great weight, have held that the death constitutes the cause. Both classes appear to concede that the cause must consist of one fact or the other. In our opinion, the true view is that the cause of action consists of both facts; that neither alone amounts to one. If the heirs had brought this suit alleging in the complaint the trespass without the fact of death, the court would have been compelled to sustain a demurrer to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action. The wrongful act caused the death of Mason, but his death in turn must be regarded in a legal sense as causing the injury to the heirs. The injury to the decedent from defendant's wrongful act, the law made actionable. And the injury to his heirs from his death caused by that wrongful act, the statute also made actionable. The relation of cause and effect between the defendant's act and the injury to the heirs completes the legal chain. In the suit by

the decedent there is a legal combination constituting a cause of action without the death. Not so in the suit by the heirs. Without the death, there would be a missing link, in that the wrongful act of the defendant, the decedent's death, and the relation of cause and effect between those two facts constitute the combination of facts which the statute declares a cause of action in favor of the heirs against the wrongdoer. "The fact or combination of facts which gives rise to a right of action" constitutes the "cause of action." Rap. & L. Law Dict. Speaking of the statement of a cause of action at law, Chitty, in his work on Pleading, (volume 1, p. 240,) says: "A declaration is a specification, in a methodical and legal form, of the circumstances which constitute the plaintiff's cause of action, which necessarily consists of the statement of a legal right, or, in other words, a right recognized in courts of law." An action by the legal representatives or heirs of George S. Mason to recover compensation for the loss to them in consequence of his death would necessarily differ from the action instituted by him, and which it is claimed survived in respect to the parties, the cause of action, the time at which it occurred, and as to damages. We hold that the action instituted by George S. Mason in his life-time against the defendant could not, after his death, continue and survive for the benefit of his heirs. The judgment of the court below is affirmed.

BLACKBURN, J., concurs.

ANDERSON, J., (*dissenting*.) I cannot assent to either the reasoning or the conclusion announced by the majority of the court in the opinion just delivered. It appears from the record that plaintiff's decedent, George S. Mason, sued the defendant in a commissioners' court for wrongfully ejecting him from a car on its road, claiming \$300 damages. At the trial he recovered judgment for \$200. The defendant appealed the case to the district court, but before the case was reached for trial in that court the plaintiff died, and his administrator, the present plaintiff, was substituted in his stead, with the consent of counsel for defendant. Afterwards the defendant moved the court to dismiss the action, because it had abated by the death of the original plaintiff, and at the same time counsel for plaintiff asked leave to amend his complaint, and allege that the decedent's death was caused by the wrongful act of the defendant in ejecting him from its car. Leave to amend was denied, and the cause dismissed by order of the court. Section 3187, 2 Comp. Laws 1888, provides that an action does not abate by the death of either party if the cause of action survives or continues, and that in case of the death of a party the court may allow the action to be continued by or against his representatives. If, then, the cause of action in this case survived or continued, the action did not abate by the death of the plaintiff; but, if the cause of action did not survive or continue, then the action did abate by plaintiff's death. What, then, is the cause of action in this class of cases? Is it the wrongful or neg-

ligent act which produced the death, or is the death the cause of action, or does it consist of both the wrongful act and the death, as held in the majority opinion? The statute declares the wrongful or negligent act must be such that the injured party could have maintained an action therefor, if death had not ensued. The cause of action, then, for the wrongful act must have existed and been vested in plaintiff during his life-time. He might, therefore, if he had lived, have prosecuted an action for the wrongful act to a final determination, or he might have accepted satisfaction and executed a release, and in either case, as there could be but one cause of action, or one satisfaction, for the same wrongful act, no further right of action could be maintained, notwithstanding his subsequent death from his injuries. *Dibble v. Railroad Co.*, 25 Barb. 183; *Littlewood v. Mayor*, 89 N. Y. 25; *Read v. Railway Co.*, L. R. 3 Q. B. 555; 2 Redf. R.R. (6th Ed.) 294; 1 Shear. & R. Neg. (4th Ed.) § 140; *Cooley, Torts*, 264; *Freem. Judgm.* § 241.

It will be observed that the damages which the administrator may recover are not given specifically for the death, but for the wrongful act "notwithstanding the death," and when, and only when, damages could have been recovered by the injured party during his life-time. If the defendant be guilty of no fault, or if the decedent was guilty of such contributory negligence that he could not have recovered for his injuries if he had lived, his personal representative cannot recover for his death. 1 Shear. & R. Neg. (4th Ed.) § 140; *Cooley, Torts*, 264; 2 Redf. R. R. (6th Ed.) § 195. How, then, can it be said that the death is the cause of action instead of the wrongful or negligent act which produced the death? It is true that, but for the death, the personal representative or heir could not maintain the action, but this fact does not make the death the cause of action. If the defendant had owed the decedent on a promissory note at the time of his death, the death would be equally necessary to give a right of action to the administrator on the note, but that would not make the death the cause of action in a suit by him on the note.

Sections 2961, 2962, of our statute (2 Comp. Laws 1888, p. 179) are substantially the same as the English statute commonly called "Lord Campbell's Act," (9 and 10 Vict. c. 93,) and which, with some modifications, has been adopted in most of the states of this Union. In *Cooley on Torts*, (page 264,) the learned author, speaking of this statute, says: "It is seen, on perusal of this statute, that it gives an action only when the deceased himself, if the injury had not resulted in his death, might have maintained one. In other words, it continues for the benefit of the wife, husband, etc., a right of action which, at the common law, would have terminated at the death, and enlarges its scope to embrace the injury resulting from the death." The case of *Horton v. Daly*, 106 Ill. 131, was like the case at bar in all material respects. The plaintiff in that case obtained a verdict and judgment against the defendant for personal injuries caused

by defendant's negligence. The defendant appealed, and the case was reversed and a new trial granted; and before the second trial the plaintiff died, and his administrator was substituted, and counsel for the defendant, as in the case at bar, moved the court to dismiss the case because the action had abated by the death of the plaintiff, which motion was overruled. The supreme court sustained the ruling of the lower court, and held that, there being nothing on the face of the record showing of what the deceased died, the question of the survivorship of the cause of action could not be raised by motion, and intimates that it could only be done by plea in abatement. The court in that case, under a statute substantially like the Utah statute, held that the negligent act and not the death was the cause of action, that it survived to the administrator, and that the administrator occupied the same position he would have occupied had the suit not been begun until after the death of the decedent. The only cause cited in the opinion of the chief justice, in support of the views of the majority of the court as to the survivability of actions of this kind, are *Whitford v. Railroad Co.*, 23 N. Y. 465, and *Hegerich v. Keddie*, 99 N. Y. 258, 1 N. E. Rep. 787. In the first of the above-mentioned cases, it was held by a majority of the court that the cause of action was the death and not the wrongful act that produced it. Chief Justice COMSTOCK delivered a dissenting opinion, which was concurred in by Justice HORT, in which he maintained with great force and clearness that the wrongful act and not the death was the cause of action. The case of *Hegerich v. Keddie*, above referred to, was an action by the administrator of the estate of the injured party against the executor of the estate of the wrong-doer. The court, while holding that the statute, which is similar to ours, creates a new cause of action, in that it authorizes an action to be maintained by personal representatives against a wrong-doer, whose act or negligence has produced death, which could not be done at the common law, says that the action "is founded upon the wrongful act of the party causing the death, and gives a right of action therefor to the representatives of the deceased for the pecuniary consequences suffered by the husband, wife, or next of kin from such wrongful act. The court also says: "The cause of action is obviously the wrongful act, and the pecuniary injuries resulting afford simply a rule to determine the measure of damages. However much the husband, widow, or next of kin may suffer pecuniarily by the act causing death, it constitutes no cause of action, independent of evidence that it was occasioned by the wrongful or negligent conduct of another." Again, the court say: "It will be observed also that the statute, although creating a new cause of action, and passed for the express purpose of changing the rule of the common law in respect to the survivability of actions, and conferring a right upon representatives which they did not before possess,

does not undertake either expressly or impliedly to impair the equally stringent rule which precluded the maintenance of such actions against the representatives of the offending party." It is thus seen that, of the two cases referred to in support of the doctrine held by the majority of the court, only one of them supports it, and that by a divided court, while the other and later case in the same court announces a contrary doctrine, and supports the views expressed in this opinion. Before the adoption of this statute, (sections 2961, 2962, 2 Comp. Laws 1888,) a party injured by the wrongful or negligent act of another could recover for his injuries under the common law, but, if he died from his injuries without having done so, his cause of action died with him, and did not survive or continue to his personal representatives or heirs. The very object, and in fact the only object, of the statute was to change this common-law rule, and create a survivorship of the cause of action in favor of his personal representatives, by taking away the immunity which his death afforded the wrong-doer; and, under the sections above referred to, his personal representative could maintain an action against the party whose wrongful or negligent act caused his death, and this right was extended to the heir by section 3179, adopted at a later period. Upon both reason and authority, the wrongful act which causes the death constitutes the cause of action in this class of cases, and under the statute survives or continues to the personal representative or heir. The original plaintiff in this case having begun his action against the defendant for a wrongful act, which it is alleged resulted in his death after the action was begun, and his administrator having been substituted as plaintiff, the cause should have proceeded to trial. Under section 3187 of our statute, which provides that an action does not abate by the death of a party where the cause of action survives or continues, but may be continued by his personal representatives, this action did not abate, and should not have been dismissed by reason of the death of the plaintiff.

#### WILSON v. HULL et al.

(Supreme Court of Utah. Aug. 30, 1890.)

#### HIGHWAY—DEDICATION AND ACCEPTANCE—EVIDENCE—OBSTRUCTION.

1. There was evidence that in 1869 the road in dispute was laid out by a surveyor on the line between the sections; that until 1886, when it was closed by one of defendants, it continued to be traveled by the public, a portion of it all the time, and the other part a portion of the time only; that from time to time fences were erected on its sides a great portion of the way; that some of the residents near it, with the express consent of the road supervisor, paid their road taxes by making improvements thereon. *Held*, that a finding that it was a highway would not be disturbed.

2. A decree restraining the obstruction of the road was not erroneous for merely describing the road as being "on the line" between the sections named without alleging in what part of the road the line came.

Appeal from first district court; before Justice HENDERSON.

*Richards & Rolapp and Evans & Rogers*, for appellants. *A. R. Heywood*, for respondent.

**ZONE, C. J.** The plaintiff obtained a decree in the district court perpetually enjoining the defendants from obstructing or closing an alleged highway on the line between sections 7 and 8, in township 5 N., of range 2 W. of the Salt Lake meridian, in Weber county. From that order the defendants appealed, and they now assign the action of the court in making it as error.

The court found from the evidence the existence of the road described in the complaint. The appellants contend that the evidence was not sufficient to warrant the finding, while the respondent affirms that the evidence was sufficient. The first question is, does the weight of the evidence establish that the owners of the soil in dispute dedicated it to the use of the public as a highway? Upon the subject of the dedication of land to the use of the public for highways, and the evidence by which such dedication may be established, Angell, in his work on Highways, (section 142,) says: "No particular formality is required. It is not affected by the statute of frauds. It may be made either with or without writing, by an act of the owner, such as throwing open his land to the public travel, or platting it, and selling lots bounded by streets designated in the plat, thereby indicating a clear intention to dedicate; or an acquiescence in the use of his land for a highway, or his declared assent to such use, will be sufficient, the dedication being proved in most, if not all, cases by matter *in pais*, and not by deed. The vital principle of dedication is the intention to dedicate, the *animus dedicandi*, and, whenever this is unequivocally manifested, the dedication, so far as the owner of the soil is concerned, has been made. Time, therefore, though often a very material ingredient in the evidence, is not an indispensable ingredient in the act of dedication. It is not like a grant presumed from length of time. If the act of dedication be unequivocal, it may take place immediately; for instance, if a man builds a double row of houses opening into an ancient street, at each end making a street, and sells or lets the houses, that is instantly a highway. If accepted and used by the public in the manner intended, the dedication is complete, precluding the owner and all claiming in his right from asserting any ownership inconsistent with such use. Dedication, therefore, is a conclusion of fact to be drawn by the jury from the circumstances of each particular case, the sole question as against the owner of the soil being whether there is sufficient evidence of an intention on his part to dedicate the land to the public as a highway." The intention of the owner of the land to dedicate may be inferred from his acquiescence in its continual use as a road by the public. In order to constitute acquiescence in a legal sense, the owner must know that the public is using his land as a road. There must be an act of the mind, a knowledge that the public is using the land as a highway, and a pur-

pose on the part of the owner not to object. A knowledge of the use for such a purpose, without objection by word or act, may authorize the inference that the owner consents to the appropriation. But if the land of which that covered by the road is a part is uninclosed, and not appropriated to any special use by the owner, the fact that the public travels over it occasionally, as the custom may be to cross vacant and unoccupied lands without objection from the owner, does not authorize any inference of an intention to dedicate. Under such circumstances the mere failure to manifest an objection does not authorize an inference that the mind of the owner consents. The inference in that case is that the proprietor did not understand that the land was being appropriated for the permanent use of the public as a highway. The value of the failure to manifest any objection depends upon the circumstances attending such acquiescence. Touching the acceptance by the public of land dedicated by the owner to public use, the same author says, (section 157:) "It has been said that dedication to be effectual must be accepted, and this acceptance may be either of a part or of the whole of the land appropriated. Such acceptance may undoubtedly be made by a formal act of the body charged with repairing the highway, or by any act on its part sufficiently implying its acceptance; but whether such acceptance may be made by the public generally, as evidenced by a mere use of the way, is a question upon which the decisions have not yet been entirely uniform." And after referring to the fact that some American courts of high authority, influenced by local statutes, incline against the view that a highway may be established independently of the action of the body charged with its repair, and after commenting on some of those authorities, the same author further says, in section 161: "But in other states the courts, without having expressly decided in any case in which the point has been controverted that an acceptance by mere public use is sufficient, have, nevertheless, specified user as one of the modes in which an acceptance might be indicated." And in section 162 the author further says: "But, even where an acceptance on the part of the town is deemed necessary, this need not be by any formal proceeding, unless required by some statute, but may be implied from its acts recognizing the road as a public highway." In England it appears to have been settled that acceptance may be inferred from the use of the land by the public for the purpose of a highway, without the action of the body charged with its repair; that the acceptance may be by the public generally, as evidenced by a mere use of the way. In this territory there is no statute requiring any formal acceptance by officers or agents in charge of public roads of land dedicated by the owners for highways, and we are not prepared to say that the acceptance may not be inferred under some circumstances from the action and use of the public generally, without any action of the body charged with the repair of public roads. It is ap-

parent from the record that it contains a very imperfect statement of the testimony before the trial court. Several of the witnesses, in giving their testimony, referred to a diagram intended to represent the roads mentioned in the pleadings, and their relative locations. This diagram not being found in the record renders such testimony worthless. However, there is enough evidence in the record to show that, in 1869, Jesse W. Fox, territorial surveyor, at the instance of the Hooper Irrigation Company, made a survey of the town of Hooper and surrounding lands; that he laid out this road in dispute, as well as several others; that a portion of the one in dispute all the time, and the other part a portion of the time, continued to be traveled by the public to 1896, when it was closed by one of the defendants; that there were two or three sloughs in it, at rainy times, that were impassable; and that it was laid out four rods in width, and was upon the line between the sections mentioned in the complaint; and that from time to time fences were erected on its sides, a great portion of its distance. The evidence also shows that some of the residents upon or near it, with the expressed consent of the road supervisor, paid their road taxes in making improvements upon it. There is evidence to support the finding of the court to which objection is made; and there is evidence to the contrary. It is conflicting. The court below, from a more complete presentation of the evidence than is made to us, found the existence of the road as claimed by the respondent. Where there is evidence in the record to support the finding of the trial court, the court of review will not reverse when there is a reasonable doubt as to the side on which the evidence preponderates. Such preponderance must be palpably and clearly against the finding before a reversal will be made in such case.

The defendants further contend that the decree appealed from is erroneous because the description of the road contained in it is imperfect and uncertain. The road is described as being on the line between the two sections named, and as extending its entire length. In describing the road in the light of the evidence, we must assume that the court referred to it as it was actually found to exist on the section line. That line may have been in the center of the road, or to one side of it, and still in the road, and in either case the road would be upon the line between the two sections, as alleged in the complaint. Such uncertainties do not render decrees void or erroneous. We find no error in the record sufficient to require a reversal. The decree of the court below is affirmed.

ANDERSON and BLACKBURN, JJ., concur.

GOLDTREE *et al.* v. McALISTER. (No. 13,436.)

(Supreme Court of California. Sept. 29, 1890.)

WILLS—FOREIGN PROBATE—COLLATERAL ATTACK—MORTGAGE FORECLOSURE—PLEADING.

1. Code Civil Proc. Cal. §§ 1322-1324, provide that when a copy of a will, duly proved and v.24p.no.15—51

allowed in a foreign country or state, and the probate thereof, duly authenticated, shall be produced, the same shall be filed, and the court must appoint a time for the hearing, and if, on the hearing, it appears that the will has been proved, allowed, and admitted to probate in any foreign country, it must be admitted to probate in this state. *Held*, that the question whether a will has been duly proved and allowed in a foreign country is a fact which the court must find from the evidence, and, where the court finds that a will has been properly probated in a foreign country, and admits it to probate in this state, its action cannot be attacked collaterally, but only by direct appeal. Affirming 23 Pac. Rep. 207.

2. Code Civil Proc. Cal. § 392, requires actions for the foreclosure of mortgages to be tried in the county in which the subject of the action or some part thereof, is situated, and where real property is situated partly in one county, and partly in another, the plaintiff may select either county, and the one selected is the proper county for the trial of the action. *Held*, that where land is sold by the sheriff of the county of S. under foreclosure proceedings instituted in that county, and part of the land is shown to be in the county of K., but it does not appear where the remainder is situated, it will be presumed that the mortgaged premises consist of one body of land, situate partly in the county of S. and partly in the county of K. Affirming 38 Pac. Rep. 307.

3. A general demurrer will be sustained to a bill attacking a sale under a decree of foreclosure when such bill fails to state facts showing that the foreclosure sale was void.

On rehearing. For former report, see 23 Pac. Rep. 207.

Wm. Shipsey and Graves, Turner & Graves, for appellants. W. H. Spencer and J. M. Wilcoxon, for respondents.

PER CURIAM. The judgment appealed from in this case was affirmed January 31, 1890. A rehearing was granted, and the case has been reargued in printed briefs.

We have carefully considered the arguments of the learned counsel for appellant on the rehearing, but find nothing in them having the effect to change the former opinion. It is true that section 5 of article 6 of the present constitution was inappropriately cited in that opinion to sustain the foreclosure sale, made before the present constitution was adopted; but the validity of that sale is supported by section 392 of the Code of Civil Procedure, which was also cited. On the facts stated in the cross-complaint, there should be no question that it must be presumed that the district court had jurisdiction of the action to foreclose the mortgage, and, consequently, power to order a sale of all the mortgaged property in one parcel, since it must be presumed that it consisted of one body of land situated partly in San Luis Obispo county. But counsel for appellant contend, on rehearing, that, conceding the jurisdiction of the district court to decree a sale, it should have ordered that part of the land situated in Kern county to be sold in Kern county. In this, we think, counsel is mistaken, for reasons stated in the former opinion; but, admitting, for the sake of the argument, that they are right, yet it seems that they make only a case of error in the exercise of admitted jurisdiction, which did not make the decree void, or subject to the collateral attack here made upon it. If the decree was not void, it authorized the sheriff of San Luis Obispo county to make the sale,

and to execute the deed; for it is averred in the cross-complaint that the sheriff made the sale and executed the deed in accordance with the decree of the court, and not otherwise.

Counsel further contend, on the rehearing, that, if there was any defect in the cross-complaint, it was only that of uncertainty or ambiguity, for which a general demurrer should not have been sustained; but there was a deficiency of substance necessary to constitute a cause of action. To constitute a cause of action the cross-complaint must have stated facts showing, or from which it might be inferred or presumed, that the foreclosure sale was void; but, instead of this, it stated facts from which it must be presumed that the sale was authorized and valid. For the reasons here, and in the former opinion, stated, the judgment is affirmed.

86 Cal. 31

PEOPLE v. MURRAY. (No. 20,672.)

(Supreme Court of California. Sept. 15, 1890.)

CRIMINAL LAW—PROVINCE OF COURT AND JURY—INSTRUCTIONS.

1. On trial for robbery, a charge that the jury is bound to presume that the prosecuting witness states the truth, the defendant not having proven the falsity of his statements, is an invasion of the province of the jury, and erroneous under Const. Cal. art. 6, § 19, which declares that "judges shall not charge juries with respect to matters of fact."

2. When, in answer to a question asked for the sole purpose of contradicting a previous statement of defendant, he admits that he has been convicted of larceny, it is erroneous to charge the jury as to that admission, and also that "as to how much credit such a man is entitled to is for you to determine."

Department 2. Appeal from superior court, city and county of San Francisco; J. MCM. SHAFTER, Judge.

P. Reddy, for appellant. Atty. Gen. Geo. A. Johnson, for respondent.

MCFARLAND, J. The defendant was convicted of robbery, and appeals from the judgment, and from an order denying a new trial. He was charged with taking forcibly and feloniously from one Henry Braker a certain watch and chain of the value of \$30. The only witnesses on the part of the prosecution were the prosecuting witness, Braker, and two policemen, who arrested the defendant. Braker testified that on the night between November 9 and 10, 1889, he was sleeping in an old cabin (which had been part of the sleeping apartment of a boat) at the foot of Kearny street, San Francisco; that one Lewis had come into the cabin early in the evening, and had gone to sleep; that about 2 o'clock in the morning the defendant and one Kenny came into the cabin, and forcibly took from him the watch and chain, and also a knife. (Kenny and Lewis were informed against jointly with defendant.) The policemen testified that they arrested the defendant shortly afterwards, and found on his person the watch and chain, as described by Braker. This was substantially all the evidence for the prosecution. On the part of the defense, the defendant and Kenny and Lewis, and

also a witness named Hamilton, (not charged with the offense,) all testified that on the night in question the prosecuting witness, Braker, and the defendant and others, including some sailors who left immediately afterwards to go on their ship, were engaged in throwing dice in the said cabin for money; that during the game Braker put up his watch and chain on the game; and that defendant finally won the watch and chain, and Kenny won the knife. Here, then, was a keen conflict of testimony; and, as defendant admitted possession of the watch and chain, it was a conflict practically between four witnesses for the defense and one for the prosecution. Under these circumstances, the appellant contends that, in instructing the jury, the court, to the prejudice of appellant, invaded the province of the jury, and violated section 19 of article 6 of the state constitution, which provides that "judges shall not charge juries with respect to matters of fact." And in this contention we think that appellant is right. The prosecuting witness, Braker, on his cross-examination, developed a remarkable want of knowledge of his antecedents. He not only could not tell when he was born, or who either of his parents was, or where he came from, or how he happened to be here at all, but his testimony in other respects was certainly subject to some criticism. And in respect to this witness the court instructed the jury as follows: "There are attacks upon the witness, and you will consider them, and see how far they rest upon the testimony in the case. The young man who appears as a prosecuting witness testifies to a life which I will not characterize. He is unfortunate enough not to know who his father and mother are, or, perhaps, when he was born. As to particular transactions that occurred seven or eight years ago, he did not undertake to state. If his statements are untrue, the defendant should have an opportunity to disprove them. His testimony being thus given, and the defendant not proving their falsity, you are bound to presume what he states to be the truth." The propositions stated in the last sentence cannot be maintained under any view. If the phrase, "and the defendant not proving their falsity," be taken as a statement that the defendant had not proven their falsity, as the jury might very easily understand it, then it directly took away from the jury the determination of a fact about which there was not only a conflict of testimony, but with respect to which, in number of witnesses at least, there was a preponderance of four to one against the prosecuting witness. And if it be taken to merely mean that the jury were bound to take, as true, the statements of Braker about the manner in which he lost his watch, unless the defendant disproved them, it is equally untenable. The jury were not bound to take the testimony of any witness as true. From the manner of the prosecuting witness, and the nature of his whole testimony, the jury might have disbelieved him if the defendant had not introduced any evidence at all. This whole matter was for the jury, and not the court.

The defendant was a witness for himself,

and testified, among other things, that, on July 1, 1889, he was working for his father, and on cross-examination was asked this question: "Is it not the fact that on that day, July 1, 1889, in this city and county, you were convicted, and were serving on that day a term of imprisonment for petty larceny?" There is some confusion in the record as to whether the proper objection was made to this question at the proper time, and as to what answer the witness gave. There was an objection made, however, and counsel for the prosecution said: "The question is asked simply for the purpose of contradicting him." Whatever the answer was, therefore, the testimony was introduced simply for the purpose of contradicting his statement that he was working for his father on the day named. But the court instructed the jury as follows: "The defendant here admits that he has been convicted of petty larceny. As to how much credit such a man is entitled to, is for you to determine." This could be understood in no other way than as a statement that, in the opinion of the court, such a man as defendant was entitled to but little credit. It was based on a fact not in evidence for such purpose, and it was a broad inroad into the province of the jury. Then as to the witnesses for the defendant, generally, a rule was given different from that which was applied to the prosecuting witness. The court said: "On the other side the leading witness, the defendant, and the others with him testified that they started somewhere from the center of the city on an invitation to go to the cabin and get some beer. They went over there. It is for you to consider the probability of a story of seven or eight men collected together in a cabin, drinking and gambling for three pence a bit, and whether they gambled there up to 11 or 12 o'clock. That is a matter for your consideration as to the probability of their story." The instructions above quoted, and others of similar import, were violations of the rule that "to weigh the evidence and find the facts is, in this state, the exclusive province of the jury, and with the performance of that duty the judge cannot interfere without a palpable violation of the organic law," (*People v. Dick*, 34 Cal. 666; *People v. Fong Ching*, 78 Cal. 169, 20 Pac. Rep. 396;) and of section 1847, Code Civil Proc., which, speaking of a witness, provides that "the jury are the exclusive judges of his credibility." A part of the charge on the subject of reasonable doubt, and also on one or two other matters, is somewhat obscure, but it can readily be made clear on another trial.

There is only one other matter to be noticed. We think that the court went too far in cautioning the jury against believing the defendant and the two other persons charged with the crime, although we would not be prepared to say that the judgment should be reversed for that reason. In *People v. Cronin*, 34 Cal. 191, it was held not to be error for a court, speaking of the credibility of a defendant who was a witness for himself, to tell the jury that "you should consider his relation and situation under which he gives his testi-

mony, the consequences to him from the result of this trial, and all the inducements and temptations which would ordinarily influence a person in his situation." That instruction has been approved in subsequent cases, and it is now too late to question its correctness; but, if courts and prosecuting attorneys think it their duty to have an instruction on that subject in every case, they should be careful not to go further in that direction than courts have already gone. An instruction giving the general rule can do no harm, and is not of much importance, for every intelligent juror knows, without any instruction on the subject, that a defendant, whether innocent or guilty, is deeply interested in being acquitted. But when such an instruction is reiterated, and put into exceedingly strong language, so as to give it peculiar emphasis, it is too apt to lead the jury to believe that the court thinks the defendant in the particular case on trial to be unworthy of belief. The credibility of the witness in such a case should be left as much as possible to the jury. In the case at bar the court, speaking of the defendant and the two other witnesses who were also charged with the offense, said to the jury, among other things, as follows: "While they are allowed to testify, they are not given the same effect as witnesses unattended by indictment, or men not charged. They are not entitled to the same consideration." This language, if not error, is at least on the verge of error. Here is a case where several men have a dispute about a watch. Three of them swear that it was put up and lost on a game of chance; one of them swears that it was taken from him forcibly, and that there was no gambling at all; and the jury are instructed that the testimony of the three is not entitled to the same consideration as the testimony of the one, because the latter procured an information to be made against the former. This seems to be carrying the rule very far; and we allude to the matter because a criminal trial, which is usually a very simple thing when compared with the intricacies of the trials of civil cases, is so often complicated by new instructions on matters of evidence. Judgment and order reversed, and cause remanded for a new trial.

We concur: SHARPSTEIN, J.; THORNTON, J.

85 Cal. 385

MOULTON *et al.* v. KNAPP *et al.* (No. 11,757.)

(*Supreme Court of California*. Aug. 30, 1890.)

INJUNCTION—LACHES—EQUITY.

Where defendants consent to waive all defenses, and confess judgment on the strength of a verbal agreement that plaintiffs will stay execution for a year, they cannot enjoin a sale under the execution which plaintiffs levied before the end of the year, being guilty of laches in standing by and permitting the execution to be levied without moving the court to recall it.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; J. F. SULLIVAN, Judge.

T. Z. Blakeman, E. G. Knapp, Wright



& *Hasen*, and *W. B. Sharp*, for appellants. *Turner & Maddox* and *J. H. Budd*, for respondents.

FOOTE, C. A. W. Moulton and four other persons instituted this action for an injunction against Sewell Knapp, E. G. Knapp, and R. B. Purvis. It was alleged, among other things, in the complaint that the plaintiffs were stockholders and directors in a corporation denominated the "Oakdale Lumber and Water Company," and that they together owned three-fourths of the stock in that company; that the affairs of the corporation were in such a condition as that any suit or action brought against it would necessarily embarrass its interests, as the corporation was just getting into shape that would make it in a short time a paying institution; that on the 3d day of April, 1886, S. Knapp had two notes against plaintiffs, one for about \$7,500, and the other for about \$1,000; that upon the day above mentioned he commenced an action against the makers of those notes, the plaintiffs here, to recover what he claimed was due him; that about two days after this he went to these plaintiffs, and informed them that he had brought the suit; that he did not wish to annoy them, but wanted to be secured in the payment of his claims; that if they would waive all defense to the notes, and acknowledge themselves jointly and severally indebted to him on these instruments, and authorize the clerk of the court where the action was pending to enter up immediate judgment in favor of S. Knapp, that he would stay all proceedings thereon, and stay execution upon the judgment for the period of 12 months from the date thereof. To this the parties applied to consented, and, in writing, waived all defense, and consented and directed judgment to be entered up as agreed upon. The agreement is in this language: "In the superior court, state of California, in and for the county of Stanislaus. Sewell Knapp, Plaintiff, against Thomas Roberts, C. H. Head, A. W. Moulton, C. W. Sproul, Abner Potter *et al.*, Defendants. No. 617. We, the undersigned, defendants in the above-entitled action, do by these presents acknowledge ourselves jointly and severally indebted and liable to the above-named plaintiff, Sewell Knapp, on the two notes sued upon herein as they are pleaded, and we hereby expressly waive all right of defense herein, and authorize and direct the clerk of said court to enter herein in favor of said S. Knapp and against us, or against as many of us as subscribe our names hereunto, immediate judgment for the sum of eighty-five hundred (\$8,500) dollars, principal, and \$222, interest, all in United States gold coin,—in all \$8,722. Dated at Oakdale, April 5, 1886. THOMAS ROBERTS. A. W. MOULTON. C. W. SPROUL. A. POTTER. C. H. HEAD. Attest: H. WOLFE." It is then alleged that, in violation of the agreement to stay execution, etc., Knapp induced these plaintiffs to deposit their certificates of stock in the incorporated company in a safe in the office of such corporation. The judgment was duly entered up and recorded by the clerk

of the county, and thereupon became a lien upon all the real property of the defendants in Stanislaus county. That all these facts were fully known both to S. and E. G. Knapp, the latter of whom was the attorney of the former. It is then charged that in violation of the agreement for a stay of execution, and in fraud of the plaintiff's rights, S. Knapp caused an execution to be issued and levied upon the certificates of stock in the safe in the office of the corporation heretofore mentioned, the sheriff, R. B. Purvis, taking them into his possession, and on the 14th of April, 1886, posted notices that he would sell all the right, title, and interest in the shares of stock of these plaintiffs, the judgment debtors in the execution, on the 20th of April, 1886; that after the sheriff thus had taken the certificates of stock into his possession, S. Knapp promised the plaintiffs to postpone the sale until they could raise the money to pay the judgment; that he did not postpone the sale, but caused the shares of stock to be sold as advertised, and bought them in for the sum of \$500, and transferred them to E. G. Knapp, who now claims them; that all this was done, as the plaintiffs believe, with the knowledge of E. G. Knapp, who is now threatening to take from the plaintiffs all their rights and property in the corporation above mentioned, and cause to be levied other executions upon the individual property of these plaintiffs; and that R. B. Purvis, the sheriff, into whose hands the executions have come, will sell sufficient property, at least, to satisfy the judgment, if not restrained by injunction. The prayer is that he may be prevented from selling the property; and that S. Knapp may be compelled to carry out his agreement to stay execution for one year; and that he and E. G. Knapp be compelled to return to plaintiffs the certificates of stock; and that all proceedings subsequent to the judgment rendered against plaintiffs and in favor of S. Knapp be declared null and void; and that E. G. Knapp, who is alleged to be insolvent, and threatens to transfer the certificates of stock, be ordered to refrain from so doing; and that all process be recalled, and everything done subsequent to the judgment be declared to have been done in fraud of the plaintiffs' rights, etc. The action was instituted in the county of Stanislaus, and an order to show cause was also made in the superior court of that county. Pending the hearing of that motion, a temporary restraining order was made, dated the 30th of April, 1886. On the 2d of June of the same year an order changing the place of trial was made. Demurrers were filed to the complaint, and on the 16th of June the judge of the superior court of San Francisco, to which jurisdiction the cause had been submitted by the change of venue, overruled the demurrers, and granted an order restraining the defendants, from which this appeal is taken.

There is no sufficient reason given why the plaintiffs did not move the court in which the judgment was given and made, and to which they were parties, to recall the execution, and to make an order which would prevent any further issuance

of such process, or the taking of any other step to enforce the judgment, until the expiration of the year agreed on for the stay. If this motion had been entered before the sale under execution the plaintiffs could have made the same showing of facts that they have done in their complaint. It was said by the appellate court in *Imlay v. Carpenter*, 14 Cal. 173: "And even where fraud is relied upon as an answer to the motion the courts are clothed with ample powers to frame issues, and to try and determine the same, either with or without the intervention of a jury. A resort to a formal action would seem to be as unnecessary as it would certainly be expensive and dilatory. But even if no such summary relief could be granted as against the judgment, the court is invested with plenary power over the execution, and may set it aside, and order a perpetual stay, or make any other order in reference to it required for the protection and preservation of the rights and interests of the respective parties." And the court held in that case that, as the plaintiff had an adequate and speedy remedy at law, he was not entitled to the assistance of a court of equity. If the plaintiffs here had made such a showing as would have warranted the trial court, on a motion therefor, to set aside the execution that had been levied, and to stay all other process until the expiration of the year agreed upon, no sale of the stock would have taken place, or anything else been done which would have made the situation of affairs different from the *status* it was agreed they should occupy for that period. We do not see, after the laches of the plaintiffs in not taking advantage of their adequate and speedy legal remedy by motion as heretofore stated, that they can be said to have made in their complaint a sufficient showing to entitle them to the injunction which they obtained; and this view of the matter is, as we think, supported by the decision of the appellate court in *Ede v. Hazen*, 61 Cal. 360, and the cases there cited. For these reasons we advise that the order appealed from be reversed.

We concur: VANLIEF, C.; GIBSON, C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is reversed.

WORKS, J. I concur in the judgment, but it is unnecessary to decide in this case that the respondents were entitled to have the execution recalled on motion based upon a mere verbal agreement for the extension of time. It is enough to say that they were not entitled to the remedy sought in this action.

86 Cal. 60

GARNER v. ERLANGER. (No. 18,300.)

(Supreme Court of California. Sept. 17, 1890.)

JUDGMENT BY DEFAULT—MOTION TO SET ASIDE—DISCRETION OF TRIAL COURT.

An order denying or granting a motion, under Code Civil Proc. Cal. § 473, to set aside a default on the ground of mistake, inadvertence, surprise, or excusable neglect rests in the discretion of the trial court, which will not be interfered with on appeal except in a plain case of

abuse; and, where the motion is based on the fact that defendant failed to observe what county was named in the summons, the order of the court refusing to set aside the default will not be disturbed.

Commissioners' decision. Appeal from superior court, Tulare county; WILLIAM W. CROSS, Judge.

*Justice Jacobs*, for appellant. *Church & Corey*, for respondent.

BELCHER, C. C. This is an appeal from an order refusing to set aside a judgment entered against the defendant by default, in the county of Tulare. The motion was made, under section 473 of the Code of Civil Procedure, upon the ground of mistake, inadvertence, surprise, and excusable neglect. The action was upon a promissory note for \$450, dated "Kingsburgh, February 18th, 1888," and payable at Kingsburgh one year after date, with interest. Kingsburgh is in Fresno county, and the summons and copy of the complaint were served on defendant in the county of Tulare on the 28th day of February, 1889. The judgment was entered on the 13th of March, 1889. It appears from the affidavit of defendant, filed in support of his motion, that the note had been left with the First National Bank of Fresno, as collateral security for the payment of another note, made by the plaintiff to one Smith, and that defendant had been informed by the president of the bank that, unless the other note was paid on or before the 18th day of February, 1889, suit would be commenced on his note. The affidavit then proceeds to state "that, for the reason that said note was made payable at the county of Fresno, this affiant believed, and never entertained any doubt but what, if suit were brought upon said note, it would be brought in said county of Fresno, and, at the time he was served with the so-called 'summons,' and so-called 'complaint,' copies of which are hereto attached, he supposed, as a matter of course, that such suit had been commenced and brought in the superior court of said county of Fresno, and that he therefore had thirty days within which to file his pleading to said complaint; \* \* \* that, at the time the so-called 'summons' in said action was served upon this affiant, [he, thinking, of course,] he had been sued in the superior court of the county of Fresno, did not notice or think of looking at the title or name of the particular court in which such action was brought, and did not notice that the word 'Tulare' was written where he supposed the word 'Fresno' would be, in the name or title of the court in which said action was brought, and remarked to his attorney that he would have thirty days within which to answer said complaint; that thereafter he handed said papers, copies of which are hereto attached, to his said attorney, and instructed him to attend to the matter, and prepare the necessary pleading; that his said attorney, after inspecting the said papers, informed this affiant that such suit had been brought in the county of Tulare, and that the time for answering said complaint had already expired; that this affiant was taken en-

tirely by surprise at such information, he never having thought or supposed that such suit would be, or had been, brought in said county of Tulare; that affiant has fully and fairly stated the facts constituting his defense to said action to his said attorney, and is, by him, advised and informed, and verily believes, that he has a good and valid defense to said action on the merits thereof." It has been frequently held by this court that a motion like that of the appellant is addressed to the sound legal discretion of the trial court, and that an order granting or denying the motion will not be reversed on appeal unless a clear abuse of such discretion is shown. *Coleman v. Rankin*, 37 Cal. 247; *Watson v. Railroad Co.*, 41 Cal. 17; *Dougherty v. Bank*, 68 Cal. 275, 9 Pac. Rep. 112. In *Coleman v. Rankin*, the action was brought to determine an adverse claim of title to real property. The summons was served on the 25th of March, and judgment by default was entered on the 8th of April. The defendant moved, on the 9th of April, to have the judgment set aside, and, in his affidavit, stated that when he received the summons, he placed it in his hat, and it was lost therefrom; that he made no note of the time of the service, and had no means of fixing the date thereof; that about five days before making his affidavit, and at several subsequent times, he called at the office of his counsel, but did not succeed in finding him until the 8th of April, when he retained him to defend the action; that he subsequently learned from his attorney, for the first time, that the day for answering had expired; that, if he had not lost the summons, he verily believed he would not have failed to make a note on the paper of the time of service, and to have filed his answer in proper time. The motion was denied by the trial court, and the order was affirmed on appeal. The law applicable to such motions is thus clearly and succinctly stated in the syllabus of the case: "An order denying or granting a motion to set aside a judgment by default on the ground of mistake, inadvertence, surprise, or excusable neglect of the defaulting party rests in the sound discretion of the court, and, except in a plain case of abuse of this discretion, will not be disturbed by this court on appeal. Where the defaulting party discloses, in the case presented by him for an order to set aside such judgment, a degree of negligence, carelessness, and lack of diligence not to be predicated of a prudent business man in a matter of material concern to him, this court will not, on appeal, disturb the order of the court below denying such application." In this case it appears that appellant was served in Tulare county, and that he held in his hands copies of the summons and complaint for more than 10 days, without once looking at them to see whence they were issued, or where he had been sued. This shows a degree of carelessness not easily accounted for, and the court below may well have concluded that he was guilty of such inexcusable neglect as should deprive him of the relief sought. In the exercise of its discretion the court denied the motion, and, in doing so, we cannot

say that it acted improperly, or in any way abused the discretion with which it was clothed. A motion was made to dismiss the appeal, but, as we think the respondent right on the merits, it is unnecessary to consider that question. We advise that the order be affirmed.

We concur: GIBSON, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the order is affirmed.

35 Cal. 376

CURTISS V. STARR *et al.* (No. 12,872.)

(*Supreme Court of California*. Aug. 26, 1890.)

NEW TRIAL—CONFLICTING EVIDENCE—DISCRETION OF JUDGE.

In civil cases, the trial judge should set aside the verdict of the jury and grant a new trial whenever he is not satisfied with the verdict upon the evidence; and his order in that regard will not be disturbed on appeal if the evidence is substantially conflicting.

Commissioners' decision. Department 1. Appeal from superior court, Alameda county; N. HAMILTON, Judge.

Charles F. Hanlon, for appellant.  
Hutchinson & Campbell, for respondents.

HAYNE, C. This is an appeal by the plaintiff from an order granting the defendants' motion for a new trial. The order did not specify the ground upon which it was made; and, in such case, it is settled that if the record shows any valid ground upon which the order may have been made, the appellate court will presume that it was made on such ground. In this case the record shows a valid ground upon which the order may have been made. The complaint consists of two counts. The appellant's counsel asserts that the verdict was based upon the second count alone; and, for the purpose of this opinion, we assume that such was the case. We therefore dismiss from consideration the first count, and the evidence under it. The substance of the second count is that the plaintiff delivered to the defendant (a corporation) certain wheat to be sold on commission at a fixed price; and that the defendant sold the wheat at a less price, contrary to its instructions, and without notice to the plaintiff. It is obvious that the instruction to sell at a fixed price is a main foundation of such a case. Take that away, and the case falls to the ground. Now the plaintiff's letter of instructions showed no such limitation. On the contrary, it said: "Sell same at your discretion." This being so, it was incumbent upon the plaintiff to show affirmatively that the instructions were changed before the wheat was sold. He introduced some testimony tending to show this, and the jury evidently believed it, but, for reasons above stated, it must be presumed that the judge did not; and if he did not, it was his duty to grant a new trial. The rule as to conflict of evidence does not apply in the trial court. The judge should set aside the verdict whenever he is not satisfied with it upon the evidence, and his order in that regard will not be disturbed on appeal if the evidence

is substantially conflicting. *Dickey v. Davis*, 39 Cal. 569; *Sherman v. Mitchell*, 46 Cal. 580; *Irving v. Cunningham*, 58 Cal. 306; *Breckenridge v. Crocker*, 68 Cal. 403, 9 Pac. Rep. 426. The learned counsel is in error in supposing that this rule is confined to cases tried without a jury. It is plain, therefore, that the order appealed from must be affirmed.

It may be added that, in our opinion, the trial court was wrong in its theory that the written instructions could not be changed by parol. If any subsequent parol instructions were given to the agent, they were binding, subject to the right to sell for reimbursement of advances, as provided by section 2027 of the Civil Code. The error, however, was in favor of the defendant, and does not affect the question of the correctness of the order appealed from. It is noticed merely for the guidance of the court upon a retrial. We advise that the order granting a new trial be affirmed.

We concur: BELCHER, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the order granting a new trial is affirmed.

85 Cal. 632

*Ex parte REILLY.*

(*Supreme Court of California.* Sept. 12, 1890.)

CONSTITUTIONAL LAW—JURISDICTION OF COURTS—JUDGMENTS.

1. Const. Cal. art. 6, § 1, provides that the legislature may establish inferior courts, whose jurisdiction and powers, under section 13, must be regulated "by law;" and sections 15 and 16 of article 4 provide that no law can be passed except by bill concurred in by both houses, and signed by the governor. *Held*, that Const. Cal. art. 11, § 8, which provides for the adoption of city charters by mere resolution of the legislature, without the approval of the governor, was not intended to supersede the above provisions of article 6 in relation to the establishment of inferior courts, and that the provisions of the charter of the city of Los Angeles, so adopted, establishing a police court, and defining its jurisdiction, are void. Following *People v. Toal*, ante, 603.

2. The judgment of a justice of the peace in a prosecution for battery of which he has jurisdiction as justice is not invalid because he claims to exercise authority as police judge, under an act which does not apply to him.

In bank. *Habeas corpus.*

*Frederick Stanford*, for petitioner. *M. T. Owens*, for respondent. *Stephen M. White*, *amicus curiæ*.

BEATTY, J. Petitioner was arrested, tried, and convicted upon a charge of battery, alleged to have been committed in the city of Los Angeles. The trial took place before a justice of the peace who styles himself *ex officio* police judge of the city of Los Angeles, and who appears to have been acting as such police judge by designation of the mayor, in pursuance of the so-called "Whitney Act," which it was intimated in the first decision in *People v. Toal*, 23 Pac. Rep. 203, applied to the city of Los Angeles. The claim of petitioner is that his imprisonment is illegal because, under the freeholders' charter of Los Angeles, the police court thereby created had exclusive jurisdiction of the offense with

Cal. Rep. 23-25 P.—44

which he was charged, and, consequently, that Lockwood, a justice of the peace, designated under the Whitney act, had no jurisdiction. The final decision in the *Toal* Case, ante, 603, (filed August 4th,) disposes of this contention. It is there held that the charter provisions concerning the police court are void; that such court had no jurisdiction in any case, and necessarily no exclusive jurisdiction.

It is conceded that Lockwood was a justice of the peace. As such, he had jurisdiction of the offense of battery, and his judgment in this case is none the less valid because he styled himself *ex officio* police judge of Los Angeles, thereby claiming to exercise his authority under the Whitney act. Conceding that the Whitney act does not apply to Los Angeles,—and it seems it does not,—the justice of the peace had authority to act, and his judgment is valid.

Writ discharged, and prisoner remanded.

We concur: FOX, J.; WORKS, J.; PATERSON, J.; THORNTON, J.; SHARPSTEIN, J.

86 Cal. 27

PEOPLE *ex rel.* CAMPRELL v. WATERMAN, Governor. (No. 14,000.)

(*Supreme Court of California.* Sept. 13, 1890.)

JUDGE—TERM OF OFFICE.

Act Cal. March 5, 1887, increased the number of judges of the superior court in San Bernardino county from one to two, and provided that the governor should appoint an additional judge of said court "who shall hold office until the first Monday after the 1st day of January, A. D. 1889, and at the next general election a judge of said court of said county shall be elected to hold office for the term prescribed by the constitution and the law." The next general election was in November, 1888. Const. Cal. art. 6, § 6, prescribes six years as the term of office of a superior court judge. *Held*, that, there being no provisions to the contrary, the judge thus elected held office for six years from said January 1st, though the term of the other judge would expire, and another judge be elected to the vacancy before the expiration of that time.

In bank. Application for mandate.

*H. Goodsell, Jr.*, for applicant. *George A. Johnson*, *Atty. Gen.*, and *Anderson, Fitzgerald & Anderson*, for respondent.

FOX, J. This is an application for a writ of mandate against the governor of the state, requiring him, in his forthcoming proclamation for the general election to be holden on the first Tuesday after the first Monday in November next, to call for and order the election of two judges of the superior court in and for the county of San Bernardino, instead of one, as proposed by the governor. No point is made in this case as to the power of the court to issue its writ for such a purpose against the executive, and in the view we take of the real question involved, it is unnecessary for us to consider upon or determine this preliminary question.

The facts briefly stated are these: By the statute and laws under which the superior court in San Bernardino county was originally organized provision was made for but one judge of that court. Under the law as it thus stood, Hon. James A. Gibson was elected judge for the term commencing on the first Monday in

January, 1885, and ending on the first Monday in January, 1891. May 13, 1889, he resigned, when Hon. C. W. C. Rowell, the present incumbent, was appointed. Under the law that appointment continues until the next general election, which will be in November, 1890. At that time an election must be held to fill the vacancy created by the resignation of Judge Gibson for the balance of the unexpired term for which Judge Gibson was elected. Const. art. 6, § 6. That term itself, however, expires on the first Monday in January following, so that under the constitution the people will also be required, at the same election, to elect a judge of the superior court for the full term of six years, commencing on the first Monday in January next, in place of the judge who may finish out the term for which Judge Gibson was originally elected, and which term then expires. This is the plain course of proceeding to be pursued, so far as relates to the judgeship originally created under the constitution, for that county. Section 9, art. 6, of the constitution empowered the legislature, at any time, by a two-thirds vote of the members of both houses, to increase or diminish the number of judges of the superior court in any county. Acting under this authority the legislature did, on March 5, 1887, by an act duly passed, increase the number of judges of the superior court for the county of San Bernardino from one to two, and empowered the governor to appoint an additional judge, to hold office until the first Monday after the 1st day of January, 1889, and provided that at the "next general election a judge of such superior court should be elected to hold office for the term prescribed by the constitution and the law." The next general election was that one held in November, 1888, at which a judge was elected in accordance with the provisions of said act. The question here relates to the term of his office. Does it expire under "the constitution and the law" at the same time with that of the other judge of the same court, or was he elected for the term of six years from and after the first Monday after the 1st day of January, 1889? To our minds the answer to this question is, under the constitution, too clear to require argument, or the citation of authorities other than the constitution itself. The people did not elect the present incumbent in 1888 to fill a vacancy, or the balance of an unexpired term, but to fill a new office created by authority of the constitution, the term whereof commenced, by the provisions of the law of its creation, on said first Monday after the 1st day of January, 1889, and which, by the provisions of the constitution, (article 6, § 6), runs for the period of six years. We think that, under the provision of the constitution as now established, there can be no doubt that whenever a new judgeship is created by the legislature in any county, the first judge elected to fill the place is entitled to hold the same for the term of six years from the first Monday after the 1st day of January next succeeding such election, and the future terms thereof commence at each succeeding sixth year. No vacancy in a term

can occur until a term has commenced, and there is nothing in the constitution which requires that the terms of the judges of all the superior courts, or of all the judges of the same superior court, should begin and end at the same time. Nor is there anything to indicate that the judges of these courts are all to be elected at regular elections for state officers. Under the terms fixed by the constitution, this could not be made to happen oftener than once in 12 years if all were to be elected at the same time. But taking the provisions of the constitution, and the language of the act creating the office, together, there can be no doubt about the time of the commencement of the term of this office, or that the incumbent is to hold for the full term prescribed by the constitution. Section 2 of the act reads: "Within ten days after the passage of this act the governor shall appoint an additional judge of the superior court of the said county of San Bernardino, who shall hold office until the first Monday after the 1st day of January, A. D. 1889, and at the next general election a judge of said court of said county shall be elected to hold office for the term prescribed by the constitution and the law." The term prescribed by the constitution is six years, and there is no law prescribing a different term, so there is no conflict between the constitution and the law. The writ must be denied. So ordered.

We concur: BEATTY, C. J.; WORKS, J.; SHARPSTEIN, J.; MCFARLAND, J.; PATERSON, J.

36 Cal. 264

MEYERS v. POND *et al.* (No. 14,022.)

(*Supreme Court of California.* Sept. 18, 1890.)

ELECTIONS AND VOTERS—BOARD OF REGISTRATION.

Pol. Code Cal. § 1142, provided that when an election is ordered, the board of supervisors must appoint for each precinct one inspector and two judges, who shall constitute a board of election for such precinct, and in the city and county of San Francisco the supervisors must appoint an additional inspector and two additional judges in each precinct, who, with the original inspector and judges, shall constitute a board of election, and shall canvass the votes for such precinct, and shall be present at the closing of the polls. Act Cal. March 18, 1878. ("An act to regulate the registration of votes, and to secure the purity of elections in the city and county of San Francisco.") created a board of election commissioners, and gave it some of the powers in regard to elections theretofore exercised by the board of supervisors. Section 19 provided that there should be in each precinct a board of precinct registration, to be constituted in the following manner: "The board of election commissioners shall appoint the one original inspector, and the two original judges of election provided for in section 1142 of the Political Code for each precinct. \* \* \* In addition to acting as election officers \* \* \* [they] shall serve as precinct registration officers for enrolling the electors of their respective precincts." Act March 20, 1889, ("An act to amend" certain sections of the Political Code "relating to elections,") amended said section 1142 so as to provide that when an election is ordered the board of supervisors or other board having charge of elections in the counties and cities and counties, shall appoint for each precinct two inspectors, two judges, and two clerks, to be selected one from each of the two principal political parties. "The inspectors and judges so appointed shall constitute a board of election for

such precinct," which "shall canvass the votes for such precinct, and must be present at the closing of the polls." *Held*, that the act of March 20, 1889, by its amendment of section 1142, did not provide for a "board of precinct registration" of four persons, two inspectors and two judges, instead of three persons, one inspector and two judges, in each precinct of the city and county of San Francisco, the provisions of said amendment applying only to a "board of election." Fox, J., dissenting.

**Mandamus.**

*H. C. Dibble, J. A. Waymire, Dorn & Dorn, Meyer Jacobs, and E. S. Pillsbury*, for petitioner. *Stanley, Stoney & Hayes, Spencer & McEnery, Naphtaly, and Friedenrich & Ackerman*, for respondents.

MCFARLAND, J. This is a petition for a peremptory writ of *mandamus* commanding the respondents, who compose the board of election commissioners of the city and county of San Francisco, to appoint a board of precinct registration in each precinct in said city and county to consist of two inspectors and two judges, to be selected respectively from the two opposing political parties which cast "the greatest number of votes at the next preceding general election." It is admitted that the respondents are about to appoint such precinct boards to consist of only one inspector and two judges,—the inspector and one judge to be taken from one of said political parties, and the other judge to be taken from the other political party. The following are the statutory provisions bearing on the question: On the 18th day of March, 1878, section 1142 of the Political Code was as follows: "When an election is ordered, the board of supervisors must appoint for each precinct, from the electors thereof, one inspector and two judges, who constitute a board of election for such precinct; and, in the city and county of San Francisco, the board of supervisors must also, prior to the election day, appoint for each precinct, from the electors thereof, an additional inspector and two additional judges, who, with the original inspector and judges, shall canvass the votes for such precinct, and who must be present at the closing of the polls. Otherwise the board of election must appoint the additional inspector and judges, or supply the place of an absent member thereof. The original and additional inspector and judges shall thenceforth constitute the board of election, the members relieving each other in the duties of canvassing the ballots, which may be conducted by at least half of the whole number; but the final certificates shall be signed by a majority of the whole." On that day (March 18, 1878) an act of the legislature was approved, entitled "An act to regulate the registration of voters, and to secure the purity of elections in the city and county of San Francisco." By this act a system of precinct registration was created for said city and county, and powers formerly exercised by the board of supervisors, with respect to elections, were conferred upon a new body, created by the act, called the "Board of Election Commissioners." Section 19 of that act was as follows: "There shall be a

board of precinct registration in each precinct of said city and county, which shall be constituted in the following manner: The board of election commissioners, as soon as is practicable after they have divided the city and county into election precincts, as hereinbefore provided for, shall proceed in the manner provided in section 13, hereof, to appoint the one original inspector and the two original judges of election, provided for in section 1142 of the Political Code for each precinct. Said inspector and judges shall serve for one year, unless otherwise ordered by the commission, and in addition to acting as election officers at all the elections during the year, shall serve as precinct registration officers for enrolling the electors of their respective precincts on the precinct registers thereof. All other election officers shall be appointed by the board of election commissioners at such time as shall be necessary before the election." On March 20, 1889, an act of the legislature was approved entitled "An act to amend" certain enumerated sections of the Political Code, "relating to elections." By this act section 1142, above quoted, was amended. That part of this section, as thus amended and re-enacted, which is pertinent to the case at bar, is as follows: "When an election is ordered, the board of supervisors or other board having charge and control of elections in each of the counties and cities and counties of the state, shall appoint for each precinct from the electors thereof whose names appear upon the last assessment roll of said county, or city and county, two inspectors, two judges, and two clerks, the inspectors, judges, and clerks to be selected respectively from the two opposing political parties which cast the greatest number of votes at the next preceding general election. The inspectors and judges so appointed shall constitute a board of election for such precinct. Said board of electors shall canvass the votes for such precinct, and must be present at the closing of the polls. The members of said board shall relieve each other in the duties of canvassing the ballots, which may be conducted by at least half of the whole number; but the final certificate shall be signed by a majority of the whole." The foregoing statutory provisions are all that are necessary to be here cited in full.

Now, it is contended by petitioner that, by virtue of the amendment of section 1142, of the Political Code, approved March 20, 1889, last above quoted, it has become the clear and imperative duty of the respondents to create a board of precinct registration in each precinct of San Francisco, to be composed of four persons, viz., two inspectors and two judges, instead of three persons, viz., one inspector and two judges. But it is evident that there is no such requirement to be found in the statutory law. The said act of March 20, 1889, amending certain sections of the Code, makes no change, and does not purport or attempt to make any change, of the persons who have charge of the registration of voters. It deals mainly and almost exclusively with the matter of holding

elections; and, so far as it provides for any change of officers at all that change relates entirely to those who are to take charge of the election on the day of the election,—to receive the ballots, to canvass them, and to certify the result. Section 1142, as amended, after providing for the appointment of two inspectors, two judges, and two clerks, equally from the political parties, (which appointment, by section 1131, must be made "at least fifteen days prior to an election,") then provides that "the inspectors and judges so appointed shall constitute a board of election for such precinct." The section then prescribes their duties, which are stated to consist in being present at the polls, canvassing the ballots, making certificates, etc. But there is no duty imposed on them, and no power given them to take part in the prior registration of voters. That duty is imposed on other officers, and it has been imposed, generally, throughout the state on county clerks, assisted by county assessors. In San Francisco, however, by the said act of March 18, 1878, (section 19 of which is above quoted,) the power of supervising registration was conferred upon three distinct bodies or persons, each appearing to be to some extent independent of and a check upon the others, viz.: (1) A board of election commissioners, composed of five of the most important municipal officers of the city and county; (2) a registrar, appointed by the governor of the state; and (3) a board of precinct registration, who are given some power during the last few days before the time for registering expires, and who were composed,—not of the precinct board of election as provided at that time, by section 1142 of the Political Code, to which said section 19 of the act referred,—but of certain persons who form a part of that board, viz.: One inspector and two judges. If the legislature had desired the registration board to consist of a larger number, or the whole, of the boards of elections, it could easily have done so, for the latter board at that time consisted of two inspectors and four judges. And that statute (of March 18, 1878) is the only law now existing for the creation of boards of precinct registration in San Francisco. And, as that statute provides that such board shall consist of three persons, this court could not command the respondents to put a fourth person on it without usurping legislative power. To do so would be, not to construe doubtful language in a statute, which courts, from necessity, must often do, but to create a new piece of legislation,—which the legislature alone can rightfully do. Counsel for petitioner seem very much impressed with the notion that, as the legislature intended by the amendments of 1889 to have the boards of election composed of persons taken equally from the two political parties, therefore, it should be held to have intended to apply the same rule to those having charge of the registration of voters in San Francisco. But, whatever may be imagined as to such intention, it is sufficient to say that no such intention was expressed. And it may be remarked, in passing, that legislators might well have thought that

the rule of equal party representation could be conveniently applied to boards of election officers, who sit for only a day or two, and must, necessarily, be composed of comparatively a large number of persons, while it could not be well applied to registration, which is a continuous process, requiring attention for long periods. There certainly is no remote intimation that the party rule was intended to apply to registration in any part of the state other than the city and county of San Francisco. The petition is denied, and the proceeding dismissed.

We concur: BEATTY, C. J.; PATERSON, J.; SHARPSTEIN, J.; THORNTON, J.

Fox, J. I dissent. Since the amendment of section 1142 of the Political Code, there are no such officers known to the law as "the one original inspector and the two original judges of election" in the city and county of San Francisco, but there are in said city and county two inspectors and two judges, all "original,"—all equal before and under the law, and all to be appointed at the same time; the appointees to be selected equally from the two parties, etc. Members of the board of registration are simply so *ex officio* by virtue of their appointment as inspectors and judges of election. As the amendment of section 1142 was made after the act of March 18, 1878, and the latter is not, and never was, a complete law without reference to said section, it must conform to the section of the Code, as so amended, or else it has become entirely inoperative so far as relates to the board of registration. It should not be held to have become inoperative if the two can be harmonized. I see no difficulty in so construing them as to harmonize with each other, nor do I think that such a construction will amount to judicial legislation. In my judgment the writ should be granted.

85 Cal. 434

PEOPLE v. ELSEMI. (No. 20,626.)  
(Supreme Court of California. Sept. 3, 1890.)

#### HOMICIDE—INSTRUCTIONS.

The last paragraph of an instruction on manslaughter was: "But if you find from the evidence that in truth and in fact the deceased nor his associate intended no such assault nor the commission of a felony, and a reasonable person in defendant's position would not have so believed, and the defendant had no reasonable cause for so believing, such killing by the defendant, without malice, but without sufficient cause, real or apparent, will constitute the crime of manslaughter." The other seven paragraphs most clearly and correctly laid down the law on the subject. *Held* that, as the rest of the instruction was free from ambiguity, and the only trouble with this paragraph was its grammatical construction, the jury would not be considered to have been misled by it.

Department 1. Appeal from superior court, Santa Clara county; F. E. SPENCER, Judge.

Wm. P. Veuve and B. E. Bennett, for appellant. Geo. E. Johnson, Atty. Gen., for the People.

Fox, J. Information for and conviction of manslaughter. Two points only are made on this appeal.



1. The first point is that the evidence is insufficient to justify the verdict. We have carefully examined all the evidence given in the record. While the testimony of the defendant, who was sworn as a witness in his own behalf, conflicts with that of the witnesses on the part of the prosecution, and there is also a slight variance between the testimony of one of the other witnesses, as he gave it on the trial, from that which he gave on the preliminary examination, we think the decided preponderance of evidence is in support of the verdict, and it cannot be disturbed on the ground of insufficiency of evidence.

2. Exception is taken to the following language found in the instructions of the court to the jury: "But if you find from the evidence that in truth and in fact the deceased nor his associate intended no such assault nor the commission of a felony, and a reasonable person in defendant's position would not have so believed, and the defendant had no reasonable cause for so believing, such killing by the defendant, without malice, but without sufficient cause, real or apparent, will constitute the crime of manslaughter." It must be conceded that this particular paragraph of the instructions is not artificially drawn; but the question is, was the jury misled by it? To determine this we must consider it by the light of common understanding, rather than the strict rules of grammar, and also in connection with its context. So considered, and read in connection with all that the judge said upon the subject to which it related, it seems impossible that the jury could have been misled by this single sentence of the charge on that subject. As printed in the record, each sentence of the instructions is given as a separate paragraph; but upon examination it will be found that the one here quoted and the seven paragraphs next preceding it constitute the instruction of the court on the subject referred to, and in the said seven paragraphs the court has most clearly and correctly laid down the law on that subject. All the balance of the charge on the subject is free from ambiguity, and we cannot conceive that the jury, after so clear an exposition of the law, were misled by a single sentence of this kind. The sentence is not, in our judgment, susceptible of the interpretation placed upon it by counsel for appellant, but, on the contrary, properly corrected by the grammatical rules invoked by counsel himself, it would be a correct statement of the law, and we have no doubt the jury so understood it. Judgment affirmed.

We concur: PATERSON, J.; WORKS, J.

85 Cal. 559

PRESTON v. KNAPP. (No. 13,549.)

(Supreme Court of California. Sept. 10, 1890.)

SALE—EVIDENCE—APPEAL—REVIEW.

1. In an action for the price of flour, bran, etc., it appeared that plaintiff had been working as teamster for the original owner. Plaintiff testified that the original owner authorized him to sell so much of the goods as might be necessary to pay a debt due him, and to apply the proceeds to the payment of that debt; that he afterwards

sold the goods to defendant's testator; and that the latter promised to "settle" with him. It appeared, however, that, on taking these goods from a warehouse where they were deposited, plaintiff did not claim them as his own, but received for them in the name of the original owner, his employer; and that, on the delivery of the goods, defendant's testator, who knew of plaintiff's relation to the original owner, credited them to the original owner's account. *Held*, that the evidence was not sufficient to establish a sale of the goods by plaintiff to defendant's testator.

2. An executrix who has proceeded to the trial of a claim against her decedent's estate, without objecting to the complaint, and who has expressly admitted that the claim had been presented to her in due time, and that she refused to act upon it, cannot for the first time raise the objection on appeal that the presentation and rejection of the claim were not alleged in the complaint.

PATERSON, J., dissenting.

Commissioners' decision. In bank. Appeal from superior court, Tuolumne county; J. F. ROONEY, Judge.

F. W. Street, (E. G. Knapp, of counsel,) for appellant. F. D. & G. W. Nicol, for respondent.

VANCLIEF, C. This action was commenced against Sewell Knapp, in his lifetime, to recover \$493.81 for goods sold and delivered to him by I. N. Miller, the latter having assigned his demand to the plaintiff. After having answered, denying the sale and delivery of the goods and his indebtedness to Miller, Sewell Knapp died, and his executrix, Caroline Knapp, was regularly substituted as defendant, on motion of defendant's counsel. The case was tried by the court on the original pleadings, it being expressly admitted by the defendant on the trial that the claim had been presented to the executrix for allowance in due time, and that she had refused to act upon it. The trial resulted in a judgment for plaintiff for the sum demanded, against the executrix absolutely, and independently of "due course of administration." The appeal is from the judgment, and from an order denying defendant's motion for a new trial.

1. The judgment should have been made payable in due course of administration, and not otherwise. This error, however, could be corrected by a modification of the judgment, without a new trial; but, as will appear, a new trial should be granted upon another ground.

2. Appellant's counsel contend that, inasmuch as the complaint was not amended after the substitution of the executrix, by adding thereto an averment that the claim had been regularly presented to and rejected by the executrix, it is insufficient to support the judgment. But, as no such objection was made in the court below, and as defendant expressly admitted on the trial that the claim had been presented to the executrix in due time, and that she had refused to act upon it, and made no objection on the ground that it was not presented in due form, it is too late to make the objection that the presentation and rejection of the claim were not alleged in the complaint, for the first time, on this appeal. *Hentsch v. Porter*, 10 Cal. 555; *Coleman v. Woodworth*, 28 Cal. 568; *Bank v. Howland*, 42 Cal. 180; *Drake v. Foster*,

52 Cal. 225. The object of the statutory requirement of presentation and rejection of claims against estates, as a condition precedent to the commencement of suits upon them, is to save to estates of deceased persons the costs and expenses of useless suits,—suits to recover what would have been allowed and paid by the executor or administrator without suit. The merits of such claims do not depend in any degree upon their presentation and rejection before suit. The defense that a claim had not been presented and rejected before suit does not question either the validity, or the maturity of the claim, but simply challenges the remedy by suit, on the ground that another remedy provided by law has priority, and should be exhausted before commencement of suit. In other words, that the demand, or some part thereof, should be disputed and rejected, in the mode prescribed by law, before the commencement of suit. For these reasons it has been decided in the cases above cited that the defense to a claim against an estate that it had not been presented to and rejected by the executor or administrator before commencement of suit upon it is of the nature of a defense in abatement, which is presumed to be waived if not expressly made in the court of original jurisdiction, and that it will not be first heard and considered on appeal.

3. It is contended that the finding that Miller, plaintiff's assignor, sold and delivered the goods to Knapp, defendant's testator, is not justified by the evidence, and I think this point is well taken. The goods, alleged to have been sold and delivered by Miller to Knapp consisted of wheat, flour, bran, and middlings, delivered at different times in 1886, viz., March 24th, April 7th, and May 8th, and are admitted to have been the property of G. W. Hale, unless he had sold them to Miller before they were delivered to Knapp. Plaintiff claims that Miller purchased the goods from Hale before the alleged sale and delivery to Knapp; but the defendant denies this, and contends that Knapp purchased the goods from Hale, and that Miller, as the agent and teamster of Hale, merely hauled and delivered them to Knapp for Hale. It appears that both Hale and Miller had running open accounts with Knapp during the time the goods were being delivered, and that Knapp credited the goods to Hale's account, on his books, at the times of delivery. It is admitted that, before and during the time the goods were being delivered to Knapp, Miller was in the employ of Hale as teamster, driving Hale's team, of which it appears that Knapp had notice. It also appears that the goods had been deposited and stored by Hale while he owned them in Tulloch's mill, at Knight's Ferry, and thence the greater part of them were hauled directly to Knapp's store, by Miller. But it appears that, by some means not disclosed, about one-fifth part of the goods had been "left with Mr. Preston, [presumably the plaintiff,] in his warehouse at Jamestown," by whom, and not by Miller, they were delivered to Knapp. This appears by the testimony of Miller and the copy of the

account. Exhibit C. As to his purchase of the goods from Hale, Miller testified: "I was working for G. W. Hale at the time I delivered this merchandise to Mr. Knapp. I became, while working for Mr. Hale, the owner of certain wheat, flour, and bran by transfer from Hale, who owed me \$111, and he [Hale] had wheat and bran in Knight's Ferry, and he told me I could have it, and sell until I was clear of it. \* \* \* They were transferred to me in part payment of my claim against Hale for \$111. \* \* \* Mr. Hale had this merchandise in Knight's Ferry. He was owing me \$111, and he says: 'Now I want to pay you. Will you take that wheat, and sell it whenever you can, and take your pay out of it?' And I said I would, and Knapp bought it and said he would settle with me. \* \* \* Hale's agreement was for me to take the flour and sell it, and collect the money. The flour was at Tulloch's mill, Knight's Ferry. No transfer was made to me at Tulloch's mill. The wheat and flour belonged to Hale, and when I got it from Tulloch I receipted for it in my own name. I am positive I signed my own name." At this point six receipts to Tulloch of different dates signed "G. W. HALE, per I. N. MILLER," were produced, and the witness and plaintiff's counsel admitted that they were the receipts given by Miller for the goods in question. As to the sale and delivery by Miller to Knapp, Miller testified: "I hauled a load to Mr. Knapp's at his [Knapp's] request, and delivered it on my account to him; delivered the items set out in that account. [Plaintiff's Exhibit C.] Some of this wheat and these other goods were left with Mr. Preston in his warehouse, at Jamestown. They were afterwards delivered to Mr. Knapp upon my account, before he died. They are my goods at the present time. Hale and I were not interested in the goods. I did not tell Mr. Knapp that they were delivered on Mr. Hale's account. \* \* \* Have received in all \$85, and no more, on account of the claim, from Knapp and his clerks at different times, after the delivery of the goods, and before the assignment to Preston. \* \* \* I can't tell when I got the first amount of money from Mr. Knapp. I kept it in my head, what I drew. Had not been in the habit of drawing money from him. I had my money deposited with him. Never drew against the money. Got the first of this \$85 after delivery of most of the stuff. Have no memory of the money I received. Eighty-five dollars is the whole amount; \$75 of that from Mr. Knapp, \$10 of that from W. H. Knapp. Think the largest amount at any one time was \$40; that was in the store at Columbia." W. H. Knapp, called by plaintiff, testified that he was the son of Sewell Knapp; that he was keeping his father's books during the time the goods were delivered; that plaintiff's Exhibit A, viz.: "3625 wheat, 1573 lbs.; flour, March 24, '86. S. KNAPP, T."—was in his handwriting; that the books contained an account of the goods in question at the prices charged for them by plaintiff, but that they were credited to the account of Hale; that he did not remember paying anything to Miller on that

account; that he had paid Miller different amounts on his own account; that the book containing Miller's account was not present, but was in Columbia; that he never knew that Miller had any interest in the goods, and credited them to Hale, by his father's direction; that some of the goods were hauled from Jamestown by teams from Columbia. E. W. Murphy, a witness for plaintiff, testified that he had been driving and clerking for Knapp for the last eight years, and, as the agent of Knapp, he received from Miller that part of the goods in question described in plaintiff's Exhibit B, as follows: "Columbia, April 7, 1886. Rec'd of I. Miller 395 lbs. bran; 13 bbls. flour. S. KNAPP. E. M." That he understood from Knapp that the goods were to go to the credit of Hale, and so entered them on Knapp's books at the time. At Miller's request, he had given Exhibit B as a memorandum of the amount of bran and flour delivered. Neither Hale nor plaintiff was called as a witness by either party. On the part of the defendant, D. W. Tulloch testified that he delivered the goods from his mill to Miller, as the teamster and agent of Hale, and took receipts from him as such; that all the goods were not delivered to Miller, but that a teamster from Jamestown received a part of them. Considering all the circumstances, I think the evidence on the part of the plaintiff was insufficient to prove his case, even *prima facie*. It depends entirely upon the testimony of Miller, which, taken as a whole, seems to be both inconsistent and unreliable. That he "became the owner" of the goods is his legal conclusion from the facts that Hale authorized him to sell the property and apply the proceeds of the sale to the payment of Hale's indebtedness to him, amounting to \$111. The goods had not been actually, nor constructively, delivered to him before the time he says he became the owner of them, nor at any time before they were delivered to Knapp. The quantity of none of the different kinds of goods of which he says he became the owner—wheat, flour, bran, and middlings—had been ascertained or designated by weight, measure, or otherwise, nor separated from the whole quantity which Hale had stored at Tulloch's mill; and it seems incredible that it was ever the intention of the parties that Miller should take and become the owner of all Hale's wheat, flour, etc., stored at Tulloch's mill, of the market value of \$578.81, "in part payment" or in full payment of Hale's debt of only \$111. Miller's legal conclusion that he became the owner of the goods while they were stored at Tulloch's mill is only at par with his assertion that he was still the owner of them at the time of the trial. The reliability of Miller's testimony as to facts is tested, somewhat to its disadvantage, by the proof that he was, at least, mistaken in positively testifying that he received for the goods to Tulloch in his own name. Taken all together, I think the evidence, on this branch of the case, substantially tends to prove only that Hale authorized Miller, as Hale's agent, to sell and collect the pay for so much of the goods as might be nec-

essary to pay the debt of \$111, and to apply the proceeds to the payment of that debt. As to the alleged sale of the goods by Miller to Knapp, it is to be observed in the first place that Miller, except as agent for Hale, could pass to Knapp no better title to the goods than he had; and, in the second place, if he had no title, and passed none from himself to Knapp, there could have been no implied promise of Knapp to pay him the value of the goods. An implied promise, if any, must have been to pay the owner of the goods delivered, and not to pay the owner's servant or agent who delivered them. It follows that the plaintiff must recover, if at all, upon a valid, express promise of Knapp to pay him for the goods. Is the evidence sufficient to prove such a promise? It should be borne in mind that to Knapp, and all others who knew Miller's relation to Hale to be that of Hale's servant, as teamster, the acts of Miller in hauling and delivering goods were ostensibly and presumptively the acts of Hale, in the absence of notice to the contrary. Now the only evidence claimed to have any tendency to prove that Knapp had any notice that Miller owned or claimed the goods, or that he was selling or delivering them on his own account, or that Knapp promised to pay Miller, is the loose, indefinite testimony of Miller. He first testifies that, when Hale asked him if he would sell that wheat, and take his pay out of it, "I said I would, and Knapp bought it and said he would settle with me." Further on he says: "I hauled a load to Mr. Knapp's at his [Knapp's] request, and delivered it on my account to him; delivered the items set out in that account." Exhibit C. Yet that account states that a considerable portion of the "items set out" in it were delivered by Preston; and the witness proceeds to say: "Some of this wheat and these other goods were left with Mr. Preston in his warehouse, at Jamestown. They were afterwards delivered to Mr. Knapp upon my account." All this testimony of Miller seems to be intentionally evasive of the questions in dispute. He does not say that Knapp was informed, or had any kind of notice that the goods belonged to him, nor that they were delivered on his account. Nor does he say that Knapp "bought" the goods from him, or promised to pay him, but only that "Knapp bought it, and said he would settle with me." From whom did Knapp buy it, and what or on whose account did he say he would settle? It is possible, however, that Miller intended to be understood, and even supposed he had said, that he informed Knapp that the goods belonged to himself and not to his master or principal, and that he sold and delivered them on his own account; and, also, that Knapp promised to pay him. But, under the circumstances of this case, his testimony is too indefinite and uncertain to prove an express promise of Knapp to pay him for the goods. Considering the weakness and uncertainty of Miller's testimony, the failure to corroborate and strengthen it by the testimony of Hale and the plaintiff casts an additional shade of suspicion upon it, as Hale must have known all about

the transaction between himself and Miller, and the plaintiff could have explained the conditions and circumstances under which he delivered a portion of the goods to Knapp. No reason or excuse for not having called them as witnesses appears. The alleged payment of \$85 by Knapp to Miller is accounted for otherwise than as having been a payment on account of the goods. It is admitted that Miller had a running account and money on deposit with Knapp at the times he drew this money; and W. H. Knapp testified that the money was charged to Miller's account, as he understood it should be, when Miller drew the money. I think the judgment and order should be reversed, and a new trial granted.

We concur: GIBSON, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed, and a new trial granted.

PATERSON, J., dissenting.

84 Cal. 124

CITY AND COUNTY OF SAN FRANCISCO V.  
STRAUT *et al.* (No. 12,746.)

(Supreme Court of California. May 12, 1890.)

ADVERSE POSSESSION—WATER LOTS—PUBLIC TRUSTS.

Act. Cal. March 26, 1851, which grants the use of certain beach and water lots to the city of San Francisco for 99 years, with a proviso that the city shall pay into the state treasury, within 20 days after their receipt, 25 per cent. of all moneys arising from the sale of the property, does not create a trust in the city in favor of the state, so far as the land itself is concerned; and hence the city's title to such land is subject to extinguishment by adverse possession under the statute of limitations. Following *Holladay v. Frisbie*, 15 Cal. 631.

Department 1. Appeal from superior court, city and county of San Francisco.

Action by the city and county of San Francisco against William E. Straut and others to recover certain beach and water lots granted to the city by the act of March 26, 1851. There was a judgment for defendants, and plaintiff appeals. The provisions of the act of 1851 are thus stated by Justice FIELD in *Holladay v. Frisbie*, 15 Cal. 631: "By the act of March 26, 1851, a grant is made to the city of the use and occupation of the beach and water lots therein described, with certain specified exceptions, for the period of 99 years, with a proviso that the city shall pay into the state treasury, within 20 days after their receipt, 25 per cent. of all moneys arising in any way from the sale or other disposition of the property."

*Craig & Meredith*, for appellant. *Cope & Boyd*, for respondents.

Fox, J. The only question on this appeal is whether the claim of the plaintiff is barred by the statute of limitations. Confessedly it is so barred, unless the title of plaintiff was charged with a public trust, and for that reason not subject to extinguishment by adverse possession under the statute of limitations. The action is

ejectment for the recovery of one of the beach and water lots of San Francisco. It was found that the defendant Straut, and his lessor, Boyd, had been in the continuous, open, notorious, adverse possession of the lot for 12½ years next before the commencement of this action, and judgment went for defendants, from which, and an order denying a motion for new trial, plaintiff appeals.

The title of plaintiff is that, and that only, which was derived under the beach and water lot act. St. 1851, p. 309. Appellant claims that by the terms of the act the premises were "impressed with a public trust." Whether it was so impressed or not was determined by this court in *Holladay v. Frisbie*, 15 Cal. 631, where the court, speaking through Mr. Justice FIELD, said: "The right of the state to the percentage, and the obligation of the city to pay the same, can only arise after the city has parted with the estate, and received the consideration. \* \* \* Nor does the proviso create a trust in the city in favor of the state, so far as the property itself is concerned; that is to say, the estate granted is not, by force of the proviso, held in trust partly for the benefit of the state. \* \* \* The interest which the state reserved is to a portion of the proceeds arising upon the sale or other disposition of the property, if any proceeds were received by the city. \* \* \* The interest of the city in the beach and water lot property is a legal estate for ninety-nine years. \* \* \* The city may have \* \* \* parted with its interest in a variety of ways, without the receipt therefrom of any moneys." A reference to the act under which appellant claims fully justifies this decision. The grant is for a term, but during the term no beneficial interest in the land whatever is reserved to the state. The city is not required to sell. The only provision is that, if she does sell, she shall pay twenty-five per cent. of the proceeds of the sale to the state. The only right of the state is in the proceeds when realized, but with no obligation on the part of the city ever to realize any proceeds. The right of the city, therefore, for the term is as absolute a title and as free from trust as that of any private proprietor. The title thus granted may be extinguished by adverse possession, under the statute of limitations. *San Francisco v. Calderwood*, 31 Cal. 583. To the same effect is *Hoadley v. San Francisco*, 50 Cal. 274, 275, so far as relates to lands of the city not held in trust, or dedicated to a public use. See, also, *Yolo Co. v. Barney*, 79 Cal. 378, 21 Pac. Rep. 833. Judgment and order affirmed.

We concur: BEATTY, C. J.; PATERSON, J.

85 Cal. 22

KERCKHOFF-CUZNER M. & L. CO. V. CUMMINGS. (No. 13,600.)

(Supreme Court of California. Sept. 18, 1890.)

MECHANICS' LIENS—CONTRACTS NOT EXCEEDING \$1,000.

Code Civil Proc. Cal. § 1184, relating to mechanics' liens, which provides that no money shall be paid on a building contract by the reputed owner to the contractor until after the com-

commencement of the work, and that 25 per cent. of the contract price shall be reserved for at least 35 days after the completion of the work, applies only to those contracts where the price to be paid thereunder exceeds \$1,000, as provided by section 1183; and, where the contract price does not exceed \$1,000, the reputed owner may pay the whole of it to the contractor, either before the commencement of the work or during its progress, unless a written notice is served on him by the laborers or material-men, that they have performed labor for, or furnished material to, the contractor, or that they have agreed so to do, as prescribed by section 1184. Following *Sidlinger v. Kerkow*, 22 Pac. Rep. 932. BEATTY, C. J., and THORNTON and FOX, JJ., dissenting.

Commissioners' decision. In bank. Appeal from superior court. Los Angeles county; LUCIEN SHAW, Judge.

Action to enforce a lien for material by the Kerckhoff-Cuzzner Mill & Lumber Company against George Cummings and another. There was a judgment in plaintiff's favor, and defendant Cummings appeals. Section 1183, Code Civil Proc., (as amended 1887,) provides: "All such contracts shall be in writing when the amount agreed to be paid thereunder exceeds \$1,000, and shall be subscribed by the parties thereto; and the said contract, or a memorandum thereof, setting forth the names of all of the parties to the contract, and description of the property to be affected thereby, together with a statement of the general character of the work to be done, the total amount to be paid thereunder, and the amounts of all partial payments, together with the times when such payments shall be due and payable, shall, before the work is commenced, be filed in the office of the county recorder of the county, or city and county, where the property is situated; \* \* \* otherwise they shall be wholly void, and no recovery shall be had thereon by either party thereto; and in such case the labor done and materials furnished by all persons aforesaid, except the contractor, shall be deemed to have been done and furnished at the personal instance of the owner, and they shall have a lien for the value thereof." Immediately following this provision of section 1183 is the following provision of section 1184: "No part of the contract price shall, by the terms of any such contract, be made payable, nor shall the same or any part thereof be paid in advance of the commencement of the work, but the contract price shall, by the terms of the contract, be made payable in installments at specified times after the commencement of the work, or on the completion of specified portions of the work, or on the completion of the whole work: provided, that at least 25 per cent. of the whole contract price shall be made payable at least thirty-five days after the final completion of the contract. \* \* \* In case such contracts and alterations thereof do not conform substantially to the provisions of this section, the labor done and materials furnished by all persons, except the contractor, shall be deemed to have been done and furnished at the personal instance and request of the person who contracted with the contractor, and they shall have a lien for the value thereof."

*Wells, Guthrie & Lee*, for appellant.

*Graves, O'Melveny & Shankland*, for respondent.

GIBSON, C. The plaintiff furnished certain building material of the value of \$429.87 to the defendant Singer, for the alteration and repair of a dwelling-house owned by the other defendant, Cummings, who had contracted with Singer to have him alter and repair said dwelling-house, and furnish the necessary material therefor. To recover the value of the material so furnished of Singer, and to enforce a lien claimed therefor upon the house of Cummings, this action was brought, and resulted in a personal judgment against Singer, who defaulted, and a foreclosure of the lien claimed upon the property of Cummings. From the judgment so rendered against him, Cummings appeals. The appellant in his answer set up as a separate defense that he entered into a verbal contract with Singer, by which Singer was to make certain repairs on the appellant's house, and furnish material for the same, for the sum of \$451, portions of which sum were to be paid every Saturday night as the work progressed; that while the work was being done, payments were made, and after it was completed Singer was paid in full: that during the performance of the contract by Singer, the respondent did not serve any notice upon the appellant to the effect that it had furnished material for the building to Singer, but that about one month after the work had been completed, and the appellant had paid Singer, the contractor, in full, the respondent notified the appellant that there was a certain amount due for material furnished to Singer; that appellant thereupon notified respondent that Singer had been paid in full, and there was nothing due from the appellant to him. To this portion of the answer the respondent demurred upon the ground that it did not constitute a defense to the action. The demurrer was sustained, and the trial was had with such portion of the answer eliminated. The ruling thus made presents the only question in the case, as to whether notice is necessary from the material-man to the owner, in cases where the contract price does not exceed \$1,000, in order that the owner may be required to hold back sufficient money due or that may become due the contractors to meet the claim of the material-man, and satisfy any lien he may file therefor. The respondent, in support of the ruling of the court below, sustaining the demurrer to the answer, contends that all contracts between the reputed owner and the contractor, whether the price to be paid thereunder exceeds \$1,000 or not, as provided for in section 1183 of the Code of Civil Procedure, are subject to and controlled by section 1184 of the same Code, which requires the price, payable under contracts between the reputed owner and the contractor, to be paid in money, and in installments after the commencement of the work, and the reservation of one installment of at least 25 per cent. of the whole price for at least 35 days after the completion of the work; and that the contract price under the contract in this case having been made payable in a

manner different from that prescribed by section 1184, the contract was of no effect as to respondent, and the only notice it (respondent) was required to give was the filing of the lien within the proper time. This contention is contrary to the doctrine of *Sidlinger v. Kerkow*, 82 Cal. 42, 22 Pac. Rep. 952. In that case, it was held that the provisions of section 1184, relative to the payment of the price payable under contracts between the reputed owner and contractor, do not apply to such contracts when the price does not exceed \$1,000, but only to such contracts when the price exceeds that sum; and that a contract in which the price to be paid does not exceed the sum last mentioned is effective as to all persons who may perform labor for, or furnish material to, the contractor, or both. This being so, it is clear that no part of the contract price under such a contract need be withheld by the reputed owner; and he may pay the whole of it to the contractor before the commencement or after the completion of the work, unless the notice prescribed in section 1184 is given. That section provides that any person, except the contractor, who performs labor, or furnishes material, or both, may at any time give to the reputed owner a written notice containing the requisite specifications that he has performed labor, or furnished material, or both, to the contractor or other person acting by the authority of the reputed owner, or has agreed to do so. "Upon such notice being given, it shall be the duty of the person who contracted with the contractor to, and he shall, withhold from his contractor, or from any other person acting under such reputed owner, and to whom by said notice the said labor, or materials, or both, have been furnished or agreed to be furnished, sufficient money due, or that may become due to such contractor, or other person, to answer such claim, and any lien that may be filed therefor for record under this chapter, including counsel fees not exceeding \$100 in each case, besides reasonable costs provided for in this chapter." This notice must be given in time to intercept the money in the hands of the reputed owner; otherwise the payment of it to the contractor in accordance with the terms of the contract, which, as has been shown, may be made to suit themselves when the contract price does not exceed \$1,000, will operate as a complete discharge as far as the reputed owner is concerned; because section 1183 makes a contract between the reputed owner and the contractor, regardless of the amount of the contract price, a lien to the extent of the whole contract price in favor of all persons, except the contractor, and, as to him, for whatever remains after the claims of the others are satisfied, thus making the liability of the owner to all persons, except the contractor, who performs work or supplies material, depend upon whether there is anything due on the contract to the contractor. And if the contractor be paid in full before the notice prescribed in section 1184 is given, the mechanic, laborer, and material-man are remediless, except as against the contractor personally. In the

present case, the answer of the owner avers that the contract between himself and the contractor was verbal; that the price to be, and that was, paid thereunder was less than \$1,000; that it was to be, and was, paid every Saturday night as the work progressed; and that the last installment was paid upon the completion of the work; that the only notice that he received was about one month after he had paid the contractor in full. These averments, if true, under the construction given to sections 1183 and 1184 in *Sidlinger v. Kerkow*, are sufficient to constitute a defense on the part of the appellant, who is the owner of the building, against the claim of lien of the respondent for the material furnished. It may be well to remark that the only notice which, from the record, appears to have been given by the respondent to the appellant was that resulting from the filing of the lien 29 days after the completion of, and the full payment for, the work. We therefore advise that the judgment appealed from be reversed, and the trial court directed to overrule the demurrer to the answer.

We concur: VANCLIEF, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment appealed from is reversed, and the trial court is directed to overrule the demurrer to the answer.

We dissent, and will file a dissenting opinion: BEATTY, C. J.; THORNTON, J.; FOX, J.

(86 Cal. 58)

*In re MOORE'S ESTATE.* (No. 13,540.)  
(Supreme Court of California. Sept. 16, 1890.)

#### APPEALABLE ORDER.

Where a testator appoints his wife trustee to manage the estate, and in the event of her death before his grandchildren, who are to succeed her in the trust, come of age, then the trust to devolve upon his son, and the wife voluntarily renounces the trust, and procures an order substituting the son as trustee, no appeal lies from a subsequent order vacating the first, as it is not enumerated among the appealable orders in Code Civil Proc. Cal. § 963.

In bank. Appeal from superior court, Yolo county; C. H. GAROUTTE, Judge.

In regard to appeals from orders in probate proceedings, Code Civil Proc. Cal. § 963, subd. 3, provides that appeals may be taken "from a judgment or order granting, refusing, or revoking letters testamentary, or of administration or of guardianship, or admitting or refusing to admit a will to probate, or against or in favor of the validity of a will, or revoking the probate thereof, or against or in favor of setting apart property or making an allowance for a widow or child, or against or in favor of directing the partition, sale, or conveyance of real property, or settling an account of an executor or administrator or guardian, or refusing, allowing, or directing the distribution or partition of an estate or any part thereof, or the payment of a debt, claim, legacy, or distributive share, or confirming or refusing to confirm a report of an appraiser setting apart the homestead."

include the area aforesaid." The survey made under this decree included by metes and bounds land below the line of ordinary high tide. The patent following the survey described the lands by metes and bounds, but recited the decree of confirmation. *Held*, in ejectment for the lands below high tide, that the north, east, and west boundary lines given in the decree and recited in the patent would prevail over those given in the survey and the granting clause of the patent, as there was no power by which land could be included in the survey and patent, the claim to which had not been confirmed by the decree. McFARLAND, J., dissenting.

2. Plaintiff, to make his *prima facie* case, had the right to prove by surveys and maps, accompanied by parol evidence, that the premises were below the line of high tide at the date of the conquest.

3. This evidence is not overcome by a patent read by defendant which includes the premises, if the patent shows upon its face that, by reason of the specific boundary also given in the patent, the officer making it had no power over land below high tide.

4. The officer had no power to act upon land not confirmed to the Mexican grantee; nor can he by issuing a patent conclusively adjudicate upon his power over such land.

5. The evidence of plaintiff was admissible, and upon all the evidence the judgment is affirmed.

In bank. Appeal from superior court, city and county of San Francisco; JAMES G. MAGUIRE, Judge.

*E. F. Preston and James A. Waymire, (Samuel Wilson and Thomas B. Bishop, (amici curiæ),* for appellants. *Doyle, Galpin & Scripture*, for respondent.

PATERSON, J. This is an action of ejectment to recover a block of land lying below ordinary high tide in the city and county of San Francisco, and being a portion of that part of San Francisco known as "Mission Creek Lands." The defendant claims under a patent of the United States to the city, issued June 20, 1884, in satisfaction of a pueblo grant of four square leagues, which was confirmed, by the decree of the United States circuit court, May 18, 1865. The tract confirmed by this decree is described as "a tract situated within the county of San Francisco, and embracing so much of the extreme upper portion of the peninsula above ordinary high-water mark (as the same existed at the date of the conquest of the country, viz., 7th of July, 1846) on which the city of San Francisco is situated, as will contain an area of four square leagues. Said tract being bounded on the north and east by the bay of San Francisco, on the west by the Pacific ocean, and on the south by a due east and west line drawn so as to include the area aforesaid," subject, however, to certain deductions for lands previously reserved or dedicated to public use by the United States. Under the decree referred to a survey was made, and on August 13, 1868, was approved by the United States surveyor general for the state of California, which fixed the southern boundary of the land by following the high-water mark, thus excluding the lands of Mission creek, of which the land in suit is a part. Subsequently, in 1884, the secretary of the interior caused another survey to be made, one line of which ran directly across the mouth of Mission creek, thus in-

cluding the lands of Mission creek as a part of the grant to the city. The patent to the city recites the decree confirming the grant. Plaintiffs' claim of title is based upon a deed from the tide-land commissioner to Ellis, dated November 24, 1875, and subsequent conveyances to them. They contend that the state, upon its admission into the Union, by virtue of its sovereignty, became seised of the land, it being tide-land. This right of the state, they claim, is recognized by the decree confirming the grant to the city. It is claimed that the patent is bound to follow the decree in fixing the boundary at high-water mark, and that so much of the patent as attempts to convey lands below high-water mark is void, because in excess of the authority of the officials issuing the patent. Appellant contends that a party in an ejectment suit cannot question the validity of a United States patent for land upon the ground that it does not follow the decree confirming the grant; that the patent from the United States government to the city and county of San Francisco for the pueblo lands confirmed to it under the acts of congress of March 3, 1851, and of July 1, 1864, by the decree of the United States circuit court, which patent conforms in its description of the lands granted to the final survey, made as provided in the latter act in accordance with the instructions of the commissioner of the general land-office, is conclusive evidence, as against the state of California and its grantees, of the right of the city and county to all the land embraced within the exterior limits of the survey, including tide-lands lying below the line of ordinary high tide. It is said that the question is no longer an open one in this state. The case of *People v. San Francisco*, 75 Cal. 338, 17 Pac. Rep. 522, is cited and relied on in support of this contention. It did not appear in *People v. San Francisco*, whether the decree of confirmation was made a part of the patent. In this case it is shown that the patent contains full recitals of the decree, and shows upon its face that the tract confirmed embraced "so much of the extreme upper portion of the peninsula above ordinary high-water mark (as the same existed at the date of the conquest of the country, viz., 7th of July, 1846,) on which the city of San Francisco is situated, as will contain an area of four square leagues," etc. It shows that three sides of the tract are bounded by natural monuments, namely, "on the north and east by the Bay of San Francisco, on the west by the Pacific ocean, and on the south by a due east and west line drawn so as to include the area aforesaid." If it be conceded, however, that the decision referred to covers the questions involved as fully as is claimed by the appellant, we feel satisfied that the supreme court of the United States would not follow it in this case or any other, involving the same questions, which might go to that court on a writ of error. "It has always been the practice here to adopt that view of a legal question which has been taken by the supreme court of the United States, when the question is within the branch of the jurisdiction of that



court which may be exercised by writ of error to this court." As the question is a federal question, it is one which will be decided ultimately by the supreme court of the United States. *Belcher v. Chambers*, 53 Cal. 685.

The question involved in this case is whether the officers of the land department had power to patent land outside of the natural boundaries given in the decree of confirmation. If the land department had no jurisdiction to act, if any portion of the land described in the patent was not a part of the public domain, or if there was no legislation authorizing its conveyance by the land department, then, under the decisions of the United States supreme court in *Doolan v. Carr*, 125 U. S. 618, 8 Sup. Ct. Rep. 1228, and other cases therein cited, the patent is inoperative to pass the title; and objection can be taken to it on these grounds at any time, and in any form of action. Upon her admission into the Union, the state of California became the owner, by virtue of her sovereignty, of all the tide-water lands within her borders lying below high-water mark, except such as had been disposed of by the Mexican government prior to the treaty of Guadalupe Hidalgo. The territory acquired from Mexico was by the express terms of that treaty taken by the United States subject to the trust of protecting all legal and equitable interests of prior grantees under the former sovereign. The state, of course, could not take more than the United States received; and the claim of the state, by virtue of her admission and her sovereignty, was subordinate to such prior equities, and subject to the power of the federal government to confirm prior Mexican grants, and to locate grants of specific quantities of land within the exterior boundaries of larger tracts. *Lux v. Huggin*, 69 Cal. 255, 10 Pac. Rep. 674. The United States government has exercised the power vested in it, and has, through its courts, and the officers of its land department, attempted to define the boundaries of the four leagues of land to which the city of San Francisco, as successor in interest of the pueblo of San Francisco, a Mexican citizen, was entitled. The court, having jurisdiction to hear and determine the right of this claimant, finally confirmed its claim to four square leagues of land in the extreme end of the peninsula, giving, as the boundaries thereof on the west, the north, and the east, the natural lines of high-water mark, leaving the southern boundary to be fixed by the surveyor on such a line as would include, between it and the high-water lines north of it, said four square leagues of land. This, it seems, the surveyor did not do; but, ignoring the natural boundaries fixed by the court in its decree for the west, north, and east, ran his line below the line of high tide, and across the mouth of Mission creek, and included within his description the lands described in the complaint,—lands of the state not included within the decree of confirmation. Following the survey, the patent describes the land by metes and bounds.

The government of the United States is in duty bound to carry into effect the stip-

ulations contained in the treaty of Guadalupe Hidalgo; but the power to do so must be exercised in the manner provided by congress; and it would seem that when congress vested in the federal courts the power to determine the rights of Mexican claimants, and provided (section 7) that in making the survey the surveyor general should "follow the decrees of confirmation as closely as practicable, whenever such decree designates the specific boundaries," and that "it shall be the duty of the commissioner of the general land-office to require a substantial compliance with the directions of the section before approving any survey and plat forwarded to him," the officers of the land department are, as to such lands, merely auxiliary to the court, with special and limited jurisdiction to carry out its decrees. Section 13 of the Act of 1851 (9 U. S. St. 631) provides that "the patent shall issue to the claimant upon his presenting to the general land-office an authentic certificate of confirmation, and a plat or survey of said land, duly certified and approved by the surveyor general, whose duty it shall be to cause all private land claims which shall be finally confirmed to be accurately surveyed, and to furnish plats of the same; and in the location of said claims the said surveyor general shall have the same power and authority as are conferred on the register of the land-office by section 6 of the act, 'to create the office of surveyor of the public lands for the state of Louisiana,' approved March 3, 1831." Under this provision, we think it clear that the power of the surveyor general is restricted to the claim as finally confirmed. It has been decided in several cases, on appeal from decrees of confirmation, that the description must be followed; that "the decree is a finality, not only on the question of title, but as to the boundaries which it specifies." *U. S. v. Halleck*, 1 Wall. 455; *Fossat Case*, 2 Wall. 649; *Higuera v. U. S.*, 5 Wall. 829; *Van Reynegan v. Bolton*, 95 U. S. 35. In *Higuera v. U. S.*, the court declared that "confirmation must precede the survey which is made subject to such an order, and, if the decree of confirmation is so indefinite and incongruous that it cannot be executed, then it is void, and of no effect, and the claim to the land stands upon the same footing, in legal contemplation, as a claim which was never presented to the commissioners for adjudication." In the *Fossat Case* the court held that it was not competent for the district court to depart from its own decree in the exercise of the power conferred by the act of June 14, 1860; that the court was bound to execute the decree by fixing the lines of the grant in conformity with the provisions of the decree, the decree being not only the foundation of the validity of the grant, but of the proceedings in the survey and location of the land confirmed. In that case, as in this, the decree provided for specific boundaries on three sides of the tract, and left one side to be surveyed. If the court, which then had the power to supervise and confirm or reject the survey, as the land department now does, could not alter or depart from the specific boundaries

given in its own decree, how can the officers of the land department? These cases, to be sure, were direct appeals to the supreme court of the United States; but they bear directly upon the question of the authority of the officers of the land department to patent lands outside of the boundaries of the decree of confirmation, and that is the question here. If the land granted is not within the power of the officer, the grant or patent is invalid. In *Polk v. Wendal*, 9 Cranch, 87, Chief Justice MARSHALL said: "There are cases in which a grant is absolutely void, as where the state had no title to the thing granted, or where the officer had no authority to issue the grant." In *New Orleans v. U. S.*, 10 Pet. 662-781, the court said: "It would be a dangerous doctrine to consider the issuing of a grant as conclusive evidence of right in the power which issued it. On its face, it is conclusive, and cannot be controverted; but if the thing granted was not in the grantor, no right passes to the grantee." So in this case, unless congress has given the land department power to dispose of land belonging to the state of California,—lands lying outside of the boundaries of the decree,—a patent to land shown to be outside of such decree is invalid. In *Wright v. Roseberry*, 121 U. S. 488, 7 Sup. Ct. Rep. 985, it appeared that land which had been previously granted to the state by the swamp-land act was held by the defendant under a patent from the United States issued on a pre-emption claim. The court held the patent to be invalid as a conveyance, because the land was not, at the time it was patented to the defendant, within the granting power of the land-office. The state of California took the lands in controversy, in 1850, as effectually as if she had received them by grant from congress. If the land department had the power to determine that land outside of the decree of confirmation should be conveyed, it would necessarily have the power to pass on its own right to convey the land, but the decree of confirmation was the foundation of the power to make the patent. It precedes and limits the power of the officers of the land department. If the latter are not limited by the decree, then the court may confirm a tract in one place, and the officers locate it in another, and the patent which attempts to convey the latter tract controls the former. This cannot be, for the whole power of deciding what shall be granted in pursuance of the treaty is intrusted to the judicial department. Section 7 of the Act of 1864 (18 U. S. St. 334,) shows that the power of the land department is limited by the provisions of the decree: "It shall be the duty of the surveyor general of California, in making surveys of private land claims finally confirmed, to follow the decree of confirmation as closely as practicable whenever such decree designates the specific boundaries of the claim; but, when such decree designates only the out-boundaries within which the quantity confirmed is to be taken, the location shall be made, as near as practicable, in one tract, and in a compact form, \* \* \* and it shall be the duty of the commissioner of the general land-office to require a sub-

stantial compliance with the directions of this section before approving any survey and plat forwarded to him." Here is an emphatic declaration by congress that the decree is the limit of the power of the land department, and shows very clearly, we think, that congress has not given to the officers of the land department the exclusive and final power of determining whether any land is within or without the location of the decree, or of locating grants in places where the courts have not located them. If such power is not conferred upon the land department, any attempt to convey land outside of the permanent boundaries named in the decree is not an error of judgment simply, but is an act void for want of jurisdiction. Under the laws of Mexico existing at the time of the treaty, lands below and within 200 *varas* of the sea-shore could not be held in private ownership, (*Wheeler, Land Titles*, 18;) and the land-officers of the United States could not, in the absence of a judicial adjudication that such land belonged to a Mexican claimant, convey to him. "All that place is called 'sea-beach' which is covered by the waters of the sea when at its highest point during all the year." *Hall, Mex. Law*, 448. The king could not alienate such lands. *New Orleans v. U. S.*, 10 Pet. 726; *Milne v. Girodeau*, 12 La. 824. The shore of the sea is that part of the land covered by water in its greatest ordinary flux, the ports, bays, roadsteads, and gulfs, and the rivers, although they may not be navigable, (*Mission creek is navigable*,) their beds, mouths, and the salt marshes. *Hall, Mex. Law*, 448-508; *Civil Code Mex.* art. 802.

A patent cannot be issued by the land department to a person not named in the decree, because the courts, and not the department, are given the power to determine the persons to whom the lands were granted by Mexico. If the judgment of the court should decree that the grant is a forgery, and therefore void, and the land department should patent the land claimed, the action of the department would be shown to be void upon the production of the decree, because congress has given to the courts jurisdiction to determine the validity or invalidity of the claim. Of course, in cases where the court, by its decree, has established the validity of the grant, and a tract of a certain number of acres has been confirmed to be located within the exterior limits of a larger tract, it is left to the officers of the land department, in their discretion, to locate and survey the requisite number of acres within the larger tract; and their action in execution of the decree is not subject to attack in any collateral proceedings, because it is within their jurisdiction, and in pursuance of the decree. In such cases there cannot possibly be any conflict between their action and the directions of the decree. It is auxiliary to the decree, and as conclusive as the decree itself. Unless we bear in mind the distinction between cases of this kind—the confirmation of a certain number of acres to be located within the exterior boundaries of a larger tract, and designated by the supreme court of the United States as "floats"—

and cases in which the boundaries, or some of them, are definitely fixed by the decree, the decisions upon the subject will appear to be very conflicting. An examination of the authorities cited at the argument of this case and the argument of *People v. San Francisco*, with this distinction in view, will illustrate the principle stated, and explain what would otherwise seem to be a conflict of decisions on the subject. In *Moore v. Wilkinson*, 13 Cal. 478, relied on by parties claiming under the patent from the United States, the court regarded the grant "as conveying an interest to four leagues lying within a larger tract." Page 186. It is true the patents, in some cases, seem to have gone beyond the boundaries of the *deseno*, and yet they were held not to be void; but it was so held in each case because the parties attacking the patent had no title to land lying outside of the exterior boundaries, and were not, therefore, in a position to attack the validity of the patent. In *Doolan v. Carr*, the court held (only WAITE, C. J., dissenting,) that one who had not even connected himself with the paramount source of title might question the validity of the patent. 125 U. S. 618, 8 Sup. Ct. Rep. 1228. In *Ward v. Mulford*, 32 Cal. 369, the district court, as it had the right to do under the law then applicable to its decrees, had reviewed the survey, and confirmed it. Even if its action were irregular, it was not void. But at the time the grant before us in this case was confirmed the surveyor was not required to report his action to the court for confirmation, and no report was made. In *Chipley v. Farris*, 45 Cal. 539, the patent covered only a portion of the tract described in the decree, but not the land in controversy. Plaintiff had no legal title, because no patent had been issued to him under the decree. The question as to the power of the land department to patent lands outside of the boundaries of the decree was not involved. Within the boundaries of the decree it may act. Without the boundaries it has no jurisdiction. Furthermore, in that case the descriptions were both by metes and bounds, and it is expressly admitted by respondent in that case, in his written points, that if the side lines of the tract in controversy were the sea-shore a different rule would apply. In *Teschemacher v. Thompson*, 18 Cal. 11, the court assumed that the grant was of "a specific quantity lying in an area of larger extent." Page 24. In *Cassidy v. Carr*, 48 Cal. 339, there was no conflict between the decree and the patent. The survey and patent, as the court said, simply carried out the decree, and were conclusive between the parties. Of course, where "the survey and the patent but carry out the decree" the patent is conclusive between the parties. In none of the cases cited is the question of the power of the officer to issue a patent for land not embraced in the decree considered. It does not follow logically that, because the patent is conclusive in all cases where the land department had jurisdiction, it is conclusive as to all lands lying without the boundaries of the decree, as well as

within them. The surveyor cannot incorporate into the decreelands not confirmed, nor can he shift on the surface of the earth the natural boundaries,—mountains, bays, or oceans. The presumption always is, doubtless, that the metes and bounds follow the decree; but to hold that the positions of the natural monuments are indisputably fixed by the course and distances of the surveyor, and approval of the land-officers, would be placing a construction upon the acts of congress never intended by that body, and not warranted by the decisions of the national courts. The land department has power to do what the court cannot do, viz., locate, survey, and patent tracts of land designated by the court within larger areas; and when a rancho is confirmed by name to fix its boundaries, but when the court itself, in its decree, fixes one or more of the boundary lines, the department has no jurisdiction to go beyond it. The distinction between the different kinds of grants is clearly and fully stated in *U. S. v. McLaughlin*, 127 U. S. 428, 8 Sup. Ct. Rep. 1177, and in *U. S. v. Curtner*, 38 Fed. Rep. 1. In *Doolan v. Carr*, supra, the court said: "There is no question as to the principle that, where the officers of the government have issued a patent, in due form of law, which on its face is sufficient to convey the title to the land described in it, such patent is to be treated as valid in actions at law, as distinguished from suits in equity, subject, however, at all times, to the inquiry whether such officers had the lawful authority to make a conveyance of the title. But if those officers acted without authority; if the land which they purported to convey had never been within their control, or had been withdrawn from that control at the time they undertook to exercise such authority,—then their act was void,—void for want of power in them to act on the subject-matter of the patent, not merely voidable. In which latter case, if the circumstances justified such a decree, a direct proceeding, with proper averments and evidence, would be required to establish that it was voidable, and should therefore be avoided. The distinction is a manifest one, although the circumstances that enter into it are not always easily defined. It is, nevertheless, a clear distinction, established by law, and it has been often asserted in this court that even a patent from the government of the United States, issued with all the forms of law, may be shown to be void by extrinsic evidence, if it be such evidence as by its nature is capable of showing a want of authority for its issue." Under this and other decisions, including many decisions of this court, (*McLaughlin v. Powell*, 50 Cal. 64; *McLaughlin v. Heid*, 63 Cal. 208; *Railroad Co. v. McCusker*, 67 Cal. 67, 7 Pac. Rep. 122; *Mining Co. v. Oliver*, 75 Cal. 194, 16 Pac. Rep. 780, quoted approvingly in *Wright v. Roseberry*, supra,) the evidence offered and admitted was competent, relevant, and material, and fully established the findings of the court. The deeds to Ellis, and evidence of the location on the earth's surface of the line of high tide, were properly admitted.

Now, if it be true, as a matter of law, that the surveyor general had no power to include in a survey any land, the claim to which was not confirmed by the decree of the circuit court, and that neither the commissioner of the land-office nor the secretary of the interior had any power to direct or approve such a survey, the only question is, which of the west, north, and east boundary lines, respectively, shall prevail, those given in the decree, and recited in the patent, or those given in the survey, and employed in the granting clause of the patent? In determining this question, there is no violation of the principles which forbid a collateral attack upon such instruments. There is no such attack. It becomes simply a question of construction. Both descriptions are upon the face of the patent, and the case is one in which the plaintiffs claim that the defendant's title depends upon a deed describing the property by natural boundaries, and also by metes and bounds; that the description by metes and bounds includes land not included within the natural boundaries, and which defendant claims to own, but which is in fact owned by plaintiffs; that their title should be quieted because the natural and permanent boundary lines should prevail over the description by metes and bounds. A determination of this question will in no way affect the location of the south line. By the decree, the surveyor was to fix that line; but, if the surveyor had run his line through the bay of San Francisco, and taken in lands of the state lying below the high-water mark on the eastern shore of the bay, or lands lying in the foot-hills of the county of Contra Costa, would it be contended that the patent, although reciting the decree confirming four leagues on the peninsula of San Francisco, with the bay of San Francisco as the eastern line thereof, is conclusive evidence, as against the estate or its grantees, of the right of the city and county of San Francisco "to all the lands embraced within the exterior limits of the survey, including tide land lying below the line of ordinary high tide," and in fact conclusive against everybody as to all lands included in the survey, wherever located? If the plaintiff, in the case supposed, would not be prevented from showing that the metes and bounds included land belonging to him, not confirmed by the decree, and which the land-officers could not convey, why may he not show the same thing in this or any other kindred case? In *More v. Massini*, 37 Cal. 432, the court said: "The call for the seashore as the southern boundary must be regarded as the more definite and certain, and will prevail over a call for a mere station, and over the courses and distances."

But, whether we consider it as a collateral attack, or a mere matter of construction, it is clear, we think, that, under the decisions of the supreme court of the United States in *Doolau v. Carr*, supra, and other cases there cited, "want of power in an officer of the land-office to issue a land patent may be shown in an action at law by extrinsic evidence, although the patent has been issued with all the forms

of law required for a patent of public land." There were no errors in the rulings of the court. The evidence shows beyond doubt that the land in controversy is outside of the natural boundaries of the decree. The judgment is therefore affirmed.

We concur: WORKS, J.; FOX, J.; SHARFSTEIN, J.

THORNTON, J. I concur in the judgment, and will file an opinion hereafter.

I dissent: MCFARLAND, J.

#### IN BANK. ON REHEARING.

(Sept. 4, 1890.)

FOX, J. This case was first heard and an opinion thereon filed in department.<sup>1</sup> Subsequently a rehearing in bank was granted, and after argument a decision was filed January 2, 1890. This was followed by divers petitions for a second rehearing, representing that the case was one of great public importance, involving the validity of land titles to a very considerable and what is now a very valuable portion of the city of San Francisco, and in view of the alleged importance of the questions involved, a rehearing was granted. Upon this hearing elaborate oral arguments have been made, and all who desired have been permitted to file printed briefs and arguments, all of which have been carefully considered, and we are still constrained to adhere to the conclusion first reached in bank, and announced in the opinion written by Mr. Justice PATERSON. This is not, as assumed on behalf of appellant, a case of conflict between two parties, both claiming under the government of the United States; nor is it a case where one is claiming under patent issued by the government of the United States, and the other is a mere naked trespasser, failing to connect himself with any paramount source of title. The defendant, and those who are situate like him, and on whose behalf argument is here made, claims under the pueblo of San Francisco. That pueblo claimed, and derived its title, not under the government of the United States, but under the government of Mexico. Its grant was not a special one, made by the supreme legislative authority of the sovereign state, but was one made by the ministerial officers of the government, under, and necessarily in conformity with, its general laws. Necessarily so, for if the ministerial officers exceeded the authority conferred upon them by law, then their act was void. It must, therefore, be assumed that the grant was only such as the ministerial officers were authorized by law to make.

The patent of the United States, invoked by the appellant, is not an original grant,—does not emanate from the source of title,—but is a mere acknowledgment that the pueblo had title from the Mexican government, the predecessor of the United States, and a release of all claim on the part of the United States to the property found by its judicial tribunals to have been so vested in the pueblo. The

<sup>1</sup> Not reported.

patent was not necessary to invest the pueblo with title, for its title existed at the session of the territory. It was recognized by the decree of final confirmation, (cited in the former opinion,) and as shown by that decree it was of a fixed and definite quantity of land, with its boundary on three sides fixed and established by the terms of the original grant, and marked by the hand of nature as limited by the shores of the sea. It required to be surveyed for one purpose only, that of so fixing and establishing the boundary which was left undetermined by the original grant as to secure the given quantity, exclusive of that which was held by title paramount within the natural boundaries so fixed and the survey so made. The patent was only evidence of the pre-existing title. *Waterman v. Smith*, 13 Cal. 419.

The only purpose of a survey was that of establishing the one undetermined line, the southern line, of the body of land to which the pre-existing title should attach. In the case of this pueblo, it undoubtedly became necessary, in order to secure the quantity, to make a general survey of the whole, and also a survey of the several parcels within the exterior boundaries which were confessedly held by adverse claimants holding under paramount title; but this necessity and power existed only for the purpose of ascertaining and determining the one undetermined and uncertain boundary line, that on the south. The right to make that survey, and establish that boundary, belonged to the political department of the government, and could not be exercised by the courts. But the court could ascertain and fix the position of the natural boundaries which were designated in the grant, and did do so. While the courts could not and cannot interfere with the action of the political department of the government in fixing the one boundary which was left undetermined by the grant as finally confirmed, they must determine whether the prior rights of third parties have been interfered with by the survey and patent issued thereon. While the survey and patent are conclusive upon the courts in actions of ejectment, they are so only when not in conflict with the prior rights of third persons, and in such actions their inconclusiveness can be asserted to the extent essential for the protection of such prior rights. *Moore v. Wilkinson*, Id. 486.

The patent, so far as it is construed as a conveyance, is to be construed only as a quitclaim, releasing to the patentee such interest as the United States possessed in the land conveyed by the original grant, and it takes effect by relation at the time when the proceedings were originally instituted before the board of land commissioners for the confirmation thereof. As a record of the government, it is evidence that the claim asserted was valid under the laws of Mexico, (*Yates v. Smith*, 38 Cal. 71;) but it is valid as such record only to the extent that it conforms to the decree of the judicial department of the government in reference to those matters upon which the judicial department were empowered to decide; that is to say, the de-

creed of confirmation, with reference to the fixed natural boundaries, and to the survey made by the political or ministerial department, established the only boundary which was not fixed and determined by the patent. As a deed it can convey nothing which the government had not the power to grant or confirm at the date of filing the petition for confirmation. See *Doolan v. Carr*, 8 Sup. Ct. Rep. 1228, cited by Mr. Justice PATERSON, and cases therein cited. It certainly could convey nothing which was not at that time vested, and never afterwards became vested, in the United States, and this question may be inquired into, upon collateral attack, in an action of ejectment. In *Snelling Co. v. Kemp*, 104 U. S., 641, the supreme court of the United States, in passing upon this question of collateral attack upon a patent in an action of ejectment, says: "If they [the lands embraced in the patent] never were public property, or had previously been disposed of, or if congress had made no provision for their sale, or had reserved them, the department would have no jurisdiction to transfer them, and its attempted conveyance of them would be inoperative and void, no matter with what seeming regularity the forms of law may have been observed. The action of the department would in that event be like that of any other special tribunal not having jurisdiction of a case which he had assumed to decide. Matters of this kind, disclosing a want of jurisdiction, may be considered by a court of law. In such case the objection to the patent reaches beyond the action of the special tribunal, and goes to the existence of a subject upon which it was competent to act." In the later case of *Wright v. Roseberry*, 121 U. S. 519, 7 Sup. Ct. Rep. 985, the same court again considers the question, and not only quotes and approves the foregoing, but also the following passage: "A patent may be collaterally impeached in any action, and its operation as a conveyance defeated, by showing that the department had no jurisdiction to dispose of the lands; that is, that the law did not provide for selling them, or that they had been reserved from sale, or dedicated to special purposes, or had been previously transferred to others. In establishing any of these particulars, the judgment of the department upon matters properly before it is not assailed, nor is the regularity of its proceedings called into question; but its authority to act at all is denied, and shown never to have existed." And still later, in *Doolan v. Carr*, supra, the same court again says: "A patent may be collaterally impeached in any action, and its operation as a conveyance defeated, by showing that the department had no jurisdiction to dispose of the lands, \* \* \* or that they had been previously transferred to others." In view of these recent and oft-repeated decisions of the court of last resort, to which the question can be carried, there can no longer be a doubt about the right of the courts, even in actions of ejectment, when the parties present and rely, as in this case, upon a patent from the United States, to inquire as to whether or not the description given in the patent includes

land which the government or its officers had no power to convey. This being so, then, when the patent was offered in this case, the plaintiff had a right to challenge its validity, not perhaps as to everything that it purported to convey, but as a conveyance of a particular tract for the recovery of which the action is brought, on the ground that that tract was not embraced within the lands covered by the grant which the patent was intended to evidence, and was not land of which the government or its officers had the power to make valid conveyance. Being so challenged, it is found and conceded that the land lies, not on or near the southern boundary of the four leagues for which the grant is confirmed,—the only boundary which the ministerial officers of the government were required, authorized, or empowered to establish,—but midway between the northern and southern extremities of said four leagues, and near to, but outside of, the eastern boundary thereof, as said boundary had been fixed and established by the laws of the nation making the grant, and found and confirmed by the judicial department of the government in its decree of confirmation. Was it outside of that boundary? It is found, and at the argument admitted, to be below ordinary high-water mark, in a navigable arm of the bay of San Francisco. If so, it was outside the boundary line of the grant, under the laws of the country by which the grant was made. Under the laws of that country, these lands below ordinary high-water mark constituted the beach, or sea-shore, and, "with respect to the ownership, it pertains to the nation which is mistress of the country of which it forms a part; and, with respect to use, to all men." *Leyes*, 3, p. 6, tit. 28, p. 3. The king could not alienate such lands. See *New Orleans v. U. S.*, 10 Pet. 728, and other authorities cited by Mr. Justice PATERSON. That the government did not alienate them is established by the decree of confirmation quoted in the former opinion, by which decree it is expressly declared that the lands so granted, and of which confirmation is decreed, are bounded on the "north and east by the bay of San Francisco, and on the west by the Pacific ocean." That the ministerial officers of the government were bound by the description given in that decree, so far as the decree did give definitive boundaries, and had no right to include in the patent lands outside of such boundaries, is abundantly established by the authorities cited by Justice PATERSON in his opinion.

Again, the land in dispute was not land which the government had the power to grant at the date of the filing of the petition for confirmation. Not having been granted by the Mexican government before the conquest, it remained the property of the sovereign. The petition for confirmation was not filed until long after the admission of California into the Union. Immediately upon such admission, the state, by virtue of her sovereignty, became seised of the land, the same being tide-land of the bay of San Francisco. The land did not, therefore, belong to the United States and even congress had no

power to grant it to another. *Quoad* this land, the patent is absolutely void, for the reason given in *Polk v. Wendall*, 9 Cranch, 87, cited on behalf of appellant,—the government in whose behalf the patent was issued had no title to the thing granted. It is claimed on behalf of appellant that the doctrine of *stare decisis* should be applied to this case, and that, when so applied, the question here involved is *res adjudicata*, under the decision of this court in *People v. San Francisco*, 75 Cal. 389, 17 Pac. Rep. 522. We do not think so. That case was decided on demurrer to a complaint which admitted on its face that the patent was in "due form of law," was based upon a survey certified to have been made in strict conformity with instructions of the commissioner of the general land-office, which instructions had been given under the directions of the secretary of the interior, was issued under the great seal of the United States, and purported, by virtue of the authority of said decree of confirmation, and in pursuance thereof, to grant and convey to the city of San Francisco the land embraced and described in the plat and survey, and including the premises within the exterior boundaries thereof. See page 393. The decree itself is also copied in full into the opinion, (see page 392,) but did not there, as here, appear to have been a portion of the patent. It shows upon its face that the grant, as confirmed, was bounded on the east by a natural boundary, to-wit, ordinary high-water mark of the bay of San Francisco, as the same existed at the date of the conquest of the country, namely, the 7th of July, 1846. This decree has been accepted, and become final, and settles the question for this and all other courts, and for all other officers and tribunals, as to what was included in the grant, so far as this eastern boundary was concerned. But the court, on demurrer, was bound to take as true the allegation of the complaint that the survey was made and patent issued "by virtue of the authority of said decree, and in pursuance thereof," and that it did "grant and convey to the city of San Francisco the tract of land" embraced and described in said plat and survey, and "including the premises within the exterior boundaries thereof." Taking these allegations to be true, the bill being *quia timet*, affirmance of the judgment which had been rendered for defendant on the demurrer necessarily followed. But it is insisted that the case did not go off upon the proposition that these allegations must be taken as true; but the court considered and determined the broad question of the conclusiveness of the patent as the same is here and now presented. This seems to have been the course pursued by the court, and it furnishes the strongest possible argument for refusing to accept the opinion then given as conclusive of the case at bar, for it was one not necessary to the decision of the case. But disregarding that point, the court was not then convincing in its reasoning, or happy in its selection of authorities in support thereof. Neither of the three recent decisions of the supreme court of the United States cited above,

and referred to in the opinion of Mr. Justice PATERSON, were cited by counsel, or referred to by the court. It is hardly possible that the conclusion of the court in *People v. San Francisco*, as to the conclusiveness of the patent as a conveyance of land below ordinary high-water mark, could have ever been reached, if the attention of the court had been called to the cases of *Smelting Co. v. Kemp*, *Wright v. Roseberry*, and *Doolan v. Carr*, supra. In fact, the two later cases were decided after the briefs were filed in *People v. San Francisco*.

One of the cases upon which the court rests its conclusion in *People v. San Francisco* is that of *Cassidy v. Carr*, 48 Cal. 339. In that case the claimant held under a Mexican grant held to be a perfect grant. It was confirmed to the extent of two leagues, and no more, although he claimed to have received juridical possession of a larger quantity. He took no appeal. In due time his two leagues were surveyed off, the survey approved, and patent issued. He accepted the patent, and then the question in the action was whether he could still claim title to lands not included within the survey given in the patent, but claimed to have been included within the limits of his original juridical possession. The court held that having accepted the patent he was estopped from claiming lands outside the boundaries of the description therein given. The question was so different from the one here involved that we are unable to see how the decision constitutes any authority upon this question whatever. In *Moore v. Wilkinson*, 13 Cal. 487, another of the cases relied upon in support of that opinion, the grant was for merely four square leagues, but within a tract almost without limit as to extent or a western boundary; and the order was that "the judge who may give possession will cause the same to be measured according to the ordinance, leaving the remainder which may result to the nation for its proper uses." Upon confirmation, approved survey, and patent, the same being for four leagues, and no more, the question was whether persons without title, but claiming to have settled within the exterior boundaries of the tract from which the four leagues were to be taken prior to the confirmation and survey, and to have filed declaratory statements as pre-emptors, could attack the patent on the ground that the patented lines did not conform to the juridical possession. The court held that in such a case they could not; that the patent was conclusive of the validity of the grant, of its confirmation, of the survey, and its conformity with the confirmation, and of the relinquishment to the patentee of all the interest of the United States in the land patented. It could hardly have held otherwise, for the survey was within the natural exterior boundaries named in the grant, of which, as in this case, natural exterior boundaries were given on three sides, and within those natural exterior boundaries no valid pre-emption claim could be made until survey and segregation of the grant. But the case is in no

sense parallel to the one at bar, or the one in support of which it is cited. *Chipley v. Farris*, 45 Cal. 539, is another of the cases cited in support of that decision. It, like that of *Cassidy v. Carr*, was a case where the grantees, having received and accepted his patent, was seeking to claim lands excluded from the patent. It was not authority for the case in which it was cited, and is not in this. *Teschemacher v. Thompson*, 18 Cal. 11, is also cited and relied upon as authority to the conclusiveness of the patent, and also that the Mexican government had power and authority to make grants of these lands. As we read that case, it does not support either of these propositions. The lands in controversy there were not within the boundaries of or near any pueblo or other probable seat of commerce. The great body of the land in controversy was not below ordinary high-water mark, but salt marsh,—lands above ordinary and below extraordinary high-water mark. Incidentally, it was claimed, and the supreme court held, that in that case the boundary of the Mexican grant ran to ordinary low-water mark; and that, the sea-shore having been granted by the Mexican government at that point, the state took in subordination to the grant; and that her rights were postponed to and must abide the event of the action of the general government in the settlement of that private land grant; and that the patent was conclusive of the fact that the land had so been granted by the former government. In that case, also, the survey was one approved by the judicial department of the government. Here the government, through its judicial department, has determined that the lands below ordinary high-water mark were not included in the grant, and directed that the survey be made accordingly. Not being so included, and the court having so decreed, it follows that the rights of the state were not subordinate to, or postponed to the settlement of, the grant to the pueblo. The same may be said of *Ward v. Mulford*, 32 Cal. 345, also cited in support of that decision. It was almost on all fours with *Teschemacher v. Thompson*, and was decided on the authority of that case. In that case, as in the others, both the grant and the survey thereof had been confirmed by the judicial department of the government, and included the salt marsh. The court properly held that where the Mexican government had before the conquest granted those lands, the rights acquired by California by virtue of her sovereignty were subordinate to the grants so made. There is nothing in the conclusion reached now, or on the former hearing of this case in bank, in conflict with these authorities. The difference is found in the facts. There it was adjudged in and by the decree of confirmation that the lands in dispute had been granted by the Mexican government before the conquest; here it has been adjudged and determined in and by the decree of confirmation that they had not been so granted. The adjudication in both cases is final.

The only remaining case cited in support of the opinion in *People v. San Francisco*



is that of *Leese v. Clark*, 18 Cal. 574, 20 Cal. 425. All that was decided in that case bearing upon the case at bar was that "the defendants, taking whatever interest they possess in subordination to the future action of the government \* \* \* in determining the location of the older grant, are in no position to question these proceedings;" and that "the term 'third person' refers, not to all persons other than the United States and the claimants, but to those holding independent titles, arising previous to the acquisition of the country." Both of these propositions may be accepted as true, but they do not militate against the view we have taken of this case. The plaintiffs in this case, it is true, do not claim by virtue of an older grant than the Mexican government. What they claim is that the *locus in quo* was never granted, and under its laws could not have been granted, by the ministerial officers of the government of Mexico; that this fact is established, not only by reference to the laws of Mexico, but also by the final adjudication of the courts of the United States in and by the decree of confirmation of the grant which was made; that, not having been granted, it remained at the date of the conquest the property of the nation, and passed as such to the United States; that, the United States having made no grant thereof upon the admission of California into the Union, September 9, 1850, it became the property of the state by virtue of her sovereignty, and the United States could not thereafter make a valid grant thereof. The state did not take in subordination to the older grant, and her rights were not postponed until the settlement of the rights of the older grantee: for there was no older grant in any manner affecting the property, none which included it even within its exterior boundaries. And on all the authorities this conclusion seems to be correct.

*Teschmacher v. Thompson and Ward v. Mulford* may be accepted as authority for the proposition that the Mexican government could, and sometimes did, make grants covering the salt marsh lying between the high lands and the sea-shore,—the lands between the high-water mark of extraordinary tides at the full of the moon, or spring-tides, and the ordinary high-water mark of the tides in their daily ebb and flow, and even sometimes extended the grant below ordinary high-water mark; but that fact does not prove that she could, or ever did, make grants of lands lying on the sea-shore, below the ordinary high-water mark of the daily ebb and flow of the tides, within the boundaries of a pueblo. In *People v. San Francisco* the court says: "No authority has been cited in support of the statement that, by the law of Mexico, tide-lands could not be included within the pueblo lands." That may have been true, but the court failed to mark the distinction between "tide-lands" and "sea-shore;" between lands made productive by the occasional overflow of the tides, and lands made barren by the regular and daily overflow thereof. Of the one, it had before it two examples of the fact, estab-

lished by decree of the federal courts, that the Mexican government could and sometimes did grant them; of the other, no example has ever been furnished where the government made such a grant. That it did not make a grant of such lands in this case is attested by the decree of confirmation. In support of the proposition that a pueblo could not own land below ordinary high-water mark, the court was then cited to, and we again cite: *Dwinelle*, Col. Hist. San Francisco, addend. 42; *Wheeler*, Land Titles San Francisco, 13; *Civil Code Mex.* art. 802; *Dom. Civil Law*, bk. 7, tit. 8, § 1, art. 1; *Hall*, Mex. Law, § 1466; *New Orleans v. U. S.*, 10 Pet. 662; *Mayor v. Maynow*, 1 Mart. 207; *Milne v. Groleau*, 12 La. 824. There being no grant to which the rights of the state were subordinate, and to the settlement of which the rights of the state were postponed, she became vested with the title immediately upon her admission into the Union. Thereafter there was no power in the government of the United States to make a grant of the land; and the act of its ministerial officers in including it within the survey and patent of a grant theretofore made was in excess of their jurisdiction, in violation of the decree of confirmation, and void. The patent, so far as these lands were concerned, was in effect but the execution of the decree of confirmation. *U. S. v. Minor*, 114 U. S. 242, 5 Sup. Ct. Rep. 836. "When a decree gives the boundaries of a tract to which the claim is confirmed with precision, and has become final, it is conclusive, not only on the question of title, but also as to the boundaries which it specifies." *U. S. v. Hancock*, 133 U. S. 196, 10 Sup. Ct. Rep. 264. And it was the duty of the surveyor, in making a survey of the claim finally confirmed, to "follow the decree of confirmation as closely as practicable, whenever [and wherever] such decree designates the specific boundaries of the claim." *Id.*; section 7, Act Cong. July 1, 1864, (13 St. 334.) Surely, if a ministerial officer, in executing a decree which fixes specific boundaries, includes land excluded by the decree from those boundaries, his act can have no force or validity as a conveyance, and especially so if the party executing the conveyance has no title. As in *Jones v. Martin*, 13 Sawy. 317, 35 Fed. Rep. 348, so here. The meander line down the coast was necessary for the purpose of ascertaining quantity, "but, when done, it was the shore line as fixed by nature, and shown upon the ground, and not the meander line as run by the surveyor, that determined the boundary of the grant."

But there is still another aspect in which this case may be viewed. We have spoken of the rights of this pueblo as a pre-existing title. That pre-existing title was never a fee, under the Mexican law. A grant to a pueblo was not "a private land grant" in the sense which took title out of the state. It was the mere vesting in the pueblo,—a political subdivision of the state,—of the use of the land in trust for the benefit of the inhabitants thereof, and with power, as the representative of the state, to make grants which should vest title in private ownership of *solares*, or house lots,

and *suertes*, or sowing lots, to settlers; the remainder to remain vacant, to the end that gifts thereof might be made to new settlers. These grants, as they are generally called, did not deprive the state itself, at any subsequent period, of making what are technically denominated "private land grants," vesting title in natural persons of any portion of the land lying within the four leagues of the pueblo which had not already passed into private ownership; and this power on the part of the state was not unfrequently used. It was notably so used in several instances within the pueblo of San Francisco, and the grants so made by the state within the pueblo have been recognized and confirmed. And, as heretofore shown, the power of the pueblo to make grants that should vest title in private ownership, unlike that of the state, did not extend to that of making grants upon the sea-shore. The fee of all the land which had not passed into private ownership remained always in the government, and that upon the sea-shore was unincumbered by the trust or power conferred upon the pueblo. The result was that, upon the conquest, all the property upon this peninsula which had not already passed into private ownership became part of the public domain of the United States, and subject to the same laws as affected other portions of the public domain. But in executing or carrying out the provisions of the treaty of Guadalupe Hidalgo, our government added the features of our own town-site laws, and saw fit to vest in the successor of the pueblo the fee of that over which before the pueblo had exercised power only as the agent of the sovereign. The land thus became subject to the combined trusts created by the Mexican law relating to pueblos, and the American law relating to town-sites. In this sense, and this only, the patent from the United States became a grant; but as such it could convey nothing which had at the conquest become a part of the public domain, unincumbered with the trust resting in the pueblo. The premises being a portion of the public domain, unincumbered by said trust, the title thereto, in accordance with the laws of the United States, passed out of the federal government before the making of the patent.

It is claimed on behalf of appellant that quantity was the controlling element in the decree of confirmation. It is enough to say that while quantity was required, and the claimant was entitled to quantity, it was no more controlling than the natural boundaries on the north, east, and west, fixed by the decree. And the decree itself gave leave to go south for quantity, but it did not give leave to go north, east, or west for quantity, even if the government had possessed lands of its own in those directions which it had power to appropriate to make up quantity.

In view of what was said in the former opinion, which this is not intended either to supersede or modify, but merely to supplement, it does not seem necessary to further extend this discussion. After a careful review of all the authorities cited and arguments made, we still adhere to the conclusion reached in said former opin-

ion in bank, that the judgment of the court below must be affirmed. So ordered.

WE CONCUR: SHARPSTEIN, J.; PATERSON, J.

THORNTON, J., (*concurring*.) In whatever point of view this case may be regarded, I am of opinion that the evidence was admissible to show that the land in controversy was situated below the ordinary high-water mark of the bay of San Francisco, as it existed on the 7th day of July, 1846. Whatever the right of the pueblo was to the land, for which confirmation was sought by the city of San Francisco, it was never held to extend below the ordinary high-water mark of the bay. It was so adjudged by the decree of confirmation entered in May, 1865. The act of congress of March 8, 1865, ratified the decree as it was made and entered. If there was no judicial determination, binding on the state, fixing a different boundary from that of high-water mark as determined by the decree, the evidence above referred to, in my judgment, was clearly admissible. As the decree adjudges to the city nothing beyond high-water mark, evidence was admissible to locate this line so as to show that the land sued for was outside of that line. In my opinion, the patent which sets forth the decree shows no different determination as to this line from that set forth in the decree itself. The patent shows the only other determination insisted on; and this, when rightly construed, does not vary from the decree. To rightly construe the patent, the whole of it must be taken into view, and, regarding all its parts, high-water mark should be held to be the controlling call, to which course and distance must yield. The patent is but the execution of the decree. *U. S. v. Minor*, 114 U. S. 241, 242, 5 Sup. Ct. Rep. 836. The survey and the patent are made to carry out its provisions. The maxim that public officers are presumed to do their duty comes in aid of the view that the line of high-water mark is the controlling call. The officers who made the survey and issued the patent should not be presumed to have gone beyond the decree which they were to carry out, if it can be justly held that their acts show that they are consistent with its requirements. See *More v. Massini*, 37 Cal. 432-436; *Jones v. Martin*, 13 Sawy. 317, 35 Fed. Rep. 348. I adhere to my concurrence in the opinion of Justice PATERSON delivered on the previous hearing of this case, and will add that I perceive nothing in the opinion of Justice FOX inconsistent with the opinion of Justice PATERSON. With these views, I must hold that the judgment should be affirmed.

McFARLAND, J. I dissent. I could not express my views of the question involved in an original opinion as satisfactorily to myself, and certainly not as satisfactorily to others, as they are expressed in the deliberate opinion of this court, delivered by Mr. Justice McKINSTRY in the recent case of *People v. San Francisco*, 75 Cal. 388, 17 Pac. Rep. 622. The reasoning of that opinion and the authorities therein cited are, to my mind, unanswerable and conclusive.

It is said that in that opinion the court was not happy in its selection of authorities, and that it ought to have been controlled by *Doolan v. Carr*, 125 U. S. 618, 8 Sup. Ct. Rep. 1228; *Wright v. Roseberry*, 121 U. S. 488, 7 Sup. Ct. Rep. 985; and *Smelting Co. v. Kemp*, 104 U. S. 636. But it happens that all the authorities cited in *People v. San Francisco* dealt with the very matters involved in this case, that is, with rights claimed under Mexican grants; with the conclusiveness of United States surveys and patents in such cases; and with powers exercised under the act of March 3, 1851, and subsequent acts to ascertain and settle such claims in the state of California. On the other hand, *Doolan v. Carr* merely decides that the United States land department has no power to issue a patent to a railroad company for land as "public land" which lies within a Mexican grant. *Wright v. Roseberry* merely decides that, when land has been segregated and identified as swamp land, a United States patent issued for it afterwards is worthless; and, as to *Smelting Co. v. Kemp*, it merely holds that a patent to a mining claim cannot be attacked collaterally in a court of law. I cannot possibly see how any of these cases have any bearing whatever on the power of the United States government, under the treaty with the Mexican government, to determine the rights of land claimants under the latter government by any methods and through any tribunals which she may choose to adopt for that purpose. As to any rights which the state of California had at the time of that treaty, it is sufficient to say that she had not then been born. Moreover, the case of *People v. San Francisco* was decided after the fullest argument and consideration, having been heard twice; and, as it established a rule of property, it is a case to which, in my judgment, the rule of *stare decisis* should be strictly applied. I think, therefore, that the judgment in the case at bar should be reversed.

We concur: BEATTY, C. J.; WORKS, J.

#### KENYON v. KENYON.<sup>1</sup>

(Supreme Court of Utah. Jan. 29, 1861.)

##### DIVORCE—JURISDICTION—WAIVER OF OBJECTIONS.

1. The granting of divorces is not a part of either chancery or common-law jurisdiction, which is conferred in general terms on the district courts by Organic Act Utah, § 9, and hence Rev. Laws Utah, p. 162, § 1, which provides that the probate courts shall have jurisdiction in all cases of divorce, is not in conflict with the organic act in this particular.

2. The legislature has power to confer such jurisdiction on the probate court under the provision of section 9 of the organic act, which creates such court, that its jurisdiction "shall be as limited by law."

3. The fact that defendant in a divorce suit brought in the district court has answered will not affect his right to object to its jurisdiction, as all the proceedings already had therein are *coram non iudice*.

<sup>1</sup> This case, filed January 29, 1861, is now published by request, with 16 others, in order that the Pacific Reporter may cover all cases in volume 8, Utah Reports.

Appeal from district court, Carson county.

*Stephen DeWolf*, for appellant. *Broadhead & James*, for respondent.

KINNEY, C. J. Susan Kenyon filed her petition in the district court for divorce, charging adultery, and praying that the bonds of matrimony between her and her said husband be totally dissolved, also for the care and custody of the children, and for a separate estate out of the property of the defendant. Kenyon answered, denying the facts charged, and alleged that the petitioner was herself guilty of the crime imputed to him. A bill of exceptions was taken on the trial, by which, it seems, among other objections made to the jurisdiction of the court and overruled, was one that the district court had no jurisdiction of the action of divorce. The court decreed a divorce from bed and board, the care and guardianship of the children, and \$2,500 as alimony to the plaintiff. The defendant appeals, and contends, under the statutes of Utah, the district court has no jurisdiction whatever over cases of divorce. Other questions are raised, but this is the only one necessary to consider. Section 1, p. 162, Rev. Laws, is relied upon in support of this position. It provides "that the court of probate in the county where the plaintiff resides shall have jurisdiction in all cases of divorce and alimony, and of guardianship and distribution of property connected therewith." If this statute is not in conflict with the organic act, it is supreme, and must be observed. It is not in conflict unless it either derogates from the powers exclusively conferred upon the district courts by the act, or confers unwarranted powers upon the probate courts.

Part of section 9 reads as follows: "And be it further enacted that the judicial power of said territory shall be vested in a supreme court, district courts, probate courts, and in justices of the peace." After providing for a supreme court, it enacts that "the said territory shall be divided into three judicial districts, and a district court shall be held in each of said districts, by one of the justices of the supreme court, at such time and place as may be prescribed by law, and the judges shall, after their appointments, respectively reside in the districts which shall be assigned them. The jurisdiction of the several courts herein provided for, both appellate and original, and that of the probate courts and justices of the peace, shall be as limited by law." Then follows an inhibition upon justices of the peace; and the section further provides that the supreme and district courts respectively shall possess chancery as well as common-law jurisdiction. The judicial power of the territory is vested in four separate and distinct courts. The legislation as to one of these courts, that of justice of the peace, is restricted and confined within certain well-defined bounds, but, with this exception, the jurisdiction of the several courts shall be as limited by law, except that the legislature cannot curtail the chancery and common-law jurisdiction of the supreme and district courts. No

law of the territory can deprive these courts of the power to exercise this jurisdiction, because it is conferred by a higher authority. The portion of the section under consideration contains two radical provisions, two inseparable legislative barriers: (1) Against conferring jurisdiction upon justices of the peace in certain cases; (2) against encroaching upon the common-law and chancery jurisdiction of the supreme and district courts. Is the statute conferring exclusive jurisdiction upon the probate courts in actions of divorce an interference with this jurisdiction of the district courts? To arrive at a proper solution of this question we must inquire what is meant by chancery and common-law jurisdiction. Chancery jurisdiction may be defined to be a judicial power to hear and determine all cases wherein the law, for its universality, cannot afford relief. Early in the history of jurisprudence the administration of justice in the ordinary courts was found to be incomplete, and hence arose the necessity of separate courts of equity, which were organized about the reign of King Edward III. for the purpose of correcting that wherein the law was defective; and matters of fraud were among the objects to which the jurisdiction of chancery was originally confined. Soon after these courts were established in England a fierce struggle arose between the law and equity courts in relation to the jurisdiction and powers of each; but, as we trace the history of English jurisprudence, we find the prejudice which at first existed on the part of the common-law courts yielding to the necessity and utility of a distinctive equity jurisprudence. *Arnold v. Grimes*, 2 G. Greene, 77. Follow this court from the reign of Edward III., at first feeble and affording relief in only a very few cases, until it branches out with enlarged powers, and builds up a stately jurisprudence of its own both in England and America, and, with its extended jurisdiction, we venture the assertion that as an equity court, purely without the aid of statute, it has never entertained a case of divorce so as to render a final decree between the parties. The application for divorce from bed and board is not necessarily an equity proceeding. It may be either at law or in chancery, as the legislature may prescribe. In England, until very recently, it was confined exclusively to the ecclesiastical or spiritual courts, and in the United States the petition is filed either in the chancery or law courts, according to the provisions of the statutes of the different states. The celebrated case of *Burch v. Burch*, recently tried in Illinois, appears to have been at law, and the entire case tried by a jury. In other states the chancellor hears and tries the issue, in some instances upon written evidence alone, and in others upon written and oral. We say, then, that the jurisdiction in divorce cases does not necessarily belong to chancery; and that clause of the organic act which confers upon the district courts chancery jurisdiction is not violated by the statute of Utah giving another court the right to try all cases of divorce. But the question arises, is not the common-law jurisdiction

of the court trampled upon? Common-law jurisdiction we understand to mean the power of the court to hear and determine cases according to the rules of common law. Statutes are frequently invoked in aid of the common law; but common-law courts, as such, are not dependent upon statutes, unless they have become incorporated into and form part of the common law, which is often the case with old English statutes. It is no part of the powers of common-law courts to grant divorces from bed and board. Cases of this kind do not belong to their jurisdiction as common-law courts, and without the aid of statutes such courts are powerless. Opposed to this view we are referred to the case of *Wightman v. Wightman*, 4 Johns. Ch. 343. That was a case where the plaintiff married the defendant under a fit of insanity, had never lived with her husband, and had continued under aberration of mind with only occasional lucid intervals. The question arose before the chancellor whether the court could take jurisdiction, as there were no statutes in the state of New York for divorce *a vinculo matrimonii* except in case of adultery, and the cause for divorce must arise after marriage. The learned chancellor declared the contract null and void *ab initio*, on the ground that the plaintiff had not the capacity to contract, any more than if she had been an idiot. But the court expressly says that the power resides somewhere to declare the contract void, and concludes that it must reside in that court, as it has an exclusive jurisdiction, not only over cases of lunacy, but of matrimonial causes. This decision, when properly examined, will be found to sustain the position we have assumed, that proceedings for divorce do not necessarily belong to either the chancery or common-law jurisdiction of the district courts.

Two questions only remain for our consideration: (1) Whether the legislature has granted to the probate court, by giving it jurisdiction in all cases of divorce, more judicial power than it is authorized to confer by the organic act; and (2) whether the defendant below, after having answered, could raise the question of jurisdiction. The judicial power of the territory is vested in certain courts. Among those named is the probate court. The jurisdiction of these courts shall be limited by law. We have seen that neither the common-law nor chancery jurisdiction of the district courts is infringed by providing for the probate court to grant divorces. This being the case, it follows that under that clause, "limited by law," the legislature has a right to select another forum to try, and clothe another tribunal with the power to hear and determine, actions for divorce. This tribunal is the probate courts, and we see nothing incompatible with the provisions of the organic act, or the organization of the district courts, to prevent the legislature from passing the law conferring exclusive jurisdiction in such cases upon these courts. But it may be said that the defendant could not object to the jurisdiction after having answered. This would be true if the court had jurisdiction of the

subject-matter, and the judgment did not appear upon the face of the record *coram non judice*. In the celebrated case of *Voorhees v. Bank*, 10 Pet. 449, the doctrine is well settled that, if the judgment is not warranted by the constitution or law of the land, the most solemn proceeding can confer no right which is denied to any judicial act under color of law, which can properly be deemed to have been done *coram non judice*; that is, by persons assuming the judicial function in the given case without lawful authority. *Wright v. Marsh*, 2 G. Greene, 94. The line which separates error in judgment from the usurpation of power is very definite, and is precisely that which denotes the case when a judgment or decree is reversible only by an appellate court, or may be declared a nullity collaterally when offered in evidence in an action concerning the matter adjudicated, or purporting to have been so. In the one case the record is absolute verity; in the other, mere waste paper. If, then, the court below exercised a power not conferred by the organic act, or the laws of this territory, and not inherent in the court, the judgment is void, and may be taken advantage of anywhere, or before any court. It is a principle as old as the law itself that consent cannot confer jurisdiction, and if the court proceeded to try the case and render the decree in an action over which it had no control, the jurisdiction of which rightfully belonged to another court, the answer of the defendant could not confer such jurisdiction, and the judgment is void. That such is the case we think we have abundantly shown by the fact that actions of divorce do not necessarily belong to courts of chancery or common-law jurisdiction; that they may be provided for by statute, and the judicial power of the territory residing in part with the probate courts, the legislature had the right, which they have exercised, to give them the exclusive control over these actions. The decree of the court below is reversed, and set aside.

CROSBY, J., concurred.

KERR v. WOOLLEY et al.<sup>1</sup>

(Supreme Court of Utah. Nov. Term, 1866.)

**SCHOOL TAX—VALIDITY OF LAW—INJUNCTION.**

1. Act Utah Jan. 18, 1865, provides that trustees of school-districts created under its provisions shall levy a tax whose rate is to be determined by a majority of the votes cast therein; but no provision is made for adjusting the amount of the tax to the necessities of the district, no appeal is allowed the tax-payers for the equalization of assessments, and the trustees are neither required to take oath nor to give bond for the faithful performance of their duty. *Held*, that the law is void as lacking all the proper sanctions and securities of a valid tax law.

2. The collection of such tax will be restrained at the suit of a tax-payer, both because there is no adequate remedy at law, and also to prevent multiplicity of suits.

3. As the only remedy provided by such act for non-payment of taxes is distraint and sale of

the delinquent's property, actions in the probate court for the amount of such taxes are unauthorized, and the judgments therein do not become *res adjudicata* in a suit for such injunction.

4. Under Organic Act Utah T. § 9, which confers chancery jurisdiction on the supreme court, that court may, in the exercise of its original jurisdiction, grant an injunction against the collection of a tax levied under a void law.

**Bill for injunction.**

*Hempstead & Thurman*, for complainant. *Snow & Gibbs*, for defendants.

TITUS, C. J. This case arises upon a bill in chancery of John W. Kerr against Edwin D. Woolley, William S. Godbe, John H. Rumell, and John H. Winder, praying the supreme court of Utah to prevent, by injunction, the collection of a school tax of 2½ per cent. on all taxable property of the thirteenth school-district of the said territory. The three first-named defendants are all who answer the bill, and they pray the court to refuse the injunction, and dismiss the bill with costs to them. It appears that the legislature of Utah, by "an act approved January 18, 1865, consolidating and amending the school laws," enacted, among other things, "that, where not already done, the county courts in the territory of Utah shall divide their respective counties into school-districts, and number the same, and shall notify the inhabitants, as soon as districts are formed, to meet within ten days, and choose three trustees who shall appoint their own clerk; and they shall act one year, and until successors are duly elected and qualified." It also required by the same act that "said trustees shall cause to be assessed and collected a tax upon all taxable property in said district, at such rate per cent. as may be decided upon by a vote of a majority of votes cast by the residents of said school-district, at a meeting called for that purpose; and, in case of neglect or refusal of any person to pay the tax assessed, upon being duly notified thereof, the trustees shall have power to collect the same as the territorial and county taxes are collected, to dispose of any taxable property, and any conveyance made upon the same shall be valid." The last section of this act repeals an act entitled "An act in relation to common schools," approved December 30, 1854; also an act approved January 20, 1860, and an act approved January 15, 1862. It appears by an act of the same legislature, "prescribing the manner of assessing and collecting territorial and county taxes, and for other purposes, approved January 20, 1865," (section 10,) "that, in case any person neglect or refuse to pay his tax when required, the assessor and collector are hereby required and empowered to take and sell enough taxable property belonging to the delinquent to pay his tax and cost of collection. Said property shall be sold to the highest bidder at public sale after at least six days' public notice shall have been given of the time, place of sale, and kind of property." From none of these acts, subsisting or repealed, does it appear that any responsibility or qualification is or ever has been required of school trustees in the territory. The usual oaths of fidelity and bonds and securities are all dis-

<sup>1</sup>This case, filed at November term, '866, is now published by request, with 16 others, in order that the Pacific Reporter may cover all cases in volume 3, Utah Reports.

pensed with. The subsisting act seems to confess this defect by providing that trustees chosen on notice from the county courts "shall act one year, and until their successors are elected and qualified." What sanctions are necessary to render these successors thus "qualified" are nowhere stated, however. It further appears that the whole tax thus assessed in the thirteenth school-district was between \$20,000 and \$30,000; that 13 other persons thus assessed with this complainant, for an aggregate of \$6,710.65, refused to pay the tax, and that these trustees, instead of pursuing the summary remedy provided in the act of their creation, sued each one of these persons in the probate court of Great Salt Lake county, severally, for his respective assessment; and that after judgment in that court, and bond filed on these cases, with securities satisfactory to the judge thereof, on appeal to the district court, the clerk of the probate court refused to furnish the transcript of its record for the prosecution of such appeal unless all his fees were prepaid. The complainant's bill also prays incidentally that further proceedings between these parties for the tax in question in the probate court be enjoined by this court. The allegations of the complainant's bill are that the act under which these defendants have been proceeding is null and void, for want of the requisite precautionary legal sanctions; that all the acts done under it are and can be no other than unauthorized and unlawful; and that this court has the power and ought to restrain the said defendants from all further proceedings against the complainant upon the law for the tax in question. On the contrary, the defendants in their answer affirm the validity of the law in question, deny the power and jurisdiction of this court to declare it void, and maintain that the judgment of the probate court, in favor of the defendants against the complainant for the tax in controversy, has rendered the case *res judicata* there, and that, therefore, it cannot be disturbed in the present proceedings.

Thus stands the case upon the pleadings and accompanying admissions. It must be conceded that there are, in jurisprudence, like axioms in exact science, certain fundamental principles which cannot be negatived or disregarded. Many of these have been recognized by the courts as well as positively declared by the highest legislative authority. Among other such, in the constitution of the United States, article 5 of the amendments, last two clauses of the article, we find that no person shall "be deprived of life, liberty, or property without due process of the law, nor shall private property be taken for public use without just compensation." This citation, which strongly illustrates the present case, justifies the subjoined statement of practical principles, which are submitted as self-evident in themselves, that is, no tax is legal which is not for some necessary or at least useful public purpose; no tax is legal where the amount arbitrarily exceeds the purpose of its creation; no tax is legal which is not equally and impartially laid on tax-payers; no tax is legal which is not eco-

nomical, honest, and responsible in its administration; and no tax is valid in so far as it fails to secure these conditions to the tax-payer in particular, and to the public in general. Taxation is always one of the most repulsive, and may be one of the most ruinous, exercises of public power. It can have, however, hardly a less exceptionable object than the support of common schools; and, were there no exceptions to the law in question, apart from its purpose, this court would scarcely feel itself authorized to disturb its operation. Nothing, however, appears to show that the tax in question is at all adjusted to the amount or purpose of its declared object. No estimates or exhibits are required by the law, and none appear to have been shown the residents when authorizing this tax, nor to those required to pay it since. The law under examination provides, (section 3:) "The trustees shall, out of the funds collected, see that a suitable building or buildings, with necessary appendages, are furnished wherein a school or schools shall be taught, keep the same in repair, and supply the same with fuel." Doubt has been justly expressed whether the power to "furnish," thus deduced by the law, would enable the trustees to buy, build, or rent a house. In the thirteenth school-district, as well as elsewhere, the school-houses are not unfrequently appended to meeting-houses much larger and more expensive than themselves. Under the ambiguous terms of this law, all, or nearly all, of a very large tax, ostensibly for schools, might then be applied to a very different object. An affidavit permitted by the defendants to be read on the hearing of the present case without objection, and not denied, even in argument, very emphatically indicates that such may have been the purpose of a large part of the tax in controversy. The present case, therefore, strongly illustrates the danger of loose legislation on this most important subject. The law under consideration provides no security for the equality and impartiality of the tax which it purports to authorize. No appeal is allowed the school-tax payer such as is authorized for territorial and county taxes. No court or other tribunal is opened to him where he may be permitted to show that his own tax is too high or his neighbor's too low. Indeed, the easy terms of reduction proposed for some of these assessments, as shown in the present case, and the fact that, with a very considerable reduction in others, some other of these assessments always remained the same, demonstrates that exact proportion was little understood or regarded by those to whom the administration of this tax was committed. The law itself does not pretend to furnish the tax-payer any security in this particular. The most valuable qualities in all tax laws are rapidity, cheapness, faithfulness, and impartiality in their administration; and no law ought to be enacted or maintained which provides no security for these particulars. No qualifications, no sanctions, no responsibilities are exacted of those who are to execute this law and deal with its moneys. Neither oaths nor bonds nor securities are

required for its faithful execution, and any attempt to supply them in practice, in the absence of legal authority, would probably be wholly futile. Swearing these trustees would have subjected all concerned to indictment "for the misdemeanor at common law of administering unnecessary and extrajudicial oaths." The letter of this law communicates no sanction to bonds or security under it. As already shown, no appeal or other remedy is allowed the tax-payer by the provisions of this law, and no security is required for the children, the parents, the tax-payer, or the public at large, that one dollar of the tax collected under it would ever reach its destined object. It is in vain to say that individual integrity is a sufficient guaranty. Elsewhere, and under other laws, the most powerful sanctions are found necessary to be exacted of the most eminent individuals as guaranties of their official fidelity. The present case authorizes us to dispense with none of these. No case, perhaps, can be found, which more emphatically challenges the action of a court in restraining rash and incomplete legislation, than the present one. 1 Kent, Comm. 447-449, 451, and cases there cited; 3 U. S. Dig. p. 482, § 3; *Ham v. McClaws*, 1 Bay, 93, and cases cited; 1 U. S. Dig. p. 565, § 236; 3 U. S. Dig. p. 482, § 4. For the absence, therefore, of all proper sanctions and securities which belong to a valid tax law, the one under examination ought to be declared null and void, in so far as it purports to confer a power upon these defendants—trustees—to assess and collect the tax in controversy.

The next question is, has this court power to declare in the present case? Section 9 of the organic act of Utah, among other things, declares "that the judicial power of the said territory shall be vested in a supreme court, district courts, probate courts, and justices of the peace;" and "the jurisdiction of the several courts herein provided for, both appellate and original, and that of the probate courts, and of justices of the peace, shall be as limited by the law: provided, that justices of the peace shall not have jurisdiction of any matter in controversy where the title or boundaries of land may come in question, or where the debt or sum claimed shall exceed one hundred dollars; and the said supreme and district courts shall respectively possess chancery as well as common-law jurisdiction." This proviso obviously refers to the original jurisdiction of the justices of the peace, and of the supreme and district courts, and places it, in the particulars mentioned, beyond the reach of Utah legislation. Further on in the same section, the whole appellate jurisdiction of the supreme court of the territory of Utah is thus conferred: "Writs of errors, bills of exceptions, and appeals shall be allowed in all cases from the final judgments and decrees of the district courts to the supreme court, under such conditions as may be prescribed by law." No grant of power or jurisdiction is limited which is not subjected to terms of limitation. Such is the chancery jurisdiction conferred by the above-cited clause on the supreme court of Utah. It is not appellate. It is

not alternative. It is subjected to no restriction or limitation whatever. It is precisely of the same kind as that conferred by the same clause on the district court, which is admitted to be original. This proviso does not confer appellate jurisdiction on the supreme court, for the whole of that is conferred by another and independent clause. The rule of construction which requires that, if possible, some effect shall be given to all parts of a statute, demands that we ascribe to this clause of the organic law the grant of original chancery jurisdiction to the supreme court of Utah. It is impossible that appellate jurisdiction could, in the language of the organic act above cited, be respectively passed by the supreme court. This is the description of an abstract and independent jurisdiction. An appellate jurisdiction is never thus abstracted in one court, but always applicable to both the subordinate and supreme courts. Its very description embraces both in terms. An appellate jurisdiction cannot be defined as common law or chancery in the manner they are defined in the proviso in question. Every appeal or writ of error carries the case from the court below to the court above, to be under the same code, whether chancery or common law, to which it was subjected in the court of its origin. It can be tried by no other. The very mention, therefore, of chancery jurisdiction in this proviso, shows that the granting power meant to confer by it an original chancery jurisdiction on the supreme court of Utah. The inevitable conclusion, therefore, is that the supreme court of Utah does possess original chancery jurisdiction, excepting in so far as it is limited by the nature of the court, or the necessity of the case. This jurisdiction might perhaps have been further limited by local legislation. It has not, however, been so limited. The evils apprehended from bringing remote cases to the supreme court in chancery here can hardly have a real existence. Certain it is that all the parties connected with the present are on the spot. The existence of a power is indirectly admitted by those who argue its abuse, possible or actual, as is done here.

The supreme court of the United States has its original chancery jurisdiction. The highest courts of the states, wherever equity jurisdiction exists, have theirs, perhaps without exception. Both the federal and state jurisdictions are combined in the territorial courts. *Benner v. Porter*, 9 How. 235; *Hunt v. Palao*, 4 How. 589. The power to issue injunctions is one of the highest of all chancery powers. It belongs, therefore, with peculiar propriety to the supreme courts, whether of the United States or of the states or of the territories, and to this court as one of the last-named class. The court having the power to issue injunctions originally in chancery, is the present case, as presented by the bill, a proper one for its exercise? The law under which the defendants assessed the tax in controversy has already been declared null and void, in so far as it purports to confer any taxing power on them. It follows, therefore, as an inevitable consequence, that the whole proceed-



ings of the trustees, defendants, under it, including the suits in the probate court, were altogether unauthorized and illegal. Further progress of these proceedings, therefore, can be no other than an expensive evil for which the common law furnishes no adequate remedy. The mere legal costs of a series of complicated litigation might and probably would be paid the successful parties in the end. But for their loss of time, enforced absence from business, professional expenses, and anxieties of litigation, the common law has no adequate remedy. Even a multiplicity of suits will be restrained in chancery in all cases where they are merely unnecessary or useless. Much more will equity exert its restraining power when these suits are wholly unauthorized or vexatious. *Barber v. Barber*, 21 How. 582; *State v. Bridge Co.*, 13 How. 518; *Boyce's Ex'rs v. Grundy*, 3 Pet. 210; *U. S. v. Howland*, 4 Wheat. 108; *Osborn v. Bank*, 9 Wheat. 841, 842; *Livingston v. Story*, 9 Pet. 632. The most favorable view of the defendants' case fails to find any remedy at all for the evils which this bill asks us to prevent. Refusal, therefore, to furnish the preventive aid of the injunction, which this bill prays for in the present case, would be an inexcusable denial of justice. This conclusion applies to all the proceedings under the statutes in question, by these defendants, and to every stage of them. The proceedings in the probate court would have been unauthorized and illegal, even if the statute in question had been valid and effective, with all its present terms and provisions.

The second section of this statute, adopting the tenth section of the one for collecting territorial and county taxes, both of which are cited above, provides that the property, real and personal, of any one who refuses to pay his tax may be levied on or distrained, and sold, conveyed, or delivered in satisfaction of the same and costs. This is the only remedy prescribed by that statute, and there is no other hinted at from the beginning to the end of it. Now, it is an established rule that all statutory modes of executing any laws, or any power under a law, must be strictly pursued. *Turnpike Co. v. Gould*, 6 Mass. 44; *Glass Co. v. White*, 14 Mass. 286; 3 U. S. Dig. p. 43, § 30. Under the act in question, if effective for the purpose under consideration, the defendants, trustees, would have been a *quasi* corporation with taxing powers. *Carmichael v. Trustees*, 3 How. (Miss.) 84; *Trustees v. Tatman*, 13 Ill. 27; *School-Dist. v. Wood*, 18 Mass. 193; *Jackson v. Hartwell*, 8 Johns. 330; *Todd v. Birdsall*, 1 Cow. 260; *Grant v. Fancher*, 5 Cow. 309, *passim*. The supreme court of the United States has decided, (*Bank v. Skelly*, 1 Black, 436,) upon this question of taxation and kindred ones, that the rule of construction is against the corporation, and in favor of the public; and neither the right of taxation nor any other power of sovereignty will be held to have been surrendered, unless such surrender has been expressed in terms too plain to be mistaken. To the same effect are *Bank v. Billings*, 4 Pet. 661; *Charles River Bridge v. Warren Bridge*, 11 Pet. 420; *Gordon v. Tar. Court*, 3 How. 133; *Rich-*

*mond F. & P. R. Co. v. Louisa Railroad Co.*, 13 How. 71; and many other cases of the highest authority,—all of which enjoin a strict construction and execution of all such powers. It is wholly unnecessary to multiply citations as to the strict construction of the power in question, and the class to which it belongs. But for this rule of strictness, the remedies in all such cases might at last come to depend upon the mere caprice of parties, in the unbridled discretion of the courts. There is nothing in the doctrine of *res judicata* to sustain the proceedings for this tax in the probate court or out of it. This rule applies only when the court of the judgment is positively shown to have had undoubted jurisdiction, not only of the causes of action, but also of the parties, and to have fairly and fully exercised it. *Sperry's Case*, 3 Coke, 61, pt. 5; *Ladbroke v. James*, Willes, 199; *Sollers v. Lawrence*, Id. 416; *Nicholl v. Mason*, 21 Wend. 339; *Cleveland v. Rogers*, 6 Wend. 438; *Bowne v. Joy*, 9 Johns. 221; *McKnight v. Dunlop*, 4 Barb. 36. In the present case, the contrary of all this appears. The very law under which the case arose in the probate court is shown not to be of any validity to vest the power under which the defendants claim to have proceeded in the probate court. The whole procedure in the probate court is an absolute departure from the only remedy which the law under examination purports to furnish, and the adoption of one nowhere pretended to be sanctioned by any law or practice. Neither the doctrine of *res judicata* nor any other rule of support can sanction the proceedings complained of in the probate court, which are null and void, and ought therefore to be restrained by this court. Wherefore this court order that as this cause came on to be heard in bill, answer, and statement of facts, and was argued by counsel, on consideration whereof, it is now ordered, adjudged, and decreed by this court, that the special injunction already issued in this case to restrain the defendants from all further proceedings against the complainant to collect the tax described in the bill filed in the present case, especially all further proceedings in the probate court of Great Salt Lake county for the same purpose, be, and the said injunction is hereby, made absolute and perpetual; and that the defendants pay the complainant all his costs incurred from the said proceedings, not only all those incurred in this court upon the bill filed in the present case, but also all those incurred in the probate court for the collection of the tax aforesaid; and that the clerk of this court certify this order to the said defendants.

Drake and McCurdy, JJ., concurred.

SCHAUFELÉ v. DOYLE *et al.* (No. 12,892.)  
(Supreme Court of California. Sept. 30, 1890.)

INJUNCTION—WHEN GRANTED—INSOLVENCY OF DEFENDANT.

1. In a suit to restrain defendants from raising the level of the street in front of plaintiff's hotel, it appeared that they were about to raise it three feet above the level of plaintiff's property. Held, that this was an obstruction of plain-

tiff's reasonable use of the street, for which injunction would lie in the absence of anything to show that defendants were proceeding under legal authority in a legal manner.

2. It was not necessary to show that defendants were insolvent to entitle plaintiff to an injunction.

Department 2. Appeal from superior court, Monterey county; JOHN K. ALEXANDER, Judge.

*N. A. Dorn, W. M. R. Parker, and Gell & Morehouse, for appellant. W. A. Kearney and Wm. H. Webb, for respondents.*

THORNTON, J. Suit for an injunction. The plaintiff alleged in her complaint that she was the owner of and carried on the business of keeping an hotel and lodging-house upon a certain lot fronting on Alvarado street, in the city of Monterey; that the defendants, who were insolvent, were unlawfully digging up and regrading Alvarado street at various places between certain points thereon, and threatened to continue to do so; and unlawfully threatened to fill up and raise the grade of said street in front of plaintiff's premises to an additional height of about four feet, and thereby ruin her business, and damage her buildings in a sum not less than \$3,000, and render them useless and uninhabitable, and necessitate the filling up of her lot to a height of 10 feet, at the rear end, which would make access to it from that side impracticable and inconvenient; that said defendants in like manner threatened to tear up her sidewalk on said street, and dig up and destroy her sewerage system, and thereby render her premises unwholesome, and uninhabitable, and create a nuisance that she would be compelled to abate; that she would suffer the destruction of her business, irreparable injury, and impoverishment, if such threats should be carried out. Thus it appears the defendants were sued as mere naked trespassers; but they, in their answer, averred that they had the authority of the city of Monterey to raise the grade of Alvarado street, and to place a sewer in the same by virtue of a certain contract between them and the city, made and entered into pursuant to an act of the legislature entitled "An act to provide for work upon streets, lanes, alleys, courts, places, and sidewalks, and for the construction of sewers within municipalities," and approved March 18, 1885, (St. 1885, p. 147.) From the evidence introduced on the trial, it appears that the defendants were about to raise the level of the street about three feet above the level of plaintiff's hotel. Upon plaintiff's resting her case, defendants moved for a nonsuit upon the ground that it appeared from the evidence that any damage she might sustain by the performance of the proposed work could be fully compensated for in money; and that it did not appear that the defendants were insolvent and unable to make such compensation. The court granted the motion, and from the judgment in favor of defendants, and an order denying a motion for a new trial, plaintiff has prosecuted this appeal. The defendants having offered no evidence of their affirmative defense, it cannot be considered here. They are presented here

as naked trespassers, and must be so regarded in determining this appeal. The insolvency of defendants is entirely irrelevant, and that circumstance will be laid out of the case in passing on the questions to be herein determined.

The plaintiff here is an abutter on the street above mentioned, and like every abutter has the right of access to and egress from her land abutting on the street. This right of access and egress is property of which she cannot be deprived, though for a public purpose, without compensation first made. *Williams v. Railroad Co.*, 16 N. Y. 97-111; *Story v. Railroad Co.*, 90 N. Y. 122; *Lahr v. Railroad Co.*, 104 N. Y. 268, 10 N. E. Rep. 528. This right exists though the abutter has no estate in fee in the street. Though she does not own the fee of the street, she does own an easement in it in the right of access to her lot, and egress from it, which are elements of such easement. *Railroad Co. v. Combs*, 10 Bush, 382, and cases above cited. In *Railroad Co. v. Applegate*, 8 Dana, 310, the supreme court of Kentucky said, in discussing the rights of abutting owners to the use of a street, that "if it should appear that such use encroaches on any private right, or obstructs the reasonable use and enjoyment of the street, by any person who has an equal right to the use of it, we shall be ready to enjoin all such wrongful appropriation of the highway." On this subject, see *Elliott, Roads & Streets*, 524, 527, 537, and cases cited in notes. Upon the facts appearing in this case, we are of opinion that the reasonable use of the street by the plaintiff is obstructed, and her individual rights are encroached upon, by the defendants, and that an injunction should have been granted. The injury here is to plaintiff's right of access to her hotel from the street, and egress from the hotel to the street. Like the injury in *Richards v. Dower*, 64 Cal. 62, it is a permanent injury to the inheritance, which, if permitted to continue, will ripen into a right. It will remain and continue to subject plaintiff to loss and damage, unless thousands of dollars are expended to obviate it. The court erred in granting a nonsuit. Nothing said above is intended to have any bearing on the question of the rights of the authorities of Monterey to improve the street involved herein, when proceeding under a constitutional statute, and in accordance with its provisions. Judgment and order reversed, and cause remanded for a new trial.

We concur: MCFARLAND, J.; SHARPSTEIN, J.

86 Cal. 91

JAFKE v. LILIENTHAL. (No. 13,538.)

(Supreme Court of California. Sept. 20, 1890.)

ASSUMPSIT—PLEADING.

1. A complaint states a good cause of action which alleges that defendant's intestate, being engaged to marry plaintiff's daughter, requested plaintiff to make suitable preparations for "a betrothal reception" and "a wedding feast," and to purchase household goods "for both parties," and promised to repay plaintiff the money expended, which, in pursuance of the request, and in reliance on the promise, plaintiff did expend for the purposes mentioned.

2. In such case plaintiff need not aver what disposition has been made of the goods, as the cause of action became complete upon his expending the money in pursuance of defendant's request.

3. Where the complaint alleges that the expenditures were "pursuant to said request of" defendant, "and at his special instance and on his account and behalf," it need not state that they were made before defendant's death.

Commissioners' decision. In bank. Appeal from superior court, Alameda county; N. HAMILTON, Judge.

*D. M. Delmas*, for appellant. *W. H. L. Barnes and Lambertson & Taylor*, for respondent.

HAYNE, C. The defendant had final judgment upon a general demurrer to the complaint, and the plaintiff appeals. The complaint alleges in substance, that the defendant's intestate, one Solomon Lowenberg, being engaged to marry the plaintiff's daughter, requested plaintiff to make suitable preparations for "a betrothal reception" and "a wedding feast," and to procure suitable wearing apparel for his daughter, and to purchase household goods "for both parties," for use in their married life, and "then and there promised said plaintiff to repay him" whatever money he should expend for the purposes mentioned; that plaintiff "paid, laid out, and expended, pursuant to said request of said Solomon Lowenberg, and at his special instance, and on his account and behalf, and relying upon his promise of repayment and reimbursement as aforesaid, the sum of \$2,000 in suitable preparations of the character requested; that Lowenberg died before the marriage, and that the sums expended by plaintiff have not been repaid; and that the claim of the plaintiff has been rejected by the administrator of the estate. We think that the complaint is good as against a general demurrer.

It is argued for the respondent, in the first place, that it does not appear what was done with the articles purchased, and that the presumption against the pleader requires that such articles be considered to be in the possession of the plaintiff, and that he cannot have both the goods and the money. But the cause of action was complete when the plaintiff expended the money in pursuance of the request of Lowenberg. It was not necessary for the complaint to go on and state what had become of the goods. And if it be assumed in favor of the respondent that the retention of the goods by the plaintiff would be a defense, it is a matter to be set up by the answer. The presumption against the pleader does not require him to anticipate matters of defense.

It is argued, in the next place, that it does not appear whether the expenditures were before or after the death of Lowenberg. But the complaint alleges that the expenditures were "pursuant to said request of said Solomon Lowenberg, and at his special instance and on his account and behalf," which would not be legally true if they were made after his death.

The other criticisms upon the complaint do not require special notice. We therefore advise that the judgment be reversed,

with directions to overrule the demurrer, with leave to the defendant to answer.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, with directions to overrule the demurrer, with leave to the defendant to answer.

83 Cal. 629

CRAWFORD v. INDEPENDENT S. & P. WORKS  
et al. (No. 12,732.)

(Supreme Court of California. May 2, 1890.)

#### APPEAL—WEIGHT OF EVIDENCE.

The denial of a motion for a new trial on the grounds that the verdict was not supported by the evidence will not be disturbed on appeal where the evidence before the jury consisted of the positive testimony of plaintiff and the denial of defendant.

Department 1. Appeal from superior court, city and county of San Francisco; T. H. REARDEN, Judge.

*George E. Lawrence*, for appellant. *E. McGraw*, for respondent.

SHARPSTEIN, J. The plaintiff in his complaint alleges that "the Independent Stove & Pipe Works is a copartnership, doing business in the city and county of San Francisco, and that the defendants Jacob Broeder, Francis Bornheimer, and Catherine Bornheimer were members of and comprised said firm;" and that on April 15, 1885, said defendants became indebted to plaintiff in the sum of \$307, on a balance of account of goods, wares, and merchandise theretofore sold and delivered by plaintiff to said copartnership at its special instance and request; that defendants have not paid said sum or any part thereof, but the whole remains due and owing by defendants to plaintiff. Defendants Francis Bornheimer and Jacob Broeder answer jointly, denying that they and defendant Catherine Bornheimer were members of or composed said alleged copartnership, and denied that at any time said defendants were indebted to plaintiff in said sum of \$307, or any other sum. Defendant Catherine Bornheimer answered separately, denying that she was ever a member of said copartnership, or that the defendants or she was indebted to the plaintiff in any sum whatever. The action was tried by a jury, which returned a verdict against all the defendants in favor of the plaintiff, assessing his damages at the sum of \$307, for which sum a judgment was entered in his favor against all the defendants. Defendant Catherine Bornheimer moved for a new trial, which was denied, and from that order and the judgment against her she appeals. The grounds upon which appellant mainly relies for a reversal of the order denying her motion for a new trial are that the evidence shows she was not a partner with her co-defendants, and that she never held herself out to the plaintiff as a partner of said co-defendants. There is evidence that she did, and evidence that she did not, so hold herself out to the plaintiff as a partner with her co-defendants for the purpose of obtaining credit with the plaintiff for the

goods sold to said partnership. The plaintiff testifies that she did; she testified that she did not. It was for the jury to determine whom they would believe, and the court below having denied a new trial we cannot disturb the order on the ground of insufficiency of the evidence to justify the verdict. The instructions of the court to the jury, and excepted to by appellant, are not erroneous. Judgment and order affirmed.

We concur: MCFARLAND, J.; THORNTON, J.

Cal. 523

HAMMOND v. WALLACE *et al.* (No. 13,307.)  
(Supreme Court of California. Sept. 6, 1890.)

EQUITY—LACHES—RESCISSION—APPEAL.

1. A year and a half after a sale of land at auction the vendor sued to set it aside because of an agreement between the vendee and another restraining the latter from bidding, of which the vendor averred he had no knowledge "at the time of the sale and conveyance." The question of laches was raised on motion to nonsuit, and there was no offer to amend. *Held*, that the delay was unreasonable, and fatal to the action.

2. A suit to rescind in such case will not lie, unless the consideration paid is returned or tendered before suit, and an allegation that the plaintiff "is willing and able to return" it, and "now offers to do so," is insufficient.

3. Error in granting a nonsuit is error of law which may be reviewed without any specification of the evidence.

BEATTY, C. J., and WORKS, J., dissenting.

In bank. Appeal from superior court, Tulare county; WILLIAM W. CROSS, Judge.

*Atwell & Bradley* and *A. B. Hunt*, for appellant. *A. N. Drown* and *O. Sanders*, for respondents.

PER CURIAM. Plaintiff is the assignee in insolvency of Uhlhorn & Maples. On June 9, 1884, he caused to be sold at public auction certain lands belonging to them, and the defendant Wallace became the purchaser, and in due time received a deed of conveyance. She afterwards sold and conveyed various portions of the lands to the other defendants. On November 18, 1885, about one year and a half after the sale, this present action was brought to set aside the sale, on the alleged grounds that the property was bid in at a grossly inadequate price, and that the defendant Wallace had conspired with one Clowe and others to prevent competition in bidding. It is also averred that the other defendants purchased of Wallace with full knowledge of the alleged fraud practiced at the auction. The court below granted a nonsuit, and rendered judgment for defendants; and plaintiff appeals from the judgment, and from an order denying a new trial. The appeal from the judgment was not taken until nearly two years after the judgment was entered, and it is therefore dismissed. Respondents contend that the question whether or not the granting of the motion for nonsuit was sustained by the evidence cannot be considered, because there is no specification of the particular in which the evidence was insufficient, but it seems to have been settled that an error, if any, in granting a nonsuit is an error of law, and, if excepted to and speci-

fied as such, as was done in the case at bar, may be reviewed without any specification of the evidence. *Schroeder v. Schmidt*, 74 Cal. 459, 16 Pac. Rep. 243; *Donahue v. Gallavan*, 48 Cal. 576; *Cravens v. Dewey*, 13 Cal. 42. As to all the defendants other than the defendant Wallace, there is no room to doubt the correctness of the nonsuit and the judgment. There is nothing to show that either of them had any reason to suppose that there had been any fraud or irregularity. If any such there was, at the auction sale, or that there was any agreement or understanding between either of them and the defendant Wallace that the land was, under any circumstances, to be reconveyed to the latter. Indeed, the evidence showed affirmatively that such was not the case. The motion for a nonsuit on the part of defendant Wallace was made on several grounds, and among others that the complaint does not state facts sufficient to constitute a cause of action; that plaintiff was not entitled to rescind without first returning and restoring or offering to restore to said Wallace everything which he had received from her under contract, and without doing so or offering to do so, before suit brought, and that there is no averment in the complaint of such offer; that it does not appear from the evidence that the plaintiff made any offer to defendants sufficient to entitle him to a rescission or to maintain this action; that plaintiff is not entitled to recover by reason of his delay in bringing this action; that the proof does not correspond with the allegations; and that "the testimony of the plaintiff does not show, or attempt to show, the alleged fraudulent conduct of the defendant set forth in the complaint in this action, and complained of herein." It does not appear upon which, or upon how many, of the stated grounds of the nonsuit the court based its decision. It is contended by the appellant that there was some testimony tending to show that there was a fraudulent agreement between defendant Wallace and M. E. Clowe, with respect to their bidding at the auction sale, and that the court, on a motion for a nonsuit, had no right to overlook or disbelieve that testimony. The testimony of plaintiff, Hammond, showed that he was endeavoring to make an advantageous sale of the land. He says: "I had spoken to Mrs. Wallace, Mr. Crocker, and several other persons, every one I thought likely to buy, in reference to the bidding,— was endeavoring to make a sale of this land. I asked for and received a written bid, because I did not want to put up the property or advertise it for sale without I thought it would bring a reasonable sum. \* \* \* I made every effort I was able to to develop a sale of this property, before I made any application to the court for leave to sell." He did receive a written bid from Mr. Clowe, who agreed to make that bid at auction if the land was put up for sale in that way. He says that "the bid I received [from Clowe] was satisfactory to me." The sale was properly advertised, and there was a "fair attendance" at the auction. The property was offered subject to certain mortgages, which

aggregated \$47,000, and subject also to a certain asserted claim of homestead on a part of the land. The bid which Clowe had made, according to his promise, at the auction, was \$6,516.26. This bid, considering the mortgages, and not considering the homestead claim, was substantially over \$53,500. The defendant Wallace raised the bid a few dollars; and, there being no other bid, she got the property at her offer. She went into possession, and remained in possession about a year, when she sold various parts of the lands to the other defendants. On its face the sale seems to have been entirely fair. At the trial some of plaintiff's witnesses, speaking three years after the sale, testified that in their opinion the price was inadequate. But the plaintiff, who had informed himself on the subject, testified that the bid was satisfactory to him at the time. And, considering all the evidence on the point, and the delay in bringing the suit, and that mere inadequacy of price is not alone sufficient to warrant a court in setting aside a sale, we would not be warranted in saying that the nonsuit was erroneous on account of the evidence concerning the said inadequacy.

There was, however, some evidence to the point that there was an agreement between the defendant Wallace and Clowe that the latter, after his first bid, should not bid further against Wallace. There was no evidence to show an attempt to influence any other bidders. This evidence consists of the testimony of the two insolvents, Maples and Uhlhorn, and one other witness, about declarations which they say Mrs. Wallace made. Maples testified that before and immediately after the sale the defendant Wallace told him that she would have to pay Clowe a certain sum of money to keep him from bidding against her, and she had given him her note for that purpose. Uhlhorn testified that in June, 1885, Mrs. Wallace told him that she had given Clowe her note for a certain sum of money to keep him from bidding; and, moreover, that he had told her at that time that Maples was going to make trouble "about the money given to Clowe, and was going to upset the sale" on that account. One other witness, Nelson, who was in litigation with the defendant, testified that defendant once told him that she paid Clowe money not to bid against her. So that, if there was any such agreement between Wallace and Clowe, Maples knew of it at the time of the sale, and Uhlhorn must have known of it soon after, because he testifies that he knew of it before June, 1885, at which time he says Mrs. Wallace told him. How long before that he knew it he does not say. And Maples, according to his testimony, was himself a party to the fraud. And, according to the plaintiff's testimony, this action was brought at the instigation of Uhlhorn & Maples, who would be the principal gainers by a judgment for plaintiff if the lands are now as valuable as they claim them to be. And, indeed, if the lands were as valuable at the time of the sale as they are now asserted to have been, there would have been no apparent necessity for proceedings in insolvency.

Now, it is contended by appellant that on a motion for a nonsuit (although this is an equity suit, in which the court had full control) the court was bound to overlook all other considerations, and to take the testimony of Maples, Uhlhorn, and Nelson, notwithstanding any inconsistencies or improbabilities there may have been in it, as furnishing some evidence that the alleged agreement was made between Wallace and Clowe; and that therefore the court erred in granting the nonsuit. But admitting that, under extreme rules about nonsuits, originating in actions at law, where there were juries whose province it was to decide the facts, there was sufficient evidence to establish, *prima facie*, the one fact of the alleged agreement about the bidding at the sale; still that was not the only fact necessary to plaintiff's case. The motion for nonsuit was based upon several grounds, and among others that there was delay in bringing the suit, and that it could not be maintained without restoring or tendering to defendant the money which plaintiff had received from her. Assuming that the alleged contract of Wallace and Clowe about the latter not bidding was void, then, while it was in an executory form, a court would not have enforced it as between them, but would have left them just where it found them. But the executed contract of the sale of the land from plaintiff to Wallace was not void, although plaintiff, at the proper time and by proper conduct, might have rescinded it, and had it annulled by a court of equity, upon sufficient averments and proofs. But the first requisite of rescission is prompt action. The Code says: "He must rescind promptly." Civil Code, § 1691. In such a case a party cannot wait until time shall demonstrate whether the contract sought to be rescinded turned out to be good or bad; and this is particularly true in a new country where values change rapidly. Of course if Uhlhorn & Maples could be considered as the only real parties interested, there would be no basis whatever for this case. But taking plaintiff in his legal *status* as representing himself, or others besides Uhlhorn & Maples, then his complaint is fatally defective on this point. The only averment on the subject of laches is as follows: "Plaintiff avers that he had no knowledge, at the time of sale and conveyance of the property, of the collusion and fraud practiced by the defendant Emeline Wallace as aforesaid." As one year and a half elapsed between the sale and the commencement of the action, there is no averment that during that time he did not have such knowledge. *Collins v. Townsend*, 58 Cal. 614. And, although this point was made on the motion, there was no offer to amend the complaint. This delay was unreasonable and fatal to the action. *Bailey v. Fox*, 78 Cal. 396, 20 Pac. Rep. 868; *Burkle v. Levy*, 70 Cal. 254, 11 Pac. Rep. 648.

Moreover, there is neither averment nor proof that plaintiff ever made any attempt to rescind or make any tender of, or offer to return, anything of value received from defendant previous to the filing of his complaint, or any tender at all.

The only averment upon the subject is that plaintiff is "willing and able to return to the defendant all the moneys which she paid to him on the purchase of the property, and all the moneys which she has lawfully or legitimately paid out or expended on account of the purchase of said property, and now offers to do so." This is not sufficient. In *Herman v. Haffenegger*, 54 Cal. 161, a case very similar to the one at bar, the plaintiff had at least alleged "that prior to the commencement of the action he rescinded the contract, and had offered to return to the defendant what he received thereunder." But the court said: "It nowhere appears that any offer to return was made previous to action brought. \* \* \* He could not maintain the action until he had so returned, or offered to do so. This was a condition precedent to his maintenance of the action. And, as he did not comply with this requisite, the nonsuit was properly granted." See, also, *Gifford v. Garville*, 29 Cal. 589, and cases cited; *Collins v. Townsend*, 58 Cal. 608; *Bohall v. Diller*, 41 Cal. 533. In the case at bar there is not even any averment or proof of a rescission of the contract, or of any attempt to rescind, to say nothing of the absence of averment or proof of tender or offer to return to defendant anything of value received from her. And, under the authorities above cited, this defect in plaintiff's case is fatal.

The exceptions taken to rulings of the court on the admissibility of evidence relate to the question whether the alleged contract about bidding at the sale was in fact made, and to the issue of the adequacy of the price, and are not, therefore, under the views above expressed, important. For the reasons above given, we see no sufficient cause to reverse the judgment of the superior court. Judgment and order affirmed.

We dissent: BEATTY, C. J.; WORKS, J.

85 Cal. 518

CHATFIELD v. McDANIEL *et al.* (No. 18,541.)  
(*Supreme Court of California.* Sept. 6, 1890.)

PLEADINGS—DEMURRER—AMENDMENT—TENDER OF DEED.

1. The complaint in an action to recover money paid on a contract to convey lands alleged that plaintiff tendered the amount due at the time provided by the contract, but that defendants refused to convey. The case was set for trial five months after the answer was filed; but no demurrer or motion to strike out was filed, and no notice that judgment on the pleadings would be asked was given until the parties announced themselves ready for trial. Plaintiff then asked judgment on the ground that the answer denied no material allegation of the complaint. The answer had attempted to deny tender. *Held* that, there being nothing to show that defendants were not defending in good faith, they should have been allowed to amend so as to deny any tender.

2. Defendants agreed to cause to be conveyed to plaintiff, by deed, certain land, payment to be made at a certain time. *Held*, that it was not necessary for plaintiff to tender to defendants a deed for execution, but only to tender the money due under the contract.

3. Defendants having refused to convey on tender of the balance of the purchase money, plaintiff could sue for money paid on the con-

tract without a demand therefor, or notice to defendants of a rescission of the contract.

In bank. Appeal from superior court, Butte county; P. O. HUNDLEY, Judge.

*John Gale*, for appellants. *Gray & Sexton*, for respondent.

PATERSON, J. It is alleged in the complaint that plaintiff and defendants entered into an agreement, of which the following is a copy: "Biggs, Cal., March 29, 1888. Received from C. E. Chatfield three hundred dollars, for which McDaniel & Co. agree to cause to be conveyed by bargain and sale deed to said C. E. Chatfield the following land in Butte county, California, shown on the plat of Pitt's addition, and upon the terms following, to-wit: Lot No. one (1) containing 4.45 acres in said Pitt's addition to the town-site of Biggs, as per map on file with the recorder of Butte county, payable at Biggs, as follows: \$434.25 on or before October 1st, from date, with 8 per cent. interest. Time is hereby expressly agreed to be the essence of this agreement. McDANIEL & Co." That plaintiff on October 1, 1888, tendered to defendants said sum of \$434.25, with interest, and demanded that defendants cause the lands to be conveyed to him, but they refused and still neglect and refuse to convey the same or return to plaintiff the \$300 paid by him. The prayer is for a judgment for the sum of \$300, with legal interest, and costs. The defendants in their answer admit the execution of the contract, but "deny that on the 1st day of October following, plaintiff tendered to defendants the further sum of \$434.25, with interest thereon from the 29th day of March, 1888, at 8 per cent. per annum, and demanded that defendants cause to be conveyed to him by bargain and sale deed the lands above described; that defendants failed, neglected, or refused to convey said property to the plaintiff, and still do fail, neglect, and refuse to convey the same, or to return to the plaintiff said sum of \$300 paid by him on said contract." The bill of exceptions shows that the case was regularly set for trial on September 17, 1889; that on that day both parties appeared and announced themselves ready for trial; that upon the pleadings being read to the court the plaintiff moved for judgment on the pleadings, on the ground that none of the material allegations of the complaint had been denied; that thereupon defendants asked permission to amend their answer by denying that any tender was made on October 1, 1888, or before, or at any time, and the court denied the motion.

We think the amendment ought to have been allowed. The answer was filed on April 28, 1889, and no demurrer or motion to strike out was filed, and no notice that judgment on the pleadings would be asked was given, until the parties announced themselves ready for trial.—September 17th. There was an attempt to deny the allegation as to tender, and there is nothing in the record to show that it was not made in good faith. It does not appear that any delay would have been caused by the proposed amendment; but, if there had been, the court could have required an

immediate amendment, and imposed terms commensurate to the time and expense of the continuance. The denial is verified. It may be as claimed by respondent that the learned judge had reason to believe from continuances and other proceedings that the defendants were not acting in good faith. The trial judge very often can see from the maneuvers of a party in court that his object is delay, or to annoy his adversary, and, recognizing his superior position for the detection of such tactics, we are always loth to interfere with the exercise of his discretion; but here there is nothing in the record to indicate that defendants were not trying to defend in good faith on a material issue, no affidavit of the plaintiff in opposition to the request, nothing in the bill showing any previous dilatory proceedings. Taking the record as we find it, and applying the rule of liberality in the allowance of amendments which has always prevailed in this state, we must reverse the judgment. *Bank v. Stover*, 60 Cal. 387.

As the case is going back for further proceedings, we may aid the court below by saying that the contention of appellant as to the sufficiency of the allegations of the complaint, in our opinion, are not well taken. The plaintiff was not bound to tender the defendants a conveyance for execution. It was the duty of the defendants, on tender of the balance due under the contract, to execute and deliver a deed of conveyance to plaintiffs. *Camp v. Morse*, 5 Denio, 164. Nor was it necessary to allege or show that plaintiff gave defendants notice of rescission, or that he demanded a return of the \$300. Where the vendor under such a contract, on tender of the balance of purchase price, refuses or neglects to convey, his default authorizes the vendee to treat the contract as at an end, and to recover the money which has been paid. *Gillet v. Maynard*, 5 Johns. 85; *Van Benthuyssen v. Crapser*, 8 Johns. 259; *Frost v. Smith*, 7 Bosw. 108. Judgment reversed and cause remanded, with directions to allow the defendants to amend their answer as to denials, but in no other respect.

We concur: BEATTY, C. J.; WORKS, J.; MCFARLAND, J.; FOX, J.; SHARPSTEIN, J.

3 Cal. Unrep. 285

VORWERK V. NOLTE. (No. 13,470.)

(Supreme Court of California. Sept. 11, 1890.)

VENDOR AND VENDEE—CONTRACT—FAILURE TO CONVEY.

1. Defendant contracted to sell land to plaintiff, and stipulated that the money paid therefor was to be returned in case he failed to execute and deliver a deed "after one year from date" of the contract. It was agreed that time was of the essence of the contract. Held, that the deed was to be delivered one year from the date of the contract, and a tender of it nine days after the expiration of the year was not a compliance with the contract.

2. An action to recover such purchase money is not an action for the rescission of the contract, but one for money due thereunder.

In bank. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, Judge.

J. W. Mitchell, (Chapman & Hendrick,

of counsel,) for appellant. J. D. Bicknell and R. H. F. Variel, for respondent.

SHARPSTEIN, J. Action to recover \$3,750 and interest at the rate of 3 per cent. per month from June 24, 1887. The action is upon a contract in writing whereby the plaintiff agreed to pay, and did pay, to the defendant \$3,750 for a certain lot of land which the defendant agreed to convey to plaintiff one year after the date of said contract, which was dated June 24, 1887. And on the same day, and before plaintiff paid to defendant said \$3,750, defendant made and executed the following agreement, to-wit: "This agreement is to certify that I, the undersigned, promise to execute to a lot on First street, to which I executed to-day an agreement, and which has been paid in full by Mr. John Vorwerk, and, in case of failure of the undersigned to deliver and execute a deed after one year from date hereof, bind myself to refund the purchase price, three thousand seven hundred and fifty dollars. (\$3,750,) with interest at the rate of three per cent. per month. C. A. NOLTE." That this and the preceding agreement were parts of the same contract is found by the court, and conceded by counsel. And, being so conceded, the obvious meaning of the contract is that the defendant in consideration of \$3,750, to him paid by the plaintiff, would, one year after the date of said contract, execute and deliver to the plaintiff a perfect deed of the lot described in said contract; and in case of a failure of defendant to execute and deliver such a deed after one year from the date of said contract he would refund the purchase price, \$3,750, with interest at the rate of 3 per cent. a month. This construction of the agreement is not, so far as we are advised, controverted. The date of the contract, as before stated, is June 24, 1887. A deed was not tendered until July 2, 1888, which was more than one year from and after the date of said contract. But the court finds as a conclusion of law "that at the time this action was commenced, February 11, 1889, the defendant was not in default, within the terms of either of said agreements set forth in findings Nos. 10 and 12." That conclusion is probably based upon the following finding of fact: "That on the 2d day of July, 1888, the defendant made and duly signed and acknowledged before a notary public so as to entitle it to be placed of record a good and sufficient deed of grant, bargain, and sale conveying to the said plaintiff the premises described in said contract between the parties hereinbefore described in finding No. 10, free of all incumbrances; and on the said 2d day of July, 1888, and before the commencement of this action, the defendant tendered the same to the plaintiff, but plaintiff refused to receive or accept the same, and the defendant brought the said deed into court, and renewed his tender and offer therein, and did proffer in his pleadings, and at the trial of this action, to deliver the same to the plaintiff in pursuance of his aforesaid contract to do the same, and the same is now in the custody of the clerk of this court, subject to the order of the plaintiff." There is no



finding that a deed was tendered at an earlier date than July 2, 1888. From which we infer that the court regarded the tender of a deed at that time a substantial compliance with the agreement of defendant to execute and deliver to the plaintiff a deed after one year from the date of said agreement, which was June 24, 1887. Precisely how the court arrived at that conclusion, we cannot intelligently state. But counsel for respondent defends the findings of the court as follows: "But, by the express terms of that agreement, defendant only promised to pay the purchase price of \$3,750 back, with interest at 3 per cent. a month, in the event he should fail to deliver a deed after the expiration of a year. He did offer to deliver a deed on the ninth day after the year expired, and prior to the commencement of the plaintiff's action. Such tender of the deed, we submit, was only required to be made within a reasonable time after the year expired." Is that the meaning of the agreement of the defendant to execute and deliver to the plaintiff a perfect deed one year after the date of said agreement, and, in case of failure of defendant to deliver and execute a deed after one year from date of said agreement, he would refund the purchase price, \$3,750, with interest at the rate of 3 per cent. per month? We think not. It plainly appears by the language of the contract that the defendant was to deliver to plaintiff a deed one year after the 24th day of June, 1887, *i. e.*, on the 24th day of June, 1888, and defendant, failing to do that, bound himself to pay to plaintiff the sum specified in the agreement. It was agreed that time was of the essence of the contract. Nothing is better settled than that parties have a right to make their contracts as stringent as they please, and to make time of the very essence of their contract; and if one party, without the consent of the other, allows the specified time to pass, no matter from what cause, without performing the conditions, the stipulated consequences must follow. *Chrisman v. Miller*, 21 Ill. 227. We think the parties here, in employing the term "one year after the date of the contract," intended to employ it in the sense in which it is frequently employed in promissory notes, made payable at a specified time after date, as one month after date, the meaning of which is generally well understood. The object of all rules of construction is to arrive at the meaning of the parties, and not to impose one upon them.

Counsel have discussed at some length the question whether this is an action for money had and received, or for rescission of a contract. In our opinion it is neither. It is an action for the recovery of money upon an express contract. Not to rescind a contract, but to enforce it. Judgment and order reversed.

We concur: WORKS, J.; MCFARLAND, J.; PATERSON, J.; FOX, J.; THORNTON, J.

95 Cal. 48

REDD v. MURRY *et ux.* (No. 13,555.)

(Supreme Court of California. Sept. 12, 1890.)

QUIETING TITLE—DEEDS—DESCRIPTION.

1. In a complaint to quiet title, the following description of the land is not on its face incon-

sistent nor insufficient to identify it; "On the north, 240 feet on Mill street; on the east, 110 feet on a 30-foot alley; on the south, 240 feet on an alley; on the west, 110 feet by a 30-foot alley; and being all of lots Nos. 1, 2, 3, and 4, all of block No. 8, as per plat of J. & M.'s addition of the town of P.; said land being described, with reference to plats of the town of P. now on file in the recorder's office of said Tulare county, as commencing at a point on the south boundary of Mill street 30 feet east of the north-east corner of lot 5, in block 20, of the old town of P.; thence easterly along said boundary 240 feet; thence southerly at right angles 110 feet; thence westerly at right angles 240 feet; thence northerly to the point of beginning, lying and being in the S. W. corner of sec. 25, tp. 21 S., R. 27 E., M. D. M."

2. In a suit to quiet title, a deed was offered in evidence in which the land was "bounded and particularly described as follows, to-wit: On the N., 240 feet on Mill street; on the E., 110 feet on a 30-foot alley; on the S., 240 feet on an alley; on the W., 110 feet by a 30-foot alley; and being all of lot Nos. 1, 2, 3, and 4, all of block No. 8, as per plat of Johnson & Murry's addition to the town of P.; being all of said block No. 8 in said addition to P., Tulare county, Cal." Counsel offering to follow it with a plat of the addition referred to, *held*, that an objection to the deed because it described nothing was properly overruled.

3. A deed having described the land by reference to the plat of an addition to a town, an unrecorded plat is, as against the grantor and his privies, *prima facie* identified as the one referred to by evidence that he afterwards exhibited it as the plat of the addition.

4. In such case, parol evidence is competent to locate the land granted from data given in the plat, and it is not necessary as against the grantor to show that there was an actual survey of the addition.

Fox, J., dissenting.

In bank. Appeal from superior court, Tulare county, WILLIAM W. CROSS, Judge.

*Brown & Daggett*, for appellants. N. O. Bradley and G. E. Lawrence, for respondent.

PER CURIAM. This is a suit to quiet title to a parcel of land described in the complaint as follows: "Situate in the county of Tulare, state of California, described as follows, to-wit: On the north, two hundred and forty feet on Mill street; on the east, one hundred and ten feet on a thirty-foot alley; on the south, two hundred and forty feet on an alley; on the west, one hundred and ten feet by a thirty-foot alley; and being all of lots Nos. one, two, three, and four, all of block number eight, as per plat of Johnson & Murry's addition of the town of Porterville; said land being described, with reference to plats of the town of Porterville now on file in the recorder's office of said Tulare county, as commencing at a point on the south boundary of Mill street thirty feet east of the north-east corner of lot five, in block twenty, of the old town of Porterville; thence running easterly along said boundary line two hundred and forty feet; thence southerly at right angles one hundred and ten feet; thence westerly at right angles two hundred and forty feet; thence northerly to the point of beginning, lying and being in the south-west quarter of section twenty-five, township twenty-one south, range twenty-seven east, M. D. M." The plaintiff had judgment in the superior court, and the defendants appeal.

1. The superior court did not err in overruling the demurrer to the complaint. The two descriptions of the land therein contained are not inconsistent with each other, and together are sufficient to identify the land by reference to the recorded plats of the town of Porterville, if there are such plats agreeing with each other and conforming to such description in the delineation of Mill street, block 20, and the lots in question.

2. The court did not err in admitting in evidence plaintiff's deed, (Exhibit No. 1.) The plaintiff in this action is the grantee of the defendant J. P. Murray, whose wife, and co-defendant, is his subsequent grantee. The deed (Exhibit No. 1) offered in evidence by the plaintiff was the defendants' deed of the premises in controversy, dated and acknowledged June 20, 1871, and containing the following description of the premises conveyed: "All those certain lots, pieces, or parcels of land situate, lying, and being in the town of Porterville, county of Tulare, state of California, and bounded and particularly described as follows, to-wit: On the north, two hundred and forty (240) feet on Mill street; on the east, one hundred and ten (110) feet on a thirty (30) foot alley; on the south, two hundred and forty (240) feet on an alley; on the west, one hundred and ten (110) feet by a thirty (30) foot alley; and being all of lots Nos. one, (1,) two, (2,) three, (3,) and four, (4,) all of block No. eight, (8) as per plat of Johnson & Murray's addition to the town of Porterville; being all of said block No. eight (8) in said addition to Porterville, Tulare county, California." The objection to this deed was that it described nothing; but, as counsel offered to follow it up with a plat of Johnson & Murray's addition, the objection was properly overruled.

3. The court did not err in admitting the plat, (Exhibit No. 2.) It is true that this plat contained nothing in itself by which it could be identified or located. But the defendant by his deed of June 20, 1871, admitted that there was then existing a plat of Johnson & Murray's addition, and evidence was offered by the plaintiff that as early as 1873 the defendant had this plat (Exhibit No. 2) on the ground, and that it was exhibited as the plat of Johnson & Murray's addition. It seems never to have been recorded, and there may be some doubt as to whether it is the same plat with reference to which the deed was made; but the evidence offered in connection with it was sufficient to authorize its admission in evidence. By his deed, the defendant admitted that there was a plat of Johnson & Murray's addition, and within two years of that admission he is shown to be in possession of this plat, and exhibiting it as the plat of the addition. As against him, and those claiming under him, and in favor of his grantee, this is certainly sufficient *prima facie* to identify the plat. If there was another and different plat to which the deed in fact referred he was called upon to show it. He made no such attempt, but rested upon the denial that he had ever made the deed, or any plat. It was shown, however, that he had made a prior deed for other lots on

Mill street, and in the same addition; and the finding of the court as to the genuineness and due execution of the deed is conclusive against him.

4. Most of the remaining objections relied on by appellants relate to the admission of oral testimony as to the actual location of the lots delineated on the plat, (Exhibit 2.) This plat shows various things on its face,—streets and alleys; blocks subdivided into lots; a county road; Mill street, Main street, Water street, and other streets; a river; plats marked as D. Murphey's land; J. P. Murry's land; Johnson & Keeney, etc. It is certainly not impossible that witnesses acquainted with these features of the town and vicinity of Porterville might locate the addition with reference to the main town of Porterville, and testimony for that purpose was clearly admissible. It was not necessary for the plaintiff to show that there had been an actual survey of the streets, lots, and blocks of the addition, and stakes set out on the ground. Her conveyance was of lots delineated on a plat, and if she could prove a plat showing lots and streets corresponding with the description in the deed, and other things by which, with the aid of oral testimony, the lots could be located on the ground, this was competent and sufficient as against her grantor. We find no error in the record. Judgment affirmed.

I dissent: FOX, J.

85 Cal. 809

ADAMS v. ANDROSS. (No. 12,620.)

(Supreme Court of California. Sept. 12, 1930.)

APPEAL—REVIEW—MATTERS NOT APPARENT ON RECORD.

On appeal from the denial of an injunction, no affidavits used on the hearing were set out in the bill of exceptions. Some appeared in the transcript, but, in the certificate of the trial judge that certain affidavits were used at the hearing, they were only identified by the names of the parties and certain indorsements thereon. Held, that this identification was insufficient, and the judgment would be affirmed.

Department 1. Appeal from superior court, city and county of San Francisco; WILLIAM T. WALLACE, Judge.

Whittemore & Sears, for appellant. Roger Johnson and F. W. Van Reynegom, for respondent.

WORKS, J. This is an appeal from an order denying an injunction. Neither of the parties has taken sufficient interest in the case to file a brief. It is apparent that the motion for the injunction was supported by the plaintiff, and resisted by the defendant, on affidavits. A bill of exceptions was filed which simply recites that certain affidavits, naming them, were read, but the affidavits are not set out. This, of course, furnishes nothing for this court to act upon. Certain affidavits appear in the transcript, and a certificate of the judge that the affidavits of certain persons, and other documents, were used at the hearing has been filed, but the affidavits are only identified by the names of the parties who made them, and certain indorsements. It has been held that such an authentication

of papers is insufficient. *Herrlich v. McDonald*, 80 Cal. 472, 22 Pac. Rep. 299; *Somers v. Somers*, 81 Cal. 608, 22 Pac. Rep. 967. Order affirmed.

I concur: Fox, J.

PATERSON, J. I have considered the affidavits, and think the order of the court is correct.

85 Cal. 639

WOODS v. VARNUM. (No. 13,583.)

(*Supreme Court of California*. Sept. 12, 1890.)

REMOVAL OF OFFICERS—MISCONDUCT IN OFFICE.

1. Under Pen. Code Cal. § 772, providing that when an accusation "in writing, verified by the oath of any person," is presented against any officer, the court shall cite him to appear, and then "hear, in a summary manner, the accusation," the proceedings may be on a written charge by a private person, and need not be by indictment or information in the name of the people.

2. An accusation commencing "W. on oath presents," and duly "subscribed and sworn to before" the clerk, is "verified by oath," as required by said section 772.

3. The right to a trial by jury is excluded by the provision for a summary hearing, which is valid, Const. Cal. art. 4, § 18, providing for the impeachment of certain officers, and that "all other civil officers shall be tried for misdemeanors in office in such manner as the legislature may provide."

4. An accusation is sufficient, which charges that the accused is and was the tax collector, and that he collected taxes not due, and did not pay them into the treasury, or notify those who paid them, but fraudulently and corruptly converted them to his own use, giving the names of a number of the tax-payers and the sums paid by each.

5. Under said section 772 a tax collector may be removed for misconduct in office, who, having inadvertently and without evil intent collected taxes not due, willfully and corruptly retains them, and converts them to his own use.

6. It was the duty of a collector to pay to the treasury each month the taxes collected during the preceding month. He became his own successor, and during the last month of his first term collected taxes not due, which he corruptly converted to his own use. *Held* that, as he was not bound to account for that month's collections until his second term commenced, he was guilty of misconduct in office during that term, for which he could be removed.

In bank. Appeal from superior court, San Diego county; GEORGE PUTERBAUGH, Judge.

*Luce, McDonald & Torrance* and *Ham-mack & Mulford*, for appellant. *James L. Copeland* and *Hunsaker & Britt*, for respondent.

McFARLAND, J. This is a proceeding against appellant, under section 772 of the Penal Code, to remove him from the office of tax collector of San Diego county, for failing to perform his official duties. It is based upon a written accusation presented to the superior court by the respondent, Woods, who is a citizen and taxpayer of the county, and chairman of the board of supervisors. Appellant demurred to the accusation, and, his demurrer having been overruled, he answered denying the allegations of the accusation. The case was tried by the court without a jury, and judgment was rendered, removing appellant from the said

Cal. Rep. 23-25 P.—46

office, and for costs; and from this judgment defendant appeals. The record on appeal contains simply the judgment roll and three short bills of exceptions, showing that the demurrer to the accusation was overruled; that a motion to strike out and set aside the accusation was denied; that a demand for a jury trial was also denied; and that appellant excepted to these rulings.

1. The motion to set aside the accusation is based mainly on the ground that the proceeding should have been in the form of a criminal action, and brought in the name of the people. There does not appear to have been any direct adjudication of this question since the adoption of the Codes. In *Smith v. Ling*, 68 Cal. 324, 9 Pac. Rep. 171, and *Triplett v. Munter*, 50 Cal. 644, the proceeding was by written accusation made by a private citizen, while in *People v. Kirkpatrick*, 57 Cal. 353, it was in the name of the people; but each of these cases went off on other points, and in neither of them was any question raised as to the form of the proceeding, or the proper parties thereto. In *Re Marks*, 45 Cal. 199, it was expressly held that such a proceeding was properly commenced and prosecuted upon the written complaint of a private citizen. That case was before the Codes; but section 4 of the act of March 14, 1853, under which the proceeding was instituted, was substantially identical with section 772 of the Penal Code. *Hitt. Gen. Laws*, par. 4781. It is true that section 6 of that act provides that, as far as applicable, the rules of practice governing district courts in civil actions should apply to the proceeding; but we do not see how that provision could have any effect on the point under review. However, apart from authorities, the Code seems to clearly contemplate a proceeding founded upon a written accusation of a private person, and not upon a public indictment or information in the name of the people. It provides that "when an accusation in writing, verified by the oath of any person, is presented to a superior court, alleging that any officer," etc., "the court must cite the party charged to appear before the court at a time," etc., and at the time designated "must proceed to hear, in a summary manner, the accusation," etc. It is also contended that the accusation is not properly verified. It commences as follows: "J. M. Woods, upon oath, presents to the said superior court of San Diego county the following accusation, alleging." It is signed at the end by J. M. Woods, after which is the following: "Subscribed and sworn to before me this 26th day of April, 1889. M. D. HAMILTON, Clerk. [Seal.]" This makes the whole document an affidavit, upon which perjury could be assigned; and in our judgment it sufficiently complies with the requirements of verification. We think, therefore, that the court did not err in refusing to strike out the accusation.

2. We do not think that the court erred in denying the demand for a jury trial. The provision of the constitution that "the right of trial by jury shall be secured to all, and remain inviolate," refers, gen-

erally, to those cases in which the right of trial by jury existed at common law at the time of the adoption of the constitution. *Cassidy v. Sullivan*, 64 Cal. 266; *Koppikus v. Commissioners*, 10 Cal. 249; *Grim v. Norris*, 19 Cal. 140. It probably would not include new offices created by statute after the adoption of the constitution, as held in *Tims v. State*, 26 Ala. 165, or the case where the legislature creates an office, and subjects the incumbent to a trial for his official misconduct without a jury, as held in *Boring v. Williams*, 17 Ala. 510, even though our constitution contained no other provision on the subject. But the constitution itself, after a provision for the impeachment before the senate of certain enumerated officers, expressly provides that "all other civil officers shall be tried for misdemeanor in office in such manner as the legislature may provide." Article 4, § 18. The manner of such a trial is therefore clearly within the power of the legislature, and it is equally clear that the "summary manner" mentioned in said section 772 of the Penal Code excludes the right of trial by jury.

8. We think that the demurrer to the accusation was properly overruled. The general charge of the accusation is that appellant, as tax collector, willfully and corruptly refused and neglected to perform his official duties, in this: that he collected taxes not legally due, and did not pay them into the county treasury, or notify the persons from whom they had been thus collected, but fraudulently and corruptly retained the same, and appropriated them to his own use. The main points of the demurrer are that the accusation does not conform to sections 950, 951, and 952 of the Penal Code; that it is not specific enough in stating the particular circumstances of the offense, the persons from whom the taxes were collected, and the time when appellant's term of office commenced; and that no offense is charged, because the accusation does not show that appellant did the acts charged during his present term of office. The sections of the Penal Code referred to deal solely with the requirements of indictments in purely criminal actions, in which defendants may be convicted, and made to suffer the usual penalties which are imposed on convicts; and they do not, therefore, directly apply to a proceeding like the one in the case at bar, where the defendant can, at the worst, only lose an office, and have a judgment (not a fine) entered against him for \$500 in favor of the informer who makes the accusation, which judgment in this case has been waived by the informer. Of course the accusation, like any pleading in any kind of an action or proceeding, civil or criminal, must contain the substance of what is required in subdivision 2 of section 950 of the Penal Code; viz.: "A statement of the acts constituting the offense, in ordinary and concise language, and in such a manner as to enable a person of common understanding to know what is intended." This requirement is fully met by the accusation in the case at bar, for, after stating the charge generally, it gives, in detail,

the names of a number of persons from whom taxes were collected, and the amounts of such taxes. As to the point that there is no statement of the time when appellant became tax collector, or when his present term commenced, the averment is that the appellant "is, and . . . all times herein mentioned was, the duly elected, qualified, and acting tax collector of said San Diego county. This was a sufficient averment on that point. Of course, the proceeding lies only against one in office, and not against one whose term has expired, but the accusation sufficiently shows appellant to be in office. There are no other points presented by the demurrer which need notice.

4. The findings show that appellant was tax collector during the years 1887, 1888, and 1889, and that his present term commenced on the first Monday of January, 1889, he thus being his own successor in the office. And the findings and judgment are attacked by appellant because they take into account taxes collected before January, 1889, the point being that, as this proceeding is for the removal of appellant from office, nothing can be considered that occurred before the commencement of his present term. But, in the first place, finding 19 was evidently intended to find, and we think does sufficiently find, that part of the taxes to which the charge against appellant relates were collected in 1889 after his present term began, without considering the other findings that they were collected in the "collecting season of 1888-89." And in the second place, if the finding on that point be not specific enough, it is found, among other things, that part of the taxes with which appellant is charged were collected in December, 1888, and that the taxes collected by him in that month were not paid by him to the treasurer, nor was any report made thereof to the auditor "until on and after the 11th day of January, 1889, and during his present term of office." And if it was his duty to pay over the taxes to the treasurer, and settle with the auditor, under section 3753 et seq. of the Political Code, in January, 1889, or afterwards, his failure to do so was a failure during his present term, although they may have come into his possession as collector at the close of his previous term. If he had not been re-elected, and had failed to account, he could not have been proceeded against under section 772, Pen. Code, because he would have been beyond the reach of a proceeding by which he could be "deprived of his office." There are other provisions of the Code, however, under which he would have been then liable. But as he was re-elected, and continued in possession of the office, whatever misconduct he was afterwards guilty of occurred during his new term.

We see no defects in the findings, assuming that findings were necessary in this proceeding. It is true that it is first found that the double and illegal taxes with which appellant is charged were, in the first instance, collected by his deputies and clerks inadvertently, and without evil intent on their part, or on the part of appellant; but it is also found that afterwards he "knowingly, willfully, and corruptly re-

tained the same in his possession, and knowingly, willfully, and corruptly appropriated the same to his own use." Whether or not this last finding is a correct statement of fact, was for the trial court to determine. As there is no evidence before us, we have no means of reviewing it. It must be taken here as true. We see no reversible error in the record. Judgment affirmed.

We concur: WORKS, J.; FOX, J.; SHARPSTEIN, J.; PATERSON, J.

86 Cal. 74

MCCRACKEN v. SUPERIOR COURT. (No. 13,918.)

(*Supreme Court of California.* Sept. 20, 1890.)

APPEAL—JUSTIFICATION OF SURETIES.

The sureties in a bond given on appeal from a justice of the peace having failed to justify in five days after exception to their sufficiency, the superior court is without jurisdiction to extend the time in which they may justify or new sureties be given; Code Civil Proc. Cal. § 978, providing that unless they or other sureties justify in five days "the appeal must be regarded as if no such undertaking had been given."

In bank. *Certiorari.*

*Willis & Appel*, (Z. T. Cason, of counsel,) for petitioner. *E. H. Bentley* and *J. Gardiner*, for respondent.

WORKS, J. This is an application for a writ of *certiorari* to review and annul the action of the superior court of Los Angeles county, in extending the time for filing an undertaking on appeal from a justice's court, and in taking jurisdiction of the cause. The petitioner brought an action in the justice's court and recovered a judgment on the 19th day of April, 1890. On the 24th day of the same month the defendant served and filed his notice of appeal to the superior court, and on the 2d day of May filed in the justice's court his undertaking on appeal. On the 3d day of May the petitioner duly excepted to the sufficiency of the sureties on the undertaking, and on the same day the defendant gave the petitioner notice that the sureties on said undertaking would justify before the justice on the 7th day of May. On that day the petitioner appeared, but the sureties did not then or at any other time appear and justify. No new undertaking was filed or deposit made by the defendant in the justice's court. On the 9th day of May, and after the expiration of the five days within which the sureties might have justified, the superior court, the respondent in this proceeding, made an order giving the defendant in that action 30 days additional time within which to have the sureties justify, or give other sureties. After the expiration of 30 days from the time of the rendition of the judgment the petitioner moved to dismiss the appeal, which motion was denied, and the defendant was then allowed to give a new undertaking.

It is contended that, in making the order giving the defendant time within which to justify his sureties, or give a new undertaking, and in permitting the defendant to file his undertaking after the expiration of 30 days from the time the judg-

ment was rendered, the respondent exceeded its jurisdiction, and that its action should be annulled. An appeal may be taken from a justice's court to the superior court at any time within 30 days after the rendition of the judgment. Code Civil Proc. § 974. To effectuate the appeal three things are necessary, viz.: The filing of a notice of appeal with the justice, the service of a copy of the notice upon the adverse party, and the filing of a written undertaking; and all of these things must be done within 30 days after the rendition of the judgment. Code Civil Proc. §§ 974, 978; *Coker v. Superior Court*, 58 Cal. 178. In *Coker v. Superior Court*, supra, it was said: "All of these are jurisdictional prerequisites. None of them can be dispensed with, nor can any of them if not done be supplied, or if fatally defective be remedied, after the time limited by the statute; for, until all the prerequisites are completed, the appeal is not effectual for any purpose." Therefore, if no undertaking had been given in this case within the 30 days, it is clear that the appeal would not have been effectual for any purpose, and the superior court would have had no power or jurisdiction to make an order extending time or take any action whatever in the case. Here an undertaking was given, but the sureties failed to justify within the time allowed by law. Section 978 of the Code of Civil Procedure provides: "The adverse party may except to the sufficiency of the sureties within five days after the filing of the undertaking, and, unless they or other sureties justify before the justice or judge within five days thereafter, upon notice to the adverse party, to the amount stated in their affidavits, the appeal must be regarded as if no such undertaking had been given." In other words, if the sureties fail to justify within the time prescribed, the "appeal is not effectual for any purpose." *Wood v. Superior Court*, 67 Cal. 115, 7 Pac. Rep. 200. The time within which these jurisdictional prerequisites shall be completed cannot be extended by an order of court. *Roush v. Van Hagen*, 17 Cal. 122. It is evident that the respondent acted under the belief that section 1054 of the Code of Civil Procedure gave it authority to make the order; but, in our judgment, the section referred to has no application to this case. It certainly cannot be so construed as to give the superior court the power to make an order extending the time within which to do an act which is required to be done in the justice's court, and which must be done within the time limited by the statute, in order to give the superior court jurisdiction to act in the case at all. Whether the order extending time was made before or after the time when the act must be done in the justice's court, can make no difference. The superior court had no jurisdiction to extend time within which to do an act in the justice's court while the action remained in that court, and, as we have seen, until the sureties justified the cause remained in the justice's court. The appeal was not effectual for any purpose, and the superior court had no jurisdiction whatever in the case. It may be otherwise where a defective or

informal undertaking has been given. In such cases it has been held that the superior court may allow a new undertaking to be filed. *Coulter v. Stark*, 7 Cal. 244; *Cunningham v. Hopkins*, 8 Cal. 33; *Rabe v. Hamilton*, 15 Cal. 31; *Gray v. Superior Court*, 61 Cal. 337; *Coker v. Same*, 58 Cal. 177. But, to allow the superior court to assume jurisdiction, and make the order complained of in this case as against the plain provision of the Code that, "If the sureties fail to justify within the time fixed," it must be regarded "as if no such undertaking had been given," would be to override the express and unequivocal language of the statute. It is well said in *Roush v. Van Hagen*, 17 Cal. 122: "It was necessary that the sureties should justify within five days after the notice of exception, and the failure to do so rendered the appeal a nullity. The statute provides that upon a failure to justify within the time limited, the appeal shall be regarded as if no undertaking had been given. The orders extending the time were in contravention of this provision, and were therefore inoperative. The statute is peremptory in its terms, and the consequence of a violation is that the party loses the benefit of his appeal. 'It has been repeatedly held,' says Sedgwick, 'that courts have no dispensing power, even in matters of practice, when the legislature has spoken. Thus, where a statute declares that a judge at chambers may direct a new trial, if application be made within ten days after judgment, it has been said that he can no more enlarge the time than he can legislate in any other matter. When a statute fixes the time within which an act must be done, the courts have no power to enlarge it, although it relates to a mere question of practice. So where an appeal, to be valid, must be made within ten days, it is void if taken on the eleventh.' Sedg. St. & Const. Law, 322." An undertaking required in order to perfect an appeal may be distinguished from one to stay proceedings. As to the latter it is not necessary to give the appellate court jurisdiction, and the undertaking necessary to give jurisdiction having been given, greater liberty is and should be allowed as to the giving of the stay-bond which is only necessary to preserve to the party the benefits of his appeal. *Hill v. Finnigan*, 54 Cal. 493; *Lee Chuck v. Quan Wo Chong*, 81 Cal. 228, 22 Pac. Rep. 594. Authority is given the supreme court to accept a new undertaking in lieu of an insufficient one in certain cases and on certain terms, (St. 1861, p. 589, § 3.) but we know of no such statutory authority on the part of the superior court. The respondent had no jurisdiction to make the order complained of, and its action must be annulled. It is so ordered.

We concur: FOX, J.; PATERSON, J.; MCFARLAND, J.; SHARPSTEIN, J.

VISHER v. SWINNERTON. (No. 13,932.)  
(Supreme Court of California. Sept. 26, 1890.)

In bank. *Mandamus*.

L. W. Elliott, for petitioner. Baldwin & Campbell, for respondent.

PER CURIAM. This is an application for a writ of mandate to compel the settlement of a bill of exceptions. Some of the facts allege, and upon which petitioner claims he is entitled to have a bill of exceptions settled, are denied by the respondent. It is necessary that the facts of the case be settled. The parties being unable to agree upon a referee, it is ordered that the matters in issue be referred to E. E. Hood, Esq., of Stockton, Cal., to find the facts, and report the same to this court; his fees therefor, and the fees of witnesses, to be paid as in cases referred by the superior court.

86 Cal. 72

In re MOORE'S ESTATE. (No. 13,851.)

(Supreme Court of California. Sept. 19, 1890.)  
REMOVAL OF ADMINISTRATOR—APPOINTMENT PENDING APPEAL.

Pending an appeal from an order removing an administrator, he is merely suspended from office, and no general administrator can be appointed, but a special one only.

Department 2. Appeal from superior court, Santa Clara county; JOHN REYNOLDS, Judge.

Frank M. Stone, for appellant. Chas. B. Younger, for respondent.

SHARPSTEIN, J. This appeal is from an order appointing Helen M. Moore general administratrix of said estate. It appears by the bill of exceptions that Thomas W. Moore was duly appointed administrator of said estate on the 4th day of March, 1872, and that he continued such administrator until August 29 or September 7, 1888, when he was removed by order of the court. From that order he appealed to the supreme court, and said appeal was pending in said supreme court when said Helen M. Moore was appointed administratrix of said estate by the order of the court from which this appeal is taken. The contention of appellant is that, pending an appeal from the order removing Thomas W. Moore from the administration of the estate in question, the court had no authority to appoint other than a special administrator. In support of that contention he cites section 1411 of the Code of Civil Procedure, which provides, among other things, that "when an executor or administrator dies or is suspended or removed, the superior court or a judge thereof must appoint a special administrator." Pending the appeal of Thomas W. Moore from the order removing him he was suspended from office, and it was within the power of the court to appoint a special administrator to act during the period of suspension, but not to appoint a general administrator until such order or removal became final. The grounds upon which we are urged to dismiss the appeal are not sufficient to justify a dismissal.

We concur: THORNTON, J.; MCFARLAND, J.

86 Cal. 73

ALPERS v. HUNT. (No. 12,801.)

(Supreme Court of California. Sept. 27, 1890.)

BARRATROUS CONTRACTS—PUBLIC POLICY—PRACTICE—APPEAL.

1. Where, in an action on contract, defendant moves for a nonsuit at the close of plaintiff's

evidence on the ground that the contract alleged is contrary to public policy, and the motion is overruled, but the court grants a new trial on the ground that it erred in overruling the motion, the sufficiency of the complaint may be considered on plaintiff's appeal from the order granting the new trial, but not the evidence.

2. A contract by an attorney to pay a layman a third of his fee, if the layman procures the employment of the attorney by a litigant, is contrary to public policy, and void, under Code Civil Proc. Cal. § 287, subd. 4, declaring that an attorney may be removed or suspended for "lending his name to be used as attorney and counselor by another person who is not an attorney and counselor," as the effect of such a contract is to permit, by indirection, the use of an attorney's name by another not an attorney.

Department 2. Appeal from superior court, city and county of San Francisco; T. H. REARDEN, Judge.

*R. Percy Wright*, for appellant. *Sullivan & Sullivan*, for respondent.

THORNTON, J. This is an action brought by the plaintiff, as assignee of William L. Bolte, against John Hunt, executor of the last will and testament of George F. Sharp, to recover a sum of money claimed to be due on a contract alleged to have been made by Sharp and I. C. McCeney with plaintiff's assignor. On the trial verdict and judgment passed for plaintiff. Defendant moved for a new trial, which was granted, and, from the order granting the motion, plaintiff appealed.

The main question to be determined herein arises on the complaint. The averments of the complaint set forth that, prior to the 1st day of August, 1878, George F. Sharp and Julius C. McCeney were attorneys at law, practicing their profession in the city and county of San Francisco; that, in August, 1878, Mrs. Volina E. Harrigan was the owner of, and claimed an interest in the estate of Eliza Haskell, deceased, which claim was contested by other persons, and required the services of attorneys at law for its enforcement; that, about the time last mentioned, Sharp & McCeney agreed with one William L. Bolte that, if he, Bolte, would procure Mrs. Harrigan to employ them as attorneys at law in the matter of her interest and claim, above mentioned, he, Bolte, should be entitled to and should have one-third part of whatever should be received by them, or either of them, by reason of and under said employment; that thereupon Bolte procured Mrs. Harrigan to employ them as attorneys at law in the matter of her interest and claim; that, in pursuance of the arrangement thus brought about by Bolte, Mrs. Harrigan entered into a contract with Sharp & McCeney, whereby, in consideration of their professional services to be rendered in and about her said interest and claim, she agreed to give them one-third part of whatever share of the estate of Mrs. Haskell he might become entitled to or receive by way of compromise, or otherwise; that Sharp & McCeney duly performed all the conditions of their said contract, and by such services she became entitled to a large amount of property, a part of the estate aforesaid; that Mrs. Harrigan thereupon agreed upon a certain sum of money to be paid Sharp & McCeney in satisfaction of their

claim against her under the contract above stated, which they agreed to accept; that, in pursuance of this agreement, Mrs. Harrigan executed to them a promissory note for the sum of \$14,400, bearing date the 31st day of January, 1880, payable two years after its date, with interest, at the rate of 7 per cent. per annum; that, to secure the payment of this note, Mrs. Harrigan, with others, executed to Sharp & McCeney a mortgage upon certain real property; that afterwards McCeney assigned all his interest in the note and mortgage to Sharp; that the note and mortgage were subsequently sold by Sharp for the sum of \$17,964.18, which was paid to him; that no part of said sum of money was ever paid to plaintiff or his assignor, Bolte. Other averments are made in the complaint, setting forth the relations of the parties, and material to show plaintiff's right to maintain this action, but, as they have no bearing on the question necessary to be determined herein, need not be stated. On the trial, the plaintiff having put in his evidence and rested, the defendant moved for a nonsuit, on the ground, among others, (1) that the alleged contract between McCeney & Sharp and Mrs. Harrigan is against good morals and public policy; and (2) that the alleged contract between Sharp & McCeney and William L. Bolte is against good morals and public policy. The motion was denied, and the defendant excepted. A verdict having been rendered for plaintiff, defendant moved for a new trial on a statement. In it he assigns as an error of law occurring at the trial, and excepted to by him, the denial of his motion for a nonsuit. On the hearing of the motion for a new trial, the court granted it "on the sole ground [as appears from the transcript] that the contract sued upon is contrary to public policy." As above stated, the motion for a nonsuit has reference only to the contract alleged, and the error of law set out in the statement is of the same import. The contract is alleged in the complaint alone. The motion for a nonsuit must then be determined on the allegations of that pleading. The court must have granted the new trial for the reason that the contract set forth in the complaint was contrary to public policy, for from the complaint only can we ascertain the contract sued on. And here we may remark that, according to the well-settled practice, the court below could not, in passing on the motion for a new trial, go beyond the grounds on which the new trial was asked; and, in holding the action of the court to have reference only to the contract set forth in the complaint, we confine the course pursued by the court to the contract alleged therein, and to the grounds on which the defendant asked for a nonsuit. From the foregoing it is clear that, in passing on the question as to the character of the contract, the court is limited to what is stated by plaintiff in setting forth his cause of action, and that the evidence introduced on the trial cannot be considered.

But it is argued by counsel for appellant (plaintiff below) that, on an appeal, as



this is, from an order granting a new trial, the sufficiency of the complaint cannot be considered. To support this contention counsel make reference to several cases decided by this court, viz.: *Spanagel v. Dellinger*, 38 Cal. 283; *People v. Turner*, 39 Cal. 372; *Mason v. Austin*, 46 Cal. 385; *Jacks v. Buell*, 47 Cal. 162; *Onderdonk v. San Francisco*, 75 Cal. 534, 17 Pac. Rep. 678; and *Wheeler v. Kassabaum*, 76 Cal. 90, 18 Pac. Rep. 119. In the cases cited the question presented is entirely unlike the one presented here. In this case the defendant moved for a nonsuit on grounds that challenged the sufficiency of the complaint, in that it set forth a contract on which an action could not be maintained. The nonsuit was denied, and an exception was regularly reserved. The defendant then found himself in a position where he had a right to have the ruling of the court on his motion reviewed on a motion for a new trial. The ruling of the court on defendant's motion for a nonsuit, and his exception thereto, could be set forth in a statement or bill of exceptions as an error of law occurring at the trial, and there excepted to by him that it might be reviewed as above set forth. This right was assured to him by the provisions of the statute. Code Civil Proc. § 657, subd. 7; *Id.* §§ 658, 659. On the hearing of the motion for a new trial, the court *a quo* had an opportunity of reversing its former action. If it approved its previous ruling, the motion for a new trial would be denied. If its previous ruling was, in its judgment, erroneous, it was empowered to recall it, and grant a new trial. On such hearing it was in the line of the regular procedure to confirm its former action, or disapprove and recall it. Such course the law sanctions as applicable to all errors of law. An error committed in passing on a motion for a nonsuit constituted no exception to the rule. Whether the court denied or granted a new trial, its action was subject to be reversed on appeal. The plaintiff had a right to appeal from the order granting a new trial, and his appeal would bring before the court the action of the court below, as to every question germane to the inquiry whether the lower court's action was in accordance with law or not. If the court below had on the trial committed an error for which it was proper, on its being regularly brought before it, to grant a new trial, this court would approve and affirm the action of such court in granting such relief. If, on the contrary, no such error had been committed, if the court below had on the trial before it ruled correctly, this court would, in accordance with such view, hold the order granting a new trial erroneous, and reverse it. This is the usual course of practice in the courts of this state, and we see nothing in it foreign to the procedure prescribed by law. It has been a practice, not unusual in our courts, to ask a trial court to instruct the jury, when the complaint did not state facts sufficient to constitute a cause of action, to find a verdict for defendant. Whether given or refused such ruling could be reviewed on motion for a new trial; and, on the hearing of this latter motion, whether favorable or

adverse to the motion, an appeal could be prosecuted from the order granting or refusing the new trial, and the action of the trial court passed on in this court, and either approved or set aside. We see nothing irregular here in having the question made on the motion for a nonsuit considered and passed on in this court, though it does go to the sufficiency or insufficiency of the complaint. The question comes before us in the regular course of procedure, and the legal exigencies of the case demand that it be considered and determined. If this court failed to pass on the point, it would in effect hold that there was error of law occurring at the trial, and there excepted to, which could not be reviewed on a motion for a new trial, and that, too, when the statute regulating the procedure in our courts had provided that all such errors should be so reviewed. There is nothing in the cases cited by counsel for appellant in conflict with what is stated above. In our judgment the question is regularly presented here for decision, and the respondent is entitled to have it determined.

Is the contract set forth in the complaint contrary to public policy or good morals. Such is the question presented to us for determination. That contract is in substance this: A third person, not an attorney and counselor at law, enters into an agreement with an attorney and counsel or at law that he will procure his employment by a litigant, and that in consideration of such procurement he is to have from the attorney and counselor so employed, one-third part of whatever remuneration the attorney receives for his services from the litigant. Is such a contract void as contended, is the point presented for consideration and decision. Courts are justified in declaring a contract void as against public policy, when it is expressly or impliedly forbidden by the paramount law, or by some principle of the common law, or by the provisions of a statute. As said by CHASE, C. J., in the *License Tax Cases*, 5 Wall. 469: "This court can know nothing of public policy except from the constitution and the laws, and the course of administration and decision." The policy of the state "can be ascertained only by reference to the constitution and laws passed under it, or, which is the same thing, to the principles underlying and recognized by the constitution and laws." *Lux v. Haggin*, 69 Cal. 308, 10 Pac. Rep. 674. Though public policy is a doctrine on which courts and judges should proceed with caution, still there are many cases to be found in the books of reports in which the doctrine has been applied. Marriage brokerage bonds, contracts in restraint of trade, contracts by expectant heirs, or in consideration of illicit cohabitation, or such contracts as may injuriously affect the administration of justice, or to procure a contract from a public officer, or to pay for an appointment to office, or aiding in procuring an appointment, or to pay for obtaining a pardon, or injuriously affecting the public interest as to the location of the terminus of a railroad,—afford instances of the application of the doctrine.

See 5 Rob. Pr. c. 42, pp. 407, 488, where many cases are cited and commented on. In considering this question, our attention must necessarily be given to the statutes of this state in regard to attorneys and counselors at law. They are to be found in the Code of Civil Procedure, and in the section to which reference will be herein specially made. The following provisions will be found in the statute: Any citizen or person resident of this state, who has *bona fide* declared his intention to become a citizen in the manner required by law, of the age of 21 years, of good moral character, and who possesses the necessary qualifications of learning and ability, is entitled to be admitted as an attorney and counselor at law in all the courts of this state. Code Civil Proc. § 275. Every applicant for such admission must produce satisfactory testimonials of good moral character, and undergo a strict examination as to his qualifications in open court. Id. § 276. If, upon examination, he is found qualified, he shall be by the court admitted as such attorney and counselor, by an order entered to that effect upon its records, and a certificate of such record shall be given to him by the clerk of the court, which certificate shall be his license. Id. § 277. On his admission, he must take an oath to support the constitution of the United States, and the constitution of this state, and faithfully to discharge the duties of an attorney and counselor to the best of his knowledge and ability. Id. § 278. A roll of attorneys is to be kept by a prescribed public officer, which the applicant, on his admission, is required to sign. Id. § 280. Any person practicing law in any court, except a justice's court or a police court, without having received a license as attorney or counselor, is declared to be guilty of a contempt of court. Id. § 281. Section 282 of the same Code prescribes the duty of an attorney and counselor, by the provisions of which he is required, *inter alia*, to support the constitution and laws of the United States and this state, and to maintain the respect due to the courts of justice and judicial officers. Rules of duty are further prescribed in this section, which are intended to regulate and control the conduct of an attorney and counselor with regard to the public, and to those in whose behalf they appear in court, and exercise their appropriate functions. Authority is conferred on him in the discharge of his duties and functions, peculiar to his character as such. Id. § 283. He is subject to the authority of the courts, and may be, for cause shown, suspended or removed, and deprived of the right to pursue his profession by the supreme court, or either department thereof, or by a superior court. Id. § 287. One of the causes for which he may be removed or suspended is the following: "Lending his name to be used as attorney and counselor by another person, who is not an attorney and counselor." Id. § 287, subd. 4. The foregoing provisions taken from a public statute are enacted, not only in the interest of those who employ the services of attorneys, but in the interest of the community or public at large. They concern the administra-

tion of justice, always a subject of public concernment, and relate to a class of officers of courts in which the people of the state have an abiding interest. Bolte was never an attorney and counselor at law. He had never been admitted to the privileges, or authorized to exercise the rights, of an attorney and counselor. He had never assumed or been authorized to assume any of the functions of an attorney and counselor, nor was he bound by the obligations of such a position. Now, if either of the attorneys who contracted with Bolte had lent to the latter his name to be used by him as attorney and counselor, he would have been guilty of a violation of the clause above quoted from section 287 of the Code of Civil Procedure, for which he would have been liable to be removed or suspended from the practice of his profession. Was not Bolte really allowed to use their names in the prosecution of a matter in litigation? Under the employment of them as attorneys, made through Bolte's procurement, they engaged to use their faculties as attorneys and counselors at law for his benefit, and that, too, in a cause in which he had no interest as a party. By the terms of the agreement he was to derive a benefit from the rendition of their services in their professional capacity, and to receive a share of their fee, as if he had been concerned with them as a regularly admitted attorney. He is thus enabled, through their agency, vicariously, and not openly and in his own name, to aid in the prosecution of a matter in litigation, and to receive through it such a reward as is usually gained by an attorney regularly admitted to exercise his profession. An attorney is prohibited to allow the direct use of his name as an attorney and counselor at law, under the circumstances disclosed by the complaint in this case. Of what avail is such prohibition, if it can be by such indirection as is practiced in this case evaded? We are of opinion that the facts here disclose a case of indirect violation of the clause referred to, which is as much forbidden as a direct violation. If such a practice were allowed, an attorney might have a number of undisclosed associates through his agency exercising the functions of an attorney and counselor, and reaping the rewards flowing therefrom, without resting under any of the responsibilities incident to such a position, and possessing none of the qualifications which the law demands and requires. Such a practice would tend to increase the amounts demanded for professional services. In such a case an attorney would be induced to demand a larger sum for his services, as he would have to divide such sum with a third person.

We have examined *Bunn v. Guy*, 4 East, 190, and *Candler v. Candler*, Jac. 225, cited by counsel for appellant to sustain the validity of the contract sued on. We do not consider them applicable to the case before us. The office of attorney in England is entirely different from that of an attorney and counselor in this state. In England, the fees of an attorney are fixed by statute, or rules of court, or orders in council, and his bill of costs and

charges for disbursements are subject to be taxed by a taxing officer, and the taxation reconsidered by such officer. The decision of the taxing officer can also be revised by the judge on appeal. Weeks, Attys. §§ 324, 325, et seq. We cannot suppose that the fact that the attorney has to share the amount of his bill with an outsider, would at all affect the amount allowed him. That amount would be the same regardless of the circumstance that he was bound by his agreement to divide it with another. The laws of England regulating the appointments, duties, and conduct of attorneys have not been brought to our notice, and therefore we cannot determine how far the laws there prevailing permit or recognize as legal a contract made by an attorney to share his fees with a third person. Under such circumstances this court could not, with any confidence, pronounce any judgment how such a contract would be affected by English statutes or rules of court. In *Bunn v. Guy* the validity of a contract between attorneys was called in question. A practicing attorney (Carpenter) agreed for a valuable consideration to relinquish his business and recommend his clients to two other attorneys (Bunn and Guy) and that he would not himself practice within certain limits, and would permit them to make use of his name in their firm for a certain time, without any interference on his part. The question arose in chancery concerning the marshaling of assets, and a case stating the above contract was sent by the lord chancellor to the court of king's bench for its opinion. The court certified their opinion to the court of chancery that the contract above stated was good in law. In *Candler v. Candler*, Jac. 225, an agreement by an attorney to pay a share of the profits of his business to the widow of his deceased father, who had been an attorney, was held valid. The agreement was made by deed between the widow of Henry Candler, the deceased father, and their son Henry Candler. It was recited in the deed that the agreement was entered into under a due sense of the influence which his mother and family could retain with his father's clients and connections, and the widow (Mary Candler) covenanted to use her utmost endeavors and influence to induce her friends and connections to employ him. The lord chancellor (ELDON,) in delivering his judgment, said: "I have thought that, consistently with the policy of the law, agreements could not be made by which they [referring to attorneys] contract to recommend those who succeed them. I doubted whether professional men could be recommended, not for skill and knowledge in their profession, but for a sum of money paid and advanced. I knew that this would rip up many transactions, and I was happy that the court of king's bench was of a different opinion, though I never could entirely reconcile myself to their doctrine." The opinion in *Bunn v. Guy*, supra, was here referred to by Lord ELDON. In our judgment the remarks of Lord ELDON, quoted above, may well create a strong doubt as to the correctness of the conclusion reached in *Bunn v.*

*Guy*. However, for the reasons above given, we cannot follow the rulings in the cases just noticed. It is clear that the right of the plaintiff to recover herein is the same as that of his assignor, Bolte. If the latter cannot recover, neither can the plaintiff, his assignee. The considerations expressed herein have led this court to the conclusion that the contract sued on, and alleged in the complaint, is forbidden by the policy of the law, and void, and that the court below erred in denying the defendant's motion for a nonsuit. The motion for a new trial was, therefore, properly granted, and the order appealed from must be affirmed. The view taken herein disposes of the case, and it becomes unnecessary to pass on the other questions raised by counsel for appellant. Order affirmed.

We concur: MCFARLAND, J.; SHARPESTEIN, J.

86 Cal. 151

*In re LAHIFF'S ESTATE.* (No. 12,891.)

(*Supreme Court of California.* Oct. 9, 1890.)

HOMESTEAD—WIFE'S SEPARATE ESTATE.

1. Where testatrix dies leaving no other property than the premises which she and her husband had occupied as a homestead, although, by her will, she distributes her entire estate in the form of money bequests, and authorizes her executor to sell the whole property, the interest of the legatees is subject to the right of the husband to a homestead for a limited period, and to the authority and duty of the court to set it apart, given by Code Civil Proc. Cal. §§ 1465, 1468.

2. The power of the court to set aside the property as a homestead is not defeated by the fact that, previous to the application of the husband, the executor had negotiated a sale of the property, which had not yet been confirmed by the court.

In bank. Appeal from superior court, city and county of San Francisco; *J. V. COFFEY*, Judge.

*Thomas E. Curran*, for appellant. *E. H. Rixford*, for respondent.

Fox, J. Catherine Lahiff died testate in November, 1887, leaving a surviving husband, Lawrence Lahiff, but no children. She owned, as her separate property, a lot of land in San Francisco, returned in the inventory as constituting her entire estate, appraised, with the improvements on it, at \$5,000. This property had been occupied by herself and her husband, during her life-time, from the date of their marriage, as their residence and homestead; the lower floor of the building on the front of the lot being leased out for a carpenter shop, the upper floor being divided into four rooms suitable for dwelling purposes; the other improvements on the lot consisting of a small building of two rooms in the rear, and a stable, once accessible from the rear of the lot, but, at the time of her death, inaccessible and unoccupied. By her will, she distributed her entire estate in the form of money bequests; devising to her husband \$600, and no more; making divers other specific bequests, amounting to \$2,600, to other relatives, and \$1,800 to priests, churches, and charities; and making Father Pendegast residuary legatee. The will also authorized

her executor to sell the whole of her property at public or private sale, with or without notice, and without obtaining an order of sale. The will having been admitted to probate, the executor negotiated a sale of the property, reported the same to the court, and petitioned for confirmation thereof. Pending the hearing upon this petition, the surviving husband applied to the court, upon petition setting out the facts substantially as above set forth, for an order setting the property apart to him as a homestead. Of this, due notice was given; and, upon the hearing, the heirs and devisees appeared, and demurred to the petition. The demurrer was overruled; when the contestants answered, setting up the facts as to the will, and the probate thereof. On this petition, and the answer thereto, a hearing was had, findings filed, and a decree entered, setting apart the property to the surviving husband as a homestead, during the period of his natural life; but requiring him, inasmuch as there was no other property of the estate, to pay to the executor the sum of \$439 65, costs and expenses of administration. From this decree, and the order overruling their demurrer, the heirs and devisees appeal.

1. The court did not err in overruling the demurrer. The petition did not disclose a state of facts such as was shown in *Maloney v. Hefer*, 75 Cal. 422, 17 Pac. Rep. 539, cited by appellants; and that case is not, therefore, in point. While the will did authorize the sale of the property, and attempted to dispose thereof in the form of money devises, it did not operate as an actual transmutation of the property into money. When the will became operative at all, the property was, in fact, land used as a homestead, though not then protected as such by selection and recording. The parties who then became interested therein took their interests subject and subordinate to all the contingencies of administration, and, among others, to the authority conferred by law upon the court to set the same apart, for a limited period, to the surviving husband as a homestead, as well as to appropriate the same for the payment of debts, if there were any. Civil Code, § 1265; Code Civil Proc. § 1474; *Sulsberger v. Sulsberger*, 50 Cal. 385.

2. No homestead having been selected and recorded during the life-time of the decedent, it was the duty of the court to designate and set apart a homestead out of the community property, if there was any such, if not, then out of the separate property of the decedent, (Code Civil Proc. § 1465; *In re Davis*, 69 Cal. 458, 10 Pac. Rep. 671;) and it might be done from any property suitable for the purpose, (*In re Sharp*, 78 Cal. 483, 21 Pac. Rep. 182.) If there was no minor child, then it was for the surviving husband alone, (Code Civil Proc. § 1468;) but, if taken, as this was, from the separate property of the decedent, it could be for only a limited period, as was done in this case. While it is true that the husband could not have selected and made a homestead of this property without the consent of his wife, while she was living, (Civil Code, § 1239,) it is

equally true that the court may set it apart as such after her death, under the provisions of sections 1465 and 1468, Code Civil Proc. The power of the court in this regard is not defeated by the action of the executor in negotiating a sale which is unconfirmed, before the decree setting apart the homestead is made. Decree and order affirmed.

We concur: BEATTY, C. J.; SHARPSTEIN, J.; MCFARLAND, J.; PATERSON, J.; THORNTON, J.

36 Cal. 142

HARTIGAN v. SOUTHERN PAC. R. CO. (No. 12,899.)

(Supreme Court of California. Oct. 3, 1890.)

DEATH BY WRONGFUL ACT—ACTION—PARTIES—  
RES JUDICATA.

1. Under Code Civil Proc. Cal. § 377, permitting either the heirs or personal representative of a decedent to bring an action for his wrongful death, only one action for such cause can be brought, and a recovery by the executor is a bar to an action by the heirs.

2. Under Code Civil Proc. Cal. § 1588, giving executors and administrators power to compromise, with the approval of the probate court, debts due decedent, the executor may compromise a suit brought to enforce a claim for decedent's wrongful death.

Department 1. Appeal from superior court, Contra Costa county; J. P. JONES, Judge.

D. M. Delmas and George Lesinsky, for appellant. W. L. Dudley, for respondent.

Fox, J. Patrick Hartigan died June 12, 1886, from injuries alleged to have been received through the negligence of the defendant. He left a widow, the plaintiff in this action, but no children; also a will, of which he named John McCarthy as executor. The will being duly proved and admitted to probate, and letters testamentary issued to McCarthy, he brought an action against the present defendant for damages for the injuries resulting in the death of his testator. Afterwards, and before the answer was filed to the complaint in that action, the plaintiff herein brought this suit against the same defendant, and upon the same cause of action. She then filed an intervention in the suit brought by the executor, denying the right of the executor to maintain the action, and praying that he be not allowed to proceed therewith. To that intervention the executor answered, and the defendant answered to both the complaint and the intervention,—both after demurrers had been interposed thereto and overruled. In that former action a offer was made to allow the plaintiff to take judgment for the sum of \$5,000; the offer was reported to the probate court, and upon hearing of petition filed in that behalf, at which the widow appeared and was heard in the matter, the executor was authorized by the court to accept the offer, and the same was accepted, and judgment entered accordingly, and subsequently paid, and satisfaction thereof entered. Subsequently, this case came on for trial, and the plaintiff having introduced her evidence and rested, the defendant offered, and there was admitted in evidence, against the ob-

jection of plaintiff, the judgment roll and satisfaction of judgment in the former case. After argument of the case, the court charged the jury that said former judgment having been plead in bar, and having been offered and admitted in evidence, the same was a bar to this action, and that they should therefore find for the defendant. Verdict and judgment accordingly, from which plaintiff appeals.

There was no error in the instruction. The right of action is purely a statutory one, and under section 377, Code Civil Proc., could be brought by either the heirs, or the personal representative, but separate actions could not be brought or maintained by both. Under the former statute it could only be brought by the executor or administrator, (*Kramer v. Railroad Co.*, 25 Cal. 434,) but that law has been so amended in and by the Code that now it may be maintained by either the heir or the executor or administrator. On this subject this court has recently said: "But one action is permitted, and that action may be brought either by the heirs of the deceased, or by his personal representatives, and when one action is brought, and the court has obtained jurisdiction of it, that is the only action which the statute permits. As, for instance, when the personal representative of the deceased brings an action to recover damages for the act or negligence causing death, if another action is afterwards brought by the heirs of the deceased, the pendency of the prior action may be well pleaded in abatement of it; or if a judgment has been rendered in the first, such judgment may be well pleaded in bar of the second, action." *Munro v. Dredging, etc., Co.*, ante, 303, 305, (No. 12,481, filed June 12, 1890.) This being the language of this court in bank, and directly in point on the question involved here, it is conclusive of this case, and it becomes unnecessary to discuss any of the other points made by the appellant. The executor had authority, with the approval of the probate court, to make the compromise. Code Civil Proc. § 1588; *Moulton v. Holmes*, 57 Cal. 343. Judgment affirmed.

We concur: PATERSON, J.; WORKS, J.

86 Cal. 132

LANGAN V. LANGAN. (No. 13,593.)

(*Supreme Court of California*. Sept. 30, 1890.)

APPEAL—JURISDICTIONAL AMOUNT—DISMISSAL.

1. An order to pay \$25 per month alimony, being a continuing order under which the payment of more than \$300 may be enforced, is within the appellate jurisdiction of the supreme court.

2. An appeal from an order allowing alimony will not be dismissed on the grounds that it is vexatious, and is interposed for the purpose of depriving the plaintiff of means of support pending litigation.

In bank. Appeal from superior court, city and county of San Francisco; WALTER H. LEVY, Judge.

*Matthews & Morse*, for appellant. *John E. Sundstrom*, (*Manuel Eyre*, of counsel,) for respondent.

BEATTY, C. J. This is an action for divorce in which the superior court has

made two orders for temporary alimony, one requiring the defendant to pay to the plaintiff \$25 each month for her support, and another requiring him to pay her \$150 for counsel fees. Separate appeals were taken from each order. The appeal from the second order was dismissed on motion of respondent, because the amount involved was too small to give the court jurisdiction. 83 Cal. 618, 23 Pac. Rep. 1084. Respondent now moves to dismiss the appeal from the first order on the same ground. But the order to pay \$25 a month is a continuing order under which the payment of more than \$300 may be enforced, and it is therefore within the appellate jurisdiction of this court. If it had been so limited by its terms that it could not be enforced for so much as \$300, the case would have been different; but, as it is, the motion to dismiss must be denied.

It has been suggested that this appeal is vexatious, and merely intended to deprive the plaintiff of the means of support, pending the litigation. This may or may not be true of this case, but it is obvious that in like cases vexatious appeals may be prosecuted, especially if it is understood that the taking of an appeal will suspend the payment of alimony for a long time, and thereby inflict great hardship upon a party having no other means of support. To prevent this inconvenience as far as possible we have determined to expedite the hearing of appeals in this class of cases. Hereafter, on application of respondent, they will be placed on the next calendar made up after the filing of the transcript, and when an appeal is found to have been taken for delay the usual penalty will be imposed. Motion denied.

We concur: SHARPSTEIN, J.; MCFARLAND, J.; FOX, J.

86 Cal. 119

SANDERS V. RUSSELL. (No. 13,745.)

(*Supreme Court of California*. Oct. 1, 1890.)

HOMESTEAD—CLAIMS AGAINST DECEDENT'S ESTATE—PRESENTATION OF CLAIMS.

1. The homestead of a husband and wife was their community property. After the husband's death a judgment was rendered against the widow, and execution levied on the property. After the widow's death the judgment creditor instituted proceedings under Civil Code Cal. § 1245, to have the property appraised, and the excess over \$5,000, if any, applied on his judgment. *Held* that, under Code Civil Proc. § 1505, providing that, if execution is actually levied on property of decedent before his death, the same may be sold for the satisfaction thereof, but otherwise a judgment against decedent must be presented to the executor or administrator like any other claim, as the levy on the homestead created no lien, the proceeding under section 1245 could not be maintained, but the judgment should be presented to the administrator.

2. Moreover, if the levy on the homestead created a lien, the proceeding under Civil Code Cal. § 1245, could not be maintained, it being provided by Code Civil Proc. Cal. § 1475, that, "if there be subsisting liens or incumbrances on the homestead, the claims secured thereby must be presented and allowed as other claims against the estate."

In bank. Appeal from superior court, Sacramento county; W. C. VAN FLEET, Judge.

Code Civil Proc. § 1475, provides that, "if there be subsisting liens or incumbrances on the homestead, the claims secured thereby must be presented and allowed as other claims against the estate."

*Grove L. Johnson and Albert M. Johnson*, for appellant. *A. P. Catlin and Lincoln White*, for respondent.

Fox, J. Judgment went for defendant on demurrer to the complaint. The only question on this appeal is whether the complaint states facts sufficient to entitle the plaintiff to maintain the action. James and Mary W. Lansing were husband and wife. The premises described in the complaint were their community property, duly dedicated as a homestead. James Lansing died, when the premises became the sole property of Mary W. Lansing by operation of law, (Civil Code, § 1265,) and was protected as such to the survivor in the same manner as before it had been protected to the community by its homestead character, (Estate of Ackerman, 80 Cal. 208, 22 Pac. Rep. 141.) The death of the husband did not in any manner alter the state or character of the homestead, (Tyrrell v. Baldwin, 78 Cal. 470, 21 Pac. Rep. 116;) but upon his death the property immediately vested in the surviving wife, (Mawson v. Mawson, 50 Cal. 539; Estate of Headen, 52 Cal. 205; Gagliardo v. Dumont, 54 Cal. 496; Herrold v. Reen, 58 Cal. 443.) The property having thus vested, and being thus protected, this plaintiff, on April 9, 1885, recovered a judgment against Mary W. Lansing, for \$5,238.75. September 30, 1885, he caused execution to be issued and levied upon the property, and duly returned with the levy indorsed thereon, and the whole to be duly entered and recorded in the "Execution Book," in the office of the county clerk. It is claimed that, at the time of this levy, the value of the property was largely in excess of \$5,000, and that, as to the excess, this created a lien upon the property. But this claim is not tenable. Property impressed with the character of homestead, no matter what its value, is exempt from seizure and forced sale. There was no lien of the judgment, and the levy created no lien, but simply created a foundation for proceedings under the statute, (Civil Code, § 1245 et seq.,) for the ascertainment of the value of the property covered by the declaration of homestead, and the procurement of an order of court for the partition or sale thereof, and the application of the excess to the satisfaction of the judgment. *Barrett v. Sims*, 59 Cal. 618, 619; *Lubbock v. McMann*, 82 Cal. 230, 22 Pac. Rep. 1145. In October, 1885, plaintiff commenced proceedings under the statute referred to, to have an appraisal of the property, and secure an order for partition or sale, and application of the excess to the satisfaction of his judgment; but these proceedings were never prosecuted beyond having appraisers appointed. They never qualified or acted, and no further proceedings were taken in that action. In October, 1887, Mary W. Lansing died, and the present defendant was appointed her administratrix, qualified as such, and entered upon the discharge of

her duties as such, in the administration of the estate.

Early in 1889 this action was commenced, which is substantially a proceeding under the same statute, (Civil Code, § 1245 et seq.,) for the appraisal and sale or partition of the property, and the application of the excess above \$5,000, to the satisfaction of his judgment. No claim was presented to the administratrix, and plaintiff claims that he was not required to present any, but that, having a lien upon the property, he was entitled to proceed under section 1505, Code Civil Proc., directly to sale, were it not for the homestead, but that, the homestead intervening, his only remedy was to proceed as in this action, and it being to enforce a lien the law did not require the presentation of the claim to the administrator, he having waived in his complaint all claim against the estate for deficiency. But we have already seen that he had no lien. Even if he ever acquired one, either by judgment or levy, it expired before the institution of this proceeding. *Bagley v. Ward*, 37 Cal. 121; *Rogers v. Druffel*, 46 Cal. 654. If the levy created a lien, it did not extend it beyond the lien of the judgment. *Id.*; and *Isaac v. Swift*, 10 Cal. 81. Plaintiff therefore had a judgment, without lien, and it was his duty to present the same to the administratrix, in like manner with any other claim. Code Civil Proc. § 1505. And, even if his claim was in lien, and the property was a homestead, as he concedes it to have been, he was equally bound to present the claim for allowance against the estate. *Id.* § 1475; *Camp v. Grider*, 62 Cal. 20. It follows that the complaint did not state facts sufficient to constitute a cause of action, and the judgment must be affirmed. So ordered.

We concur: SHARPSTEIN, J.; THORNTON, J.; MCFARLAND, J.

I concur in the judgment: PATERSON, J.

36 Cal. 134

ROTH v. INSLEY et al. (No. 13,596.)

(Supreme Court of California. Oct. 2, 1890.)

HOMESTEAD—INJUNCTION—CLOUD ON TITLE.

1. Under Civil Code Cal. § 1265, providing for the disposition of a homestead after the death of the person whose property has been selected as a homestead, and also that in no case shall it be liable for the debts of the owner "except as provided in this title," a homestead set apart under section 1261, subd. 8, by a son with whom his mother resides, cannot be subjected to his debts after her death.

2. Where such homestead is about to be levied on and sold, an injunction will be granted to prevent a cloud from being cast on the title, for though the sale would be void under the statute, yet, as the judgment and execution are valid, the invalidity of the sale could only be shown by extrinsic evidence in ejectment for the land by the purchaser under execution.

3. Nor could defendant have had the execution recalled, for, being valid itself, it could not be recalled on the ground that it was levied on exempt property.

Commissioners' decision. In bank. Appeal from superior court, Orange county; J. W. TOWNER, Judge.

C. C. Hamilton, for appellants. Ray Billingsley, for respondent.

FOOTE, C. This appeal is taken from an order refusing to dissolve an injunction. The defendants had caused an execution to be levied upon the homestead of the plaintiff, issued under a judgment obtained against him in a justice's court by one H. C. Howard. It is charged in the complaint that the defendant Insley, as constable, has levied upon the property, and is about to sell it under execution, and that the defendant Montgomery applied to the justice of the peace and had the execution issued without authority; that Insley has been duly notified that the property he has levied upon and advertised for sale is the homestead of the plaintiff, and exempt from execution; but that nevertheless the defendants are about to, and unless restrained by the superior court "will, sell plaintiff's said homestead property at forced sale to satisfy said judgment." It is further stated that the sale contemplated would cast a cloud upon the plaintiff's title to the property, and "would irreparably injure and disturb plaintiff in the quiet enjoyment of said premises, and that plaintiff has no speedy and adequate remedy at law." The court below granted a temporary injunction as prayed for. A motion was then made to dissolve said injunction; upon that motion, which as we have seen was denied, an affidavit was read that the plaintiff's mother died on the 18th of July, 1889. It was urged by the appellants here that since the declaration of homestead showed that the plaintiff had declared a homestead upon the property as the head of a family, because his mother was then residing with him on the property, under his care and maintenance, he was such "head of a family," in contemplation of law, only during the life-time of his mother, who thus resided with him, and was maintained and cared for by him, and that, at her death, the right to the exemption of the homestead from forced sale ceased, and that it became liable as any other property of the plaintiff. Conceding that, taking the complaint and declaration of homestead together, it appears that the only claim to be the head of a family which the plaintiff ever had was as a son with whom his mother resided on the property, and under his care and maintenance under section 1261, subd. 3, Civil Code, it appears to us that, under the statute governing the present matter, and hereafter cited, the homestead levied upon was exempt from the sale about to be enforced against it. The decisions in *Revalk v. Kraemer*, 8 Cal. 73, and *Bank v. Cooper*, 56 Cal. 340, cited by the appellant in support of his contention, are not in point. At the time they were made, section 1265 of the Civil Code, as amended in 1880, was not the law. That section, at the time the declaration of homestead under consideration was made, read, and now reads: "From and after the time the declaration is filed for record, the premises therein described constitute a homestead. If the selection was made by a married person from the community property, the land, on the death of either of the spouses, vests in the survivor, subject to no other liability than such as exists or has been

created under the provisions of this title; in other cases, upon the death of the person whose property was selected as a homestead, it shall go to his heirs or devisees, subject to the power of the superior court to assign the same for a limited period to the family of the decedent; but in no case shall it be held liable for the debts of the owner except as provided in this title."

There is no question raised here that the property was not a homestead, or that it was liable for any debt of the owner at the time it was declared, or that he was not the head of a family, and entitled to it as a homestead exempt from forced sale for any such debt as that on which the execution in this instance is founded; but the contention is that it became liable, after the death of his mother, to be sold under execution, as any other property of the plaintiff might be liable for any of his debts. Under the plain language of the statute just quoted, it would appear that, when the homestead was once declared, it remained, as such, always exempt from forced sale as against any liability of the owner, except as provided in the provisions of the title of which it was a part. And, as the debt here was not one for which under that title the property was liable, it must follow that the attempt to sell the property was forbidden by law, and a sale could vest no title in the purchaser.

But it is further urged that if such be the law the plaintiff was not entitled to an injunction, since no cloud would be cast upon his title by the sale, and hence no irreparable injury could result. The authorities do not sustain this view of the matter; for, if the sale under execution had taken place, and a deed to the purchaser been made, and all other proceedings in the matter were valid, and an action in ejectment had been brought by the appellants to recover from the plaintiff the possession of the property, the proceedings and muniments of title, which the plaintiffs in that action would produce, would not show on the face thereof that such plaintiffs had no title to the property. It would be necessary, in order to defeat their action, that the defendant there, respondent here, should introduce extrinsic evidence to defeat the action; that is, he would be obliged to introduce the declaration of homestead, so as to show that an execution sale, valid on its face, and under a valid judgment against him, was not good to pass title to the property levied upon, which, by the record, was shown to be vested in him, it is true, but not subject to this debt, because it was a homestead duly and legally declared, and not abandoned. The authorities seem to assert, where such necessity might exist of the introduction in an action of ejectment of such extrinsic evidence, that a sale as here proposed would cast a cloud upon the title to the property, and entitle the owner to have it enjoined, as was done in the present instance. *Pixley v. Huggins*, 15 Cal. 127; *Culver v. Rogers*, 28 Cal. 527; *Cohen v. Sharp*, 44 Cal. 29; *Porter v. Pico*, 55 Cal. 176.

The appellants claim further error in



that they urge that respondent could have applied to the justice of the peace who issued the execution and had the same recalled; hence that no necessity for an injunction existed, and none was proper. Inasmuch as the record shows that the judgment was valid and binding against the defendant in execution and his property, save that which was exempt as a homestead, and the execution likewise; the court having jurisdiction to render the judgment and issue the execution, we perceive no reason why, at the request of the defendant therein, even if he had made such application, the justice would have been authorized to recall the execution which the constable had levied upon exempt property, but which could have been levied properly upon other property of the defendant if he had chanced to have any.

As to the point made of the insufficiency of the complaint, as setting up facts showing threatened irreparable injury, we perceive no merit in it; as the pleading in question set out the facts showing that a cloud upon the title was threatened, and would be accomplished, unless the injunction issued. We therefore advise that the order be affirmed.

We concur: BELCHER, C. C.; GIBSON, C.

PER CURIAM. For the reasons given in the foregoing opinion the order is affirmed.

BEATTY, C. J. I concur in the judgment. The declaration of homestead in this case did not show that the claimant was the head of a family. It merely stated that he was, at the date of the declaration, actually residing on the premises with his mother, and altogether fails to state that she was under his care and maintenance, a condition made essential by the statute. Civil Code, § 1261, subd. 2. But it was a good declaration for any person other than the head of a family, (Id. §§ 1266-1269,) and sufficient to secure a homestead right of exemption to the extent of \$1,000, (Civil Code, § 1260.) Such being the case, the homestead could not be sold under execution upon a judgment other than one of those enumerated in section 1241 of the Civil Code, without taking the steps prescribed in section 1245 et seq. For these reasons the injunction was proper. The question is not necessarily involved in this appeal, and cannot be decided here, but I think it ought not to be intimated that the homestead of the head of a family remains exempt in his hands to any greater extent than \$1,000, after he has ceased to be the head of a family.

30 Cal. 330

FOX et al. v. TAY et al. (No. 12,817.)

(Supreme Court of California. Aug. 12, 1890.)

EXECUTORS—LIABILITY AS TRUSTEES—LIMITATIONS.

1. An executor who takes possession of assets belonging to the estate, and gives to his co-executors a note secured by mortgage for the amount, is a trustee of the fund, and the statute of limitations will not run in his favor until there is an express repudiation by him of the trust.

2. The fact that such executor was appointed in a foreign jurisdiction does not affect his relation to the estate as trustee, for though he could not by virtue of such appointment enforce the col-

lection, in another jurisdiction, of the assets belonging to it, yet, where they come into his hands by voluntary payment, they are received in his capacity as trustee, and that relationship is not altered by his giving his own note and mortgage for the amount.

3. The co-executors appointed in a foreign jurisdiction to whom the note and mortgage were given as trustees, can prosecute an action in that capacity to foreclose the mortgage without taking out ancillary letters of administration.

Department 1. Appeal from superior court, city and county of San Francisco; F. W. LAWLER, Judge.

Taylor & Haight, for appellants. A. N. Drown, for respondents.

PATERSON, J. Charles J. Fox was associated in business with G. H. Tay, Henry Brooks, and Oscar Backus, in San Francisco, up to the time of his death, which occurred in June, 1870. In his last will and testament he appointed the plaintiffs, A. J. Fox, Enoch Ketcham, and G. H. Tay his executors. They all appeared before the surrogate of Union county, N. J., where Fox resided and died, and qualified as executors. An inventory was made out, signed, and filed by Fox and Ketcham in April, 1872, in which the estate was shown to consist of the mortgage hereinafter referred to, valued at \$33,000, and a one-fourth interest in the accounts of the partnership, amounting to \$17,802.92; but the latter, being considered nearly worthless, was valued at only \$1,000 in the inventory. After he qualified as executor, Mr. Tay returned to San Francisco, and entered into correspondence with the executors in New Jersey concerning the settlement of the interest of the deceased in the partnership business. On June 3, 1871, he executed and delivered to them the promissory note in suit for \$33,000, payable five years after date to "Enoch Ketcham and Alanson J. Fox, trustees," together with the mortgage sought to be foreclosed herein; and on the same day Fox and Ketcham gave to him the following receipt: "New York, Jan. 3. 1871. Received from Tay, Brooks & Backus \$33,000, for account of estate of Charles J. Fox. \$33,000. ALANSON J. FOX. E. KETCHAM." During his life-time Mr. Tay paid the interest every six months through his agent J. W. Sullings, who was book-keeper for E. Ketcham & Co. of New York. The last check for this purpose was given January 11, 1883, and Mr. Tay died in April following. Although the interest money was sent in the name of George H. Tay & Co., it was charged to Tay's individual account on the books of the firm. In due time, after the death of Mr. Tay, the surviving executors presented their claim to his executors, but it appearing to the latter that the claim was barred by the statute of limitations, they declined to allow it. Thereupon this case was commenced.

By its terms the note matured January 3, 1876, and, of course, unless the relations of the parties to themselves and to the fund in controversy can be looked into, it became barred January 3, 1880. We think that the defendants were not entitled to claim the benefit of the statute of limitations. It is entirely clear to our minds that Tay, in his life-time, occupied such a

relation of trust towards the *cestuis que trustent* and executors under the will of Charles J. Fox, and to the fund which constituted the consideration of the note and mortgage in suit, that he could not have pleaded the statute of limitation, and his representatives stand in no better position. In qualifying as executors before Tay left New Jersey, the executors promised on oath "to make and exhibit unto the surrogate's office of the county of Union a true and perfect inventory of all and singular the goods, chattels, and credits, as far as the same have or shall come to their possession or knowledge, or to the possession of any other person or persons, to their use, to their knowledge." Afterwards an inventory was filed, in which the estate was represented as consisting of this \$33,000 note and mortgage, and \$1,000 in accounts. It is true this inventory was signed only by Fox and Ketcham, and there is nothing to show whether Tay had any knowledge of its contents; but the evidence shows conclusively, we think, that the latter always considered that the fund represented by the note and mortgages was a portion of the assets of the estate of Fox, deceased. Upon his return to California Mr. Tay addressed a letter to Mr. Ketcham, in which he says, among other things: "My Dear Ketcham: Yours of the 4th inst. is with me this A. M. Yesterday I received a letter from A. J. Fox, dated the 2d, both of about the same tenor, referring to and approving my proposition for the settlement of Charley's interest in our business. You will please write me at once, and tell me shall I make the mortgage in favor of Enoch Ketcham, trustee, or Alanson J. Fox, trustee, or Mrs. Emma F. Fox? My advice is Ketcham or Fox. My advice as executor of what I know would be the wish of Charley, as a friend of the widow and the little ones, is Ketcham or Fox. All of my best judgment enjoins me to say Ketcham or Fox, and not Mrs. Emma F. Fox. If Ketcham, Fox, and Tay, as true friends of the dead Charley, wish the derivable income to be used economically, and to aggregate or enlarge for reinvestment, and for reaccumulation, the mortgage should be in favor of Ketcham or Fox. \* \* \* Write at once. \* \* \* I trust the year upon which we have entered will be fruitful of happiness and prosperity for you and yours, my dear Ketcham, and that 1871 may be followed by very many more." The letter from Fox, referred to, says: "Your proposition for the settlement of Charley's interest in the business of Tay, Brooks & Backus seems to be a liberal one, and as favorable as he could expect. I have written to Mr. Ketcham that I am satisfied with your offer, and wish him to write you about it, with such suggestions as to details, etc., as he might think best. \* \* \* I am very glad to know that Charley's family are to have so ample a provision for their support." On the 1st of June, 1871, a statement headed "Charles J. Fox, in account with Tay, Brooks & Backus," was sent to Ketcham and Fox, as executors of the estate of C. J. Fox, and signed by Tay, Brooks & Backus, showing a balance to

the credit of the deceased of \$35,839.46, and a one-fourth interest in accounts amounting to \$46,692.21. Mr. Tay wrote on the back of the note and mortgage, which he sent to New Jersey, the following: "The within note and the mortgage given to secure its payment are held by us in trust for Emma F. Fox, widow, and ——— and ———, minor children of Charles J. Fox, deceased, and in accordance with their respective interests under the will of deceased." The names Louisa Fox and Sheridan Fox were written in the blanks by the executors. The telegrams directing payment of interest specify the purpose in various ways, and one says, "Pay Ketcham interest Fox estate," another, "Pay Tay's mortgage interest." Mr. Sullings testified that the statements were forwarded to him in letters written by Mr. Tay, in the name of George H. Tay & Co., and that he sent Mr. Tay a statement of the payments of interest; that Mr. Tay directed him at the time he gave him a power of attorney to pay the interest on the note and mortgage, and the other claims as they might arise, by giving checks on the Market National Bank, signed "GEORGE H. TAY & Co." for several years prior to the death of Fox, Backus & Tay were the only partners in the business. Mr. Backus testified that he had nothing to do with sending any telegrams, and knew nothing of any mortgage or any liability on account of any mortgage; that Mr. Tay had never spoken to him about any mortgage. The books of the firm were introduced in evidence, and Mr. Warner, one of the employees, testified that the items of interest therein pointed out were charged to the private account of Mr. Tay.

While Mr. Tay could not, by virtue of his appointment in New Jersey, administer upon any estate of Fox in this state, it was his duty to take charge of any personal asset of the estate which he found here, and send it to New Jersey for administration. Although a foreign executor may have no coercive power for the collection of assets in the jurisdiction in which he resides, yet, if assets situated in that jurisdiction come into his possession by a voluntary payment or administration, he is bound to account for them in the domiciliary jurisdiction. *Schouler, Ex'rs*, § 175; *Parsons v. Lyman*, 20 N. Y. 103; *Wilkins v. Ellett*, 108 U. S. 258; *Wyman v. Halstead*, 109 U. S. 656, 3 Sup. Ct. Rep. 417. Mr. Tay took the interest of the deceased in the partnership to himself, and gave his note and mortgage in evidence thereof. The change of form did not, in our opinion, change the real character of the property, so far as it was related to the estate of Fox. The note and mortgage were simply an asset in another form. If Mr. Tay had sold the property to another, received the money, and given this note and mortgage to the other executors, he would still have remained in possession of a fund belonging to the estate; or if he had sent the purchase money to the executors in New Jersey, and, at his request, they had returned it to him as a loan, he would not have been any more a trustee than he was by receiving and holding it without the money having changed hands. "If a trus-

tee receive any portion of the funds from a transaction, he must personally see to the application of them. He cannot pass them over to his co-trustee for investment or distribution; and, if he do so, he will be personally responsible for the acts and defaults of such co-trustee." 1 Perry, Trusts, § 418. "By this rule, trustees may be liable to great losses while they can receive no profit; and the rule is made thus stringent that trustees may not be tempted from selfish motives to embark the trust funds upon the chances of trade and speculation." *Id.* § 429. If the money had been lost in speculation all the executors would have been liable therefor. It was the duty of Tay to see that the estate received the fund which he had collected. It would still be his duty to do so if he were alive, and the fact that he had given a note and mortgage would be no defense to an action therefor, and the statute of limitations would be no defense. In case of an express trust the statute does not commence to run until a repudiation of the trust. *Hearst v. Pujol*, 44 Cal. 235; *Janes v. Throckmorton*, 57 Cal. 388; *Broder v. Conklin*, 77 Cal. 339, 19 Pac. Rep. 513; *Bacon v. Rives*, 106 U. S. 99, 1 Sup. Ct. Rep. 3; *Perry, Trusts*, § 863. Mr. Tay not only did not put himself in hostility to the trust, but recognized it by punctually paying the interest as it fell due up to the time of his death. By qualifying as trustee under the will of Fox, he became the trustee of an express trust. He was required by the terms of the will to invest the proceeds of the estate for the benefit of the wife and children of Fox, and he did so by taking the fund unto himself, and paying interest thereon. The form in which the transaction was conducted could not wipe out the fiduciary relation. If he had kept the fund without giving any written promise, he would not have been released from his obligation to account to the estate of Fox, nor could he have shielded himself behind the plea of the statute of limitations, without express, open repudiation of the trust. As stated before, it was as much his duty to protect and preserve the estate as it was the duty of his co-executors. The evidence all shows that Mr. Tay himself recognized this responsibility, and intended to live faithfully up to it. It cannot be said that he took no further action or interest in the matter than to qualify as trustee. His letters indicate the liveliest interest in the settlement of the estate, and in the welfare of the widow and children. There is no merit in the contention that the firm settled for the Fox interest in the partnership, and sent the money to the executors in New Jersey. It is true that the receipt given by the executors would, unexplained, indicate that such was the fact, but the evidence in the case, considered as a whole, shows beyond a doubt that the executors never received anything on account of the \$33,000 interest in the partnership, except the note and mortgage.

We do not think it was necessary for the plaintiffs to take out letters testamentary here. They are endeavoring herein to secure trust moneys which came into the hands of their co-trustee since the death

of the decedent, and are prosecuting the suit as mortgagees under the terms of the mortgage made by the co-trustee himself. A trust will be enforced, if at all, only indirectly, and by the application of the rule of equitable estoppel. *Barton v. Higgins*, 41 Md. 546; *Brown v. Gas-Light Co.*, 58 Cal. 426; *Hall v. Harrison*, 21 Mo. 227. The case of *Lewis v. Adams*, 70 Cal. 403, 11 Pac. Rep. 833, does not hold contrary to this view. It is authority simply for the proposition that the executor cannot, as such, prosecute an action in a foreign jurisdiction on a cause of action accruing to his testator. Here the claim is not one which accrued to the testator, but it accrued to his executors after his death. It is an asset which came into the hands of the co-trustee without administration. He was entitled to receive it, and, there being no claim of any kind, either by creditor or distributee in this state, it was his duty, and is the duty of his representatives, to turn it over for distribution according to the laws of the state of New Jersey. *Estate of Apple*, 66 Cal. 432, 6 Pac. Rep. 7.

The court did not err in excluding the depositions. The appellants were precluded by the statute from being examined as witnesses "as to any matter of fact occurring before the death of Tay." The incompetency thus created is only limited, and partial, and the parties could testify to any facts occurring subsequent to the death of Tay. We see nothing in the stipulations which operated as a waiver of the objections made at the trial. In view of what has been said, it is unnecessary to pass upon the question as to whether the acknowledgments alleged and proved had the effect claimed for them by the appellants. Judgment and order reversed, and cause remanded for a new trial.

We concur: FOX, J., WORKS, J

85 Cal. 432

PEOPLE v. TURNER. (No. 20,667.)

(Supreme Court of California. Sept. 2, 1890.)

INFORMATION—SIGNATURE—DE FACTO ASSISTANT  
—DISTRICT ATTORNEY.

1. An information for murder signed and presented by a *de facto* assistant district attorney appointed by the board of supervisors without authority, but recognized as such by the district attorney, and acting under his directions, is good, as being the act of the proper officer.

2. The fact that both defendant and decedent were Indians does not deprive the superior court of jurisdiction of the crime.

In bank. Appeal from superior court, Modoc county; G. F. HARRIS, Judge.

*Spencer & Raker* and *C. A. Raker*, for appellant. *Geo. A. Johnson*, Atty. Gen., for the People.

Fox, J. Information for murder, conviction of manslaughter.

1. The first point made is that the court erred in refusing to strike the information from the files: (a) Because it had not been preceded by an examination before a committing magistrate; (b) because it had not been signed, presented, or filed in open court by the district attorney of the county. The first information filed had been set aside, and before the filing of the

information upon which the trial and conviction was had, an examination had been regularly had before the judge of the superior court sitting as a committing magistrate. J. H. Stewart was the district attorney of the county. He had never made any formal appointment of a deputy or assistant district attorney, but the board of supervisors of the county had, before that time, under a provision of the county government act as it then stood, authorizing them to provide for the appointment of an assistant district attorney, whenever in their judgment they should deem it necessary, not only provided for the appointment of one, but believing that the board was the proper party to make the appointment, had appointed J. J. May to that position. He had duly qualified, and was by the district attorney recognized as duly appointed his assistant, and was acting as such, with the knowledge and approval of the district attorney. Shortly before the examination was held the district attorney left the county, and was absent until after the information was filed. Before leaving he told May, the assistant, if the defendant was held to answer to prepare and file the information. After the examination, and the order holding the defendant to answer, May took a blank information, which had been signed by the district attorney, filled it out, added to the signature of the district attorney which was already attached as such his own signature as assistant district attorney, and having completed the same filed it in open court. He was at the time assistant district attorney *de facto*, if not *de jure*. No other person was claiming the office. He was acting under and by the directions of the district attorney. His acts were valid and it was not error to deny the motion.

2. Defendant then moved to set aside the information on the same grounds upon which the other motion had been made. The motion was denied, and this is also assigned as error. There was no error in this ruling.

3. The next error assigned is that the court erred in overruling defendant's demurrer to the information. The information was complete and sufficient, in all the particulars referred to in the demurrer; it charged the offense in the language of the statute, and was sufficient in that regard. It is claimed in and by the demurrer that the court had no jurisdiction, because both the decedent and the defendant were Indians. We know of no law, and are cited to none, which supports such a position, on the facts as shown in this record. There was no error in overruling the demurrer.

These are the only errors assigned, or specifications made, in the bill of exceptions, and consequently the only points which demand our consideration. Upon the argument, however, counsel criticises some of the charges given by the court to the jury, and some of the proceedings had in the course of the trial, as well as the form of the judgment. No exception was taken to any of the matters so urged in argument, but we have examined the record, and find that the instructions and

proceedings, in the matters referred to, are free from error. Judgment affirmed.

We concur: BEATTY, C. J.; SHARPSTEIN, J.; MCFARLAND, J.

85 Cal. 251

WALDRON V. WALDRON. (No. 13,503.)

(Supreme Court of California. Sept. 1, 1890.)

On petition for rehearing. For former opinion, see ante, 649.

WORKS, J. A rehearing is denied. The petition in this case is discourteous and disrespectful in some of its language. However individual members of the court may regard such conduct on the part of attorneys as affecting them, personally, it is an offense against the court that cannot be allowed to pass without rebuke. An attorney who has a sufficient understanding of his high calling, and the respect due to the court, as well as the respect due to his profession, should not so far forget himself as to use such language. Because of the important question presented we have carefully considered the points made, notwithstanding the manner in which they were presented in the petition. But, having done this, out of consideration for the better feelings of counsel who filed it, as well as to prevent a recurrence of a like offense, the objectionable language should not be perpetuated as a part of the records of the court. It is therefore ordered that the petition for a rehearing be and the same is hereby stricken from the files.

We concur: THORNTON, J.; FOX, J.; SHARPSTEIN, J.

BEATTY, C. J., (*dissenting*.) I did not participate in the decision of this case, owing to want of opportunity to examine it within the time allowed for a decision. Since the petition for rehearing, I have considered it carefully, and I am unable to concur in the judgment or the order refusing a rehearing. I think section 94 of the Civil Code defines extreme cruelty, and that by such definition it consists of either—*First*, the infliction of grievous bodily injury; or, *second*, the infliction of grievous mental suffering. This definition was, I think, intended by the legislature to be complete, and this conclusion is not invalidated by what must be conceded to be true, viz.: That the acts or words causing the mental suffering or bodily injury must be not only intended but unjustifiable. These qualities of the acts of cruelty are sufficiently implied in the word "infliction." In this view the finding of the superior court comes up to the law, and nothing more can be required. The testimony, in my opinion, is sufficient to support the finding. It is possible that the application of the epithets testified to by a man to his wife in the presence of third parties might not cause her grievous mental suffering, but, on the other hand, they probably would; and in this case the superior court has found that they did, in fact, cause such suffering, unless this conclusion is negatived by the other fact found that her bodily health was not af-

fect. But this, in my opinion, was not essential as a test of the degree of suffering contemplated by the statute. While dissenting from the judgment of the court and the order refusing a rehearing, upon the grounds thus briefly indicated, I concur in the view that some of the language employed by counsel in their petition for rehearing was intemperate, and improper to go upon the records of the court.

McFARLAND, J. I dissent from the order denying a rehearing, and adhere to the views expressed in my former dissenting opinion. I concur in the views of the majority of the court as to the objectionable language used in the petition for rehearing.

86 Cal. 122

LANDREGAN v. PEPPIN. (No. 13,528.)

(*Supreme Court of California.* Oct. 1, 1890.)

TAXATION—ASSESSMENTS—NOTICE TO REDEEM FROM SALE.

1. Under Pol. Code Cal. § 3628, providing that "no mistake in the name of the owner or supposed owner of real property shall render the assessment thereof invalid," an assessment to M. & Co. of property standing in the name of M., but in fact owned by a third person, is binding on the property.

2. Under Pol. Code Cal. § 3785, (as amended March 12, 1885,) providing that, prior to obtaining a deed of land purchased at delinquent tax-sale, the purchaser thereof "must, thirty days previous to the expiration of the time for the redemption, or thirty days before he applies for a deed, serve upon the owner \* \* \* a written notice stating \* \* \* the amount for which it was sold, the amount then due, and the time when the right of redemption will expire, or when the purchaser will apply for a deed, and the owner shall have the right of redemption indefinitely, until such notice shall have been given," the purchaser gets no title under a tax-deed which affirmatively states that the land was sold for a certain amount, and that the notice to redeem stated that it had been sold for a less amount.

3. Under Code Civil Proc. Cal. § 12, providing that the computation of time in which an act provided by law is to be done shall exclude the first day and include the last day, a notice, July 25th, fixing August 23d as the time when the purchaser would apply for a tax-deed, is only a notice of 29 days "previous to," etc.

4. The recital in the deed that a 30-days notice was given will be controlled by the statement that it was given July 25th, and fixed August 23d as the last day for redemption.

Commissioners' decision. In bank. Appeal from superior court, Plumas county; G. G. CLOUGH, Judge.

*Goodwin & Goodwin*, for appellant. *Edward C. Robinson* and *W. W. Kellogg*, for respondent.

FOOTE, C. This action is brought to quiet title to a certain piece of land in Plumas county. The court below rendered judgment as prayed for, from which, and an order refusing a new trial, the defendant takes this appeal. From the record it appears that in the year 1881 William Minto obtained the land by deed of conveyance from one Ward; that Minto afterwards, in January, 1886, made a deed of it to certain parties, which conveyance was not placed upon record until September, 1886. Through mesne conveyances from these parties the plaintiff claimed

title. Since about March, 1887, the defendant has been in possession of the property in dispute. The state and county taxes on it for the year 1886 were assessed to William Minto & Co. The taxes becoming delinquent the property was sold in February, 1887, to satisfy the same. At that sale one Hall became the purchaser, and he assigned his certificate of purchase to the defendant. In August, 1888, the latter obtained a deed to the premises from the tax-collector, through which the defendant claims to be the owner of the land. Upon the validity of this tax-deed to pass title to the land, this controversy depends. It does not satisfactorily appear from the record upon what precise ground the trial court deemed the deed invalid. The respondent contends that it is so upon several grounds. His first position is that the assessment to William Minto & Co. is void as respects the real property, which then appeared upon the record as that of William Minto. The decisions which he cites in support of his position were made prior to the amendment of 1880, to section 3628 of the Political Code. To that section, as amended, construction was given by the appellate court in *Lake Co. v. Mining Co.*, 66 Cal. 19, 4 Pac. Rep. 876, where it is said: "The assessment put in evidence shows property assessed to 'Sulphur Banks Q. S. M. Co.' Section 3628 of the Political Code provides: 'No mistake in the name of the owner or supposed owner of real property shall render the assessment thereof invalid.' There is nothing in the language of the section to indicate that the clause quoted can be given effect only when an attempt is made to enforce the lien for the tax. The effect of the clause in section 3628 is but to give a more enlarged operation to a rule already established. Prior to the adoption of that clause it has been frequently held that a defendant sued for a tax assessed to 'unknown' owners could not be permitted to prove that the assessor might, with more diligence, have ascertained the real owner of the property. On behalf of the defendant in those cases, it was urged that, unless inquiry was permitted, with respect to care and diligence of the assessor, that officer would have it in his power entirely to neglect his duty, and to assess to unknown owners property, the ownership of which he should use no effort to ascertain, or which he might even know to belong to a particular person. So here, it is said that, if he is allowed to assess the property to a person other than the real owner, he may abuse the power. But the ascertainment of the name of the owner is a matter with respect to which the assessor has discretionary power, and his judgment or conclusion in regard to it is final, so far as the validity of the tax is concerned. In the case before us the defendant was sued as the owner of the property assessed to the 'Sulphur Banks Q. S. M. Co.' If the defendant is not the owner of such property, it had full opportunity to establish that fact; but it is not a defense to the payment of the taxes upon the real estate that the assessor mistook the name of the owner of it." The assessment here was therefore binding up-

on the property, and, so far as it goes, the deed was valid.

But it is further claimed that the notice to redeem, prescribed by section 3785 of the Political Code, which was offered in evidence and excluded, was insufficient. With that matter, upon this appeal, we have no concern. The appellant here is not complaining of any error of the trial court when it excluded the evidence offered upon that point by the respondent. The evidence is not, therefore, before us.

From the tax-deed, which was in evidence as the basis of defendant's title, it appears that, at the sale of the land for taxes, the amount due therefor was the sum of \$49.64, and that Hall, the purchaser, bid that sum for it; that it was sold to him for that amount, which he paid, and that he therefore became the purchaser thereof. But it is further stated in the deed that in the notice to redeem, which Peppin, the assignee of the certificate of sale, served upon William Minto & Co., those to whom the assessment was made, the land was sold for \$45.90, and that such amount was due thereon for delinquent taxes. Thus, the amount mentioned in the deed for which the land was sold for taxes differs from the sum mentioned in the notice to redeem, in that the latter amount is less than the former by \$3.74. Section 3785 of the Political Code (as amended March 12, 1885) provides, among other things, that, prior to his obtaining a deed to the land he has purchased at delinquent tax-sale, the purchaser thereof "must, thirty days previous to the expiration of the time for the redemption, or thirty days before he applies for a deed, serve upon the owner of the property purchased, or upon the person occupying the property, if said property is occupied, a written notice stating that said property or a portion thereof has been sold for delinquent taxes, giving the date of the sale, the amount of property sold, the amount for which it was sold, the amount then due, and the time when the right of redemption will expire, or when the purchaser will apply for a deed, and the owner of said property shall have the right of redemption indefinitely, until such notices shall have been given, and said deed applied for, upon the payment of the fees, percentage, penalties, and costs required by law." Since it appears affirmatively from the deed itself that the notice thus required did not contain the amount for which the land was sold for taxes, but notified the owner of the land that it had been sold for a different amount of money, it would seem as if the purchaser was not entitled to have the deed made to him, and that it conveys no title to the land in dispute.

The recitals of the deed further show that the notice to redeem was served on the 25th day of July, 1888, and that it fixed August 23, 1888, as the time when the purchaser would apply to the tax-collector for a deed. This was giving the notice only 29 days "previous to the expiration of the time for the redemption," at which time the application for a deed was to be made, under the rule declared in section 12 of the Code of Civil Procedure,

which, in the computation of time in which an act provided by law is to be done, excludes the first day, and includes the last. *Misch v. Mayhew*, 51 Cal. 516.

The law requires that such notice must be served "thirty days previous to the expiration of the time for the redemption, or thirty days before he [the purchaser] applies for a deed." Pol. Code, § 3785. It is true that one of the recitals of the deed is that this 30-day notice was given, but, in the same sentence in which that occurs, it is further stated that the date of service was the 25th day of July, 1888, and that the time for the redemption of the land sold for taxes, and when the purchaser would apply for his tax-deed, was the 23d of August, 1888, so that taking the whole sentence together it appears beyond dispute that the first recital, as to 30 days' notice having been given, is not true. For this reason also the purchaser was not entitled to a deed, and that which he obtained is invalid. We therefore advise that the judgment and order be affirmed.

We concur: BELCHER, C. C.; GIBSON, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

WORKS, J., dissenting.

86 Cal. 144

PEOPLE V. AH GEE YUNG. (No. 20,682.)  
(*Supreme Court of California*. Oct. 5, 1890.)

CRIMINAL LAW—MURDER—INTENT—BURDEN OF PROOF—INSTRUCTIONS.

1. Under Pen. Code Cal. § 1105, providing that after the commission of the criminal act is shown by the prosecution, the burden of proof then rests on defendant to show the absence of criminal intent, it is only necessary for defendant to introduce such evidence as will create a reasonable doubt of his guilt. He need not prove the circumstances of mitigation by a preponderance of evidence.

2. Where the court instructs the jury as to the various degrees of murder, and also as to the forms of the verdict proper in case they convict of any of the different degrees, or acquit, there is no prejudicial error in the fact that one sentence of the instruction taken separately may be construed to imply that defendant is guilty of murder or manslaughter.

Commissioners' decision. Department 2. Appeal from superior court, Fresno county; M. K. HARRIS, Judge.

G. W. Jones, M. Farley, and Graham & Monson, for appellant. Atty. Gen. Geo. A. Johnson, W. D. Tupper, and H. H. Welsh, for respondent.

FOOTE, C. The defendant was convicted of murder in the first degree. From the judgment rendered against him, and an order denying a new trial, this appeal is prosecuted. It is argued, on behalf of the defendant, that the court, among others, gave an erroneous instruction to the jury, reading thus: "In every crime or public offense, gentlemen of the jury, there must exist a union or joint operation of act and intent or criminal negligence. But, when the act committed by the accused is of itself an unlawful act, the law, in the first instance, presumes the criminal intent, and

the *onus* or burden of proof falls upon the defendant to show the absence of criminal intent. In this case, if you find from the evidence that the defendant struck the fatal blow, then the burden of proving circumstances of mitigation, or that justify or excuse the homicide, devolves upon the defendant, unless the proof upon the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable." Following this it is stated: "The law presumes every man to be innocent until his guilt is established beyond any reasonable doubt, and this presumption attaches at every stage of the case, and to every fact essential to a conviction." And throughout the instructions asked by the defendant, and given by the court, the principle is enunciated that at all times, and under all circumstances, it is incumbent upon the people to establish the guilt of the defendant by evidence beyond any reasonable doubt. Nowhere, either in the charge or in the instructions, is it even hinted that the lifting the burden, by showing the absence of criminal intent thrown upon the defendant by the proof that he struck the fatal blow, must be done by any preponderance of proof. The instruction in this respect, substantially, is in the language of section 1105 of the Penal Code, and the meaning to be attached thereto is expressly stated in *People v. Bushton*, 80 Cal. 160, 22 Pac. Rep. 127, 549, as follows: "The section [1105, Penal Code] casts upon the defendant the burden of proving circumstances of mitigation, or that justify or excuse the commission of the homicide. This does not mean that he must prove such circumstances by a preponderance of the evidence, but that the presumption that the killing was felonious arises from the mere proof by the prosecution of the homicide, and the burden of proving circumstances of mitigation, etc., is thereby cast upon him. He is only bound under this rule to produce such evidence as will create, in the minds of the jury, a reasonable doubt of his guilt of the offense charged." When such reasonable doubt is thus raised, the presumption of criminal intent is overcome, the burden or *onus* is lifted, and the jury must presume an absence of such criminal intent. An unlawful act is presumed to have been committed with unlawful intent. Section 1963, Code Civil Proc., subd. 2. But such intent may be controverted by other evidence, and, in a case like the present, that intent may be rebutted, and its absence shown by any evidence which may raise, in the minds of the jury, a reasonable doubt of its existence; but such rebuttal it is incumbent upon the defendant to make, somewhere in the evidence. After such a plain declaration by the appellate court as to the meaning of the statute, it is not perceived how the giving of an instruction which embodied its provisions, coupled with others which so fully and clearly enforced the right of the defendant to have, in every step of the case, all reasonable doubts as to his guilt, or as to any fact essential to show guilt, resolved in his favor, could have prejudiced him, and we are unable to perceive any

force in the argument of counsel that an instruction virtually in the language of the statute is in itself misleading.

The further point is made that the following instruction is wrong. It is, (the italics being our own:) "Under the information in this case, the jury may, if the evidence warrant, find the defendant guilty of murder in the first degree, murder in the second degree, or manslaughter. Should the jury entertain a reasonable doubt as to which of the grades of crime named the defendant may be guilty of, if any, they will give the defendant the benefit of such doubt, and acquit him of the higher offense. That is to say, gentlemen of the jury, should you be convinced by the evidence, beyond a reasonable doubt, that the defendant is guilty of murder, and yet have a reasonable doubt as to whether he is guilty of murder in the first or second degree, you can only find him guilty of murder in the second degree. So, if the doubt in your mind be as to whether he is guilty of murder in the first or second degree, or of manslaughter, you can find him guilty of manslaughter only." The reason given by the appellant why the instruction is erroneous is that he claims it carries with it the impression to the jury that the defendant is guilty of some offense; that the jury are told that they may find the defendant guilty of murder in the first degree, or murder in the second degree, or manslaughter, as the evidence may warrant, but they must find him guilty of some one of them, and they cannot find him not guilty. The jury is instructed: "Should your judgment be one of conviction, you should state the degree of the offense for which you convict. Should your verdict be one of acquittal, you will simply say, 'We, the jury, find the defendant not guilty.'" And by consent, the court instructed the jury particularly as to what the form of their verdict should be in the event they found the defendant guilty of murder in the first degree, and how the form should be on that verdict if they should fix his punishment at imprisonment for life in the state-prison. Also, as to what the form should be for murder in the second degree, for manslaughter, and for a verdict of not guilty. It does not seem possible, from what we have quoted, and from the general tenor of the very full and clear charge and instructions, that the jury could have been misled in any degree into the belief that the court was of the impression, and so instructed them, that the defendant was necessarily guilty of some crime, and that they could not, if the evidence warranted, find him not guilty. Perceiving no prejudicial error, we advise that the judgment and order be affirmed.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

THORNTON, J. I concur in the judgment.

McFARLAND, J. I concur in the judgment, but do not wish to be understood



as commending or approving the first part of the instruction first quoted in the opinion of the commissioner. It is always dangerous to inject new language into the statement of old propositions. After all that has been said by this court in the Bush-ton Case, and since then, about requiring defendants to prove certain things by a preponderance of evidence, it would seem that trial courts might exercise some caution not to state the rule stronger against a defendant than it is stated in section 1105 of the Penal Code.

86 Cal. 110

JOHNSON V. VANCE. (No. 13,569.)

(Supreme Court of California. Sept. 30, 1890.)

## RES ADJUDICATA—PLEADING AND PROOF.

1. Plaintiff in ejectment alleged ownership of a certain section of land, and that she had been ousted therefrom by defendant, who admitted in his answer that he held possession of the east half of the section, but denied holding possession of a portion of the west half. Judgment was rendered declaring plaintiff to be the owner of the east half, but no decree was made in reference to said portion of the west half. *Held*, in a subsequent action of ejectment against defendant for said portion of the west half, that plaintiff's right to the possession thereof was not *res adjudicata*, as no decree was made in the former action in reference to it.

2. Where issue is not joined as to the damages alleged to have been sustained, no proofs upon the subject are required.

Commissioners' decision. In bank. Appeal from superior court, San Joaquin county; J. G. SWINNERTON, Judge.

Amos H. Carpenter, for appellant. Baldwin & Campbell, for respondent.

BELCHER, C. C. This is an appeal from a judgment entered against the defendant on the pleadings, and the case is brought here on the judgment roll. The action is ejectment. The complaint alleges that on the 9th day of October, 1888, the plaintiff was the owner and in possession of the N. W.  $\frac{1}{4}$ , the N.  $\frac{1}{2}$  of the S. W.  $\frac{1}{4}$ , and the S. W.  $\frac{1}{4}$  of the S. W.  $\frac{1}{4}$ , of section 31, in township 3 N., range 9 E., Mount Diablo base and meridian; and that, on the day named, the defendant entered and ousted the plaintiff from the said land, and has ever since continued to withhold the possession thereof from the plaintiff, to her damage in the sum of \$1,500. For answer to the complaint the defendant pleads, in bar of the action, a judgment entered in a former action between the same parties; and this is his only attempted defense. The answer alleges that the complaint in the former action was filed on the 8th day of June, 1888, and that the judgment therein was made and entered on the 2d day of October, 1888. It then sets out a copy of the complaint, answer, findings, and judgment in the former action, from which it appears that the plaintiff alleged that in June, 1887, she was the owner in fee-simple, and entitled to the possession, of the above-described section of land; and that afterwards, in the same month, the defendant ousted and ejected her from the possession thereof; that the defendant admitted his possession of the E.  $\frac{1}{2}$  of the said section, but denied that he was ever in possession, or claimed to be in posses-

sion, or ever ousted or ejected the plaintiff from the possession, of the W.  $\frac{1}{2}$  of the section, except the S. E.  $\frac{1}{4}$  of the S. W.  $\frac{1}{4}$  thereof, which it was alleged that he owned, and was entitled to the possession of; that the court found that the plaintiff was the owner of all the land described in her complaint, except the 40 acres alleged by defendant to be owned by him; and that, during the time mentioned in the complaint, defendant withheld from plaintiff the E.  $\frac{1}{2}$  of section 31 described in said complaint; and that judgment was entered that the plaintiff recover from the defendant possession of the E.  $\frac{1}{2}$  of said section 31. The answer then further alleges that the possession of exactly the same land is demanded in the complaint in this action as was demanded in the complaint in the former action, and that the parties, plaintiff and defendant, are the same in both actions; that the judgment in the former action finally determined and decided that the plaintiff was the sole owner of all the land described in her complaint in this action, and that the said judgment is now in full force and effect, and binding upon plaintiff and defendant in this action; "that the defendant herein has acquired no title, and claims to have acquired no title to any of the land described in the plaintiff's complaint herein, since the commencement of said former action for the possession of the said land in controversy; that the title to the land described in plaintiff's complaint herein, and the right of possession thereof, has become and is *res adjudicata* by and between the parties to this action, by reason of said judgment duly made and rendered in this court in favor of the plaintiff herein, and against the defendant, on said 2d day of October, 1888." Wherefore defendant prays that the action be dismissed, and that he have judgment for his costs. When the case was called for trial counsel for plaintiff moved for judgment on the pleadings, and the motion was granted on the ground that none of the allegations of the complaint were denied. The judgment was that the plaintiff recover from the defendant possession of the demanded premises and \$1,500, with costs.

Only two questions are presented here for decision. The first relates to the plea in bar, and the second to that part of the judgment which awards the plaintiff \$1,500.

1. It is not controverted that a plaintiff is entitled to a judgment on the pleadings, if his complaint states a cause of action, and the answer presents no defense. And it is true that a judgment rendered in an action to recover the possession of real property is, as to all matters put in issue and passed upon in the action, conclusive between the parties and their privies, and a bar to another action between the same parties, or their privies, where the same matters are directly in issue. *Caperton v. Schmidt*, 26 Cal. 479; *Thrift v. Delaney*, 69 Cal. 189, 10 Pac. Rep. 475. But does that rule apply here? It must be observed that this is an action to recover possession of a part of the W.  $\frac{1}{2}$  of a section, and that the judgment pleaded in bar was for the possession of the E.  $\frac{1}{2}$  of the section. The plaintiff in the former action alleged own-

ership of the whole section, and that she had been ousted therefrom by the defendant, but he denied that he had ever been in possession of, or had ever ousted the plaintiff from, the land here sued for; and, while the court found that the plaintiff was the owner of the land here in controversy, still as to it no judgment was rendered, presumably because the court was of the opinion that the defendant's denials in regard to it were true. In this case the plaintiff alleged that the defendant entered upon the land and ousted her therefrom seven days after the former judgment was rendered, and this, not being denied, must be taken as true. Under such circumstances how can the former judgment be a bar to this action? If it can, then the plaintiff, though having an unquestioned right to the possession of her property, must be denied all relief by the courts. We think it clear that the case does not come within the rule above stated, and that the action was not barred.

2. It is contended that the judgment for \$1,500 cannot be sustained, because it was for unliquidated damages, and no proofs were taken as to the amount which should be allowed. But there was no issue as to the damages alleged to have been sustained by the plaintiff, and no proofs upon the subject were therefore required. It has been so held in this state from the earliest times. *Hartman v. Williams*, 4 Cal. 254; *Patterson v. Ely*, 19 Cal. 29; *Dimick v. Campbell*, 31 Cal. 239; *Huston v. Turnpike Road Co.*, 45 Cal. 550. We find no error in the record, and advise that the judgment be affirmed.

We concur: VANCE, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

33 Cal. 123

JOHNSON v. VANCE. (No. 13,570.)

(Supreme Court of California. Oct. 1, 1890.)

EJECTMENT—PLEADING—FINDINGS.

1. A complaint, which avers that plaintiff is "the owner in fee-simple" of a certain tract of land, is not demurrable on the ground that the averment is a conclusion of law and not of an ultimate fact.

2. Where the complaint in ejectment alleges that defendant is in possession of the whole of a section of land, and the answer alleges he is in possession of only the east half, a judgment declaring plaintiff owner of the east half will not be reversed because it fails to find as to the west half, as it is an immaterial issue.

3. A finding in ejectment that "defendant withheld the east half of section 13," is a sufficient finding that he withheld the east half of section 31, where that is the only section mentioned in the complaint.

4. Where plaintiff in ejectment alleges possession by defendant, and he admits it, it is not necessary that the court should find that defendant was in possession, as findings as to admitted facts are not required.

5. While the *gravamen* in an action of ejectment is the wrongful withholding, it is not necessary that the words "wrongful" or "wrongfully" should be used in a finding that defendant ousted plaintiff.

Commissioners' decision. In bank. Appeal from superior court, San Joaquin county; J. G. SWINNERTON, Judge.

*Amos H. Carpenter*, for appellant. *Baldwin & Campbell*, for respondent.

BELCHER, C. C. This is an action of ejectment. It is alleged in the complaint that on the — day of June, 1887, plaintiff "was the owner in fee-simple, and entitled to the possession," of the land described as section 31, township 3 N., range 9 E., Mount Diablo base and meridian, and that afterwards, in the same month, the defendant entered on the land, and ousted and ejected the plaintiff therefrom. A general demurrer to the complaint was interposed, and overruled. The defendant, Vance, then answered. The answer denied that defendant ever was in possession, or claimed to be in possession, or ever ousted or ejected the plaintiff from the possession, of the west half of the section described, except the S. E.  $\frac{1}{4}$  of the S. W.  $\frac{1}{4}$  thereof, which, it alleged, the defendant owned, and was entitled to the possession of. It then alleged that in the month of April, 1880, defendant came into possession of the east half of the section, and that he "is now, and ever since has been, continuously, in possession of said land, to the exclusion of every other person, and especially the plaintiff." It further alleged that the plaintiff's cause of action was barred by the statute of limitations. The court found that the plaintiff was the owner of the land described in the complaint, except the S. E.  $\frac{1}{4}$  of the S. W.  $\frac{1}{4}$  thereof, and "that defendant has, during the time mentioned in said complaint, withheld from plaintiff the east half of section thirteen, described in said complaint." It further found that the action was not barred. Judgment was entered that the plaintiff recover from the defendant the east half of section 31; and from this judgment the defendant has appealed on the judgment roll.

1. It is claimed that the demurrer should have been sustained, because the only averment in the complaint as to the plaintiff's title to the demanded premises was that she was "the owner in fee-simple," etc. It is urged that this was an averment of a conclusion of law, and not of an ultimate fact; and hence that it was insufficient. This position cannot be maintained. In *Payne v. Treadwell*, 16 Cal. 243, the same objection to the complaint was made, and overruled, and the law there declared as to the sufficiency of an averment, like that here called in question, has been approved and followed in numerous subsequent cases. *Garwood v. Hastings*, 38 Cal. 217; *Turner v. White*, 73 Cal. 299, 14 Pac. Rep. 794; *Heeser v. Miller*, 77 Cal. 192, 19 Pac. Rep. 375; *Souter v. Maguire*, 78 Cal. 543, 21 Pac. Rep. 183.

2. It is contended that a material issue was raised by the answer as to whether or not the defendant was in possession of the west half of the section, and that the court wholly failed to find upon this issue; and hence that the judgment should be reversed. The obvious answer to this point is that, while the court found that the plaintiff was the owner of all of these

tion, except 40 acres, it gave judgment against the defendant only for the restitution of the east half thereof. When, therefore, the judgment was entered, the issue as to the possession of the west half of the section became wholly immaterial, so far as the defendant was concerned. And the rule is well settled that a judgment will never be reversed for a failure to find upon an immaterial issue.

3. It is further contended that the court failed to find that defendant was ever in possession of, or ousted and ejected the plaintiff from, the east half of section 31. But the answer affirmatively alleged that the defendant, since April, 1880, had been continuously, and then was, in possession of the east half of that section "to the exclusion of every other person, and especially the plaintiff." And, as shown by the record here, the court did find that defendant "withheld from plaintiff the east half of section thirteen, described in said complaint." The word "thirteen" is evidently a mistake, and should be read as "thirty-one," that being the only section described, or referred to, in the pleadings. Under these circumstances, it was not necessary that there be any finding as to defendant's possession, the rule being that findings are never required as to facts admitted by the pleadings.

It is urged, however, that the finding as to the ouster was insufficient, because the court did not find that the defendant wrongfully withheld the property. It is true, as said in *Marshall v. Shafter*, 32 Cal. 194, that "the gravamen of the action [ejectment] is the wrongful withholding of the possession. \* \* \* and the wrongful withholding is an ouster." But, though this be so, still it is not necessary that the words "wrongful" or "wrongfully" be used either in the complaint or the findings. In *Payne v. Treadwell*, supra, the court, speaking by FIELD, C. J., on this subject, said: "The possession of the defendant is, of course, a pleadable and issuable fact, and the only question of difficulty arises from the supposed necessity of negating its possible rightful character. \* \* \* If the defendant's holding rests upon any existing right, he should be compelled to show it affirmatively in defense. The right of possession accompanies the ownership, and, from the allegation of the fact of ownership, which is the allegation of seisin in 'ordinary language,' the right of present possession is presumed as a matter of law. We do not think, therefore, any allegation beyond that of possession by the defendant is necessary, except that he withholds the possession from the plaintiff. The allegation that the possession is 'wrongful or unlawful' is not the statement of a fact, but of a conclusion of law. The words are mere surplusage, and, though they do not vitiate, they do no good. The withholding of the possession from one who is seised of the premises is presumptively adverse to his right, and wrongful. It is by force of this presumption that the plaintiff can rest, in the first instance, his case at the trial upon proof of his seisin, and of the possession by the defendant. From these facts, when established, the law implies a right to the pres-

ent possession in the plaintiff, and a holding adverse to that right in the defendant." We are not aware that the law as thus declared, has ever been questioned in this state, and it follows, therefore, that the appellant's contention cannot be sustained. The foregoing being in substance all the points made for a reversal, we advise that the judgment be affirmed.

We concur: VANCLIEF, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

91 Cal. 433

SAN LUIS OBISPO COUNTY V. WHITE. (No. 13,556.)

(Supreme Court of California. Oct. 2, 1890.)

TAXATION—BRIDGES—COUNTIES—TRIAL.

1. Pol. Code Cal. § 3671, provides that taxes upon road-districts shall be collected in the same manner as county taxes. St. 1880, p. 136, provides that a county may maintain an action, in its own name, for the recovery of delinquent taxes. *Held*, that a county can maintain an action in its own name to collect delinquent taxes which were levied upon a road district.

2. St. Cal. 1883, p. 299, provides that the board of supervisors of a county shall have power to levy taxes upon the taxable property in any district, in their county, for the construction and repair of roads, provided the proposition be submitted to and received by a majority of the qualified voters. Pol. Code, § 2618, defines a bridge to be a highway. *Held*, that it is within the power of the board, provided the proposition is approved by a majority of the voters, to levy a tax on a road-district to build a bridge.

3. An election proclamation, ordered published by the board of supervisors, pursuant to Pol. Code Cal. § 1056, is not invalid because the clerk affixed a scroll thereto, instead of his official seal, though the county government act (St. Cal. 1883, p. 299, § 20, subd. 8) makes it the duty of the clerk to place his seal upon all proceedings of the board, whenever the same are ordered published.

4. If the clerk of the board of supervisors neglects to enter an order for the publication of a special election proclamation upon the minutes, as he is required to do by law, parol evidence is admissible to prove that such an order was made.

5. Code Civil Proc. Cal. § 2010, provides that evidence of the publication of a notice required by law may be given by the printer's affidavit annexed to a copy of the notice. *Held*, that an objection that the contents of an election proclamation could not be proven by a printed copy with the affidavit of publication annexed, on the ground that the original had not been sufficiently accounted for, was properly overruled, where the court was not requested to limit such evidence to the purpose for which it was admissible.

6. Pol. Code Cal. § 1055, provides that the board of supervisors, upon the receipt of the governor's proclamation of a general or special election, shall cause a copy of the same to be published in some newspaper printed in the county, and posted in each place of election, and in the case of a special election to fill vacancies in certain state offices, they shall post or publish a copy of such proclamation upon the receipt thereof. Section 1056 provides that whenever a special election is ordered by the board of supervisors they must publish and post a proclamation in the same manner as a proclamation issued by the governor. *Held*, that, if a proclamation by the board of supervisors, of a special election on a proposition to levy a tax to build a bridge, was published in a county newspaper, it was not necessary that it be posted also.

7. Upon an assessment roll, the decimal parts

of the dollar were separated from the units and tens by the subdivisional account-book lines instead of the decimal point, and the word "cents" was omitted from the top of the column. *Held*, that an objection that the tax was not entered upon the assessment roll, on the ground that the decimal point and word "cents" were omitted, is untenable, and that it was competent for the district attorney to permit the assessor to add the abbreviation "cts." at the top of the column, over the space intended for the decimal parts.

5. Pol. Code Cal. § 8881, provides that omissions, errors, or defects in an assessment book may, with the consent of the district attorney, be supplied or corrected by the assessor at any time before the sale for delinquent taxes. *Held*, that it is competent for the assessor, under the written instructions of the district attorney, to supply the omission on the original roll of the "total tax" in the column provided for it, where the total tax appeared in the column headed "Road Tax."

Commissioners' decision. In bank. Appeal from superior court, San Luis Obispo county; V. A. GREGG, Judge.

Venable & Goodchild and W. H. Spencer, for appellant. J. M. Wilcoxon, Graves, Turner & Graves, and F. A. Dorn, for respondent.

GIBSON, C. Action to recover of the defendant his proportion of a special tax levied in road-district No. 2, of San Luis Obispo county, in the year 1888, for the purpose of raising the sum of \$10,000, to erect a bridge across the Salinas river at San Miguel in said district. Judgment passed for plaintiff from which, and an order denying a new trial, the defendant appeals. The appellant's principal points are that there is no law authorizing respondent to collect the taxes in question by suit, and that the assessment of the taxes was illegal.

1. The authority for any county or city and county to maintain an action in its own name for the recovery of delinquent taxes for any fiscal year, collectible in such county or city and county, is to be found in the act of April 23, 1880, (St. 1880, p. 136.) This act, it is to be observed, does not include in express terms a local or special tax; but by the act of March 9, 1883, (St. and Amend. 1883, p. 65,) a new section, viz., 3671, was added to the Political Code, which prescribes the basis of taxation, and that "all taxes upon townships, road, school, or other local districts, shall be collected in the same manner as county taxes." The taxes involved here were levied upon a road-district, therefore they can be recovered in the same manner as county taxes, under the act first above referred to.

2. The taxes here, appellant claims, were void because—*First*, the board of supervisors had no power to levy them; *second*, the election upon the proposition to make the levy was void; and *third*, they were not entered upon the assessment roll. That the board of supervisors had ample power to levy the taxes is made apparent from an inspection of the county government act of March 14, 1883, (St. and Amend. 1883, p. 299.) It is therein provided: "The boards of supervisors in their respective counties have jurisdiction and power under such limitations and restrictions as are prescribed by law \* \* \* to levy taxes upon the taxable property of their respect-

ive counties for all county purposes, and also upon the taxable property of any district for the construction and repair of roads and highways, and other district purposes: provided that no tax shall be levied upon any district until the proposition to levy the same has been submitted to the qualified electors of such district, and received a majority of all the legal votes cast upon such proposition." Section 25, subd. 13. Highways include bridges. See Pol. Code, § 2618.

Appellant contends that the election was void because the board of supervisors failed to make, publish, and post a proclamation of the election. "Whenever a special election is ordered by the board of supervisors, they must issue an election proclamation containing the statement provided for in subdivision 1 of section 1054, and must publish and post it in the same manner as proclamations issued by the governor." Pol. Code, § 1056. That portion of the section referred to, as far as applicable here, provides that such proclamation shall contain a statement of the time of the election; and, as to the manner in which proclamations must be made and published by the governor, he is, by section 1053, Id., required, at least 30 days before a general election, and 10 days before a special election, to issue a proclamation, under his hand and the great seal of the state, and transmit copies thereof to the boards of supervisors of the counties in which the elections are to be held. Upon the receipt of such proclamation the board of supervisors may, in case of a general or special election, cause a copy of the same to be published in some newspaper printed in the county and to be posted at each place of election at least 10 days before the election; and, in case of a special election to fill a vacancy in the office of state senator or assembly-man, the board of supervisors, in their discretion, may cause a copy of the proclamation to be published or posted in the manner above stated, except it need not be published or posted for a longer period than five days before such election. Id. § 1055. The board of supervisors in this case made an order which was duly entered upon the minutes of the board that the proposition to levy a special tax for the construction of a bridge across the Salinas river at the town of San Miguel should be voted upon at a special election, to be held for that purpose, in road-district No. 2, on the 24th of March, 1888, in conformity with the general election laws of the state; and that the clerk of the board should issue an election proclamation to that effect, under his hand and the seal of the board. The board also ordered that the proclamation should be published in a paper known as the "San Miguel Messenger." This order was not entered upon the minutes. The clerk of the board wrote, in the presence of the latter, a proclamation embodying the substance of the order for the election, and signed it; but, instead of affixing his official seal to it, he made a scroll for a seal, and then sent it to the San Miguel Messenger for publication, in which paper it was published once a week for five consecutive weeks prior to the election. It is

objected that the so-called proclamation was not properly authenticated because the seal was omitted, but we do not think that the validity of the acts of the board of supervisors depends upon the care with which they may be authenticated by the clerk of the board. The board undoubtedly had the authority to issue the proclamation, and it ordered that it should issue and be authenticated in a certain manner; but, as we have seen, the clerk failed to observe the requirements of the order in one respect. Such a failure, however, could not defeat the proclamation. For, while it is made the duty of the clerk, by subdivision 8, § 20, of the county government act, to authenticate with his signature and the seal of the board the proceedings of the board, whenever the same are ordered published, still an omission to affix the seal cannot defeat any of the actions of the board. Subdivision 9 of the same section requires all ordinances to be authenticated in the same way by the clerk, and to be by him recorded at length, in the ordinance book. Yet, it has been held that a failure to so record an ordinance does not affect its validity. *Irrigation Dist. v. De Lappe*, 79 Cal. 358, 21 Pac. Rep. 825. See, also, *County of Santa Clara v. Railroad Co.*, 66 Cal. 644, 6 Pac. Rep. 744, in which it was held that the validity of an ordinance imposing county licenses, which had been properly passed by the board of supervisors, was not affected by the omission of the clerk to add the seal of the board to the record of it, in the ordinance book. Besides, in the present case, as far as the electors of the district were concerned, the proclamation, as published, was complete as to them, as the scroll which appeared thereon in place of the seal was all that could appear, even if the seal had been affixed to the original.

The objection to oral evidence of the order of publication of the proclamation was properly overruled. It is true the order, as part of the proceedings of the board, should have been entered upon the minutes, the same as the order for the election and the issuance of the proclamation, which was made at the same time. But, as appears by the case last referred to, the failure of the clerk to record an ordinance will not defeat it, neither do we think the failure to enter the order in this case precluded proof of it by oral evidence. The power of the board to act exists independently of any action of the clerk, and the validity of an exercise of it does not depend upon the diligence of the clerk. Were it otherwise, the clerk would have it in his power to either by carelessness or design defeat any of the actions of the board.

It is further objected that proof of the contents of the proclamation could not be made by the published copy, because the absence of the original was not sufficiently accounted for. This objection, as far as it went, was well founded, because there was no showing of any attempt to recover the original proclamation from the printer, to whom it had been sent for publication, nor was it shown that it had been lost or destroyed. But as the printed copy, with the affidavit of its publication

annexed thereto, was relevant and competent to prove the publication of the proclamation, (Code Civil Proc. § 2010,) and as the court was not requested to limit the evidence to the purpose for which it was admissible, the objection was properly overruled. *Williams v. Insurance Co.*, 54 Cal. 449.

Before the proof of publication of the proclamation had been received, the clerk testified without objection, as follows: "After the making of the order contained in the minutes just read in evidence, I made, in the presence of the board of supervisors, and pursuant to said order, a pencil draft of a notice for publication, of which draft the printed advertisement annexed to the affidavit which I hold in my hand is a copy." Now, taking this testimony in connection with the copy referred to, which we have seen was admissible in evidence, there appears to have been sufficient proof of the contents of the proclamation.

It is argued that as the proclamation was only published in the newspaper, but not posted, the notice intended to be given by it was incomplete. Section 1055 of the Political Code provides that in cases of general or special elections the proclamation may be published and posted; but, in cases of special elections to fill vacancies in certain offices, it may be, in the discretion of the board, published or posted for a period of not longer than five days before the election. Thus there was one of two methods for the board to adopt in the present case, and they having decided to simply publish it for five weeks before the election, their action must be sustained. *Comstock v. County of Yolo*, 71 Cal. 599, 12 Pac. Rep. 728.

It is claimed the tax was not entered upon the assessment roll, because, in the column of the assessment roll headed "Road Tax," the amount of such tax upon the real estate was entered as \$1200, and upon the personalty as \$460, without any mark to indicate the portions intended for cents, instead of as \$12.00 and \$4.60, respectively. An inspection of the copy of the roll in the transcript shows that there are the usual subdivisional account-book lines between the decimal parts of the dollar and the units and tens of dollars in each instance, so that the value of the sums entered in the decimal column is plain enough without the word "cents," or the abbreviation thereof, at the top of the column. Since this is so, the point made as to the error committed by the district attorney in granting permission to the assessor to add the abbreviation "cts." at the top of the column, and in the space intended for the decimal portions of dollars, need not be further noticed.

In the original roll the special bridge tax was not carried to nor entered in the column headed "Total Tax;" but, after the roll was made up and placed in the hands of the tax collector, no sale for delinquent taxes having been made, the district attorney gave his consent in writing to the assessor to enter the said tax in the column last mentioned, whereupon the assessor made the proper entries in that column. This is now urged as error. The

total tax appeared in the column headed "Road Tax," and consequently it was clear what the omitted total tax was. It was therefore competent for the district attorney to authorize the assessor to supply the omission under section 3881 of the Political Code, which provides: "Omissions, errors, or defects in form in any original or duplicate assessment book, when it can be ascertained therefrom what was intended, may, with the written consent of the district attorney, be supplied or corrected by the assessor at any time prior to the sale for delinquent taxes, and after the original assessment was made."

We do not see any cause for a reversal of the judgment or order appealed from, and therefore advise that they be affirmed.

We concur: VANCLIEF, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

86 Cal. 149

TRIPP v. DUANE *et al.* (No. 9,631.)

(*Supreme Court of California.* Oct. 8, 1890.)

APPEAL—DISMISSAL—LACHES.

On motion to dismiss an appeal for want of prosecution, it appeared that the transcript was filed in manuscript, and was never printed, appellant having failed to furnish funds therefor; that, after being on the calendar for argument, it was dropped several years before the motion to dismiss; that no motion to restore to the calendar was ever made. *Held* that, both parties having been guilty of gross laches, one would not be allowed to take advantage of the laches of the other to prevent a hearing on the merits, provided the matter was now prosecuted with diligence.

Department 1. Appeal from superior court, city and county of San Francisco; JAMES G. MAGUIRE, Judge.

Moses G. Cobb, for appellant. P. G. Galpin, for respondent.

FOX, J. This is a motion to dismiss the appeal of the defendant Ellis. The notice does not state upon what ground the motion will be made, but does state that it will be made upon affidavit, a copy of which is served with the notice. The affidavit shows no ground for dismissal, except that of laches or want of prosecution. It, and the files and records of this court, show that the appeal was taken prior to, and the transcript filed in this court on, June 24, 1884. It was filed in manuscript, and has never been printed, the appellant having failed to furnish the clerk with funds to pay for the printing. The case was on the calendar for argument several years ago, but was dropped from the calendar. It could not thereafter be restored except upon notice, and it does not appear that any notice has ever been given to restore it to the calendar, and so get it in position to be heard. Both parties have been guilty of gross laches in the matter, and the court does not think that under all the circumstances it ought to allow one of the parties to take such advantage of the laches of the other as to cut her off from a hearing upon the merits, if she desires it, and will now prosecute the matter with due diligence.

The present motion to dismiss will be denied. If the transcript is printed and served 40 days or more before the commencement of the next January term of this court, the case will be placed on the calendar of that term for argument; otherwise respondent may then renew his motion to dismiss.

We concur: BEATTY, C. J.; PATERSON, J.

86 Cal. 114

DALEY v. RUSS *et al.* (No. 12,036.)

(*Supreme Court of California.* Oct. 1, 1890.)

ACTIONS ON CONTRACTS—PLEADING AND PROOF—NONSUIT.

1. Defendants agreed to pay plaintiff \$4,000 brokerage for negotiating a loan of \$4,000 for them, "on the security of said Jupiter Mining property." The complainant set out the contract, and averred that plaintiff, "in accordance with the terms of said contract, procured said sum," but the evidence showed that defendants had to give other security than the mining property, and \$3,600 additional brokerage, to another person, in order to secure the \$4,000. *Held*, that the evidence did not prove the case made by the complaint.

2. In an action to recover \$4,000, the residue of \$7,600 brokerage for negotiating a loan of \$4,000 for four months, the evidence did not support the allegations of the complaint, and plaintiff was nonsuited. *Held*, that it was immaterial that defendant did not specify the grounds for his motion to nonsuit, as the complaint could not be corrected, except by an amendment, and that could not be granted, because the demand in the complaint is unconscionable.

WORKS and THORNTON, JJ., dissenting.

Commissioners' decision. In bank. Appeal from superior court, city and county of San Francisco; M. A. EDMONDS, Judge.

R. B. Mitchell, for appellant. Nagle & Nagle, for respondents.

HAYNE, C. This was an action to recover \$4,000, as brokerage, for negotiating a loan. The plaintiff was nonsuited, and he appeals from an order denying his motion for a new trial.

We think that the plaintiff failed to prove the case set forth in his complaint. The contract, which was annexed to the complaint, was as follows: "This agreement, made this the 19th day of November, 1881, by and between C. C. E. RUSS and F. M. BIBER, parties of the first part, and JOHN H. DALEY, party of the second part, witnesseth: That whereas, said parties of the first part are in want of the sum of four thousand (4,000) dollars to make improvements, and pay out money on account of a certain property known as the 'Consolidated Jupiter Mines,' etc., in Sierra county, of which the said parties of the first part are the owners, and the said party of the second part is willing to procure them said amount on the security of said Jupiter Mining property: Now said parties of the first part hereby agree that, if said Daley procures them said money as aforesaid for the term of four (4) months, they will pay him four thousand dollars as brokerage for his trouble in procuring the same; if the sum loaned is less, his brokerage shall be in the same proportion; if the money is not loaned and received by them, no brokerage is to be paid." A material condition of the above

contract is that the money should be procured upon certain named security, viz., the property known as the "Consolidated Jupiter Mines." The complaint alleges that the money was so procured. Its averments in this regard are that John H. Daley "in accordance with the terms of said contract procured the said sum," etc., and that he "performed all the conditions of said contract to be by him performed." The complainant, therefore, relied upon performance of the contract,—in other words, upon the proposition that Daley had procured the money upon the security of said Consolidated Mining property,—and as this was denied, it was incumbent upon the plaintiff to prove it. But the evidence does not prove it. The principal witness called by the plaintiff was the defendant Russ, who testified, among other things, as follows: "Question. Was there any other property besides mining property conveyed? Answer. Yes, sir. Q. What was it? A. The parties were not satisfied with that property, and we gave them some more, and the whole crop as security. Q. They were not satisfied with the Consolidated Jupiter property? A. No, sir. Q. Wouldn't take that as security? A. No, sir." And not only so, but it appears that John H. Daley was not able to negotiate the loan by himself, but had to obtain assistance for which the defendants became responsible. The money was to be obtained from a certain Miss Peltret, and the transaction could not be closed without an additional commission of \$3,600, to an attorney,—one Linforth. This seems to be conceded by the counsel for the appellant. For he says: "Before Miss Peltret could be brought to the point of loaning the money, however, it became necessary to enlist the services of a Mr. E. J. Linforth, an attorney at law. \* \* \* He was introduced to the defendants by Daley, and bargained with them for an extra commission on his own account." The evidence, therefore, did not show performance of the contract set forth in the complaint. And if the conduct of the defendants amounted to a modification of the contract, it should have been declared on as modified. This was the rule of the common law. See *Little v. Holland*, 3 Term R. 590; *Phillips v. Rose*, 8 Johns. 392; *Freeman v. Adams*, 9 Johns. 115; *Baldwin v. Munn*, 2 Wend. 403. And it prevails in California. (*O'Connor v. Dingley*, 26 Cal. 21.) and in other states which have the reformed procedure, (*Evarts v. Smucker*, 19 Neb. 43, 26 N. W. Rep. 596; *Lanitz v. King*, 93 Mo. 519, 6 S. W. Rep. 263.) The rule is fundamental that the complaint must allege either performance or a valid excuse for non-performance. One is not the same as the other. And if the plaintiff did not perform the contract, but relies upon the consent of the defendants as an excuse, he must set forth the excuse in his complaint. *Purdue v. Noffsinger*, 15 Ind. 388; *Armstrong v. Rockwood*, 53 Ind. 506; *Garvey v. Fowler*, 4 Sandf. 665; *Bogardus v. Insurance Co.*, 101 N. Y. 329, 4 N. E. Rep. 522; *Jerome v. Stebbins*, 14 Cal. 457. The plaintiff's idea that it was for the defendants to set up the excuse for non-perform-

ance of the contract is without foundation. It results that the evidence does not prove the case made by the complaint.

It is objected, however, that the defendants did not specify this as a ground of their motion for nonsuit. It is undoubtedly the settled rule that a motion for nonsuit should specify the grounds upon which it is made, and ordinarily a ground which is not stated cannot be considered. *Kiler v. Kimbal*, 10 Cal. 268; *McGarrity v. Byington*, 12 Cal. 429; *Holverstot v. Bugby*, 13 Cal. 44; *Baker v. Joseph*, 16 Cal. 180; *People v. Banvard*, 27 Cal. 474; *Sanchez v. Neary*, 41 Cal. 487; *Raimond v. Eldridge*, 43 Cal. 508; *Silva v. Holland*, 74 Cal. 530, 16 Pac. Rep. 385; *Loring v. Stuart*, 79 Cal. 201, 21 Pac. Rep. 651; *Miller v. Lucco*, 80 Cal. 261, 22 Pac. Rep. 195. But the reason of the rule is to afford an opportunity to correct such defects as admit of correction. It is plain that this reason does not apply where the defects do not admit of correction. As to such cases the rule does not apply. Or, if the phrase be preferred, where the defects cannot be corrected the error of not specifying the grounds of the motion is immaterial. In the case before us the defect is that the cause of action shown by the evidence is not the cause of action stated in the complaint. This could only be corrected by an amendment to the complaint which could only be made by leave of the court. In passing upon an application for leave to amend, the controlling principle must be whether the amendment is in furtherance of justice. And where, as here, the demand is unconscionable, (being for part of a brokerage of \$7,600 for obtaining a loan of \$4,000 for four months,) we think that leave to amend should be refused. A party who seeks to enforce a liability like that must stand upon his legal rights. The court should not interpose its discretion to save such a case. The defect therefore could not be cured. A reversal will not be ordered for the purpose of allowing plaintiff to make an application which should, and presumably would, be refused. It is immaterial therefore that the motion for nonsuit did not specify the grounds upon which it was made. We advise that the order appealed from be affirmed.

We concur: VANCLIEF, C.; GIBSON, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

THORNTON, J., dissents.

WORKS, J. I dissent. The ground for a nonsuit must be specifically stated, and this case presents no exception to the rule.

85 Cal. 408  
**FARRELL v. BOARD OF TRUSTEES OF THE CITY OF SACRAMENTO et al.** (No. 13,480.)  
*(Supreme Court of California. Sept. 1, 1890.)*

CONSTITUTIONAL LAW—SPECIAL LAWS.

Const. Cal. art. 4, § 25, subd. 28, provides that the legislature shall not pass local or special laws, "creating offices, or prescribing the powers of officers, in counties, cities," etc. St. 1871-72, §§ 1, 6, pp. 243, 244, provides for a board of police



commissioners of the city of Sacramento, and the appointment of not over 15 policemen. St. 1889, p. 148, amends the act of 1871-72 by authorizing the police commissioners to appoint any number of police not exceeding 30. *Held*, upon *mandamus* to compel the levy of a tax to raise a sum of money to pay the salaries of the extra policemen appointed under the act of 1889, that said act was a special act, and therefore unconstitutional. BEATTY, C. J., dissenting.

In bank. Appeal from superior court, Sacramento county; JOHN W. ARMSTRONG, Judge.

*W. S. Church and Johnson, Johnson & Johnson*, for appellants. *Hart & Davis* and *Catlin & Blanchard*, for respondent.

THORNTON, J. Action for a writ of mandate to the board of trustees and others, above mentioned, to compel them to levy a special tax to raise a sum of money to pay the salaries of policemen, etc. Judgment was rendered for the petitioners, and the respondents appealed.

The city of Sacramento is a municipal corporation, organized in 1863, under an act of the legislature. St. 1863, p. 415 et seq. The board of trustees is, under that act, the governing body of the corporation, (St. 1863, § 2, p. 416,) and by it the board was invested with power to create and establish a city police, to prescribe their duties and compensation, and to provide for the regulation and government of the same; to create the office of chief of police, and elect such chief and eight policemen, (Id. § 2, subds. 1, 9, pp. 416, 417.) In 1872, an act was passed amendatory of and supplementary to the act of 1863, by which the office of chief of police was created, and a board of police commissioners. St. 1871-72, §§ 1, 6, pp. 243, 244. This board was to consist of the president of the board of trustees, the chief of police, and the police judge. Section 6. The board was authorized, immediately on entering upon their duties, to appoint a permanent police force for the city, which was to consist of a captain of police, and such number of policemen, not exceeding 15, as they might deem necessary for the protection and good government of the city. By the fourteenth section of this act it was provided that, at the time of the levy of the annual city taxes, the board of trustees should estimate the amount of money that will be required for police purposes during the fiscal year, and shall cause this money to be kept as a separate distinct fund, to be called the "Police Department Fund," which shall be used for no other purpose whatever, except the payment of the salaries and expenses of the police department, and shall levy a special tax to meet these estimated expenses to pay the officers and expenses provided for in this act. The former act, as regards the police, was repealed. Section 15, St. 1871-72, p. 246. In March, 1889, an act amending the act of 1872 was passed. By it the board of police commissioners was authorized to appoint policemen, not exceeding 30 in number. St. 1889, p. 148. This act went into effect immediately, and on the 1st day of April, 1889, the board of police commissioners, by authority of the last-mentioned act, appointed 25 policemen. The petitioner and the others

named in his petition are the 25 so appointed. The board of trustees on February, 1889, made the estimate and levy required by the fourteenth section of the act of 1872, basing this estimate and levy on the police department as it then stood, consisting at that time of a chief of police, a captain of police, and 15 policemen. The sum raised by the levy of February was insufficient to pay the force subsequently appointed in April, and the board was requested, on behalf of the petitioner and the other appointees to the police force, to levy a tax to raise the sum required. The board refused, and this proceeding was instituted to compel it to do so.

The contention here made on behalf of appellants is that the act of 1889, amending section 6 of the act of 1872, is unconstitutional and void, and hence it imposed no obligation on the board of trustees to proceed to levy a tax under it. It is said that the act is special, and forbidden by the twenty-fifth section of the fourth article of the constitution of 1879. There can be no doubt that the act of 1889 is a special law. It relates to a special board of trustees of one particular city, and a particular class of men to be appointed by this special board to perform the duties of their office in the one city above mentioned. Is it forbidden by the constitution? Among other cases in which the legislature is forbidden to pass special laws is the following: "Creating offices, or prescribing the powers and duties of officers, in counties, cities and counties, townships, election or school districts." Article 4, Const. Cal. § 25, subd. 28. Conceding, as is contended, that a police officer is an officer of the state, and not of the municipality in which he exercises his office, it does not follow that the provision above quoted does not apply to them. We think it applies to all officers who are appointed to exercise their duties in either of the particular political divisions above mentioned. It is not limited to officers of such political divisions, but embraces officers in such divisions. This interpretation gives to the language of the clause its usual and ordinary meaning, which is the true rule where the words are not employed in any technical or peculiar sense. *Weill v. Kenfield*, 54 Cal. 113. The preposition "in" qualifies the entire clause, and is used as denoting officers who exercise their office and perform their duties within the limits of either political division mentioned in the clause. There is nothing in the context to indicate that it is used in any other sense. That the people of this state had power to put this restriction on the legislative power cannot be doubted. This power was ample as regards the police power of the city, conceding that they were state or municipal officers. The act of 1889 creates the office of policeman in the city of Sacramento. There can be no doubt of this, as to the additional number of policemen whose appointment is authorized by the act. This creation of offices, in our judgment, is forbidden by the provisions above quoted of the organic law of the state.

It is urged that "the act complained of here [referring to the act of 1889] is not

an act creating offices, within the meaning of subdivision 28, of section 25, of article 4, of the constitution. It merely gave the city permission to have more policemen than she had before, if it was deemed necessary for the protection and good government of the city. To say that such a permission is the creation of offices, implies a misconception of the meaning of the term 'creating offices.' This has been ruled against appellants' contention in *Ford v. Board*, 81 Cal. 19, 22 Pac. Rep. 278." In that case there was no reference in either opinion to the clause of the constitution referred to. The act under consideration did not require it. No point was there made that the act was a special act, or that it was as such inhibited by any provision of the constitution. Section 2521 of the Political Code, as amended in 1883, was there considered, which provided that the board of state harbor commissioners must, on entering on the duties of their office, appoint the following officers, viz.: "A secretary, an assistant secretary, an attorney, a chief engineer, a chief wharfinger, and such number of wharfingers and collectors as they may deem necessary." It provided further that "such officers shall hold for a term of four years from the dates of their respective appointments, but may be removed by the board at any time, after due investigation, for causes affecting their official character or competency. The order for such removal, stating distinctly the causes therefor, must be entered on their minutes. In case of a vacancy in such offices by the expiration of a term, or for any other cause, the board must fill the same by an appointment for four years." The action was brought by Ford to compel, by writ of mandate, the allowance and payment of a balance of his salary as collector for the month ending 24th July, 1889. It appeared by an agreed statement of facts that Ford had been appointed by the board under the act to the office of collector on the 9th of June, 1887; that he had duly entered upon and continued to discharge the duties of his office until he was removed in July, 1889, for no cause affecting his official character or competency. It further appeared that the board had in July, 1889, abolished the office. It was held by three of the judges of this court (FOX, MCFARLAND, and SHARPSTEIN) that the board had authority, under the statute, to create the office of collector, and consequently had power to abolish it, at its pleasure. BEATTY, C. J., filed an opinion, in which he concurred in the judgment, in which he repudiates the view taken in the opinion concurred in by the three justices just referred to, and places his concurrence on the ground that the statute under consideration was unconstitutional, for the reason that it delegated to the board the power of creating an office, which pertained to the legislature, and which power the legislature could not delegate. In this opinion WORKS, J., concurred. PATERSON, J., concurred in the judgment, and THORNTON, J., dissented. It thus appears that only three of the justices agreed in the holding that the office of collector was created by the board. This ruling, though

worthy of great consideration by reason of the ability and learning of the three distinguished judges who concurred in it, cannot be regarded as the decision of this court, and binding in any case as authority. If the offices mentioned in the statute were created by the board of harbor commissioners, the conclusion reached by BEATTY, C. J., and WORKS, J., is supported by the sounder and better reason. According to that conclusion, the office of collector never existed, there never was a lawful incumbent, and the dismissal of Ford furnished no cause of action or ground of complaint.

Why is not the power to create an office a legislative power? Of course no reference is made here to offices created by the constitution. But as to all other offices, how can they be created other than by an act of the legislature? If the legislature cannot create offices, why the restriction on its power in subdivision 28, § 25, art. 4, of the constitution? Why is the legislature forbidden to create the offices embraced in the subdivision cited, by special or local laws, if they cannot do it in the exercise of the power granted it by the constitution by a general law? There are other provisions of the constitution which show that the creation of an office is to be accomplished by legislative action. See article 20, §§ 4, 16. The sections cited are meaningless, unless the creation of office is a legislative function. The legislature, having created the office by statute, may vest the appointment to such office in such individual or officer or board as it may think proper. Article 20, § 4. As in the case before us, the legislature, by the act of 1889, created the office of policeman, including captain of police, to exercise their office in the city of Sacramento, and vested the appointment of these officers in the board of police commissioners of that city.

Further, if the legislature cannot create an office by special act it certainly cannot accomplish the same thing through a special act which vests the power to appoint to such office in any board whatever. This would be a clear evasion of the constitution. Our conclusion is that the act of 1889 is unconstitutional and void. As this conclusion has been reached, it is unnecessary to consider the contention so earnestly made by counsel for petitioner, that the charter of the city of Sacramento can be controlled by a special law. But, conceding that it can be so controlled, we cannot hold that it can be controlled by an act which is violative of the constitution. The act under consideration is unconstitutional, and cannot be held valid for any purpose. The judgment in this case must be reversed, and the cause remanded, with direction to the court below to enter judgment for the defendants. Ordered accordingly.

I concur: PATERSON, J.

I dissent: BEATTY, C. J.

We concur in the judgment: SHARPSTEIN, J.; MCFARLAND, J.

WORKS, J.; Fox, J. We concur in the judgment on the ground that, by providing that additional policemen might be appointed by the city authorities, the legislature attempted to do indirectly, by a special statute, what it was forbidden to do directly by subdivision 28, of section 25, of article 4, of the constitution. I do not understand, however, that this point is decided against the appellant in *Ford v. Board*, 22 Pac. Rep. 278. We do not wish to be understood as holding that the legislature may not amend a special charter of a city, such as the city of Sacramento is acting under, by a special statute, except where, as in this case, the law enacted is forbidden by the constitution for other reasons.

**EUREKA COUNTY v. LANDER COUNTY. (No. 1,330.)**

(*Supreme Court of Nevada.* Sept. 22, 1890.)

**COUNTY BOUNDARIES—LOCATION.**

St. Nev. 1862, p. 53, creating the county of Lander, designated the fortieth meridian as its western boundary; but in 1870, by a joint survey instituted by Lander and Humboldt counties, as permitted by St. 1866, p. 130, the western boundary of Lander county was fixed on a line  $1\frac{1}{2}$  miles east of the fortieth meridian. This line was subsequently adopted by the legislature (St. 1873, p. 189) as the correct western boundary of Lander county. At the same session of the legislature, but after the adoption of this boundary line, the county of Eureka was created, (St. 1873, p. 107;) one of its boundaries being described as on a line equidistant between the north-east and north-west corners of Lander county. Held, that on locating this boundary of Eureka county, the true western boundary of Lander county must be considered as being on the line fixed by the joint survey made by Humboldt and Lander counties, and not on the fortieth meridian.

Appeal from district court, Ormsby county; RICHARD RISING, Judge.

W. D. Jones, Dist. Atty., *Henry Mayenbaum*, and *T. Coffin*, for appellant. *Baker & Wines*, for respondent.

BELKNAP, J. Mr. Wenban, the owner of real estate lying near the boundary line of Eureka and Lander counties, and assessed by each county as within its jurisdiction, paid his taxes to Lander county, under the law authorizing a tax-payer to pay either county. Gen. St. § 1205. The county of Eureka, claiming that the assessed property is within its boundaries, brought this action to recover back the amount of money paid. The statute creating the county of Eureka describes the boundary line between Eureka and Lander counties as follows: "Beginning at a point on the north boundary line of Lander county equidistant between the north-east and north-west corners of said Lander county; thence running due south from said initial point to the south boundary line of said Lander county." And Eureka county was required to establish the line at its own expense. St. 1873, p. 107. The line was accordingly established in the year 1873 by Mr. Edwards, the county surveyor of Eureka county. His survey places the disputed territory in Lander county. In the year 1886 it was ascertained that the line established by Edwards was about

three-fourths of a mile east of its correct position, as claimed by Eureka county. The difference arose from the fact that the surveys made in the interest of Eureka county, subsequent to the Edwards survey, proceeded upon the assumption that the north boundary line of Lander county extended to the fortieth meridian of longitude west from Washington. If this hypothesis is correct, the disputed territory is in Eureka county; but, if the line extends only to the Lander-Humboldt line, as established in the year 1870, (a point about  $1\frac{1}{2}$  miles east of the meridian,) Mr. Wenban's property is in Lander county. The question is, therefore, where is the western terminus of the north boundary line of Lander county?

The statute creating the county of Lander designates the fortieth meridian as the western boundary line of the county, (St. 1862, p. 53;) but the line was afterwards changed, as we shall proceed to show. The western boundary line of Lander county is the eastern boundary line of Humboldt county. The position of this line was established in the year 1870, by a joint survey made by the county surveyors of the counties, at the instance of the county commissioners. Surveys of this character are authorized by a statute entitled "An act authorizing the survey and establishment of boundaries between the several counties of this state," approved February 26, 1866, (St. 1866, p. 130.) The line as established by the joint survey was adopted by the legislature as the boundary between the counties by a statute entitled "An act to define and establish the boundary line between Humboldt and Lander counties," approved March 7, 1873. The statute is as follows: "Section 1. The boundary line between Humboldt and Lander counties is hereby defined and established as follows, to-wit: Beginning at the north-west corner of Lander county and running due south on the present line between Humboldt and Lander counties to a point due west of Battle Mountain station; thence due west twelve miles; thence in a direct line to the present north-east corner of Churchill county." St. 1873, p. 189. This statute became a law before the one creating Eureka county went into effect. St. 1873, p. 109, § 10. If, in the statute creating Eureka county, there is any uncertainty touching the locality of the north-west corner of Lander county, the uncertainty is removed by the statute establishing the Humboldt-Lander line. At the time of the enactment of this statute no boundary line, other than the one mentioned, had been run between the counties of Humboldt and Lander. And when the statute fixed the initial point at the north-west corner, and directed the line run thence, due south, "on the present line," no other line than the one established by the joint survey of 1870 could have been intended. Since the enactment of the statute it has been discovered that the Humboldt-Lander line is not at the fortieth meridian, as required by the law of 1862, but is one and a half miles east of the meridian. This fact, however, does not affect the case. The legislature has full power to change the bound-

aries of counties, and the statute of 1873, p. 189, did change the boundary line between Humboldt and Lander counties from the descriptive line designated by the statute of 1862, to the line actually run by the counties. It results that the judgment in favor of Enreka county should be reversed, and the cause remanded. It is so ordered.

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**HURTGEN V. KANTROWITZ et al.**

(Supreme Court of Colorado. Sept. 12, 1890.)

**ATTACHMENT—CLAIMS NOT DUE—APPEAL FROM JUSTICES.**

1. Under Gen. St. Colo. § 2003, providing for attachment in certain cases upon debts not at the time due, defendant in attachment on notes not due is not entitled to judgment on the merits, on the ground that the notes were not due when the suit was instituted, when plaintiff brings himself within the provisions of the statute by his affidavit and sustains the grounds of attachment by his evidence.

2. Where in an attachment before a justice of the peace the issues in attachment and upon the merits are tried at the same time, and judgment on both issues is rendered for defendant, from which plaintiff appeals, the county court should retry the issues in attachment, as well as on the merits, under Gen. St. Colo. §§ 1979, 1987, providing for the right of appeal from all judgments rendered by justices, and that the rights of the parties shall be the same as in the original action, and shall be determined in a summary way.

**Appeal from Arapahoe county court.**  
**H. B. Johnson, for appellant.**

HAYT, J. This action was commenced before a justice of the peace by attachment upon promissory notes not at the time due. In the affidavit several statutory grounds for attachment are alleged. This affidavit was traversed, and a motion to dissolve the same was interposed. The issue thus made was by consent tried with the trial upon the merits. The justice dissolved the attachment, and gave judgment upon the merits for the defendants. The record shows that an appeal was promptly taken "from the judgment aforesaid" to the county court, where the cause was tried to the court without the intervention of a jury. No appearance was entered in the county court by or for the defendants, or either of them. Upon this trial the notes were introduced, and the grounds of attachment fully sustained by the evidence. The county court, however, being of the opinion that the order dissolving the attachment was not an appealable order, and could not for this reason be reviewed, gave judgment for the defendants upon the merits, as the notes were not due at the time of the institution of the suit. This was error. It is immaterial as to whether the order dissolving the attachment is an appealable order or not. It is followed by a final judgment for the defendants, and from this judgment an appeal was duly taken, and the attachment issue was thereby appealed as a part of the main case.

The statute makes express provision for the commencement of actions by attachment in certain instances upon debts and liabilities not at the time due. Gen. St. § 2003. The plaintiff by his affidavit

brought himself within the provisions of the statute. The fact that the attachment issue was decided against him by the justice did not preclude plaintiff from having this issue retried upon appeal. Any other conclusion would have the effect of making the determination of a justice of the peace affecting property rights final and conclusive. This is contrary to both the letter and the spirit of our justices' act. In this act the right of appeal, with the single exception of judgments taken by confession, is given from all final judgments rendered by these magistrates, irrespective of whether such judgments are for or against the party taking the same. Gen. St. § 1979. It is also provided that no exception need be taken to any of the proceedings before a justice, and the appellate court is required to determine the case in a summary way, according to the rights of the parties. Gen. St. § 1987. And it is further provided that the rights of the parties upon appeal shall be the same as in the original action. *Id.* § 1989. In other words, the trial on appeal is *de novo*. An attachment may be a vital part of the case, and, in our opinion, the language employed by the legislature in the provisions cited is broad enough to permit the bringing up for review the attachment as a part of the case. The rights of third parties do not appear to be involved in this case, and the case is decided without reference to what the effect of an appeal might be upon such rights. When such rights are involved it is manifest that the attachment lien may be lost, when it would not be if viewed in reference to the two parties alone. We are clearly of the opinion that the county court was in error in holding that it had no right to retry the issue made upon the attachment. *Wade, Attachm. § 294; Myers v. Mott, 29 Cal. 359; Danforth v. Carter, 4 Iowa, 230.* The case will be reversed, and remanded for further proceedings.

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**FITCH V. ELLISON.**

(Supreme Court of Colorado. Sept. 12, 1890.)

**NEW TRIAL—INCOMPETENCY OF ATTORNEY—DISCRETION OF TRIAL JUDGE.**

The action of the trial court in refusing to grant a motion for a new trial will not be interfered with on appeal where plaintiff's affidavit in support of the motion states that, "when he came into the court-room to attend to his said cause" he was surprised to find after the trial of his cause had commenced that his attorney was in a state of intoxication, and was wholly unable to attend to the case, and that plaintiff did not know of the condition of his attorney "until after the trial of his cause had begun, and after the conclusion thereof."

**Appeal from district court, Douglas county.**

Appellant commenced suit in the court below to recover the sum of \$56.93 alleged to be due upon an account with appellee. Appellee in his answer denied the indebtedness, and, by way of counter-claim, alleged that there was due him upon such account the sum of \$125.25. A jury trial resulted in a verdict for appellee in the sum of \$120. Motion for new trial having been inter-

posed and overruled, judgment was rendered upon the verdict.

*W. T. Rogers and D. C. Webber*, for appellant. *Wm. Dillon*, for appellee.

HAYT, J. The judgment appears to be in accordance with the evidence introduced; but appellant, in support of his motion for a new trial, filed an affidavit in which he stated that he was prevented by his attorney from introducing competent evidence that was at his command, and which would have been sufficient to have changed the result, and that such action on the part of his attorney arose out of said attorney's incapacity, on account of drunkenness, to properly conduct the trial. It does not appear, however, that appellant made any objection to the attorney acting for him until after the trial was concluded, and a verdict returned against him. Then for the first time, upon a motion for a new trial, the complaint was made that the verdict resulted from the drunken condition of his attorney, and that he was thereby prevented from introducing evidence that would have secured a favorable verdict. The only affidavit filed in support of the motion for a new trial is that of appellant himself. In the beginning of this affidavit appellant states "that he was in his store attending to his business when this cause was called for trial, and that when he came into the courtroom to attend to his said cause and the trial thereof, he was surprised to find and discover, after the trial of his cause had commenced, that his attorney, J. W. Farrel, was in a state of intoxication, and wholly unable and incompetent to attend to the rights of his complaint." Further on in the affidavit we find the following statement: "And plaintiff did not know of the injustice being done him by his said attorney, or of his intoxication, until after the trial of his cause had begun, and after the conclusion thereof." Appellant's indifference or negligence in regard to the trial of the case is apparent from the fact that he was notified upon the previous day that the case would be called for trial at 10 o'clock the next morning, and yet he was not present at the time fixed, and upon being sent for was found attending to other matters. In the exercise of reasonable prudence a plaintiff who, as in this case, relies solely upon his own evidence to support his cause of action should be promptly on hand at the hour set for the trial of his cause.

Again, the time at which appellant wishes to be understood as first becoming aware of the condition of his attorney is left somewhat in doubt by the affidavit. If he became aware of this condition in the beginning of the trial, appellant should have then called attention to the matter. Had this been done, without doubt the court would have extended relief if the facts justified its interposition. The fact that plaintiff waited until a verdict was returned against him before doing so does not commend his application for relief to the favorable consideration of this court. On the contrary, if he desires to be understood as saying that he was not aware of the intoxicated condition of his attorney

until the trial was concluded, and an unfavorable verdict reached, this would indicate that the attorney's condition was not as bad as now represented, otherwise it would have been discovered sooner.

The fact that the trial court with opportunities of judging of the extent of the alleged incompetency of appellant's attorney, which this court has not, overruled the motion for a new trial must not be overlooked. In cases of this kind much must be left to the discretion of the judge presiding at the trial, and we are not prepared to say that the court showed such a gross abuse of discretion in this instance as calls for interference by this court upon appeal. In order that our position may not be misunderstood, we will say that courts should not permit the rights of litigants to be jeopardized by an attorney who so far forgets the obligations which he owes to the bench, to his profession, and to his client, as to appear in the trial of a cause in a condition of intoxication. The trial ought not to be allowed to proceed under such circumstances without giving the unfortunate litigant an opportunity to employ other counsel who should have an opportunity of advising themselves in reference to the case before being required to proceed, and the summary power of the court to punish the offending attorney as for contempt of court ought also to be exercised. While this is true, we are not prepared to say, under the circumstances as presented by this record, that this court should interfere with the judgment of the court below. It will therefore be affirmed.

#### CARR v. SCHAFER *et al.*

(*Supreme Court of Colorado. June 30, 1890.*)

#### CARRIERS OF GOODS—SPECIAL CONTRACT—EVIDENCE.

1. Where a freighter, acting as a common carrier, contracts in writing to transport perishable goods across the country, and there is a stipulation in the contract that he shall receive a sum in addition to the regular freight if the goods are delivered by a certain date, it is error in an action by the shipper for damage to the goods to submit to the jury the question whether he contracted to positively deliver the goods by that date.

2. Where in such case the shipper selects and approves the wagons to be used, evidence that the conveyances selected were unsuitable is incompetent to show negligence on the part of the freighter. *Transportation Co. v. Cornforth*, 3 Colo. 280, distinguished.

Appeal from district court, Pitkin county.

This appeal is prosecuted under the act of 1885. It appears from the abstract of record that on the 1st day of November, 1885, appellant, who was defendant below, was about to commence the business of transporting or freighting goods with horses or mules and wagons from the railroad station at St. Elmo through and over the mountains to the town of Aspen. Parcells, appellee, was at St. Elmo, and had there, in a car, a lot of nursery stock consisting of trees, shrubs, plants, and roots, in bales, barrels, and boxes, and applied to appellant to haul them to As-

pen. Woods, a witness, was engaged at St. Elmo in a commission and forwarding business, and assisted Parcels in finding transportation and shipping the goods, and acted as the agent of Parcels after his departure. Parcels, with the assistance of Woods, made a contract with Carr to deliver the goods at Aspen. Parcels left St. Elmo before a written contract was made, but, before he left, Woods submitted a memorandum to him in regard to the contract, which was approved. Afterwards, the contract to be found in the opinion was made by Woods from such memorandum, and signed by Carr. Before making the contract, Parcels examined the wagons of defendant, and approved of them. Woods, as the agent of Parcels, attended to the loading of the goods, and by packing with hay and other material protected them as far as practicable from freezing. The goods were packed in three wagons, which left St. Elmo on November 3d for their destination. The ordinary or average time for making the trip with freight between the two towns was shown to have been five days, when the roads were in an ordinarily good condition. On the second day out a severe snow-storm was encountered, and the weather turned very cold. This delayed the teams. The goods did not arrive at Aspen until the 21st and 22d of the month, and were then found to be badly damaged by freezing. Appellees refused to receive them, and brought suit to recover the value. The complaint is as follows, omitting portions unnecessary to be considered: "The plaintiffs complain and allege of the defendant (1) that the amount involved in this action does not exceed the sum of two thousand dollars; (2) that at the times hereinafter mentioned the defendant was a common carrier of goods for hire between the places hereinafter named; (3) that on the 2d day of November, A. D. 1885, at the town of St. Elmo, county of Chaffee, of the state aforesaid, the plaintiffs delivered to the defendant certain goods and chattels, to-wit: One bale of trees, three barrels of nursery stock, six boxes of trees, five boxes of strawberry plants, the property of the plaintiffs, of the value of seventeen hundred and twenty-six dollars and sixty-five cents; and the defendant, as such carrier, received the same, to be by him safely carried to the town of Aspen, of the county of Pitkin, of the state aforesaid, and there to deliver to the plaintiffs, on the 5th day of November, A. D. 1885, for a reasonable reward to be paid by the plaintiffs therefor, to-wit, the sum of \$1.25 per hundred-weight; (4) that the defendant did not fulfill his agreement to carry safely the said goods, and to deliver the same to the plaintiff in the said town of Aspen on the 5th day of November, A. D. 1885, but on the contrary, although the period between the said day when said goods were received by the defendant and the said day when they should have been delivered to plaintiffs was a reasonable time for the carrying of the same from the said town of St. Elmo to the said town of Aspen, yet the defendant so negligently and carelessly conducted, and so mis-

behaved, in regard to the same, in his calling as common carrier, that he failed to deliver the same or any part thereof until the 22d day of November, A. D. 1885, in the said town of Aspen; (5) that the defendant did not safely carry and deliver the said goods pursuant to said agreement; but on the contrary, the defendant so negligently conducted, and so misbehaved, in regard to the same, in his calling as common carrier, that the said goods were wholly lost to the plaintiffs to their damage, in the said sum of seventeen hundred and twenty-six dollars and sixty-five cents. Prayer for judgment." Defendants answered specifically denying every allegation of the complaint. The case was tried by a jury resulting in a verdict and judgment against appellant for \$562.50, and costs.

*Wilson & Stimson*, for appellant. *W. W. Cooley*, for appellee.

HAYT, J., (after stating the facts as above.) It is stated in the complaint that appellant was a common carrier, and, although denied in the answer, it seems to have been conceded at the trial that such was the capacity in which he contracted. The trial court assumed by its instructions that his liability was to be controlled by the law applicable to common carriers, and the correctness of such assumption is not challenged upon this appeal. In determining his liability, we shall therefore assume that he contracted as a common carrier, and measure his responsibility for the damage resulting from the freezing of the goods in transit by the strict rules governing such carriers, except so far as the same were modified by the special contract of the parties offered in evidence. In reference to such special contract, the following is the substance of the testimony of H. N. Wood, one of the firm of Wood Bros., and it is not contradicted: "That in November, 1885, witness was a forwarding agent at St. Elmo; that as such forwarding agent he received from the Union Pacific Railroad Company at St. Elmo a lot of goods marked 'Nursery Stock, etc.' consigned to H. A. Parcels & Co., plaintiffs; that he delivered these goods to defendant, Carr, for transportation to Aspen; that he obtained these goods from the railway company on presenting the bill of lading under which they had been shipped from Denver to St. Elmo; this bill of lading had been given to witness by plaintiff Parcels; that, at Parcels' request, witness went with him to find a freighting outfit to transport the goods in question from St. Elmo to Aspen; that they found some freighters whose wagons Parcels examined and pronounced to be not large enough for properly packing the nursery stock so as to protect it from frost, and so not suitable; that, on Parcels' request, witness introduced him to defendant, who was about to engage in freighting between St. Elmo and Aspen; that, on the afternoon of the same day, (November 1st,) defendant's wagons arrived at St. Elmo from Arizona, and that Parcels examined these wagons and pronounced them to be 'just the thing he wanted;' that these wagons were the

ones in which the goods were packed for shipment; that the wagons examined in the morning by witness and Parcels were such as were ordinarily used at that time for freighting between St. Elmo and Aspen; that in the several conversations witness had with Parcels witness told Parcels that he would be obliged to ship the goods at owner's risk, and defendant also stated that he wanted to receive the goods at owner's risk; that it was agreed that the goods should not remain overnight on top of either range; that witness afterwards, in presence of Parcels and defendant, made a memorandum of the arrangement between Parcels and defendant; this memorandum was to go on the bill of lading, and from it witness afterwards drew up a bill of lading as the contract between Parcels and the defendant." The witness further testifies that he took the goods out of the railway car and superintended their packing in the defendant's wagons; that they were packed with hay on the bottom and sides, and hay and grain on top; that they were packed in this way to keep them from freezing, the matter of their freezing having been discussed; that witness had been in freighting business more or less since 1878; that the letters "O. R.," in connection with the word "freezing," signify "owner's risk." The bill of lading introduced in evidence reads as follows:

O. R. Freezing.	16	No.		Name.	Articles.	Weight.	Rate.	Amount.	Adv.	Com.	Total.
		16	Ex.								
				H. A. Parcels	1 Bale Trees..... 3 Bbs N. Stock..... 6 Boxes Trees..... 5 Boxes Strawberry Plants.....	\$110	\$1 25	\$28 90	\$3 00		\$41 90
By Cash.....											\$25 00
Balance Due.....											16 90

"No. 16"  
"No. 16"  
"Way-bill of goods forwarded by Woods Bros., by James Carr, freighter, to Aspen, Colorado."  
St. Elmo, November 2d, 1885.

"If this consignment is delivered in Aspen by the evening of November 4th, 1885, the freighter shall be paid ten dollars extra above the regular freight. It is further agreed that the said freighter shall not expose his load on either range overnight, and take the best possible care of same.

"Received the above goods in good order and condition, which I agree to de-

liver to consignee in same order and condition.

[Freighter's signature]

"JAMES CARR, per Mc."

This was duly signed for Carr, and accepted by the forwarders for appellees. It constitutes the only written evidence of the contract between the parties, and must be taken as the only contract for the transportation of the goods. Evidence of the previous conversation and negotiations of the parties leading up to the contract cannot be considered for the purpose of altering its terms. The measure of the liability of appellant must be determined by the written contract. By the terms of this instrument, he expressly acknowledges the receipt of the property in good order, and expressly agrees to deliver it in the same condition. This is the customary contract of a common carrier. There is no agreement to deliver the property in Aspen by November 5th, although it does contain a stipulation by the consignee to pay \$10 additional if the property should be delivered in Aspen by the evening of November 4th. It is also agreed that the property shall not be exposed on either range overnight, and that the freighter will take the best possible care of the same. It is further provided that the property shall be carried at the owner's risk of freezing. It is, in fact, the ordinary common carrier's contract, loss by freezing excepted, and an agreement that the property should not be exposed to the severity of the weather which might prevail at the summit of the mountains to be crossed. But there was no agreement that the property should be delivered at its destination by the 5th day of November, as alleged in the complaint; and the submission to the jury of the question whether there was such an agreement was error. As we have seen, the liability of appellant was fixed by the written contract, and by that alone.

The evidence shows that this was appellant's first experience in freighting over the road between St. Elmo and Aspen; that his teams had just arrived in that section of the state, as Parcels well knew, and that Parcels examined the wagons before contracting with him, rejecting some, and selecting others as suitable for the work. Under the circumstances, he alone was responsible for the character of the wagons employed, and is estopped from claiming that they were not suited to the business. And the testimony introduced by appellee tending to show that the conveyances selected were unsuitable was incompetent for the purpose of showing negligence on the part of appellant, and the instructions to the jury to this effect were erroneous.

The ruling of the trial court does not, as supposed by counsel, find support in anything which was said in the case of Transportation Co. v. Cornforth, 3 Colo. 280. The facts in the two cases are totally dissimilar. The selection of the car in which the goods were transported in that case was left entirely with the carrier. It was shown that it was customary to use refrigerator cars for the transportation of fruits in the winter season from New York,



the place of shipment, to Denver, the place of destination, while the carrier in that instance used an ordinary box-car, with apertures through which the cold and snow entered. The evidence showed that the injury resulted from the gross negligence of the carrier; and the court held that public policy would not permit the carrier by special agreement to be relieved from damages occasioned by negligence or misfeasance in him or his servants. In that case, the cars were selected by the carrier; in the case at bar, the wagons were selected by the shipper and pronounced by him "just the thing." In addition to this, it would be unreasonable to measure the duty of an ordinary freighter in providing vehicles for the transportation of perishable goods with that of a company contracting for transportation across the continent by rail. As we have seen, the goods were shipped at the owner's risk of freezing. This does not, however, relieve the carrier from loss resulting from his own negligence. The law will not permit a common carrier to contract against liability for his own negligence or that of his servants and employees. *Transportation Co. v. Cornforth, supra*; *School-Dist., etc., v. Railroad Co., 102 Mass. 552*; *Railway Co. v. Wilcox, 84 Ill. 239*; *Railroad Co. v. McCloskey, 23 Pa. St. 526*.

Whether or not the loss complained of was occasioned by the negligence of the carrier in this case, or resulted as an inevitable consequence from the condition of the road and the severe weather encountered, without the fault of the carrier, are questions for the jury to determine under proper pleadings and instructions. For the errors pointed out, the case must be reversed, and the cause remanded for further proceedings.

#### DINGLE V. SWAIN.

(*Supreme Court of Colorado. June 20, 1890.*)

##### WRIT OF ERROR—SUFFICIENCY OF THE RECORD.

1. When on writ of error the record discloses only a complaint, demurrer to the same, and an answer, but there is no record of any proceedings had upon the demurrer, an assignment of error, based on its being overruled, cannot be considered, as the answer must in such case be treated as a waiver of the demurrer.

2. A general assignment of error to the effect that the court erred in the admission and rejection of testimony will not be considered on writ of error.

3. Where on writ of error the verdict appears only in an uncertified copy of the journal entries of the proceedings in the case, it cannot be deemed a part of the record under rule 8 of the supreme court requiring the clerks of inferior courts to certify to the supreme court the pleadings of the parties, the verdict in jury trials, the judgment, all orders made in the cause, and the bill of exceptions.

Error to district court, Arapahoe county.

This action was brought by defendant in error to recover damages claimed to have been sustained by him on account of certain criminal prosecutions alleged to have been maliciously instituted against him by plaintiff in error. A trial by jury resulted in a verdict for defendant in error for \$1,000 damages, upon which judgment was duly entered February 23, 1886. A re-

view of this judgment is sought in this court. The case was first docketed as an appeal. Subsequently the appeal was dismissed for failure to properly serve notice of appeal, and for other irregularities. Thereupon the record was withdrawn by leave of the court, and thereafter filed upon error. The return to the writ of error consists of the identical papers filed upon the appeal, with no change except in the title of the cause.

*T. C. Early and W. B. Felker*, for plaintiff in error. *Patterson & Thomas and Chas. Hartzell*, for defendant in error.

**PER CURIAM.** It is insisted by counsel for defendant in error that the record in the case is so defective as to confer no jurisdiction upon this court to review the errors assigned. In considering this objection, it will be necessary—*First*, to ascertain what is sought to be reviewed by this court; and, *second*, to inspect the record itself, and determine whether the objection to such review is well founded. The only errors which are specifically pointed out are: "(1) That the court erred in overruling the demurrer to the complaint. (2) That the court erred in overruling the defendant's motion for a new trial. (3) There is no sufficient evidence to justify or support the verdict in the case." The other assignments are general in statement, and are to the effect that the court erred in the admission and rejection of testimony in the instructions, and that the verdict was against the law and the evidence. Defendant in error claims that no one of these assignments can be considered by this court, because—"*First*, that the record nowhere shows the overruling of a demurrer to any part of the complaint; *second*, that there is no proper bill of exceptions in the files; *third*, that there is no assignment of error upon which the admission or rejection of testimony can be considered by this court."

For the purposes of this case, it is unnecessary to define the office of a writ of error. It is sufficient to say that it is in the nature of process, and that by its express terms the clerk of the court to which it is directed is required to transmit to this court, "with all convenient dispatch, a true copy of all of the proceedings therein, together with a complete and perfect transcript of the record and proceedings of the suit aforesaid, with all things concerning the same distinctly and openly under the seal of your court, together with this writ," etc. This mandate of necessity requires that the return to the writ should be a complete and authenticated record, not only of the judgment sought to be reviewed, but of everything properly made a part of the record by the court below. This office in the proceeding is performed by a transcript of the record, duly certified by the clerk of the inferior court, and attested by the seal thereof. In the absence of statute, or of rules of this court modifying the practice, the return to the writ must be a full and complete response to the mandate above quoted.

The writ in this case was issued in 1886. By the first rule of this court then in force, a substitute for a formal return to

the writ by the clerk was provided for in this language: "In any case where a transcript of the record, duly certified to be full and complete, has been filed, or may hereafter be filed, in the office of the clerk of this court, before the issuance of a writ of error, it shall not be necessary, except in a case where a *supersedeas* may be allowed, to deliver such writ to the clerk of the inferior court, but the same may be filed in the office of the clerk of this court; and such transcript so filed with the clerk of this court shall be taken and considered to be a due return of said writ of error." Under the rule it is clear that none of the formalities required by the writ itself could be omitted, except, perhaps, by order of this court in a particular case. Again, rule 8, which defines the duties of clerks of inferior courts in relation to the transcript of the record, expressly requires them "to certify to this court a copy of the process with the return thereto, the pleadings of the parties, the verdict in jury trials, the judgment of the court below, all orders of the court, and the bill of exceptions." It is manifest that the requirements of these two rules, either upon an actual or substituted return to the writ, could be answered only by a record complete in all respects, and duly authenticated by the certificate of the clerk, under the seal of the court. At the time the writ of error in this case was issued, the practice and procedure of this court in such cases was substantially, if not entirely, governed by its rules; there being nothing in the Code of 1879 which related to the practice, and the act of 1885 having no relation thereto, being confined in its operation to appeals alone. An examination of what purports to be the record in this case discloses that the same is made up of three separate papers. The first is a duly-certified copy of what is termed an order of judgment, together with a copy of the appeal-bond, which was filed upon the appeal. This paper was undoubtedly made as required by the provisions of the act of 1885, and, when the appeal was dismissed, was withdrawn and filed as a part of the record in this case. The second paper consists of what appears to be an uncertified copy of the journal entries of the court below, made during the progress of the trial, together with a copy of the verdict, the motion for a new trial, and the order overruling the same. The third consists of the original bill of exceptions, properly authenticated, as filed in the court below. To the bill of exceptions, copies of the complaint, demurrer, and answer are attached. It is contended that this court cannot consider the bill of exceptions for the reason that it is the original instead of the transcript thereof, and should have remained upon the files of the court below under the practice in force at the time this writ of error was taken. It is unnecessary to determine the question thus raised in view of the defects in this record, which would prevent the consideration of appellant's assignments of error, even if this bill of exceptions should be treated as a proper bill of exceptions in this case.

The first assignment of error is that the court erred in overruling the demurrer to

the complaint. It is sufficient to say that there is nothing in the case to show that the demurrer was overruled. We have simply the complaint, a demurrer, and an answer. There is no record of any proceeding had upon the demurrer at all. The filing of this answer to the same cause of action, under the circumstances, must be treated as a waiver of the demurrer. The error assigned as to the admission and rejection of testimony is too general to be considered.

The instructions of the court appear in the bill of exceptions, but it is expressly stated therein "that the parties did not object to them, nor any of them." It is also alleged for error that the verdict is against the weight of the evidence. The verdict, however, does not appear in any of the papers certified into this court. In addition to this, no objection appears to have been made or exception taken to the judgment as entered; and there is no irregularity upon the face of the judgment which the court is asked to consider. Although it is clear that upon the case as presented by the plaintiff in error he is not entitled to ask this court to consider any of the errors assigned, we have examined the evidence with some care, and find the same amply sufficient to support the judgment. The judgment must be affirmed.

#### OPINION OF THE JUSTICES.

*In re FUNDING OF COUNTY INDEBTEDNESS.*  
(*Supreme Court of Colorado.* Sept. 22, 1890.)

COUNTIES—CONSTITUTIONAL LAW—FUNDING ACTS.

Const. Colo. art. 11, § 6, as amended November 6, 1888, provides that any county may contract a debt by loan by the issuance of bonds for the purpose of liquidating indebtedness incurred prior to December 31, 1886. *Held*, that the funding act, (Sess. Laws 1885, p. 232,) providing for the funding of valid county debts, was not repealed by implication, and that under that act the counties could fund their valid obligations incurred since December 31, 1886.

The opinion is in response to the following question submitted by the governor in pursuance of amended section 3, art. 6, of the constitution:

"To the Honorable the Supreme Court of the State of Colorado:

"SIR: At the petition of the county commissioners of the counties of Washington and Yuma, a copy of which is herewith attached, I would respectfully request the opinion of the honorable court in answer to the following question, to-wit: Does section 6 of article 11 of the constitution of the state of Colorado, as amended by the people at the general election on the 6th day of November, A. D. 1888, operate to prohibit and prevent the several counties of this state from funding or refunding their indebtedness duly contracted, or incurred and existing, in any form, since the 31st day of December, A. D. 1886?

"I have the honor to remain,

"Your obedient servant,

"JOB A. COOPER, Governor."

It is believed unnecessary to incorporate into this statement of the case the petition upon which the question is based. It is a fact worthy of mention, however, that ac-

cording to this petition not less than 16 counties are desirous of funding their outstanding indebtedness, and hence have an interest in the subject submitted for adjudication. Amended section 6, art. 11, of the constitution, a partial construction of which is given, reads as follows:

"No county shall contract any debt by loan, in any form, except for the purpose of erecting necessary public buildings, making or repairing public roads or bridges; and such indebtedness contracted in any one year shall not exceed the rates upon the taxable property in such county following, to-wit: Counties in which the assessed valuation of taxable property shall exceed five millions of dollars, one dollar and fifty cents on each thousand dollars thereof; counties in which such valuation shall be less than five millions of dollars, three dollars on each thousand dollars thereof; and the aggregate amount of indebtedness of any county, for all purposes, exclusive of debts contracted before the adoption of this constitution, shall not, at any time, exceed twice the amount above herein limited, unless when, in manner provided by law, the question of incurring such debt shall, at a general election, be submitted to such of the qualified electors of such county as in the year last preceding such election shall have paid taxes upon property assessed to them in such county, and a majority of those voting thereon shall vote in favor of incurring the debt, but the bonds, if any be issued therefor, shall not run less than ten years, and the aggregate amount of debt so contracted shall not at any time exceed twice the rate upon the valuation last herein mentioned:

*"Provided, that any county in this state which has an indebtedness outstanding, either in the form of warrants issued for purposes provided by law, prior to December 31, 1886, or in the form of funding bonds issued prior to such date for such warrants previously outstanding, or in the form of public building, road, or bridge bonds outstanding, at such date, may contract a debt by loan by the issuance of bonds for the purpose of liquidating such indebtedness: provided, the question of issuing said bonds shall, at a general or special election called for that purpose, be submitted to the vote of such of the duly-qualified electors of such county as in the year last preceding such election shall have paid a tax upon property assessed in such county, and the majority of those voting thereon shall vote in favor of issuing the bonds. Such election shall be held in the manner prescribed by the laws of this state for the issuance of road, bridge, and public building bonds, and the bonds authorized at such election shall be issued and provision made for their redemption in the same manner as provided in said law."*

For convenience, that part of the section representing the amendment made in 1887 is above indicated by italics.

*D. E. Parks, amicus curiæ.*

HELM, C. J. The question now submitted to the court for adjudication may be briefly stated as follows: Are counties

inhibited from funding their valid municipal indebtedness accruing since the 31st of December, 1886? If an affirmative answer be given, great public inconvenience and injury are the inevitable result. The legislature has provided a rule, eminently just and reasonable, to the effect that county warrants shall be cashed in the order of their issue and presentation for payment. If outstanding warrants may not be taken care of by means of the funding process, many counties will suffer serious embarrassment and loss, while in some the very existence of county government will itself be threatened. It is obvious from the foregoing that the inquiry is "important," and the occasion "solemn." It is clear, also, that the matter inquired of is essentially *juris publici*. We therefore feel bound, under the constitutional mandate, to accept jurisdiction, and report an opinion in the premises.

Previous to the year 1887, a statute was in force authorizing the funding of county indebtedness. This statute has never been repealed, unless its repeal results by implication from the adoption of the constitutional amendment now under consideration. Such an implied repeal is asserted, its advocates relying for a vindication of their view upon the following proposition: Since the amendment provides for bonding county indebtedness outstanding prior to the 31st of December, 1886, it follows, under the maxim *expressio unius est exclusio alterius*, that the funding of county debts created since the date mentioned is forbidden. It may be suggested at the outset that, had the framers of the amendment entertained this purpose, they would hardly have expressed it in such ambiguous terms. So important a limitation of legislative authority would scarcely have been trusted to the hazard of judicial discovery and assertion through the application of the maxim in question. In construing doubtful constitutional provisions, it is proper to consider "the mischief designed to be remedied or guarded against." Cooley, Const. Lim. (5th Ed.) 79. Prior to the convening of the sixth general assembly, by whom this amendment of the constitution was submitted for popular ratification, the subject of county indebtedness had attracted deep and widespread attention throughout the state. It was judicially found that counties had issued warrants largely in excess of the limit upon the aggregate amount of their municipal indebtedness fixed by the constitution. The scope and extent of the constitutional limitation, together with measures designed to avoid the injurious effect of its application, were subjects of judicial and general discussion and anxiety. Efforts to enforce by legal proceedings the collection of specific excessive claims had been made; but both the supreme court of the United States and this court had held that they constituted no legal indebtedness, and had denied relief. *Lake Co. v. Rollins*, 130 U. S. 662, 9 Sup. Ct. Rep. 651; *People v. May*, 9 Colo. 80, 404, 10 Pac. Rep. 641, and 12 Pac. Rep. 839. It appeared upon investigation that a large part of the invalid indebtedness was represented by warrants and bonds

issued for services rendered and materials furnished; that the counties had received just and valuable consideration therefor; and that the giving and receiving of this consideration, and the issue of warrants in connection therewith, were acts done in good faith by both parties, and in ignorance, as a matter of fact, of the illegality affixed thereto by the constitution. The counties interested were powerless to settle the equitable obligations thus incurred, and the legislature was powerless to confer upon them the requisite authority. As a result, debts, equitable though illegal, aggregating a very large amount, were left unpaid, and without any possibility of future liquidation. To meet the emergency thus presented, the assembled legislators initiated the only possible remedy,—they prepared and submitted for adoption the constitutional amendment before us. This amendment was designed to enable counties so disposed to relieve themselves from the embarrassment of the outstanding obligations referred to. Instead of being a limitation upon the power to contract indebtedness which is treated of in the constitutional provision amended, the amendment is an extension of this power. Instead of being designed to inhibit the funding of valid debts created after its adoption, its principal purpose was to enable counties to discharge the existing obligations mentioned, which were binding in the forum of conscience, though not in the forum of law. Whether this purpose has been accomplished is a question not now involved, and therefore not determined.

The section amended originally inhibited the contracting by counties of debts by loan in any form, "except for the purpose of erecting necessary public buildings, making or repairing public roads and bridges." It also limited the total aggregate amount of county indebtedness allowed in all forms, and for all purposes. The proviso, which constitutes the amendment, extends the purpose for which a debt by loan may be contracted, and removes the limitation as to the aggregate amount of indebtedness; but such extension of purposes and removal of limitation are carefully confined to claims existing prior to the 31st of December, 1886. Regarding debts by loan subsequent to that date, the counties were left as before. They could only contract them for the purposes originally enumerated in the section, and to the amount originally specified. The important result of the proviso, or amendment, was a declaration to the counties interested, in effect, as follows: "You have, by extravagance or carelessness, incurred obligations binding in conscience, though not in law. You shall have power to relieve yourselves from the embarrassment and odium resulting, but you must not commit the offense again, as this remedial process, being limited to claims now existing, will not enable you to discharge like illegal obligations incurred in future." The word "indebtedness" employed in the amendment does not most accurately express the purpose above mentioned. In strict legal parlance, this word is more often applied to obligations enforceable by judicial proceedings, but legis-

lators, jurists, and writers frequently use it with reference to pecuniary claims that do not possess this attribute. For instance: In section 4 of the fourteenth amendment to the constitution of the United States, the words "debt," "debts," and "obligations" are used to designate illegal claims. It is there solemnly enacted that "neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, \* \* \* but all such debts, obligations, and claims shall be held illegal and void."

Courts should rarely, if ever, impute to the framers of a constitutional provision or statute the doing of a foolish and useless act. Yet such is precisely the conclusion that must follow a rejection of the foregoing view as to illegal indebtedness. It was wholly unnecessary to provide by constitutional amendment, (the method named,) for taking care of existing legal county indebtedness. If all of the contemplated debts were legal, they were not affected by the constitutional limitation upon the aggregate liability of counties, and there was no occasion for removing this limitation while the legislature already possessed plenary power to authorize action substantially the same as that designated in the amendment. It will presently be shown that this legislative power had been invoked, and that counties were acting thereunder. We must regard the word "indebtedness" as here used in a general sense, and as descriptive of county warrants and bonds outstanding on the date mentioned, regardless of their legality or illegality. But in considering the effect of the constitutional amendment in question, we do not rely alone upon the history preceding and the circumstances surrounding its adoption, however pertinent and convincing these matters may be. Contemporaneous and subsequent legislative interpretation supports the view that the funding statute is still in force. When this amendment was adopted, two statutory methods of issuing and disposing of county bonds co-existed. Gen. St. §671 et seq.; Sess. Laws 1885, p. 232. One of these methods was evidently intended to effectuate the constitutional provision authorizing debts by loan for the construction of public buildings, roads, and bridges; the other constituted an act to enable counties "to fund their floating indebtedness." Though the leading features of the procedure prescribed in these statutes are quite similar, yet important differences appear therein; for instance, the one relating to public buildings, etc., requires the sale of bonds at not less than 85 per cent. of their par value; the funding act, on the other hand, directs the exchange of bonds for outstanding warrants at a rate of exchange specified in the notice of election; and it is only when bonds are not thus exchanged that permission is given to sell them at par, and apply the proceeds to the redemption of warrants. The co-existence of these statutes must be received as evidence that the legislature regarded both as necessary, and that, according to the legislative view, neither would supply the place of the other; nor has any one,

so far as we are advised, ever contended that the latter (the funding act) repealed the former by implication.

It is a very significant circumstance that in drafting the constitutional amendment before us, the sixth general assembly expressly adopted, and substantially incorporated, the process relating to roads, bridges, and buildings, to govern the issue and disposal of the bonds provided for therein. We are bound to assume that the funding act was not ignored, and the other statute adopted by accident or mistake; also, that the discrimination was intelligently and purposely exercised. But the purpose of this discrimination must have been to classify the debts by loan authorized in the amendment with debts by loan for the public improvements originally specified, thus giving the former a *status*, accompanied by a method of liquidation, not inconsistent with the continued co-existence of the funding law applicable to valid pecuniary obligations subsequently accruing. Thus the sixth general assembly, like its predecessors, assumed that the two lines of procedure in regard to county indebtedness and county bonds were necessary, and might consistently co-exist. But the fact that this body did not regard the future force of the funding statute as impaired by the amendment in question is further shown by its subsequent action. When providing for the issue of warrants, as assignments of incoming revenue to meet current expenses, it ordained that lawful warrants outstanding, "unless redeemed under the funding statute," should, however, be preferred in payment. Sess. Laws 1887, p. 240 et seq. Here was a clear recognition, almost before discussion on the constitutional amendment had ceased, of the right to take care of lawful outstanding warrants by the prescribed process of funding. The succeeding legislature, more than four-fifths of its members having been chosen by the electors, who, at the same time, adopted the constitutional amendment, also treated the right to fund county indebtedness accruing subsequent to 1886 as still existing. That body provided for the funding of judgments against counties, and for the refunding of bonded county indebtedness. Sess. Laws 1889, p. 31.

It has been suggested, with a good deal of force, that while provision is made in the amendment for the creation of a debt by loan, the word "funding" is not used; and the fact is emphasized that a debt by loan may be contracted when no prior obligation exists, as for the future erection of county buildings, and the like, but that before the process of funding can be invoked there must necessarily pre-exist a debt to be funded. Besides, it is said, in funding, the elements of a debt by loan do not, all of them, necessarily appear, the ideas of borrowing and of loaning not being essential thereto. We restate the propositions without dwelling upon them, inviting, however, such consideration as they shall deserve. Our reasons for preferring to rest the decision upon the grounds above stated are: That since the debt by loan provided for in the constitutional amendment is to be contracted

through the issue of bonds; since the proceeds from the sale of these bonds are to be used in discharging what is denominated "indebtedness outstanding;" and especially since revenue is set apart and pledged to the payment of those bonds, —the distinctions mentioned, though correctly drawn, seem to lose much of their practical importance. It is a universal rule that repeals by implication shall not be favored. Only in cases where a conflict clearly and unavoidably exists may this doctrine be invoked. Its application to the case at bar would be indefensible. Therefore the interrogatory propounded must be answered in the negative.

We return thanks for the able brief furnished in this case, *amicus curiæ*, by Mr. Daniel E. Parks, of the Denver bar.

#### JULIAN V. PEOPLE *et al.*

(*Supreme Court of Colorado. Sept. 12, 1890.*)

##### CONSTRUCTIVE CONTEMPT—WHAT CONSTITUTES.

1. A petition for a change of venue on account of the prejudice of the judge alleged that the wife of the judge, at the time of the trial of another suit in which plaintiff in the present case was interested, had stated in the presence of petitioner "that she must go and see the judge, and arrange with him to have Mrs. Davis (meaning the plaintiff herein) to win her case." *Held*, that petitioner was not liable for contempt for alleging such statement in his petition.

2. The petition further alleged "that at said trial, as petitioner was informed, the judge of this court and his wife were boarding at the house, and the guests of Mr. and Mrs. Davis." *Held* that, though they may not then have been boarding there, petitioner was not liable for contempt if he was informed that they were.

3. An allegation that petitioner believes from the rulings and instructions of the court in the former case in which plaintiff in this suit was interested that the court is prejudiced in favor of plaintiff is not contempt.

##### Error to district court, Gunnison county.

In the court below plaintiff in error was adjudged guilty of willful contempt of court, and fined therefor in the sum of \$150. The alleged contempt consisted in his making and causing to be filed a petition for change of venue in a certain case at the time pending in the district court of Gunnison county, and to which action plaintiff in error was the real party in interest, although not a party to the record. Said petition is in substance as follows: "Carle L. Davis v. John H. Bowman. (No. 324.) In the district court of the seventh judicial district of the state of Colorado, and for the county of Gunnison. Your petitioner would respectfully represent to the court that he is the real party defendant in interest in the matter in controversy in the above-entitled action; that the defendant John H. Bowman was, at the time the supposed cause of action accrued, the qualified and acting sheriff of Gunnison county; that the said defendant Bowman has no personal interest in the result of this action, and is only a nominal party defendant. Your petitioner says that he fears that he will not receive a fair trial in this court on account that the judge is prejudiced in favor of the plaintiff herein, and for reason for said fears he says that, at a prior term of this court, when the

above-entitled action and another action pending in this court, and before the judge hereof, wherein the above-named plaintiff was plaintiff, and the above-named defendant and others, of which your petitioner was one, were defendants, were about to be called for trial, being cause numbered No. 325, the wife of the judge of this court was at the residence of your petitioner, and, in excuse for her short visit to your petitioner herein, said, in substance, and in presence of your petitioner and his wife, that she must go and see the judge and arrange with him to have Mrs. Davis (meaning the plaintiff herein) to win her case; that at said time, as petitioner was informed, the judge of this court and his wife were boarding in the house and the guests of Mr. and Mrs. Davis. Your petitioner further says that immediately thereafter he informed his attorneys of the foregoing facts, and requested them to make an application for a change of venue, but was advised by them to allow the judge to try one of said causes, and it could then be ascertained whether the judge was in any manner prejudiced in favor of the plaintiff herein. Your petitioner further says that one of said causes was tried by this court, and that Mrs. Davis did win her said cause, and your petitioner believes that, from the rulings of said court, and the instructions of the court to the jury in said cause, this court is prejudiced in favor of the plaintiff herein. Wherefore he prays that the venue in this action be changed. Respectfully, LONDON MULLIN." The present proceeding was commenced by the filing of an information by the district attorney of the district in which the court was sitting. The remaining facts necessary to a full understanding of the case appear either in the opinion of the court in the case at bar, or are set forth sufficiently in the report of the case of *Thomas v. People*, 14 Colo. —, 23 Pac. Rep. 326. The only difference in the two cases arises from the fact that Thomas was the attorney who prepared and presented the petition for change of venue, while Mullin alone made the affidavit thereto, and, in the former case, the information filed as a basis of the contempt proceedings was not verified, while in the present case the information appears to have been duly verified by the district attorney.

*Thomas & Thomas and Alex. Gullett*, for plaintiff in error. *The Attorney General* and *H. M. Hogg*, Dist. Atty., for the People.

HAYT, J. As the information in this case is verified, it may properly be allowed to perform the office of the affidavit made necessary by the statute as the foundation of a proceeding for constructive contempt. The record shows that the petition for a change of venue was presented in a respectful manner; that in fact it was not read to the court, but was handed to the presiding judge for his perusal; and that there was nothing in the petition itself that was regarded, or that could properly have been regarded, as contemptuous. If, therefore, any contempt was committed, it was constructive rather than di-

rect. This was determined in the cause of *Thomas v. People*, 14 Colo. —, 23 Pac. Rep. 326. We will therefore inquire as to whether or not the facts alleged in the verified information are sufficient to constitute a constructive contempt of court. If the facts charged do not show affirmatively that a contempt has been committed, the judgment of the district court against the plaintiff in error must be reversed. In the case of *Cooper v. People*, 13 Colo. 337, 373, 22 Pac. Rep. 790, it was said: "When an affidavit is presented as the basis of a proceeding for contempt, the court must, in the first instance, examine the same, and, if the facts presented do not show that a contempt has been committed, the court will be without jurisdiction to proceed; but, if the facts are sufficient, the court may take jurisdiction, and its subsequent orders will not be reviewed for mere error." In the case at bar we must assume that the statement set forth in the verified petition for a change of venue as having been made by the wife of the presiding judge was in fact so made, for the reason that, in the affidavit or information filed, it is not denied that such language was used by her. In some jurisdictions, when a change of venue is asked on account of the prejudice of the presiding judge, it is not necessary to set forth in the petition the fact or facts on which the party bases his fears that he will not receive a fair trial in the court wherein the cause is pending. But in this state such facts must be stated, although with not the same particularity as is required in cases in which the application is based upon the alleged prejudice of the inhabitants of the county. *Hughes v. People*, 5 Colo. 486. Assuming then, for the purposes of this case, that the wife of the presiding judge made the statement attributed to her, plaintiff in error had the undoubted right to embody such statement in his petition for a change of venue without subjecting himself to being punished for contempt. The principal ground relied upon to sustain the action of the court below therefore fails. Had it been charged that the affidavit was false in this respect, and that such false statements were made willfully and maliciously, as argued, a different case would have been presented.

It is alleged, however, that the charge contained in the following language is false: "That at said time, as petitioner was informed, the judge of this court and his wife were boarding at the house, and the guests of Mr. and Mrs. Davis." Issue upon this statement seems to have been taken upon the time only, and does not deny that plaintiff in error had received information as stated in his affidavit. The judgment cannot, therefore, rest upon this charge.

The only remaining matter contained in said information necessary to be considered is as follows, to-wit: "That the charge contained in and written upon said petition for a change of venue and herein set out, to-wit, 'and your petitioner believes that from the rulings of said court, and the instructions of the court to the jury in said cause, this court is prejudiced in favor of the plaintiff herein,' is and was

made without any foundation in fact for such belief." On account of the rulings and instructions in the cause previously tried, the plaintiff in error may have concluded that the judge was prejudiced against him, and yet the rulings may have been correct, and the instructions proper. As we have seen, this language is not *per se* contemptuous, and there is no charge made in the information going to show that plaintiff's conduct was not consistent with his entire innocence of evil intent. We must therefore conclude that no contempt is charged in the information. It should therefore have been quashed upon plaintiff's motion.

It is probable that, if the district court had refused to grant the petition for a change of the place of trial of the case of *Davis v. Bowman*, its judgment would not have been disturbed upon appeal. And yet we cannot say from anything charged in this information that plaintiff in error had not the right to present his petition to the district court, and obtain its judgment thereon. We can readily see why a judge, who had enjoyed a long and honorable career upon the bench, might feel that the charge that he could be influenced by the matters set forth in the affidavit was wholly unwarranted, and yet in our opinion the facts stated in the information, if true, will not sustain the judgment for contempt. The judgment will therefore be reversed, and the cause remanded.

#### SPENCER V. CARSTARPHEN.

(Supreme Court of Colorado. Sept. 22, 1890.)

##### PROMISSORY NOTE—INDORSEMENT.

1. Mere indorsement of name of payee on promissory note is ineffectual to pass the title thereto without delivery.

2. Possession of promissory note by payee is, unless the contrary appears, evidence that he is the *bona fide* owner and holder thereof, and he may strike out the indorsement on the note, and maintain an action thereon in his own name without a reassignment.

(Syllabus by the Court.)

Appeal from Lake county court.  
*S. J. Hanna*, for appellant.

ELLIOTT, J. This was an action upon a promissory note by the payee, J. E. Carstarphen, against Spencer, the maker. The defendant pleaded, specially, want of consideration for the note, and a general denial. The trial resulted in a finding and judgment for plaintiff. The defendant brings this appeal. On the trial the note being offered in evidence by plaintiff was objected to for the reason that the name "J. E. Carstarphen" was indorsed on the back of the note. The court permitted the plaintiff to erase the name so indorsed, and thereupon the note was received in evidence. The defendant objected and excepted to the rulings of the court, and assigns the same for error. The grounds of objection, as urged by appellant's counsel in the court below and on this appeal, are to the effect that there was a variance between the note as first offered and the complaint, that the indorsement of the payee's name on the back of the note

showed that the note had been assigned, that the title had passed out of the plaintiff, and that he could not maintain his suit upon it in his own name, he not being the real party in interest. Section 4, c. 9, Gen. St. 1883, is relied on to support these objections. The section provides in substance that promissory notes shall be assignable by indorsement thereon under the hand of the payee, so as absolutely to transfer and vest the property thereof in the assignee. The fact that the name "J. E. Carstarphen" was written on the back of the note, even if it was the genuine signature of the payee, did not operate as an assignment of the note so as to transfer the title thereto without delivery. The indorsement was in blank; no assignee was named; and, the note being in the possession of the payee and plaintiff in the action, it was evident that there had not been a delivery thereof. Hence an assignment by the supposed indorser was incomplete, and ineffectual to divest the plaintiff of his title. 1 Daniel, Neg. Inst. § 663 et seq.; Byles, Bills, 150.

The statute relied on by appellant was borrowed from Illinois. The supreme court of that state, in cases of this kind, holds that the possession of the note by the payee is, unless the contrary appears, evidence that he is the *bona fide* owner and holder thereof, and that he may strike out the indorsement on the note, and maintain an action thereon in his own name without a reassignment. *Brinkley v. Going*, Breese, 366; *Parks v. Brown*, 16 Ill. 454; *Best v. Bank*, 76 Ill. 608. The rulings of the county court in permitting the erasure of the indorsement, and the reception of the note in evidence, were, under the circumstances, not erroneous. It is unnecessary to determine whether or not, under proper pleadings, defendant could have given the indorsement in evidence in his own behalf in connection with other facts or circumstances as tending to show a transfer of the note. *Simons v. Waterman*, 17 Ill. 371; *Williams v. Smith*, 21 Mo. 419.

The remaining objection urged for reversal is to the effect that the evidence is insufficient to sustain the finding of the court. It is unnecessary to discuss the evidence in detail. It was somewhat conflicting on the question of the consideration of the note; but, as it might reasonably be considered sufficient to sustain the plaintiff's side of the issue, we cannot properly disturb the finding of the trial court. The judgment is accordingly affirmed.

#### FECHHEIMER *et al.* v. TROUNSTINE.

(Supreme Court of Colorado. Sept. 22, 1890.)

##### PAROL EVIDENCE.

As a general rule, the consideration recited in an instrument under seal, as well as in a simple receipt, is *prima facie* evidence only, and may be controlled or rebutted by parol proof.

(Syllabus by the Court.)

Error to district court, Arapahoe county.

*Morrison & Kohn* and *Browne & Pat-*



*nam*, for plaintiffs in error. *Shaw & Denison*, for defendant in error.

HAYT, J. The defendant in error, Mollie E. Trounstine, brought an action in the district court of Arapahoe county against Marcus Fechheimer and others, plaintiffs in error; and in her amended complaint alleged that she had sold to them a certain claim against the firm of A. Jacobs & Co., of Denver, amounting to \$4,050.66, upon which claim she had brought suit in the superior court, and which suit was at that time pending and undetermined. It is also alleged in the pleading that the plaintiffs in error agreed to pay her for said claim "a sum equal to the amount of the claim as soon as the sum of \$30,000 should be realized by them out of certain property which had been attached and levied upon in other suits as the property of A. Jacobs & Co." It is further alleged that the plaintiffs in error had realized more than the sum of \$30,000 from the sale of the property so attached, and that therefore the claim of the defendant in error, by the terms of her agreement as aforesaid with plaintiff in error, had become due. In the answer the following, among other defenses, are set up: (1) The making of the contract set out in the complaint is denied. (2) It is alleged that the defendant in error, by her certain writing under seal, for value therein confessed and acknowledged to have been received, did sell and assign to plaintiffs in error all her right, title, and interest in her claim against A. Jacobs & Co., and the judgment to be obtained thereon, setting out a copy of the assignment, and that this was the same sale referred to in the amended complaint. A replication was filed to this second defense, in which it is admitted that the assignment of the claim against A. Jacobs & Co. was in writing as therein alleged, and that this is the sale, transfer, and assignment mentioned in the complaint. But in this pleading defendant in error denied that she had received the value as acknowledged in said instrument of writing, or that she received any consideration whatever for said assignment; and she also denies that she was to receive no other or different consideration for said sale, transfer, and assignment than that mentioned in said instrument of writing; and avers that she was to receive therefor the amount stated in the complaint as per the agreement therein alleged. To this replication a general demurrer was interposed and overruled, and plaintiffs in error, having duly excepted, now seek to have the final judgment of the trial court reversed for this and other alleged erroneous rulings.

The bill of exceptions in this case having been stricken from the files for the reason that it was not authenticated in apt time by the judge who presided at the trial, no assignment of error that is not predicated upon the record proper can be considered. *Fechheimer v. Trounstine*, 12 Colo. 282, 20 Pac. Rep. 704. Thus we have eliminated from our consideration everything, except the action of the court in overruling the defendants' demurrer to that part of the replication which is directed to the second

defense. The question raised may be stated as follows: Is the recital of consideration, and its receipt in the written assignment, conclusive upon the parties, or is the amount of the consideration and its payment open to parol proof notwithstanding such recitals? It is now firmly established that such recitals stand upon a distinct basis, and are merely *prima facie* evidence against the party making them. They are like ordinary receipts which are open to explanation by parol. This question has been frequently before the courts, and the rule in favor of the admissibility of such evidence is now well settled. That this is true of ordinary receipts for money, there can be no doubt. This is said by Dr. Wharton to be "a necessary consequent of the informality of such instruments." 2 Whart. Ev. § 1064. The same rule has been applied in many cases to the consideration clause in a deed under seal. See *Wilkinson v. Scott*, 17 Mass. 249; *Clapp v. Tirrell*, 20 Pick. 247; *Thayer v. Viles*, 23 Vt. 494; *White v. Miller*, 22 Vt. 280; *Belden v. Seymour*, 8 Conn. 304; *Bowen v. Bell*, 20 Johns. 338; *Bassett v. Bassett*, 55 Me. 127. In *Wilkinson v. Scott*, supra, it was held that a receipt was always open to explanation, and the fact that it was under seal did not change the rule; and, although a grantor was estopped by his deed to deny that he granted or that he had a good title to the estate conveyed, yet he was not bound by the consideration expressed; but that the real consideration might be proven. In *Clapp v. Tirrell*, supra, it was held that the consideration expressed was only *prima facie* evidence of payment, and that it might be controlled and rebutted by proof. And in *Thayer v. Viles*, supra, it was held that the recitals in a deed of the amount of the consideration and its receipt will not estop a party from sustaining an action for the price. In *White v. Miller*, supra, it was decided that such recitals were subject to explanation. In *Belden v. Seymour*, supra, it was said: "The only operation of the clause in a deed regarding the consideration is to prevent a resulting trust in the grantor, and to estop him forever to deny the deed for the uses therein mentioned." We deem further reference to authorities unnecessary. It is sufficient to say that it is clearly established by the great weight of authority that, as a general rule, the consideration in an instrument under seal, as well as in a simple receipt, may be explained by parol evidence. No reason for making this case an exception has been pointed out, and we know of none. The ruling upon the demurrer was correct, and the judgment of the district court must be affirmed.

#### VON TROTHA et al. v. BAMBERGER.

(Supreme Court of Colorado. March 28, 1890.)  
STATUTES OF FRAUDS—TRUSTS—PAROL EVIDENCE—PLEADING.

1. A verbal agreement to share the profits arising from the purchase and sale of real estate may be made independent of any contract for an interest in the land itself. When so made, the agreement is not within the statute of frauds,

and may become the foundation of an action for a money judgment, but not for a decree of specific performance affecting the title to the real estate.

2. In jurisdictions having a statute of frauds like ours, the general rule is that the existence of a direct or express trust cannot be established by parol evidence.

3. When the legal title to land has been acquired in pursuance of a verbal agreement to hold the same in trust for a specified purpose, the agreement cannot be upheld as an express trust; but, if it be clearly established that the title has been fraudulently acquired, and is still held in fraud of the rights of another having a valuable interest in the premises, a trust by operation of law may be declared upon equitable terms.

4. Parol evidence is admissible to prove facts from which a trust by implication of law may arise, but such evidence is not competent to prove an express trust, where the statute of frauds is relied on as an objection.

5. Averments in pleadings in avoidance of the statute of frauds must not only be direct and positive, but they must be clear and unequivocal, or they will not be regarded as sufficient, either in form or substance.

6. Where the statute of frauds prevails, a mere oral promise to reduce to writing a verbal agreement declaring a trust in land, and the breach thereof, are not admissible to establish such trust, except in connection with other evidence tending to show fraudulent conduct in the acquisition of the title by the party holding it; but, when the existence of fraud is thus shown, equity will declare the party thus acquiring and holding the title a trustee *ex maleficio* upon the terms of the dishonored verbal agreement, or other equitable terms, for the benefit of a person having a subsisting valuable interest in the premises.

7. Acts of part performance, such as will furnish a foundation for enforcing a verbal contract respecting land otherwise void under the statute of frauds, must be such as are done in pursuance, or according to the terms, of the contract, and which in some manner affect or change the relation of the parties in respect to the property, whereby one of the parties would be defrauded if the contract were not enforced.

8. Actual possession in furtherance of the terms of the contract, especially when accompanied by the making of permanent and valuable improvements upon the premises, may be made the foundation of a decree for specific performance; but mere possession will not be deemed a part performance sufficient to justify such relief when it may fairly be referable to some other cause than the execution of the contract.

(Syllabus by the Court.)

Error to district court, Arapahoe county.

A. W. Rucker and Wells, McNeal & Taylor, for plaintiffs in error. W. J. Sharman and L. S. Dixon, for defendant in error.

ELLIOTT, J. This was an action by Therese L. Bamberger, plaintiff below, to recover possession of certain real estate. In her complaint, plaintiff claimed to be the owner in fee-simple of the premises, and charged, in substance, that Claude and Helene L. von Trotha, husband and wife, defendants below, had stealthily entered into a certain building situate thereon, and have falsely asserted that the title thereto was in said defendant Helene, and with force and arms have excluded plaintiff therefrom, notwithstanding plaintiff's title is absolutely plain and clear, and defendants' without right, etc. The defendants by their answer denied plaintiff's title; and, by cross-complaint, the defendant Helene alleged in substance, among other things, that she, through her hus-

band, negotiated and bargained for the land in the first instance, but that, failing in her efforts to complete the purchase, she brought the same to the notice of plaintiff, and thereupon entered into a verbal agreement whereby plaintiff was to pay the consideration, and take the title in her own name, to hold in trust for said defendant; that the agreement between plaintiff and defendant, at the time, was to the effect that the land should be graded and platted into blocks and lots, the plaintiff furnishing the necessary money therefor; that, "in consideration of allowing plaintiff an interest in the purchase and enterprise," it was agreed that, when sufficient lots should be sold to reimburse plaintiff for the purchase money and the cost of improvements, "the remaining part of the premises should be equally divided between plaintiff and defendant;" that, to secure to said Helene the carrying out on the part of plaintiff of the terms of said agreement until such time as the terms should be reduced to writing, it was agreed that defendant should go into exclusive possession of the premises for the benefit of the parties holding and owning the same, and retain possession until the division thereof should be made in accordance with their said agreement; that, in pursuance of such agreement, plaintiff paid for and received the deed of the premises, and undertook to take immediate and exclusive possession of said property; that afterwards said defendant, having procured the removal of a certain tenant who was temporarily occupying the premises, went into the exclusive possession of the property under said agreement, and so remained up to the commencement of this action; that plaintiff now absolutely refuses to execute her said agreement with defendant, and claims the entire right to said property as her own, to the exclusion of defendant, and threatens to sell the same, and convert the profits thereof to her own use; that said premises have greatly increased in value since the purchase; "that said premises are capable of division at the present time, in accordance with the original contract between plaintiff and defendant;" and defendant asks that "plaintiff be ordered and adjudged to specifically perform the contract," and for other relief. The court, upon the evidence, made certain special findings favorable to defendant, but which need not be set out at length, since afterwards, upon the final hearing, the court found "that all the allegations of the plaintiff's complaint are substantially true, and also that the allegations of the defendant's cross-complaint are true in manner and form as heretofore found and recorded by the court; but that, all and singular, the matters in the said cross-complaint alleged are insufficient in law to enable the defendant to obtain any relief," etc. Judgment was entered in favor of plaintiff for the possession and peaceable enjoyment of the premises, and the cross-complaint of the defendant was dismissed. To review this judgment, defendants bring the case to this court. In the special findings of the court referred to in the final decree, the trial judge speaks of the defendant's cross-complaint as "set-

ting up the facts substantially as I have found them." Nevertheless, such findings differ materially in legal effect from the allegations of the cross-complaint. For example, the findings state the agreement between plaintiff and defendant to have been that, "upon a sale of the property after payment of all charges, interest, and taxes, in addition to the cost of the property, they should share and share alike in the profits to be derived from the adventure." And again, the trial court in connection with the special findings says "The property, if taken in the name of Mrs. Bamberger would have been held in trust for the purpose of being sold and dividing the profits after payment of all the charges among the persons concerned. \* \* \* She therefore stands to-day, in the view of the court, as a trustee holding the property, not as a permanent investment, but merely and simply for the profit that is to be had from the transaction." On the other hand, the cross-complaint, as we have seen, sets forth an agreement whereby "the remaining part of the premises should be equally divided between plaintiff and defendant" after plaintiff should be reimbursed from the sales, etc., and also speaks of defendant as taking possession of the property for the benefit of the parties holding and owning the same \* \* \* as an undivided whole until a division thereof should be made in accordance with their said agreement," and other similar expressions. The prayer of the cross-complaint is for a decree for the specific performance of the original contract based upon the theory that "said premises are capable of division." Nowhere in the cross-complaint is it alleged, either directly or indirectly, that there was ever any agreement between plaintiff and defendant to engage in the buying and selling of the property in controversy, or any part thereof, or any other property or thing, and to "divide the profits to be derived from the adventure." Neither in the cross-complaint nor in the special findings is there any statement that plaintiff has sold or parted with any portion of the property or any interest therein, or that there was any time fixed or agreed upon between the parties within which the land or any portion thereof should be sold. Hence, the special findings were not sufficient to support an equitable decree for profits in favor of defendant, even if the cross-complaint had been framed upon the theory that the verbal agreement was a mere contract for the division of profits between parties engaged in the business of buying and selling real estate. A verbal agreement to share the profits arising from the purchase and sale of real estate may be made independent of any contract for an interest in the land itself. When so made, the agreement is not within the statute of frauds, and may become the foundation of an action for a money judgment, but not for a decree of specific performance affecting the title to the real estate. *Trowbridge v. Wetherbee*, 11 Allen, 361; *Snyder v. Wolford*, (Minn.) 22 N. W. Rep. 254; *Treat v. Hiles*, 68 Wis. 344, 32 N. W. Rep. 517; *Kayser v. Maugham*, 8 Colo. 232, 6 Pac. Rep. 803. Whatever may have

been the views of the trial judge at the time of making the special findings, it is obvious that, at the time of rendering final judgment, his opinion was that the defendant Helene could have no relief in the present action because the matters and things set forth in her cross-complaint were not supported by evidence in writing as required by the statute of frauds. The correctness of such final conclusion of the trial court is the only matter of law assigned for error. Hence, it would seem that the question might be speedily disposed of. But counsel have discussed the various points relating to the operation of the statute of frauds in transactions of this nature with such extraordinary zeal and ability that great care and considerable space will be required to give their briefs and arguments deserved consideration.

It has already been shown that the gist of this action is not a suit for profits arising from the purchase and sale of real estate; hence, relief under the cross-complaint must be obtained, if at all, by showing that defendant is possessed of some title or interest in the land in controversy. That plaintiff holds the legal title to the land, is conceded. The troublesome question for determination is: May it be established by parol evidence that she holds such legal title in trust for the benefit of defendant, or for the benefit of both plaintiff and defendant? The cross-complaint states that the verbal agreement was "that plaintiff should hold the title in trust for defendant," and that, in pursuance of such agreement, the deed was executed and delivered to plaintiff. The agreement was voluntary, and, according to defendant's version of the transaction, the conveyance was so made for her special accommodation and protection. So it appears that the parties attempted to create an express trust in contradistinction to a trust arising by "act or operation of law." In jurisdictions having a statute of frauds like ours, the general rule is that the existence of a direct or express trust cannot be established by parol evidence. When the legal title to land has been acquired in pursuance of a verbal agreement to hold the same in trust for a specified purpose, the agreement cannot be upheld as an express trust by reason of the statute; but, if it be clearly alleged and proved that the title has been fraudulently acquired, and is still held in fraud of the rights of another having a valuable interest in the premises, a trust by operation of law may be declared upon equitable terms. Parol evidence is admissible to prove facts from which a trust by implication of law may arise, but such evidence is not competent to prove an express trust where the statute of frauds is relied on as an objection. 1 *Perry, Trusts*, §§ 79, 166; 2 *Story, Eq. Jur.* §§ 972, 980; 2 *Pom. Eq. Jur.* §§ 1030, 1055, 1056; *Learned v. Tritch*, 6 Colo. 432; *Kayser v. Maugham*, supra; *Stewart v. Stevens*, 10 Colo. 440, 15 *Pac. Rep.* 786; *Todd v. Munson*, 53 *Conn.* 579, 4 *Atl. Rep.* 99.

But it is claimed in behalf of defendant that plaintiff promised to reduce the verbal agreement to writing, whereby defend-

ant's estate or interest in the land would have been declared and protected in conformity with the requirements of the statute of frauds; and that plaintiff's failure to keep such promise is such a fraud upon the rights of defendant as will entitle her to establish her estate or interest by parol, and have plaintiff adjudged a trustee *ex maleficio*. In answer to this claim, it may be said that neither the cross-complaint of defendant nor the findings of the trial court contain any statement, either in direct terms or to the effect, that plaintiff made any such promise. The nearest approach to such an averment in the cross-complaint is that, to "fully secure defendant in carrying out, on the part of plaintiff, the terms of said agreement until such time when the terms thereof should be reduced to writing," it was agreed that defendant should go into and remain in the exclusive possession of the premises, etc. The alleged promise to reduce the verbal agreement to writing is not mentioned in the findings of the court. Considering how easily the protection of the statute of frauds may be swept away, and titles to real property exposed to danger, by the admission of parol evidence to establish implied trusts, we perceive the wisdom of the rule as announced by Chief Justice BECK in *Bohm v. Bohm*, 9 Colo. 111, 10 Pac. Rep. 790, that "the evidence must be strong and unequivocal, and must clearly establish the trust alleged." Considering, also, the elementary rule that the *allegata* and the *probata* must correspond, we unhesitatingly declare that averments in pleadings, in avoidance of the statute of frauds, must not only be direct and positive, but they must be clear and unequivocal, or they will not be regarded as sufficient, either in form or substance. 2 Pom. Eq. Jur. § 1040; 1 Perry, Trusts, § 226.

Aside from the defects in the pleadings and findings, the rule contended for is not applicable to the case under consideration. Where the statute of frauds prevails, a mere oral promise to reduce to writing a verbal agreement declaring a trust in land, and the breach thereof, are not admissible to establish such trust, except in connection with other evidence tending to show fraudulent conduct in the acquisition of the title by the party holding it: but, when the existence of fraud is thus shown, equity will declare the party thus acquiring and holding the title a trustee *ex maleficio* upon the terms of the dishonored verbal agreement, or other equitable terms, for the benefit of a person having a subsisting valuable interest in the premises,—thus substituting a trust by operation or implication of law in the place of the express trust orally promised. It must be confessed that the route to such a result is circuitous and beset with many obstacles. Nevertheless, courts of equity will thread their way through its devious courses when it is necessary for the protection or rescue of some unfortunate victim who might otherwise be plundered or defrauded of his estate. But the party claiming such protection must be able to show that he has some valuable subsisting interest, either in the property itself

or in the consideration by which the estate has been acquired, possessed, or improved, of which it would be unconscionable to deprive him, before the court will declare a trust in his favor upon parol evidence. It has never been adjudicated, so far as we are advised, that a mere verbal agreement for the creation of a trust in lands in which the *cestui que trust* had no valuable interest independent of the verbal agreement can be exempted from the operation of the statute of frauds and enforced in equity by simply proving the breach of an oral promise to reduce the verbal agreement to writing. 2 Pom. Eq. Jur. §§ 1053, 1056; *Hall v. Linn*, 8 Colo. 264, 5 Pac. Rep. 641; *Bohm v. Bohm*, 9 Colo. 100, 10 Pac. Rep. 790; *Levy v. Brush*, 45 N. Y. 589; *Wolford v. Herrington*, 86 Pa. St. 39. This subject has already received the consideration of this court. In each of the Colorado cases cited above, the parties asserting the breach of an oral promise to execute written instruments declaring the trusts were the original owners of the premises conveyed; and it appeared that, at the time of executing the conveyances, the grantees promised that certain valuable interests in the premises or the proceeds thereof should be reserved and secured to the grantors by appropriate instruments in writing, duly executed and delivered. These promises were not performed. In the *Hall-Linn* Case, the conveyance, though absolute in form, was designed to subserve the purpose of a deed of trust, with a power of sale for the benefit of the creditors of the grantor, of which the grantee was one, and surplus, after the payment of creditors and the expenses of the trust, to be returned to the grantor. This view was abundantly sustained by the evidence, and, though the court declared that the transaction did not constitute a mortgage, it was analogous thereto in some particulars. At all events, there existed the important tangible facts, to wit: The original interest of the grantor in the estate; the debts which the conveyance was given to secure; and the conduct of the grantee, indicating his trust relation, and that the grantor had not parted with his entire interest in the estate, but that he retained the residue, or whatever might remain of the proceeds thereof, after satisfying his creditors. In the *Bohm* Case a like valuable interest in favor of the grantor was reserved. Besides, the grantor in that case was the widowed mother of the grantee, who relied, as according to the dictates of reason and humanity she had a right to rely, with peculiar confidence, upon the promise of her son. But in the *Bohm* Case, as in the *Hall-Linn* Case, the controlling consideration, furnishing substantial ground for the interposition of a court of equity to take the case out of the statute of frauds, was the valuable interest which the grantor had remaining in the premises notwithstanding her absolute conveyance. In both these cases, equity extended its arm to protect valuable interests of the grantors in the premises upon clear proof of fraudulent conduct on the part of the grantees in procuring and retaining such conveyances. Their refusal

to execute the written agreements was admissible as evidence tending to show such fraudulent conduct; but such evidence of itself would not have been sufficient, nor would the actions have been maintainable, but for the equities which the grantors had remaining in the premises or the proceeds thereof. *Ryan v. Dox*, 34 N. Y. 307; *Wolford v. Herrington*, 74 Pa. St. 311, 86 Pa. St. supra; *Perry v. McHenry*, 13 Ill. 227; 2 Pom. Eq. Jur. §§1055, 1056; *Howland v. Blake*, 97 U. S. 624; *Levy v. Brush*, 45 N. Y. supra; *Todd v. Munson*, supra; *Gilpatrick v. Glidden*, 81 Me. 137, 16 Atl. Rep. 464. Upon principle it would seem that an oral promise by a party, when acquiring title to real estate, to execute a written agreement declaring a trust in favor of another having a valuable interest in the premises, and the breach of such promise, are admissible in evidence in connection with other facts and circumstances tending to taint the transaction with fraud, thus furnishing, if the fraud be clearly established, a foundation for a trust by operation of law; but that proof of such promise and breach merely, without proof of such valuable interest in the promisee, cannot be accepted as an independent ground for sustaining and enforcing such verbal agreement as an express trust. It is scarcely necessary to say that the case at bar is lacking in the principal features characterizing the *Hall-Linn* and *Bohm* Cases, and the other cases above cited. Neither the defendant *Helene*, nor her husband, was the original owner of the land in controversy nor any part thereof, nor any interest therein. Neither of them contributed any portion of the purchase money or agreed to do so; nor did they furnish or agree to furnish any money for the improvement of the premises. It is conceded that the \$100 advanced as earnest money some little time before the consummation of the purchase was furnished by plaintiff. The receipt therefor was undoubtedly taken in the name of defendant, because it was then expected that she would furnish the greater part of the purchase price, and that the conveyance would be made in her name. But this was abandoned when her plans for raising the purchase money failed; and thereupon plaintiff assumed the whole burden of buying and improving the premises. It does not appear that the *Von Trothas* and *Bambergers* were related, either by blood or marriage, or that there were any confidential or fiduciary relations existing between them. The only consideration upon which defendant bases her claim for equitable protection against the operation of the statute of frauds is that of "allowing the plaintiff an interest in the purchase and enterprise." This privilege was allowed only after defendant's failure to consummate the purchase, and when she had no interest in or power over the premises; it was allowed, also, upon condition of plaintiff's paying the whole purchase money, and all the expenses of improving the premises. It is clear that defendant had no interest or equity in the premises at the time of the purchase upon which a trust might be declared by operation of law.

If anything further were needed to show that defendant is not placed in a position of peculiar hardship, by reason of her claim being barred by the statute, it is the conceded fact that her husband, through whom everything was done that was done on behalf of defendant in the entire transaction, actually received commissions of over \$300 from the seller for his services in consummating this very sale,—conduct entirely inconsistent with his relation as agent for his wife as a joint purchaser with plaintiff. Again, it is urged that the verbal agreement between plaintiff and defendant in respect to the land in controversy has been partly performed, and that thereby defendant has acquired an equity to have the agreement enforced by a decree of specific performance. Acts of part performance, such as will furnish a foundation for enforcing a verbal contract respecting land otherwise void under the statute of frauds, must be such as are done in pursuance, or according to the terms, of the contract, and which in some manner affect or change the relation of the parties in respect to the property whereby one of the parties would be defrauded if the contract were not enforced. 1 Story, Eq. Jur. §§ 759–766; 3 Pom. Eq. Jur. § 1409; *Gill v. Newell*, 13 Minn. 462, (Gil. 430.)

Defendant claims that, by taking possession of the premises with the consent of plaintiff, there was a part performance of the verbal contract sufficient to entitle her to have the same specifically enforced. Actual possession in furtherance of the terms of the contract, especially when accompanied by the making of permanent and valuable improvements upon the premises, may be made the foundation for a decree for specific performance; but mere possession will not be deemed a part performance sufficient to justify such relief, when it may fairly be referable to some other cause than the execution of the contract. In this case, defendant did not make improvements or expend money upon the land. Besides, defendant's occupation of the premises cannot be said to have been according to the terms of the alleged verbal agreement, nor in furtherance of its ultimate objects as claimed by defendant. In the special findings of the trial court, as first announced, after stating how the conveyance came to be made in the name of plaintiff, it is said: "Some arrangement was thereafter had as to the possession of the property. Mr. *Von Trotha*, representing his wife, entered into the possession of the property, and took care and charge of the same." So it appears that possession was not taken in pursuance of the original agreement, but under a subsequent arrangement. According to the original agreement, as set forth in the cross-complaint, the premises were not intended for the immediate and permanent possession of either or both of the supposed parties interested in the purchase; but they were to be graded, plat- ted, and a certain portion thereof sold, and the residue to be divided, and then, and not till then, was each of the alleged parties in interest to come into possession of her separate share of the estate. It is

contended that the transactions between plaintiff and defendant amounts substantially to a mortgage; that defendant has an interest in the premises subject to plaintiff's lien for the purchase money in the nature of an equity of redemption; and that the verbal agreement is to be regarded as a recognition of such interest. From the views heretofore expressed, it will be readily perceived that this position cannot be maintained—*First*, because defendant had no interest in the premises capable of being mortgaged; *second*, because there is no subsisting indebtedness to be secured. Defendant neither owed plaintiff anything prior to the purchase, nor did she become indebted by the purchase, so there is no consideration to support the conveyance as a mortgage. The claim that plaintiff and defendant were partners in this transaction is untenable; and so, also, is the claim that plaintiff was the agent of defendant. While some of the matters alleged in the cross-complaint may tend to show an attempt to create such relationship, the averments as a whole do not show a partnership actually formed or "launched," much less a previously existing partnership. The verbal agreement, as pleaded, does not purport to be a contract for a partnership, nor for the relation of principal and agent between the parties. On the contrary, the terms of the agreement are alleged to be that plaintiff was to take the conveyance and hold the title in trust for both parties. The special findings do not show the existence of a copartnership, nor sustain the theory of such an agency as is contended for. The alleged verbal agreement is specifically put in issue by the pleadings; and the denial of the agreement is sufficient to give the plaintiff the benefit of the statute. Hence, the final judgment of the trial court in dismissing the cross-complaint must have been based upon the conclusion that, under the evidence, a partnership was not actually entered into between the parties; that the relation of principal and agent did not exist between them; and that the statute of frauds was a bar to plaintiff's claim. *May v. Sloan*, 101 U. S. 231.

It is unnecessary to further discuss the evidence or findings of the trial court. Proof that a verbal agreement was made as alleged would be no evidence that the conveyance to plaintiff was fraudulent; nor can the fraudulent character of such conveyance be established by mere proof of the breach of the verbal agreement. To hold such proof sufficient to take the case out of the statute of frauds would be to practically abrogate the statute itself. So that, even if the verbal agreement and the breach thereof be admitted, still defendant can obtain no relief in the face of the statute unless such admission, supplemented by proofs *aliunde*, clearly shows that plaintiff acquired the title in fraud of defendant's substantial rights in the land. As we have already seen, the cross-complaint does not contain sufficient allegations upon which to base such proofs. So, whether or not plaintiff made the verbal agreement as claimed, and then violated it, we need not undertake to determine.

Upon this point, the evidence is conflicting, not to say doubtful; but fortunately the law is clear upon the pleadings and admitted facts of the case, and we should not hesitate to declare the same. Eminent counsel and distinguished jurists have battled ingeniously and vigorously for the last 200 years with cases like this, endeavoring to secure relief under verbal contracts concerning land notwithstanding the statute of frauds and perjuries. At times they have well-nigh succeeded in repealing the statute, and have often illustrated the saying that "hard cases make bad precedents." Nevertheless, the statute has survived these attacks; and the tendency of modern decisions is to maintain its substantial provisions according to its true spirit and purpose, and not to indefinitely multiply exceptions thereto, as the authorities already cited abundantly show. Upon the whole case, we are constrained to conclude that defendant cannot succeed upon her cross-complaint; and that, even if she has suffered a wrong at the hands of plaintiff in this transaction, she is, nevertheless, precluded by the statute from obtaining the redress she seeks in this action. We are of the opinion that the final judgment of the district court was correct, and the same is accordingly affirmed.

PEOPLE V. CHRISTENSEN. (No. 20,650.)

(Supreme Court of California. Sept. 8, 1890.)

CRIMINAL LAW—LARCENY—INSTRUCTIONS.

1. On a trial for grand larceny it is within the discretion of the court to grant or refuse defendant's request to be allowed to testify in her own behalf, when the request is made after the court has begun to charge the jury; and a refusal cannot be considered an abuse of discretion.

2. A charge that "unless the prosecution has proved beyond a reasonable doubt that the defendant feloniously stole the money of the complaining witness it is your duty to acquit the defendant," is not erroneous, as being an insufficient definition of larceny, when no further instruction was asked.

3. A charge that "it is not a matter of the number of witnesses, but the preponderance; and you may, if you retain a reasonable doubt, give the defendant the benefit of it,"—while not specially clear and perspicuous, is yet not erroneous.

4. It is improper for the court in its charge to use expressions calculated to impress the jury with the idea that defendant's witnesses are a disreputable class of people whose evidence may well be disregarded.

Commissioners' decision. In bank. Appeal from superior court, city and county of San Francisco; J. McM. SHAFTER, Judge.

P. F. Dunne, for appellant. Atty. Gen. Geo. A. Johnson, for the People.

FOOTE, C. The defendant was convicted of grand larceny, and she appeals from the judgment therein rendered, and from an order refusing a new trial. It is primarily claimed in her behalf that the evidence is entirely insufficient to support the verdict. The record shows very clearly that the defendant was positively identified by the prosecuting witness as the person who stole his money, although he was somewhat intoxicated at the time, and Annie O'Farrell, a witness for the defend-

ant, although she positively swears that the defendant stole nothing, nevertheless states that she, the defendant, and the prosecuting witness were in company with each other at saloons (naming them) at the time when the money is alleged to have been stolen, and, although several witnesses for the defense swore to facts which negatived such statement of the prosecuting witness, yet, as the jury saw and heard those who testified before them, and resolved the conflict between them against the innocence of the defendant, we are not prepared to say that the verdict was clearly wrong. It is also very earnestly urged that the court erred in not permitting the defendant to testify in her own behalf when she desired to do so. The evidence had all gone to the jury, and the court had proceeded with its charge to that body as to the law governing the case, when this offer was made. It thus became discretionary with the court to grant or refuse the request, and we cannot declare that its action was an abuse of its discretion. *People v. Ross*, 65 Cal. 105, 3 Pac. Rep. 491; *Pen. Code*, §§ 1093, 1094.

Error on the part of the court is alleged in its instruction to the jury that "unless the prosecution has proved beyond a reasonable doubt that the defendant feloniously stole the money of the complaining witness it is your duty to acquit the defendant." This, it is said, was not a definition of larceny, unless of larceny in general, and that, as larceny consists of grand and petit larceny, the instruction was defective. In answer to this it may be said that the defendant asked for no further definition of the offense; the information charged grand larceny, and the proof showed beyond cavil or question that if any larceny was committed it was grand larceny. This being so, the defendant could not have been prejudiced. Further, it is said that the court assumed that the prosecuting witness had money on the occasion of the alleged theft. We do not so understand the instruction. In effect, it conveyed the idea that, unless it is proved beyond reasonable doubt that the prosecuting witness had money which was stolen by the defendant as charged, they should acquit. This was entirely proper. It is also said that the court did not define what a reasonable doubt is. If the defendant had desired such a definition, she should have asked for it; but she did not choose to do so, being seemingly satisfied that the jury knew what a reasonable doubt was. *People v. Gray*, 66 Cal. 277, 5 Pac. Rep. 240, and cases cited. Further, complaint is made that the court instructed the jury:—"It appears that these saloon-keepers, who were in the Louisiana saloon at this time, on the way from their ordinary places of business, according to their testimony; that they engaged in playing cards, and the prosecuting witness says that on this occasion he was robbed of his money, and there is no explanation why this defendant was there except that she was the wife of the witness, or was with the other woman who was there." It is claimed that by this the court prejudicially told the jury that, as a matter of fact, the Louisiana saloon was the place

where the alleged larceny took place. This is a mistake. The court stated that the prosecuting witness said that it was on the occasion when the saloon-keepers were playing cards in the Louisiana saloon that he was robbed of his money, but the court did not state to the jury that such was the fact. As to the statement about the explanation given why the defendant was present, it cannot be prejudicial to her even if it was a fact that she was present as a wife with her husband, or with a female companion; and there does not seem to have been any other explanation consistent with her innocence why she should have been there.

Again, it is said that error was committed in giving this portion of the charge: "It is not a matter of the number of witnesses, but the preponderance, and you may, if you retain a reasonable doubt, give the defendant the benefit of it." The first clause of the language is the part at which condemnation is directed. Evidently the court meant to say, and the jury must have so understood it, that the number of witnesses either upon one side or the other was of no controlling force, but that the preponderance of evidence which would show her guilt beyond a reasonable doubt must be against the defendant, else they must acquit her. It is true the language used, and its connection, is not specially clear and perspicuous, but it is not susceptible of any other rational construction than that which we have given it.

There is another portion of the charge to which strong objection is made. It is this: "You may consider the probabilities of this class of witnesses of telling the truth." The connection in which the language was used in the charge can be best appreciated by stating that portion of the charge which immediately precedes, and another portion which occurs in a latter part of the charge, thus: "There is nothing calling for any particular enumeration of witnesses, or the statement of their testimony. It appears that these saloon-keepers, who were in the Louisiana saloon at this time, on the way from their ordinary places of business, according to their testimony, that they engaged in playing cards, and the prosecuting witness says that on this occasion he was robbed of his money, and there is no explanation given why this defendant was there except that she was the wife of the witness, or was with the other woman who was there. If you consider the probabilities of the story,—the complaining witness pointing out this woman as being the guilty one, as the officer states,—you may consider the probabilities of his making a mistake, and whether he tells the truth, or intends to tell the truth, of what he himself believes, or he saw there, and also of this class of witnesses on the other side, of telling the truth. \* \* \* As to the matter of policy, as to bringing in a verdict of guilty in regard to these places, that is a matter for you to take into consideration as citizens rather than as jurors here." It must be borne in mind that the witnesses "on the other side," that is, those for the defendant, were, according to the record, a wo-



man who frequented saloons on the Barbary Coast, (well known in San Francisco, and throughout this state, perhaps, as a rather disreputable locality,) and who was in company with the defendant and the prosecuting witness at these saloons, and of saloon-keepers from that unsavory locality. Therefore, it is plain from the language of the court that it contrasted the probabilities of the defendant's story of the prosecuting witness, and his pointing out the woman as the guilty one to the policeman, as against the witnesses for the defense, whom it unnecessarily denominates witnesses of "that class." "That class" evidently conveyed the idea to the jury that it was a disreputable class, the probabilities of whose testimony they were to weigh, while nothing was said tending to throw any discredit upon the prosecuting witness. And then, at the close, the statement, as to the policy of bringing in a verdict "in regard to these places, that it was a matter for consideration as citizens rather than jurors," was likely to convey the idea that "these places"—that is, saloons on the Barbary Coast—were very bad places, where such crimes as was here charged probably took place, and which the jury were told that as such they had nothing to do with it in their verdict as a matter of policy, yet as citizens they had a right to take the matter into consideration, the court evidently thinking that "these places," being "bad places," needed good citizens to look after, and at least condemn, if not suppress, them; all of which certainly tended to discredit the witnesses by the court, which ought never to be done. In this case the testimony of the prosecuting witness alone was depended upon to identify the defendant as having stolen his money, and he was evidently also a drunken man at the time the theft is alleged to have taken place, and an utter stranger before that to her. Against him were the defendant's witnesses, designated by the court as heretofore stated. We are constrained to say, therefore, that the portion of the charge in question was erroneous, being well calculated to impress the jury with the idea that her witnesses were a disreputable class of people, whose evidence might well be disregarded, and for that reason the judgment and order should be reversed, and we so advise.

We concur: GIBSON, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are reversed.

(85 Cal. 418)

GRANT v. EDE. (No. 12,784.)

(Supreme Court of California. Sept. 1, 1890.)

REAL-ESTATE AGENT—AUTHORITY TO SELL.

A letter to an agent, saying: "As you stated you could get \$30,000 for the place you occupy, \* \* \* and if you can, we will sell at that price, \* \* \* and allow you two and one-half per cent. on said price,"—merely authorizes the agent to find a purchaser, but not to sell; and a contract by the agent to sell confers no rights on the purchaser.

In bank. Appeal from superior court, city and county of San Francisco.

Hall & Rodgers, for appellant. J. C. Bates, for respondent.

PATERSON, J. It is alleged in the complaint herein that the defendant, being the owner of certain real estate, gave to Martin the following authorization to sell the same: "San Francisco, August 3, 1887. Mr. Wheeler Martin: As you stated you could get \$30,000 for the place you occupy on Market street, and if you can, we will sell at that price any time before the 1st day of September, 1887, and allow you two and one-half per cent. on said price, and if no sale is made no expenses made to us. Yours, truly, [Signed] WILLIAM EDE." Thereafter Martin executed and delivered to the plaintiff an agreement in the following words: "By virtue of the within and foregoing authority, I, Wheeler Martin, have, this 23d day of August, 1887, sold unto George Grant, of San Francisco, the land in said authority mentioned, situated in the city and county of San Francisco, state of California, and particularly described as follows, \* \* \* for the sum of \$30,000, of which \$500 was paid by check dated August 23, 1887, payable to said William Ede, and \$29,500 in cash to be paid with said check upon the execution by said Ede of a deed conveying said property to said Grant, purchaser, as aforesaid. [Signed] WILLIAM EDE. By MARTIN, His Agent." It is further alleged that, on the execution of this agreement, plaintiff paid to the defendant \$500, as a deposit and part payment of the purchase money; that plaintiff has duly performed all the conditions on his part to be performed, and is ready and willing, on having a good and marketable title made to him of said premises, to pay the balance of the purchase money; and that, on the day named in the agreement, he tendered to the defendant the sum of \$30,000, and requested such a conveyance, but the defendant refused to execute or deliver such conveyance. Plaintiff asks judgment against the defendant that, on payment by him to the defendant of the amount of the purchase money, he, said defendant, be required to execute and deliver a good and sufficient deed. It is admitted by the appellant that the power of a broker is merely to find a purchaser, but he claims that this rule cannot apply here, because the purchaser had already been found. The case cited by him (Rutenberg v. Main, 47 Cal. 220) is not like the case at bar. In that case the written instruments and corroborative circumstances showed the parties intended that on the receipt of the dispatch affirming the preliminary action of Meinecke, he, the agent, should be clothed with power to make the sale binding on his principal. The contention of appellant that the authority to find a purchaser had been given before the letter was written to Martin, and that the latter had already found a purchaser, and reported the fact to the defendant, is not sustained by the record. The object of the writing, doubtless, was to fix the price which the defendant was willing to take for the land, and the com-

pensation he was willing to allow Martin for making the sale. Without this written memorandum, signed by the party to be charged, Martin could not have recovered compensation for negotiating the sale of the property. The language of the letter is: "We will sell." It does not say that Martin is authorized to sell and convey for the price named; nor is any form of deed, or time of payment, or of delivery of possession, specified. Martin was authorized simply to find a purchaser who would pay \$30,000, and if he should succeed in finding such purchaser, he was to receive a commission of 2½ per cent. The interpretation put upon the agreement by the court below is sustained by the following authorities: *Duffy v. Hobson*, 40 Cal. 244; *Treat v. De Cella*, 41 Cal. 202; *Armstrong v. Lowe*, 76 Cal. 616, 18 Pac. Rep. 758. The demurrer, therefore, was properly sustained. Judgment affirmed.

We concur: BEATTY, C. J.; WORKS, J.; SHARPSTEIN, J.; FOX, J.; McFARLAND, J.

85 Cal. 402

GILLESPIE v. LAKE et al. (No. 12,758.)  
(Supreme Court of California. Sept. 1, 1890.)

LIABILITY OF MAIL CONTRACTOR'S BONDSMEN.

A contractor for carrying the mails sublet the contract to plaintiff; and afterwards, on receiving a quarterly payment, absconded, without paying plaintiff his last quarterly dues. The contractor's bondsmen proposed to the post-office department that they be allowed to fulfill the contract, and received, as an answer, from the department: "An order has been issued this date to recognize your services on said route, and pay for the same from" the date up to which the contractor had drawn pay. The bondsmen hired plaintiff to continue to carry the mails, which he did for about a year longer. *Held*, that the bondsmen were not liable for plaintiff's dues with which the contractor absconded.

Commissioners' decision. Department 1. Appeal from superior court, Del Norte county; JAMES E. MURPHY, Judge.

L. F. Cooper and Sawyer & Burnett, for appellant. Lucas & Miller, for respondents.

BELCHER, C. C. In April, 1882, W. H. Otto entered into a contract with the government to carry the mails twice a week between Crescent City, in California, and Ellensburg, in Oregon, for the term of four years, commencing July 1, 1882, and the defendants became sureties for the faithful performance of his contract. In June, 1882, Otto employed A. K. Russ to convey the mails over a portion of his route during the whole term of four years, and the agreement between them was put in writing, and signed by them. In pursuance of this agreement Russ carried the mails until April 1, 1884, when he gave up his contract. Otto then employed the plaintiff to take the place of Russ, and carry the mails over the same portion of the route, during the balance of the four years, and agreed to pay him for so doing the sum of \$1,300 per year, payable in quarterly installments of \$325. Under this employment the plaintiff at once commenced to carry the mails, and continued to carry them until January 1, 1886. Otto was paid by the government quarterly, for the service rendered under his contract up to the end

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of the year 1884, and he paid the plaintiff the first two installments due him, but failed and neglected to pay the third one, due for the quarter ending December 31, 1884. Early in 1885, Otto absconded, and no further payments were made by the government to him. A correspondence was then commenced with the post-office department in reference to Otto's contract and the payment of the carriers, and, among others, the following letters were written:

"Ellensburg, Or., June 22d, 1885. To the 2d Asst. Postmaster Gen.—Dear Sir: The postmaster at this place handed me a letter from you to him last night, in which letter you stated that W. H. Otto, the contractor on route 46,141, from Smith River, Cal., to Ellensburg, Or., had notified you that he (Otto) had never employed me to carry the mail on said route, which statement on the part of Otto is false. It is true that I took the place of Mr. Russ on the route, but with an understanding that I was to receive my pay from Mr. Otto direct, at the rate of \$325 per quarter, which was the same as Mr. Russ had been receiving. This agreement was verbal, but in the presence of witnesses; and, upon this agreement, I received two quarters' pay direct from Mr. Otto, and the third quarter's pay he left with the postmaster at Crescent City about ten days, stating to the P. M. that the money was mine, but finally drew the money, and left the country before I found out that he had received the check. \* \* \* Very respectfully, A. M. GILLESPIE.

"P. S. The quarter's pay on route 46,141, due April, 1885, is overdue, and we need our pay in order to pay the running expenses of the route. I cannot get a sub-contract from Otto, from the fact that he is not here to sign it. Now, in case the department cannot issue the checks to us carriers, instead of Otto, cannot the check be issued to the bondsmen of Otto, on said route, and let his bondsmen settle with us carriers for our services? But from the overplus which Otto was receiving I think I should receive my back pay, which Otto got away with, (which was the quarter ending January 1st, 1885.) If I did not have faith to believe that your department would stand by us carriers, and see that we got our pay, I should take my stock from the road immediately, and let Otto's bondsmen look out for the route. Yours, truly, A. M. GILLESPIE."

"Smith River, Del Norte Co., Cal., July 2d, 1885. To the Second Assistant Postmaster Gen., Washington, D. C.—Sir: W. H. Otto, contractor on route 46,141, Smith River, Cal., to Ellensburg, Or., having left the state, we, J. L. Lake and Daniel Haight, his bondsmen, do hereby ask that all warrants for service rendered on said route shall be made payable to us, as we are at present responsible, and intend to see that said mail is carried according to contract; that is, with full understanding between ourselves and carriers, we pledge ourselves to settle with carriers for the last quarter, which pay was withheld, at the request of Mr. Gillespie, and ask that said warrant be issued

to us. J. L. LAKE and DANIEL HAIGHT, Bondsmen for W. H. Otto."

"Office of the Second Asst. Postmaster Gen., Washington, D. C., Aug. 19th, 1885. Gentlemen: W. H. Otto having abandoned service on route No. 46,141, from Smith River to Ellensburg, and in response to your proposition of July 20, 1885, an order has been issued this date to recognize your service on said route, and pay for the same, from January 1, 1885, to June 30, 1886, at contract rate of pay, viz., \$2,114.34 per annum. Very respectfully, G. M. SWENY, Acting Second Asst. P. M. Gen'l.

"Messrs. J. L. Lake and Daniel Haight, Smith River, Del Norte Co., Cal."

Under the new arrangement, resulting from the correspondence, the service was continued, and the defendants were paid at the rate named, until January 1, 1886, when the number of trips, and the amount of the quarterly payment to be made therefor, were reduced by the government for the balance of the term. The plaintiff was unwilling to accept a reduced compensation for his service, and thereupon gave it up. The first payment to the defendants was made in September or October, 1885, and they thereafter paid the plaintiff \$325 for each quarter, from January 1, 1885, to January 1, 1886. The plaintiff claimed that the defendants ought also to pay him the \$325 due for the quarter ending December 31, 1884, which Otto received from the government and appropriated to his own use; but they refused to make the payment, and in March, 1887, he brought this action to recover from them the amount claimed. The case was tried before the court, sitting without a jury, and the findings and judgment were in favor of the defendants. The plaintiff moved for a new trial, which was denied, and then appealed from the judgment and order. It was alleged in the complaint that the defendants, on their application, were authorized and undertook to fulfill the contract abandoned by Otto, upon the express condition that they would pay the plaintiff whatever was due him from Otto, and that \$325 of the money paid them by the government was for the plaintiff's use. The answer denied that defendants accepted any employment for carrying the mails upon an express, or any, condition that they would pay plaintiff any amount whatever due him from Otto prior to January 1, 1885; and further denied that they had received any money from the government for the use of the plaintiff, which had not been paid to him. It is contended for appellant that the issue as to whether defendants accepted their employment to carry the mails, upon the express condition that they would pay the plaintiff whatever was due him from Otto, was a material one, and that the court failed to find upon it, to his prejudice. But the court did find "that the contract of the defendants was with the government of the United States alone, and not with the plaintiff in this action;" "that the defendants herein have never received any moneys for the use and benefit of the plaintiff herein, arising out of this cause of action;" and that there is "no existing obligation, past, present, or future,

binding said defendants to pay to plaintiff the sum of three hundred and twenty-five dollars, which has not been complied with, and which has not been fully met."

These findings were not as full as they might and perhaps should have been, but we think they should be treated as sufficient. Besides, whether sufficient or not, we are unable to see that the plaintiff was in any way prejudiced by the failure complained of. In the evidence presented in the record, there is nothing tending to show that the defendants ever accepted the employment upon the condition named, or ever agreed to pay plaintiff the money sued for. If, therefore, a more complete finding upon the issue had been made, it must necessarily have been adverse to the plaintiff; and in such case the failure to find is not a ground for the reversal of the judgment. *People v. Center*, 66 Cal. 564, 5 Pac. Rep. 263, and 6 Pac. Rep. 481; *Murphy v. Bennett*, 68 Cal. 528, 9 Pac. Rep. 738. It is further contended that the court erred in the admission of evidence. The plaintiff alleged and sought to prove that he was employed by Otto to carry the mails after April 1, 1884. The defendants denied this averment and offered in evidence the written contract between Otto and A. K. Russ to show that plaintiff was in the employment of Russ and not Otto. Defendants also called two witnesses to prove certain conversations in support of their position. Plaintiff objected to all of this evidence as irrelevant and immaterial, and the objections were overruled, and exceptions reserved. After hearing all the evidence, the court found upon the issue thus raised in favor of the plaintiff, and against the defendants. If it be conceded, therefore, that the rulings complained of were erroneous, still they were rendered harmless and immaterial by the finding; and for such errors judgments are never reversed. No other points are made, and we, therefore, advise that the judgment and order be affirmed.

We concur: HAYNE, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

85 Cal. 515

PEOPLE v. MORINO. (No. 20,716.)

(Supreme Court of California. Sept. 6, 1890.)

CRIMINAL LAW—SPEEDY TRIAL—DISMISSAL—LARCENY—INSTRUCTIONS.

1. Const. Cal. art. 1, § 13, guarantees a speedy trial to every person charged with crime, and Pen. Code Cal. § 1882, provides that, unless good cause is shown, the court must order the prosecution to be dismissed, "if a defendant whose trial has not been postponed upon his own application is not brought to trial within 60 days after the filing of the indictment or filing of the information." *Held*, that a prisoner against whom an information was filed on August 7th, and who was arraigned, and pleaded not guilty five days later, was entitled to a dismissal of the case for want of prosecution, on motion made in the following March, when it appeared that he had made no application for a continuance, and no cause for the delay was shown by the prosecution.

2. On a trial for larceny a charge that, "if the jury believe that the defendant had no felonious intent to steal the property at the time he

took it, they must acquit, even if they should believe that he subsequently conceived the intent to appropriate it," being applicable to the evidence, was improperly rejected.

Department 1. Appeal from superior court, city and county of San Francisco; EUGENE R. GARBBER, Judge.

*Barelay Henley and Clitus Barbour*, for appellant. *Atty. Gen. Geo. A. Johnson*, for the People.

WORKS, J. The defendant was convicted in the court below of the crime of larceny, and sentenced to the state's prison for the term of four years. In support of his appeal to this court he contends that the court below erred in overruling a motion made by him to dismiss the case. The motion to dismiss was made on the ground that he was not given a speedy trial. It was shown, or stipulated, in support of his motion, that the information against him was filed on the 7th day of August, 1888; that he was arraigned, and entered his plea of not guilty on the 12th day of the same month; and that he had never made any application for, nor was there any postponement of, the action in his behalf, or on his application. The motion to dismiss was made on the 19th day of March, 1889. No showing was made on the part of the people, or any attempt made to show any valid reason for the delay. The constitution guarantees a speedy and public trial to every person charged with crime. Const. art. 1, § 13. The legislature has provided what shall constitute a reasonable time within which a defendant shall be brought to trial. Section 1382 of the Penal Code provides: "The court, unless good cause to the contrary is shown, must order the prosecution to be dismissed in the following cases: (1) When a person has been held to answer for a public offense, if an indictment is not found or an information filed against him, within thirty days thereafter; (2) if a defendant, whose trial has not been postponed upon his application, is not brought to trial within sixty days after the filing of the indictment or filing of the information." The court below, in denying the defendant's motion, said: "The question you raise I have considered before, and, under my construction of the law, it is discretionary and not mandatory, and I will presume that the court was engaged in the trial of other causes." We think this is not a proper construction of the law. A party charged with crime has the constitutional right to a speedy trial, and the court has no discretionary power to deny him a right so important, or to prolong his imprisonment without such trial beyond the time provided by law. The statute is imperative. "The court, unless good cause to the contrary is shown, must order the prosecution to be dismissed." Here no cause for delay was shown. It was enough for the defendant to show that the time fixed by the statute, after information filed, had expired, and that the case had not been postponed on his application. If there was any good cause for holding him for a longer time without a trial it was for the prosecution to show it. The court could not presume

it. Under the facts, as shown, the case should have been dismissed, and it was error to deny the motion. As to what is meant by a speedy trial, independent of a statute like ours, see *Nixon v. State*, 41 Amer. Dec. 601, and note, 604. Under a statute similar to ours the supreme court of Kansas held that a defendant was entitled to be discharged on a writ of *habeas corpus* where his case had not been tried as required by the statute. In *re McMicken*, 18 Pac. Rep. 473. Certain rulings of the court upon the evidence are complained of, but the proper exceptions were not reserved, and the questions cannot, for that reason, be considered by this court.

The defendant requested the court to instruct the jury: "If the jury believe that the defendant had no felonious intent to steal the property at the time he took it, they must acquit, *even if they should believe that he subsequently conceived the intent to appropriate it.*" The court gave the first clause of the instruction, but refused to give that part of it in italics. The instruction was correct as an abstract proposition of law. *People v. Jersey*, 18 Cal. 337; *People v. Salorse*, 62 Cal. 139; *State v. Homes*, 57 Amer. Dec. 269, note, page 273; *Starek v. State*, 63 Ind. 285. And the evidence was such as to render such an instruction applicable to this case, and it should have been given. Whether the felonious intent existed at the time the property was taken was a question which should have been left to the jury under the instruction asked. The judgment and order appealed from are reversed, and the court below is instructed to dismiss the information unless good reason for the failure to bring the defendant to trial is shown.

We concur: PATERSON, J.; FOX, J.

3 Cal. Unrep. 288

ELLIS v. WOODBURN. (No. 13,533.)

(Supreme Court of California. Oct. 2, 1890.)

ACTION FOR ATTORNEY'S FEE—CONTINGENT FEE—EVIDENCE—INSTRUCTIONS.

1. In an action for the recovery of attorney fees, the first count of the complaint was on a *quantum meruit*. The second count alleged that defendant promised to pay plaintiff an absolute fee of \$500 for conducting certain litigation, and \$1,000 in addition upon the contingency that plaintiff conducted said litigation successfully. The answer admitted that defendant promised to pay the absolute fee, but denied that he promised to pay any contingent fee. *Held*, that expert testimony was inadmissible to prove what would be a reasonable contingent fee, as the reasonableness of said fee was not in issue. The right to recover such fee depended entirely upon the proof of the alleged promise to pay it, and the performance by plaintiff of his part of the contract.

2. The court instructed the jury that it was admitted that plaintiff did render some service, and "if you do not find that there was an express contract, as stated by either plaintiff or defendant, the services being admitted, and it being admitted that plaintiff has been paid \$500 for his services, if you are satisfied that plaintiff's services were worth more than the \$500 you will render a verdict for plaintiff for any amount above \$500 that you find such services to be worth, not exceeding the sum of \$1,000." *Held*, that the testimony having been as to what would have been a reasonable contingent fee under all the circumstances, and as to what would be a reason-

able attorney's fee, in the case, taking into consideration not only the services actually rendered, but others which the plaintiff agreed to render, and there being no evidence as to what the services actually rendered were worth, it was error to give the instruction.

BEATTY, C. J., dissenting.

Commissioners' decision. In bank. Appeal from superior court, El Dorado county; GEORGE E. WILLIAMS, Judge.

*Blanchard & Swisler*, for appellant. *Rogger Johnson, Geo. H. Ingham, A. C. Ellis, and B. Morgan*, for respondent.

VANCLIEF, C. The plaintiff is an attorney at law, and brought this action to recover a balance of \$1,000, alleged to be due him from the defendant for professional services. The case was tried by a jury, and the trial resulted in a verdict and judgment in favor of the plaintiff for \$1,000. The defendant appeals from the judgment, and also from an order denying his motion for a new trial. The complaint consists of two counts for services rendered in defense of an action prosecuted by the Lake Valley Railroad Company, a corporation, against this defendant, to condemn a right of way over defendant's land, and in conducting negotiations for a compromise of that action. The first count is for the recovery of *quantum meruit* for such services, alleging them to have been reasonably worth \$1,500, and that only \$500 had been paid, and praying judgment for the balance of \$1,000. The second count is for the recovery of a contingent fee of \$1,000 in addition to the \$500 admitted to have been paid upon an alleged express agreement between the plaintiff and defendant, to the effect that plaintiff was to defend the action to condemn defendant's land, and at the same time to assist defendant to compromise that action, by selling to the plaintiff therein the land over which the right of way was sought; and in case the compromise failed, and the defense should be unsuccessful, the plaintiff was to commence proceedings to forfeit the right of the railroad company to operate the proposed road, on the ground of non-user, if that could be proved. For all these services the defendant was to pay the plaintiff \$500 absolutely, and the further sum of \$1,000, on the condition of success, either in negotiating a compromise by sale of the land, or in the defense of the action, or in procuring a judgment forfeiting the franchise of the railroad company. As a performance of this condition it is alleged that, by the advice and assistance of the plaintiff, a compromise of the action to condemn the right of way was effected by a sale of defendant's land to the plaintiff in that action. It is admitted that defendant paid \$500 before the commencement of this action, but it is alleged that he has refused to pay the contingent fee of \$1,000, or any part thereof. The answer of the defendant admits his express promise to pay \$500, for plaintiff's services in defending the action, and in assisting to negotiate a compromise by selling his land, etc., but denies that he agreed to pay \$1,000, or any further sum, upon any condition or contingency whatever; and

alleges, on the contrary, that plaintiff expressly agreed to accept \$500 in full satisfaction for all his services in the defense of that action, and in assisting to negotiate a compromise thereof; and also denies that the agreement extended to services in any contemplated proceeding to forfeit the right of the Lake Valley Railroad Company to operate its road. It appears, and is admitted, that, on the day when the trial of the action to condemn defendant's land was about to be commenced, the case was compromised, through the advice and assistance of the plaintiff in this action, by a sale of the defendant's land to the plaintiff in that action, for a price (\$36,500) which the defendant consented to take, and which was then paid. As to the existence and terms of the express agreement alleged in the second count of the complaint, the plaintiff and defendant were the only witnesses. The plaintiff testified positively to such a contract in all its details; and the defendant testified as positively to the express agreement alleged in his answer, and that there was no agreement or promise to pay any conditional or contingent fee in addition to the absolute fee of \$500. It thus appears that each pleaded and testified to a special express agreement covering the whole subject-matter of the services to be rendered, and the fees or compensation to be paid therefor; but as to the existence of that part of the agreement, as alleged in the complaint, providing for a contingent fee or any compensation in addition to the absolute fee of \$500, their testimony was squarely and irreconcilably conflicting. If the testimony of either is wholly true, there could have been no implied contract as to the compensation to be paid for any part of the services rendered, and consequently no recovery upon the first count of the complaint, since, to justify a verdict for the plaintiff on the first count, the jury must have found (1) that there was no valid express agreement as to what compensation should be paid for the services, or for some part thereof; and (2) that the value of the services actually rendered exceeded the sum of \$500, which had been paid. On the trial of this case, M. P. Bennett, W. S. Wood, and Patrick Reddy were examined as expert witnesses for the plaintiff to prove what would be a reasonable contingent attorney's fee to be paid by defendant to plaintiff, in the action to condemn defendant's land, upon hypothetical statements of facts, embracing all the facts stated in the second count of the complaint, and some others, which were entirely irrelevant. Upon these hypothetical statements Mr. Reddy and Mr. Wood were asked what would be a reasonable contingent fee. To these questions, the attorneys for the defendant objected, on several grounds, among them, that the questions were irrelevant to any issue made by the pleadings. The court overruled the objections, and the witnesses answered, in substance, that, in addition to the absolute fee of \$500, a contingent fee of \$1,000 to \$1,500 would have been a reasonable contingent fee.

1. The appellant's counsel insist that the court erred in overruling their objec-

tion to these questions. I think the objection should have been sustained, for, while there was an issue as to the value of the actual services alleged in the *quantum meruit* count, there was no issue as to the value or reasonableness of the conditional or contingent fee which is the subject of the second count. An obligation to pay a contingent fee is necessarily the creature of an express agreement, and is not implicated in the mere rendition of valuable services by request, as is the unconditional obligation to pay the reasonable value of such services. Nor does the amount of a contingent fee depend upon, or necessarily coincide with, the value of the services for which it is to be paid; nor in the absence of fraud upon its reasonableness. Whether or not the plaintiff was entitled to recover a contingent fee of \$1,000, depended entirely upon proof of the express contract alleged in the second count, and performance of the express conditions of that contract, on his part. That the evidence objected to may have confused the jury to the prejudice of the defendant seems probable from the fact that there was no evidence of the value of the distinct services actually rendered, considered in connection with the fourteenth instruction to the jury.

2. Counsel for appellant further contend that the court erred in giving to the jury the instruction numbered 14, of which the following is a copy: "It is admitted that plaintiff did render some service, and if you do not find that there was an express contract, as stated by either plaintiff or defendant, the services being admitted, also it is admitted that plaintiff has been paid \$500 for his services. If you are satisfied that plaintiff's services were worth more than the \$500, you will render a verdict for plaintiff for any amount above \$500 that you find such services to be worth, not exceeding the sum of \$1,000." I think this instruction erroneous for the reason that there was no evidence tending to prove that the services actually rendered "were worth more than \$500," or any sum whatever. The testimony of Messrs. Wood and Reddy was expressly applicable to a contingent fee alone, in answer to the question, what would have been a reasonable contingent fee under the circumstances stated? And the circumstances stated in this hypothetical question included, not only the conditions upon which it was alleged, in the second count, that the contingent fee was to be paid, but others not alleged in either count. Messrs. Wood and Reddy expressed no opinion as to the distinct value of the services actually rendered. Mr. Bennett expressed the opinion that "\$2,000 would be a reasonable attorney's fee in the case;" but this opinion is not based solely upon the services actually rendered, but partly upon the consideration of plaintiff's "agreement to follow the case throughout, into whatever court it might be taken, and his agreement to prosecute *quo warranto* proceedings for a forfeiture of the charter of the Lake Valley Railroad Company in case of a defeat in the condemnation case." Yet it appears that no services were rendered under these parts of the agree-

ment. Mr. Bennett's opinion was evidently intended to be applicable to the second count alone; but, whether so intended or not, it is not applicable to the first count. Upon what evidence, under the fourteenth instruction, was the jury to become "satisfied that plaintiff's services [actually rendered] were worth more than \$500," if not upon the irrelevant testimony of Messrs. Wood, Reddy, and Bennett? The case seems to have gone to the jury in a tangled state; and, to say the least, it does not appear that the jury may not have been confused and misled to the prejudice of the defendant by the erroneous instruction given, and the irrelevant evidence admitted. I therefore think the judgment and order should be reversed, and a new trial granted.

We concur: GIBSON, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed and a new trial granted.

I dissent: BEATTY, C. J.

#### STATE V. CODY.

(Supreme Court of Oregon. March 5, 1890.)

For majority opinion, see 23 Pac. Rep. 891.

LORD, J. (*dissenting*.) It will be my effort to submit my views briefly, as they can serve no other purpose than to furnish the reasons for my dissent. The main point upon which the case is decided was suggested in the brief, but not argued, and is to the effect that the evidence does not warrant the verdict, or is insufficient to constitute proof of mayhem. It is based on the theory that the evidence only shows a mutual altercation or quarrel suddenly developed into a fight, during the heat and excitement of which the defendant bit out a piece of the under-lip of one Morin. The opinion admits that the offense may be committed as charged, but affirms, as a matter of law, that the evidence does not show that it was purposely or maliciously done, because it was done or committed during the progress of a fight, suddenly precipitated, and in the heat and excitement of passion, when the defendant was incapable of forming a purpose or acting from motives of malice, and therefore there is wanting an essential ingredient to constitute the offense charged.

For the purpose of this case only, I am willing to accept the view that an injury of the character charged, committed on a person during the heat of a fight, not deliberately or purposely sought and forced on the other without his consent and against his protest, will not constitute sufficient proof of mayhem, and is conclusive of this case. As all questions of fact belong exclusively to the jury, the court cannot invade its province except to examine it for the purpose of ascertaining whether there is any evidence, or such a defect in it, as the law declares will not warrant a verdict of guilty. But if there is any evidence tending to show there was matter material for the jury to consider,

although different men might disagree as to the conclusions to be drawn from it, evidence that tended to show that the defendant did not act from sudden heat of passion, whether weak or strong, but that he deliberately and purposely forced a fight on the other against his will and protest, and in the course of which he perpetrated the crime of mayhem, although there may be other evidence tending to contradict it, the material facts involved in the issue are controverted, and the inferences to be drawn from them are uncertain and disputed, and are exclusively for the jury. A motion of this character is said to be equivalent to a demurrer to evidence; that it serves the same purpose, and is to be tested by the same rules; and that as such it not only admits the facts, but also every conclusion which a jury might fairly or reasonably infer from them. In such case it must be borne in mind that the facts submitted in evidence are to be taken as true, not disputed, but admitted, and concede to the state, as plaintiff, every proper inference which may be fairly drawn from them, and that the defendant, granting all this, nevertheless claims that the evidence is insufficient to sustain the crime with which he is charged. In considering a like motion, that eminent jurist, Mr. Justice DILLON, said: "It must be assumed that all the evidence in the case is true, and that the witnesses are credible, for if there are questions relating to the credibility of witnesses, or if what the evidence proves depends upon the credibility of witnesses or upon the proper deduction to be drawn from the evidence, these are questions not for the court, but for the jury under the direction of the court." And referring to the right of the jury to pass upon the evidence, whether weak or strong, citing from another United States case, he says: "It was not proper for the court to wrest this part of the case, more than any other, from the exercise of their judgment. The instructions overlooked the line which separates two separate spheres of duty. Though correlative they are distinct, and it is important to the right administration of justice they should be kept so. It is as much within the province of the jury to decide questions of fact as of the court to decide questions of law. The jury should take the law as laid down by the court, and give it full effect. But its application to the facts, and the facts themselves, it is for them to determine. These are the checks and balances which give to the trial by jury its value. Experience has proved their importance. They are indispensable to the harmony and proper efficacy of the system. Such is the law." *U. S. v. Babcock*, 3 Dill. 578, and cases cited. In the light of the law as thus expounded, and which no one will dispute, it becomes our duty to examine the evidence, and if there is any which, if taken as true, tends to show that the fight was not the sudden outgrowth of a mere altercation or dispute, but was purposely and deliberately inaugurated and prosecuted by the defendant against the man Morin, and that the offense was committed during the progress under such circumstances created by the defendant, and

that these facts present material matter from which to deduce the inference of purpose or motive which prompted the defendant to commit the act charged, then, such facts as evidence being material to the issue, although there is other evidence in contradiction of it, they are exclusively for the consideration of the jury. For no proposition is better settled when the evidence is conflicting or the facts controverted, and the inferences to be drawn from them are uncertain and disputed, although different men equally sensible, and equally impartial, would make different inferences, than that the law commits the case to the decision of the jury under instructions from the court. In advance I may say I shall take the position that there is evidence tending to show that Morin was not engaged in any dispute with the defendant out of which, in the heat of the moment, a sudden fight was precipitated, but that the defendant sought him, and charged him with doing that which he denied, and deliberately struck and forced him to fight, and that when he had him down and at his mercy the defendant bit him on the lip and cheek and finger, while he was calling out to the defendant to "let me up, and not bite me;" and that the defendant paid no heed to his entreaties, and that when Mr. Freeman invoked some one to interfere to stop "the disgraceful fight," the brother of the defendant, in effect, defied any one to interfere, and that when at last he was released from the grasp of his assailant, and Morin got up covered with blood, he dealt him a severe blow in the face. I admit that there is other evidence introduced by the defendant that contradicts this, and tends to establish the state of facts suggested in the opinion, but this only goes to show that the facts in controversy are disputed, and that the evidence is conflicting, in which case its proper solution necessarily depends upon the credibility to be attached to the witnesses, all of which only shows more emphatically and conclusively that the case is for the decision of the jury, and not of the court.

Morin in substance testified that he was engaged at the Holton House as porter, and on the 17th of March, while he was attending to his duties as porter, he had some words with the bell-boy, who insisted on running the elevator up and down in such a manner as to interfere with his work. He says: "I went up in the elevator, and left the elevator there until I fetched the baggage in. I had two more valises to fetch there, and when I was in the room some one rang the bell for the elevator, and the bell-boy Frank ran the elevator down, and when he came down, and stopped there, I warned him not to do so," etc. "Then I came down-stairs with the baggage. I had six trunks to run out on the sidewalk for the expressman, so I run them out, and helped him to put them in the express wagon." It may not be amiss to say, at this point, that I have been thus particular in stating this matter in order to show the frame of mind, the relation of the parties, and the condition of affairs which existed prior to the fight. Continuing, he says: "When I got done



with the work I came in the office, and was sitting by the elevator talking to some one, and Al. Cody called me. He says: 'Frenchy,' (he called me by the name of 'Frenchy.') I says, 'Well,' and I walked to the desk. He was writing a message or a letter, and he said to me, 'The next time you raise your hand on that boy I will break your neck.' I says, 'I didn't raise my hand on that boy.' He replied, 'You are a damned liar,' and struck me in the eye at the same time, in the left eye, with his right hand. He made forward round front of the desk in the office, and clinched me, and I clinched him, and the two of us wrestled around on the floor until some one was going to interfere, and I heard Arthur Perkins say, 'Let them fight it out.' When I fell back on the table he was on the top of me, and he put his teeth into my cheek, there, [exhibiting the mark. That is a part of the evidence this court is unable to see.] Then I pushed him back with my hand, so that he could not disfigure me, and he got hold of my thumb and bit that also, and there is the mark and scar on that yet. I had to get it lanced three times from blood poisoning, and Dr. Wheeler and Dr. Rand could tell you the same thing. When I managed to get my thumb away from him, then he took my lip, and took a piece out of my lip here, and then got hold of my finger here, which has the scar yet." Juror. "Let me see that finger." Witness exhibits to the jury his finger, lip, and cheek. "He got hold of my lip with his teeth, and bit it, and bit a piece off of it, so when I managed to push him away from me, he caught hold of my right finger," etc. Referring to his lip, he said: "The piece was taken off from here. It has healed up. The lip is drawn up again, but it shows disfiguration." It must be borne in mind that some of the statements were visible to the jury, if true, and that they were in a position to estimate their value, and draw the proper inference from them. Continuing, he said: "While he had my finger in his mouth, and chewing it, I said to the people standing around, 'Don't you see that man is biting me, and trying to disfigure me for life?' and no one seemed to pay any attention to it." And right here, let it be observed, if what the witness stated is true, and the jury are the judges of that, are these not facts from which the inference of the defendant's purpose may be drawn? He had bitten him on the cheek and thumb, a piece out of the lip, and lastly on the finger, and the witness evidently thought, by his expression or declarations made while suffering from the pain inflicted by this bite and during the fight, that his purpose was to disfigure him. It certainly ought not to require the argument, "put yourself in his place," to know that these are facts admissible for the purpose of showing the intent with which the offense charged was committed. Recurring to the witness, he says: "I told him, 'Cody, don't bite me,' and that I said three or four times. When I got up, and saw that I was disfigured for life, I got a pistol, and opened fire upon him," etc. Mr. Freeman, who was be-

ing shaved in the barber-shop in the adjoining room, when the fight occurred, and is an officer in the Oregon Railway & Navigation Company, testifies that:—"I heard a scuffle, and I thought I would go and see if I could not stop the trouble, but I found that I could not do anything. I called upon some of them to stop it, and they said: 'Let them fight it out.' Arthur Perkins said: 'Let them fight it out.' I think I asked them why they did not stop this disgraceful fight. Cody's brother was there on the occasion, and seemed to be defending his brother, keeping the crowd back, and after Perkins said, 'Let them fight it out,' this man (Cody's brother) turned and defied anybody to interfere. Morin was underneath Cody, and he said he wanted to be let up, let alone. He said he didn't want to fight, but he wanted to be let alone, 'Take him off,' or something like that. I think that was the words. His condition was bloody. There was blood all over his face. The Frenchman (Morin) was cut badly." Replying as to the character of the fight, he said: "I could not see any blows struck, and did not see any. They seemed to be clinched and close together. Their heads seemed to be close together. The back of Cody's head was next to me, and I could not see what he was doing. Cody was on the top of him. Morin was bloody when they separated, when he got up, and Cody struck him a blow after they got up and separated," etc. Rudolph Marsch, a barber in the Holton House, who was engaged in shaving Mr. Freeman at the time the row occurred, among other things, said: "I saw Cody on top of Morin, and I heard Morin say, 'Let go; don't bite me.' That he heard Morin cry out, 'Let me up,' and 'Don't bite me,' three times," etc. Another witness was Dr. Rand, who described the wound on the lip, the size of it, etc.; that it was caused by the teeth; but, as these facts are not questioned, it is unnecessary to consider them further. Several other witnesses were examined whose testimony is corroborative of the facts that he was bit on the cheek and finger and thumb, and that a piece was bit out of his lip, and one of whom seemed to think that Morin was "chewed" quite severely, but we have not the space nor time for further detail, nor is it necessary, as a sufficient quantity of the testimony is already presented to serve that purpose of my argument, and, I think, to show that the judgment rendered cannot be sustained on the theory propounded.

As the evidence we have recited must be taken as true, and stands confessed, the plaintiff is entitled to every fair and reasonable inference of which it is susceptible, and if it is material, whether weak or strong, or about which men of equal intelligence and fairness might differ, it is for the jury, and cannot be reviewed by the court without a usurpation of their duties, however honestly or unconsciously done. Analyzing this evidence, it shows that, at the time Morin was called to him by the defendant, he was seated by the elevator, chatting, he thinks, with some one, and utterly unconscious of any

hostilities or controversy between himself and defendant, and in fact, so far as he was concerned, there was none by the record. Morin responded promptly to the defendant's summons, saying, "Well," and the first words of the defendant, judged by what he said,—that he would "break Morin's neck,"—were indicative of a spirit and purpose which contemplated a more heinous offense than he subsequently committed. But, waiving this view, they indicated at least a spirit, backed by a purpose already formed, of hostility and injury to Morin; or, if there is any doubt at this point, it is conclusively shown by the defendant's conduct which immediately succeeded, for, when Morin denied his accusation, he instantly called him "a damned liar," and followed it with a blow in his face, and clinched him. Thus far Morin is a passive party, and has done nothing to engender any heat of temper or cause hostilities. There is no controversy or dispute. Nor is there any mutual altercation between them which, from bandying epithets, the temper of the parties growing more and more inflamed, is suddenly and unexpectedly developed into a fight, and during the progress of which the offense charged was committed. In that kind of case the facts might preclude the idea of malice or purpose; but when all the acts and conduct of the other party indicate a determined spirit of hostility, and a purpose to injure, it is a legitimate inference that he intended the consequences inflicted by his acts. The jury have a right to make this inference until by other proof he overcomes it in some way, and establishes the fact to be otherwise. The purpose to injure or malice is formed before the fight and, when he inaugurates it, all that follows is presumed to be incident to that purpose, and the heat of the battle only adds vim to its execution; but, in the other case, the purpose is wanting, and when from word to word the dispute grows into a quarrel, and a fight is suddenly precipitated, the heat of battle, and its excitement, excludes the idea of a deliberately formed purpose or malice. As evidence of facts from which the inference of purpose or malice may be drawn, consider the character of the "disgraceful fight," as Mr. Freeman called it. It was one of biting more than blows. Mr. Freeman saw no blows, except the one after the separation, but he saw their heads together, and the defendant was on top, and the result showed that the defendant was biting. More, the progress of the fight shows that as fast as Morin got loose from his teeth in one place he seized him in another, and so kept on until he had gone from cheek to thumb, lip, and finger, and despite his entreaties to be "let up" and "not to bite me," reiterated three or four times, and his vain appeals to the crowd to witness that the defendant was biting him, etc., the defendant, who seems to have been surrounded by his friends, and one of whom defied interference, paid no heed to his cries. The "disgraceful fight" could not be stopped, and the defendant continued to bite until Morin, when released, looked as if he had encountered a wild

beast, so bitten and bloody was his appearance. Take all these facts together, and consider how the fight was initiated, that it was not a fight struck out suddenly from mutual altercation, but that it was deliberately begun by the defendant, and forced upon Morin despite his protests, and, during its progress, the constancy with which the defendant bit him despite his appeals to let him up, and not bite him, and can it be said that these circumstances do not tend to support the charge, and are not material evidence for the consideration of the jury? Do they not tend to show that the offense was committed, not during the excitement of an unpremeditated, but a premeditated, fight, forced on an unoffending party? Do they not show after the fight was begun that the defendant conducted it with brutality and a determined spirit to injure? Are not these circumstances susceptible of the inference that the act charged was done purposely or maliciously, and whether weak or strong, if they are, the inference is for the jury, and not for the court. A man cannot force a fight on another, and during the progress of it commit the offense charged, and then plead the heat and passion of its brutal prosecution to escape the consequences of his crime. To allow such an argument or defense any ruffian might force a man of peace, and law-abiding, into a fight for the purpose of inflicting such an injury, and when he had consummated his purpose, and disfigured his victim for life, escape the just punishment of his crime. The law will not allow a man to create the conditions which give birth to his crime, and escape the consequences of it. Of course I am considering these facts only for the purpose of showing that there are facts material in the case, and that taken as true, as required to be, they will not warrant the conclusion reached by my associates. Nor does it make any difference that there is other evidence which contradicts it, for that only renders the argument more conclusive that the case is for the decision of a jury, and not for the court. It may be that the result I reach might inflict pain and sorrow, and if so, while I should regret it, it could afford me no excuse for dereliction of duty. I am bound to be governed by the record, and when that, as certified to us, makes a case for the jury, the matter is for them to decide, and beyond our interference. But if I could consent to pass in silence this point, the principle declared in the next is so at variance with my views of the law that I should violate my sense of duty not to record my dissent.

I cannot concur in the proposition that we may look at any other matter in a bill of exceptions save such as has been excepted to and assigned as error. On the contrary, I hold it is only such particular matter as the trial court has been required to decide in the progress of the trial, which has been excepted to, and certified to us as alleged error, that is the subject of appellate review, or of which we can take cognizance. Any other view seems to me to be in conflict with the purpose of a bill of exceptions, and the matter it should

contain. It involves no question of consent or dissent of the defendant, but simply whether the bill of exceptions certified to us that the matter complained of was decided by the court, and excepted to, as error, and put therein for the purpose of having it reviewed and decided in the appellate court. Where the trial court has charged no proposition of law, nor made any decision in the progress of the trial not excepted to and reserved for the appellate court, or where the trial court has omitted to charge some matters that counsel claimed it ought to have charged, but to which counsel did not call the attention of the court, and require it to so charge, so that the point claimed, and the decision upon it, may be excepted to, and put in the record or bill of exceptions, and certified to us, as alleged error, there is nothing in the record for our cognizance, and which we can examine and decide. The fact that the whole of the evidence may be in the record for some particular assignment of error gives us no right to pry into it to discover some other error not alleged, or that all of the instructions are included in it to serve some special purpose assigned as error, as that such instructions do not cover certain instructions asked and refused and excepted to as error, gives us cognizance or the right to examine and consider any other error than that reserved and assigned, and to which we are bound to confine our decision. No other is certified to us by the trial court, and, in legal contemplation, no other can be before us for our cognizance. A "bill of exceptions" is defined to be a statement in writing, on an objection made by a party to the decision of the court on a point of law, clearly stating the objection, with the facts and circumstances upon which it is founded, and, in order to attest its accuracy, signed and sealed by the judge or court who made the decision, the object being to put the decision objected to upon record for the information of the court having cognizance of the cause in error. 2 Amer. & Eng. Enc. Law, 218. It was said by this court in *State v. Drake*, 11 Or. 398, 4 Pac. Rep. 1204: "Originally at common law no matter could be assigned as error except such as appeared in the record, and, as the parties were bound by it as absolute verity, they were not allowed to impugn or contradict it by averment. The rulings of the court in the progress of the trial, and often of vital importance, did not appear in the record, nor were there any means of introducing them into it, and the consequence was that the party believing himself aggrieved was without remedy. To obviate and remedy this defect, the statute, 2 Westm. (13 Ed. I.) c. 31, was passed, which established in practice what is now known as a bill of exceptions. Its object was to bring in the record the particular matter excepted to and supposed to be error, and which the record would not otherwise disclose, to lay the foundation for proceedings in error. It is required therefore to be in writing, clearly stating the point wherein the court is supposed to have erred, with the necessary facts and circumstances to attest the accuracy and

authority of which it must be signed and sealed by the judge who made the ruling or decision." It must be clear, then, that a bill of exceptions only lies to such errors of law as have been made during the progress of the trial, and to which counsel have reserved exceptions, and that it can properly only contain such matter as on which the decision to be reviewed is founded, and only those to which such decision applies, whether these be made in deciding as to the admissibility of evidence, instructions, or in accepting or rejecting witnesses, etc. If I am right in this view, the circuit court is reversed for an error not alleged and certified to us, and not, therefore, in the bill of exceptions for our information and cognizance. Nor is any constitutional right of the defendant waived or violated. The case of *Cancemi v. People*, 18 N. Y. 128, has no relevancy to the point here involved, either directly or by analogy. That involved the right of an accused to be tried by a greater or less number than 12 men, which the fathers of the constitution in their wisdom saw fit to provide. That the weight of judicial authority in criminal cases is that such right cannot be waived, no one disputes; and yet a contrary view is supported by authority, with reasons not easy to answer. "A conviction," said SEEVERS, J. "can only be legally obtained in a criminal action upon competent evidence, yet, if the defendant falls at the proper time to object to such as is incompetent, he cannot afterwards do so. He has a constitutional right to a speedy trial, and yet he may waive this provision by obtaining a continuance. A plea of guilty ordinarily dispenses with a jury trial, and it is thereby waived. The defendant may have consented to be tried by eleven jurors because his witnesses were then present, and he might not be able to get them again, or that it was best that he should be tried by the jury as thus constituted. Why should he not be permitted to do so? Why hamper him in this respect? Why restrain his liberty or right to do as he believed for his own interests?" *State v. Kaufman*, 51 Iowa, 579, 2 N. W. Rep. 275. It is seen, then, that the argument is controverted, but what pertinency or analogy can it have to the point here involved?

The omission of a judge to charge that the defendant may be convicted of a lesser crime than the offense charged is not a subject of constitutional provision, and involves no question of constitutional right of the accused to be waived or otherwise. The constitutional provision giving to a party a right to trial by jury means a common-law jury of 12 men, and no other number of men, greater or less, will meet the requirements of this provision. The reason is that consent cannot give the court jurisdiction or authorize a substantial change in its fundamental mode of proceeding that can neither be enlarged nor restricted. *People v. Guldici*, 100 N. Y. 508, 3 N. E. Rep. 493. But we look in vain for any provision out of which may be evolved the idea that an omission in the charge of a judge, in a criminal action, involves any constitutional right or privilege of the accused which is fatal to his

trial, and renders it illegal and void. It is not a matter which affects jurisdiction or the mode of proceeding. Such an omission stands upon the same footing as any other matter which may be omitted in the charge, which, to be made available, must be reserved by exception, and assigned as error, to be the subject of review in the appellate court. In such case the inquiry is not one of constitutional law, and no arguments drawn from that source have any relevancy or applicability. Again, it is admitted in the opinion that the weight of authority is against it, and to my mind this implies that the weight of reason is against it, unless the reason assigned in the opinion outweighs them. "In criminal actions," said Mr. Chief Justice SHAW, "by the form in which the issue is made up, the jury pass upon the whole matter of law and fact. It is the duty of the judge to give such instructions to the jury in matters of law as in his judgment may be calculated to aid and assist them in forming their verdict. But he is not bound to give instructions upon any particular questions, unless his attention is called to them, and they are particularly requested, in which case, if pertinent, instructions will be given, and, if the judge thinks proper, he will reserve the question of their correctness." *Com. v. Kneeland*, 20 Pick. 222. Mr. Chief Justice SHEPLEY says: "The court must first be requested to charge upon the point made, and if the request is refused exceptions may be taken." *State v. Straw*, 33 Me. 554. The reason of the rule, says Mr. Thompson on Trials, "rests upon the soundest foundation. The facts of the case come to the mind of the judge as matters of first impression, and it will often be extremely difficult for him, in the short time allowed for a trial before a jury, and in the midst of such a trial, to prepare a series of instructions applicable to all the hypotheses presented by the evidence. On the other hand, counsel are presumed to have studied their case beforehand, to come to the court with a \* \* \* full knowledge of the law applicable to those facts. It is therefore their duty to give attention to the charge of the judge, and, if in their opinion, he omits to give direction as to the law applicable to any essential feature of the evidence, to call his attention to the omission, and to the request appropriate supplementary instructions; and, where they fail to call his attention to something which he may fairly be supposed to have omitted from inadvertence, they ought not to be allowed to complain of the omission in an appellate court. A rule which would allow them to do so would be extremely inconvenient. It would multiply new trials and reversals, and often on grounds which have no connection whatever with the merits." 2 *Thomp. Trials*, § 2341. Does any one suppose if the learned counsel for the defendant had observed the requirements of this rule, and called the attention of the court to the matter now claimed to be prejudicial, that he would have had any ground for complaint? And can they take advantage of an omission which duty to their client and the trial court required them to point

out, and constitute it an assignment of error with which to reserve the judgment? As that distinguished lawyer, Gen. WILLIAMS, when judge of this tribunal, well said: "Prisoners in our courts are provided with counsel, confronted with the witnesses against them, allowed to except to all the court says and does upon the trial, and it is no hardship to say that, if they have any objections to the acts of the tribunal before whom they are tried, they shall make their objections known or forever after hold their peace." *O'Kelly v. Territory*, 1 Or. 58. In all these matters the defendant is represented by his counsel, who are supposed to be skilled and learned in the law, and vigilant, attentive, and faithful to his interests according to the injunction of their oath, and upon whom devolves the duty to see that all the requirements of the law are observed so that he may have a fair trial, and to prevent and guard against any failure therein, either of omission or commission, in the trial court, to point out and reserve the matter prejudicial to his client, and save it by exceptions for the consideration and judgment of the appellate tribunal. Such a rule not only prevents unnecessary delay and expense, but new trials and reversals needlessly multiplied, and often without regard to the merits; but what is more important, it makes it the duty of counsel, although representing diverse interests as to clients, to mutually aid the court in rightly administering the law. Any other rule seems to me to be subversive of the soundest principles of justice regulating trials, and to invite to practices or conduct which are calculated to lower the standard of professional ethics, and to obstruct the proper administration of the law. In England such a rule has never found countenance, and it is impossible under their rules of practice. Nor ought we to tolerate it. The law is not a scheme of chicanery contrived by knaves to outwit justice, but a system of enlightened principles devised by the "collected reason of ages" to establish justice, and committed to the courts to be administered for the protection of society, and the punishment of criminals. A man who bites, when he fights, like a wild beast, lacerating and disfiguring his victim, is not an object worthy of admiration or sympathy, or even likely to be respected or tolerated by those who delight in brutal sports, and regard pugilism as a manly art; nor is he deserving of any other consideration at the hands of the court than the bare law affords; nor for whom ought it to overturn a rule of law, founded in reason, and supported by the unquestioned weight of authority.

#### WHEELER v. WHEELER.

(*Supreme Court of Oregon*. Dec. 23, 1889.)

#### MARRIAGE—DIVORCE—RECRIMINATION.

1. The contract of marriage, unlike ordinary contracts, the state is specially interested in preserving unbroken, and the contracting parties cannot annul it, nor the court, except for the causes specified in the statute, and only then up-

on satisfactory evidence that such cause or causes exist.

2. Where the party asking for a divorce is liable to a charge which is a cause for divorce, it will prevent him from obtaining such divorce, although the wife may have misconducted herself.

(*Syllabus by the Court.*)

Appeal from circuit court, Multnomah county.

*Williams & Wood* and *F. V. Drake*, for appellant. *James Gleason*, for respondent.

**LORD, J.** The facts are these: On March 8, 1889, the appellant, Ella Wheeler, filed her complaint against the respondent, C. H. Wheeler, based on a late act of the legislature, to compel her husband, the respondent, to contribute to her support. The respondent appeared and answered, and at the same time filed a complaint for a divorce from the appellant, his wife; but in his answer, among other things, set forth the fact that he had commenced a suit for divorce against his wife, and prayed a suspension of proceedings until the determination of his suit for divorce. In the proceedings for divorce, the respondent answered denying all the material allegations, and alleging his neglect to provide a support for her, etc., and praying that his complaint might be dismissed. After all issues had been joined in the divorce suit, the evidence was taken, and the case argued by counsel, and the court found that the appellant had been guilty of cruel and inhuman treatment towards the respondent by the use of opprobrious epithets, false accusations of marital infidelity, and exasperating conduct, etc., and, as a conclusion of law, found that the respondent was entitled to a divorce, which was decreed, and also entered a decree dismissing the petition for support, from both of which decrees these appeals are taken.

As the cases stand, the suit for divorce must be first disposed of, and when that is done the petition for support can be easily determined upon the facts as disclosed by this record. The ground of the complaint is cruel and inhuman treatment, and indignities, rendering life burdensome. The particular acts which make up the *gravamen* of these charges consist in accusing the defendant of adultery, calling him opprobrious names, and the habit contracted by the defendant in drinking whisky and using morphine, all of which, it is alleged, greatly annoyed the respondent, and made his life burdensome. Passing the criticism suggested as to the complaint, and entering directly upon the merits with as little detail as possible, our first duty is to inquire whether the respondent has proven or sustained the allegations of his complaint. And in pursuing this inquiry it is our duty to remember that the contract of marriage, unlike other contracts, the state is specially interested in preserving unbroken, and that the contracting parties cannot annul it, nor the court, except for the causes specified in the statute, and only then when satisfactory evidence that such cause or causes exist. "Divorces," said **STRONG, J.**, "ought never to be de-

creed without clear and satisfactory evidence of the wrong which the law treats as justifying cause for a divorce." *Edmond's Appeal*, 57 Pa. St. 234. The evidence discloses that the respondent is a physician, and was married to the appellant in December of the year 1881. The first charge he makes is that the appellant accused him of adultery with one of his patients in a little over a year after their marriage, but it is evident from his own testimony, if it shall be considered that such an accusation was made, that he did not treat it seriously, nor did it cause him any mental concern, sufficient, at least, to disturb his happiness, and render his life burdensome. Whatever may have succeeded that period, his own evidence bears testimony, which covers this charge, that their married life was tranquil and happy, free from bickerings and quarrels, or any causes or accusations to irritate or disturb its peaceful tenor. The appellant flatly contradicts it, and under the rules of law, which must guide us, the allegation is not proven. The next count against the appellant is that without cause or provocation, she applied, in a loud and violent manner, opprobrious epithets to the respondent, in the presence of other persons greatly to his mortification and annoyance. It appears, at the time when this scene occurred, that it was the occasion commonly known as the "Villard Demonstration," in honor of the completion to Portland of the Northern Pacific Railroad, and suffice it to say that it was an important event which the citizens sought to make memorable by various public demonstrations during the day, and illuminations during the evening. Necessarily on such an occasion, the spectacular displays were numerous and attractive, the streets thronged with sight-seekers, on foot and in carriages, to witness the various displays designed for amusement and entertainment, and altogether the celebration was not only conspicuous for general rejoicing and congratulations but, it furnished an opportunity for many pleasant social interchanges among friends and acquaintances. Without detail, on the last evening of the celebration the respondent took his wife down town in her buggy, drove around the streets a short time, and then took her home, and as he was driving back, at the instance of a friend, took his wife in the buggy and again drove around for awhile, and then back to the livery stable, where, as he says, his wife met him, all ablaze with indignation, and applied to him violent and abusive names. The appellant's version of this affair is that she was anxious to see the sights and enjoy the celebration, and that her husband only drove around, while she was with him, about a half of an hour, early in the evening, between 8 and 9 o'clock, and then took her home, and, contrary to her wishes, and despite her protests, required her to return to her rooms, promising to return himself immediately. Instead of doing this he was spending the remainder of the evening in the way described by himself, and when he returned to the livery stable she confesses to have been indignant, and

to have reproached him for his conduct. He claims also that his object in driving back after he left her was to attend to a business engagement, and that the incident of taking another lady riding was merely accidental. Be that so, still his conduct was not free from fault, and did much to provoke the outburst from his wife. It was an occasion when it was natural that she should wish to enjoy the scenes and sights as others were doing; and why should she be deprived of this pleasure? She remonstrated, but of no avail, and when she found that another lady had supplanted her place, concede there was nothing improper, it was in the nature of the circumstances that she should be resentful and indignant. Better, no doubt, it would have been to have restrained her temper and her tongue; but better, too, it would have been if he had on such an occasion granted his wife's reasonable request, especially when no circumstance is disclosed by the evidence to justify its refusal. A review of all the circumstances in connection with this unhappy affair, which seems to be the point in their lives when their paths began to diverge, and the charges alleged in respect to the same lady in the succeeding paragraph of the complaint, exhibit only contradictory and conflicting statements in many particulars, mutual faults and re- crimination, and in both an absence of a spirit of forbearance and conciliation. There is, however, one of the specifications in which it is alleged that the appellant accused the respondent of adultery with one Mrs. C., which is admitted. As to this woman, the testimony of both agree that such accusations were made, and it is important to ascertain whether they were made in good or bad faith, and all the circumstances in which such accusations originated. His testimony is as follows: "Mrs. C. was a patient of mine. She was living with her husband at the Merchants' Hotel, and would come to the office. For some reason Mrs. Wheeler supposed she was coming there for other purposes than professional. She was purely a professional patient. Her presence would create such anger in Mrs. Wheeler that she was simply wild. She would exclaim: 'Why do you have that woman running here after you? What do you want her coming here for? Why do you permit it?' And finally I told the lady that she must not come to the office any more. She accused me of having intercourse with the woman, and would go into a rage; would make her appearance where she could see her, and she saw everybody that came." There are circumstances connected with the accusations at the time made and his conduct in respect to them that furnish at least reasonable ground for suspicion, and when this is the consequence such charges are not made wantonly and in bad faith. If a wife has reason to suspect her husband of infidelity, it is not cruel or inhuman to charge him with it. *Kennedy v. Kennedy*, 73 N. Y. 374. Nor is it a matter of surprise that it should cause her annoyance and irritation, which she would exhibit in rudeness of language and of temper. To avoid pro-

lixity, and obviate any more than a reference to this disgusting affair, I shall forbear giving her version of the matter in detail, and content myself with saying that his conduct about the possession of the napkin, and the determined resistance he manifested to it, is hardly consistent with the trifling and inconsequential cause to which he ascribes it. There is something significant, too, in the fact that, as a witness, the respondent does not swear that his wife's accusations as to this woman were false, or that he was not guilty as charged. It is not our purpose to say that he was, only that his conduct furnishes ground for suspicion, and that when his wife thought she had discovered the proof, his acts were more consistent with guilt than innocence. The bare facts are that shortly after this woman's visit at his office, and when his wife believed the adultery was committed, a napkin was found which she claimed bore evidence of the adulterous act, and he claimed was caused by cleaning an apple, there ensued a scene, a row, marked by conduct on her part that plainly indicated that she was intensely jealous and enraged, and uttered, whether true or false, her honest convictions of his infidelity, and by conduct on his part that exhibited a fierce determination to prevent her from obtaining the possession of the napkin, as if it contained some "damning proof" of his guilt. In this view the circumstance was unworthy of the demonstration he exhibited, and in her view it was consistent with the guilty act which she charged, so that while she made the charges, and admits them, she made them in good faith and believing them to be true. The last allegation, in which he alleges she accused him of adultery, was with a young lady visiting them from Oakland, Cal., all of which is as specifically denied by her. Their testimony in respect to this charge is in irreconcilable conflict, but the circumstances of her visit, of their old friendship, of the young lady's accomplishments, and the fact that his wife and this young lady continued to be friends afterwards, and interchanged letters, and all the facts connected therewith, do not furnish any reason for such accusation, and his wife not only emphatically denies it, but expresses extreme chagrin that the young lady should have been made the subject of such an allegation in the complaint.

This ends all the allegations in respect to the charges of adultery alleged to have been made by the appellant against her husband, and there only remains to be considered two other specifications of conduct on the part of his wife, which he avers, greatly annoyed him, and rendered his life burdensome. The chief of these consists in the habit, which, he alleges she contracted since marriage, of drinking whisky and using chloral and morphine, and he specifies one occasion in which he found her on the floor in a state of stupor from its effects, and that when aroused she behaved in an indecent and unladylike manner. There is no proof in this record that the appellant was addicted to drinking or the use of opiates as a contracted habit. Take all his testimony on this point, and exclude

all other, and the amount used would not be sufficient to indicate a habit. The instances referred to of purchases by her are singularly few, for one supposed to be afflicted with this habit; and the one relied upon turns out, upon independent testimony, not to have been whisky, but claret ordered for domestic purposes. She denies the whole matter *in toto*. I have looked through the testimony, and I can find no evidence upon which to sustain the charge. That she was at times nervous and excitable, and that, with the concurrence of her husband, another physician was called in on one occasion, and that it was their joint opinion that some opiate had better be administered, is true. But there is nothing in that occasion or the circumstances which indicates that she was in that nervous and excited condition as the result of the whisky or opium habit. That she may have indulged in these things occasionally may be true; the evidence of her husband would lead to that inference, but it falls far short of the allegations to which she has responded by denial. So, too, I am inclined to the impression, taking their testimony as a whole, that, whatever may have been her condition on the particular occasion which forms the specification of this charge, she behaved in an unladylike manner, and exhibited a rudeness of temper and speech of which she ought to be ashamed. But, in admitting this, the inference is not to be drawn that I think the allegation is sustained by the evidence, or, if it was, in view of some acts and circumstances to which I shall presently refer, although she may have caused him annoyance and discomfort, that he is entitled to a divorce. The fact is that he does not swear directly that he ever saw his wife intoxicated by the use of whisky, but seeks to insinuate the habit of its use, and the inference of drunkenness on the occasion referred to. The last ground of complaint is that his wife kept up a system of espionage upon his actions and his patients; that in cleaning the steps she would sweep the dust into the face of his lady patients, and that she refused to attend to her domestic duties, etc. There is no doubt that his wife was jealous, and, like all such, was spying on his actions, and perhaps some of his patients, annoying him, and making herself ridiculous. There is some evidence, too, that, in cleaning the stairs leading to her husband's office, she swept the dust in the face of a lady ascending. Her own explanation of the affair is that it was an accident, and the form of the stairs has some tendency to confirm it, or at least that it would occur in the way she has explained. As to the refusal to cook meals, wash dishes, etc., these only indicate the state of mind resulting from their altercations, occurring more frequently until the end is reached in separation, and these proceedings. In this case the husband occupies the position of assailant, and in the view thus far considered I have searched only for evidence, *pro* and *con*, in proof and disproof, of the causes alleged in the complaint.

The evidence has not been of that clear and satisfactory character upon which courts of equity act in suits for divorce,

and the result is that the relief prayed for must be denied. But there are some other facts which have been admitted, bearing on the conduct of each, that emphasizes our duty as to him, and weakens her claim to consideration for support. Their joint evidence bears testimony that the first years of their married life were tranquil and happy, but after the Villard celebration the clouds began to lower, and their paths to diverge. She became jealous, and trifling circumstances were often regarded with suspicion and distrust, and sometimes seemed to make her frenzied with excitement and passion. At such times her temper was resentful and belligerent, and she exhibited no spirit of conciliation or concession for the sake of peace and harmony, but she retaliates to the full extent of her ability, and often with much success. Nor does she seem on many occasions to justly appreciate her duties and responsibilities, but acts without a proper regard for his feelings or wishes, and in a spirit and manner calculated and designed to annoy and exasperate him. But while we cannot approve or justify her conduct, yet much of it was provoked by him, and can find no palliation or justification of his ill treatment of her. By his own confession he has more than once brutally beaten her, and his only apology was that he was aggravated beyond control. "I struck her upon the face, and blacked her eyes. I pouliticed her eyes, and done everything I could in order to try to allay whatever damage I had done; but I was exasperated beyond control." A great judge, more than a half century ago, said: "The moral sense of this community at this day revolts at the idea that a husband may inflict personal chastisement upon his wife, even for the most outrageous conduct." RICHARDSON, J., in *Poor v. Poor*, 8 N. H. 313. There is no doubt that he felt badly after the assault, and regretted it, for she says: "When I recovered consciousness I was lying on the floor, and he was bathing the blood from my face, and crying. He felt very badly, and said he thought he had killed me." Nor was this the only occasion he laid violent hands upon his wife, and wronged and insulted her with barbarous blows, at the bare mention of which his cheeks ought to tingle with the blush of shame. However outrageous her conduct, or however much it may have harassed and exasperated him, the moral sense of this age will not permit a husband to find redress for his grievances in the degrading and cowardly task of inflicting personal chastisement on his wife. But we forbear further enumeration. While he charges his wife with abusive epithets, he admits that he retaliated in kind, and as two wrongs never made one right, in view of her testimony that he called her vilest names, he has no standing upon this ground. There is another matter bearing on the relations of these parties that cannot well be omitted. In consequence of his remaining out of nights to play poker, he admits that she frequently and bitterly remonstrated with him about his absence, and when asked if its effects were not to make her nervous and ex-



cited, he answered: "Probably it excited her as much as her actions excited me." In her testimony she says she remonstrated with him,—"begged him. I implored him on my knees, and told him it was killing me that it would drive me insane; that could not stand the mental strain." She evidently felt that the habit was gaining the ascendancy, and breaking down the moral forces of his character, when the fatal allurements of the gambling table could supplant the attractions of home, and consign her to loneliness and neglect, and foreshadowed in her mind the wretchedness and the desolation which would ultimately come upon their lives, and darken their hearthstone. It is hardly necessary to pursue the investigation further, for, to put the case most favorable for the respondent, he was guilty at least of such conduct as would prevent him from obtaining a divorce. In considering these charges, it may not be amiss to say that the parties and their witnesses are all strangers to me, and that I have endeavored, where I could, to throw a mantle over their faults and errors. Had the conduct of the wife been different, free from blame, her petition for support would be entitled to consideration. But the fact cannot be ignored that her conduct has been resentful and unforgiving and subjected her husband to many annoyances, often for the evident purpose of exasperating him; nor has she evinced a proper regard for his wishes in their household affairs, or discharged her duties, under the circumstances, in a way calculated to soften asperities of temper or to promote domestic peace and harmony. We are unable, therefore, to allow her the relief for which she asks; but on her return, or when she changes her conduct and puts herself in a position that puts him in the wrong, this court will be open to her relief. It follows that the decree for divorce must be reversed, and the bill dismissed.

#### WHEELER v. WHEELER.

(Supreme Court of Oregon. Dec. 23, 1889.)

Appeal from circuit court, Multnomah county. *Williams & Wood* and *F. V. Drake*, for appellant. *James Gleason*, for respondent.

PER CURIAM. For the reasons stated in the foregoing opinion, the complaint is dismissed; and, in view of the circumstances, the defendant, C. H. Wheeler, will pay all costs and disbursements. And it is so ordered.

#### INGALLS v. CAMPBELL.

(Supreme Court of Oregon. Dec. 16, 1889.)

##### PARENT AND CHILD—APPOINTMENT OF GUARDIAN—RIGHTS OF MOTHER.

1. The common law did not recognize the right of either parent to appoint a testamentary guardian for his children. The right was conferred on the father by the statute, 12 Car. II., and the statute, shorn of its verbiage, has been substantially re-enacted in this state. This statute did not impose or recognize any civil disabilities in the wife, nor create any civil disability in her which did not previously exist, but was a new or added right conferred upon the father, and left the mother where she was before its enactment. *Held*, therefore, that the want of capacity in the wife to make such an appoint-

ment is not a civil disability created by section 2885 of Hill's Code, and is not repealed by said section.

2. As the father enjoyed the right to the full and complete control of his children before the enactment of the statute giving him the right to appoint a testamentary guardian, and as such right to the custody of the children, and management of their estates, is not dependent upon it, or essential to its existence, and as section 2878 does not refer in terms, or otherwise, to section 2885, *held*, that the effect of section 2878 is to so modify or repeal, in whole or in part, so much of section 2885 as is incompatible with the mother's right to the full and complete control of the children and their estates at the father's death as the father has at the mother's death, but does not confer upon the mother the right to appoint a guardian.

(Syllabus by the Court.)

Appeal from circuit court, Multnomah county.

*C. B. Bellinger* and *R. & E. B. Williams*, for appellant. *Williams & Wood* and *Mitchell & Tanner*, for respondent.

LORD, J. The facts in this case are these: On the 5th day of April, 1889, Esther Holladay, widow of Ben Holladay, died, leaving a will in which she appointed Gen. Rufus Ingalls executor thereof, and the guardian of her two children, Linda Holladay and Ben Campbell Holladay. The will was regularly proven and admitted to probate in the county court on the 20th day of April, 1889, and Gen. Ingalls was appointed executor of the will; but in regard to the matter of his application to be appointed guardian of the children, in accordance with the will of the mother, Harriet B. Campbell, the grandmother of said children, Maria A. Smith and Mrs. William H. Barnhart, the aunts, and Joseph Holladay, the uncle, of said children, filed an answer alleging that they were the nearest relatives of said children, and united in asking the appointment of said Harriet B. Campbell as the guardian of said children. Upon due consideration, the county court granted the prayer of said relatives for the appointment of the said Harriet B. Campbell, which, upon appeal to the circuit court, was reversed, and from that decision this appeal is taken.

The question involved, and to be decided, is the right of a mother to appoint by will a guardian for her children. The common law did not recognize the right of a testator to appoint a guardian for his children during their minority. While it made various provisions for the care of infants, and their estates, the right to make any testamentary dispositions of the guardianship of the children was denied or withheld. It was years after the power to dispose of his property by will had been established by various statutes that the right to make a testamentary disposition of the guardianship of his minor children was conferred. This right was given by the statute of 12 Car. II. c. 24, and, by the words of the act, the father only can appoint the guardian or guardians, who shall have the custody of his children, and the control of their estates, during minority. The power thus conferred, when exercised to its fullest extent, invested the testamentary guardian with an au-

thority over the children, and control of their estates, almost as co-extensive as that enjoyed by the father himself. His appointment supersedes all other guardians, and all control on the part of the mother. So absolute is this power that it may be exerted in utter disregard of the claims of maternal affection, and despite its protests, and commit the custody of the children to a stranger, and embitter the life of the mother by depriving her of the society of her offspring. It matters not how amiable and refined she may be, how competent in ever respect to direct the education, and to participate, at least, in the custody of her children, the paramount right of the testamentary guardian deprives her of all right to interfere with his custody of them, or their education. Said Lord Chancellor COTTENHAM: "It is proper that mothers of children thus circumstanced should know that they have no right as such to interfere with the testamentary guardians, and if, under the peculiar circumstances, I think it proper now to leave the child in the custody of the mother, it is not in respect of right in that mother, but it is in consequence of that power which the court has of controlling the power of testamentary guardians." *Talbot v. Earl of Shrewsbury*, 4 Myne & C. 683. It was the legal effect of the fact of guardianship that constituted him a trustee, and, like all such, subject to the general supervision of chancery to control his actions in a proper case. *Beaufort v. Berty*, 1 P. Wms. 702. While the court of chancery had thus the power to control his actions, neither the statute nor the court recognized any right in the mother to the custody and control of her children; but, on the contrary, the power conferred on the father to make a testamentary disposition of his children was unlimited, and might be exerted against his unborn child. Under no circumstances could she exercise the power to appoint a testamentary guardian, and whenever she has made such appointment the courts have declared it absolutely void. *Ex parte Edwards*, 3 Atk. 519; *Ex parte Bell*, 2 Tenn. Ch. 327. In all this the statute was in accord with the harsh features of the common law, which, in the marital relations, destroyed the wife's personality, deprived her of her property, and denied her the right of the custody of her children, save such as her husband might vouchsafe. Cases there are, which show so absolute and unqualified was his right to the custody of his children, and to take them from the mother, that, irrespective of her merits, and his demerits, in all the relations of domestic life, he could exclude her from all access to them, and might do this even from the worst of motives. *Rex v. Greenhill*, 4 Adol. & E. 624. See, also, *Forsyth, Infants*, 11, 12. It is to the credit of the American courts that they have been guided by a more liberal policy than those of England in awarding the custody of the children to the mother, and have regarded their welfare and interest in such controversies as the paramount obligation to be considered. *Mercin v. People*, 25 Wend. 104; *Schouler, Dom. Rel.* 339, 340; *Hurd, Hab. Corp.* 472 et seq. Yet,

notwithstanding the liberality of our courts in this regard, the statute of 12 Car. II. has been re-enacted in most of the states, including our own state, shorn only of its verbose phraseology, but without any intention, it is thought, of varying its construction. 2 Kent, Comm. 225. It is true that in some of these states, of late years, the injustice to which it subjected mothers provoked a revolt in public sentiment, and resulted in legislation which has softened its rigors, or so materially changed its features as to place the parents comparatively upon an equality in the right of the custody of the children. And while the spirit of modern progress has characterized our legislation, leading to the removal of numerous disabilities created by the common law, and to a recognition of her individuality, and of her rights of property, and, what is equally or more sacred to her, the right to direct and control the training and custody of her offspring, in case of divorce, where the husband is in fault, or shown in any controversy between them to be an unfit custodian of them, yet this relic of barbarism in the form of a statute is still in force in our own state, unless its rigors have been softened or repealed by the act of 1880. With a full knowledge, then, of the injustice which may result to the mother from the operation of this statute, we are to turn to the statute of 1880 in order to determine whether its effect has been to give the mother the right to appoint a testamentary guardian for her children in the same manner as the father could do; for, unless the statute works this result, the judgment must be reversed.

Our statute permitting the father to appoint a guardian by will is as follows: "Every father may by his last will, in writing, appoint a guardian or guardians for any of his children, whether born at the time of making the will or afterwards, to continue during the minority of the child, or for a less time," etc. Section 2385, Hill's Code. "All laws which impose or recognize civil disabilities upon a wife, which are not imposed or recognized as existing in the husband, are hereby repealed: provided, that this act shall not confer the right to vote or hold office upon the wife, except as is otherwise provided by law; and for any unjust usurpation of her property or natural rights she shall have the same right to appeal, in her own name alone, to the courts of law or equity for redress that the husband has." Section 2998, Id. "Henceforth, the rights and responsibilities of the parents, in the absence of misconduct, shall be equal, and the mother shall be as fully entitled to the custody and control of the children and their earnings as the father, and in case of the father's death the mother shall come into as full and complete control of the children and their estate as the father does in case of the mother's death. All laws and portions of laws inconsistent with the foregoing are hereby repealed." Section 2878, Id. The two last sections constitute the act of 1880, and the contention is that they give the mother the same right to appoint a testamentary guardian

in case of the father's death as the father would have in case of the mother's death. The first section (2998) provides that "all laws which impose or recognize civil disabilities upon the wife which are not imposed and recognized as existing as to the husband are hereby repealed." "All laws" would include both the statutory and common law; and whatever of these that impose or recognize civil disabilities in the one that is not recognized in the other are hereby repealed. The manifest object of the section is to repeal, not to modify or amend, all laws, whether common or statutory, which have the effect to impose or recognize such civil disabilities. What are the "civil disabilities" of the wife? "Civil disabilities" means "disqualification created by law." And, Law Dict. "Civil Disability." To the wife it means some disqualification created by or the result of law, which renders her incapable of doing certain acts or things. At common law, marriage merged the existence of the wife into that of the husband, and constituted them one person in the law. The legal effect of the coverture was to disendow her of her property, and to civilly disqualify her to do many other acts which she was qualified to do as a *feme sole*. At common law the right to make a testamentary disposition of the guardianship of children did not exist. Neither parent had the authority to appoint a guardian by deed or will during the minority of the children. The right was conferred upon the father by the statute of 12 Car. II., and created in him a legal capacity to make such appointment, which, before the statute, the law did not accord to any person. The want of capacity in the mother to make such a testamentary disposition did not arise by reason of the right conferred upon the father, or of the marriage, because before the act, and while the marriage might have existed, neither would have been qualified to make such a testamentary appointment. It was simply a right conferred upon the father, and not one denied the mother by the statute, for the statute left her just where she was before it was enacted. So to speak, it was a case where one was taken, and the other was left,—not an unusual thing in that age. The effect, therefore, of the statute was not to create any disqualification in the wife, but to confer a new power on the father. In substance, the statute of 12 Car. II. has been adopted or re-enacted in this state, and provides that "every father" may appoint a testamentary guardian for his children during their minority. The same principle of reasoning applies to this statute. By it the father has conferred upon him the right to appoint a guardian by will. It invests him with the capacity to do that act, but it leaves the mother as she was, and as he was, before its enactment, without such capacity. As between them, he is qualified to appoint a testamentary guardian, and she is not; but his qualification was derived from statute, but her disqualification was not,—that existed before the statute, but was not the effect of it. Hence a want of power or capacity in the wife or mother to appoint a testa-

mentary guardian is not a civil disability, created by the statute, or the result of its enactment. When, therefore, section 2998 says, "all laws which impose or recognize civil disabilities in the wife," etc., "are hereby repealed," it does not refer to or include section 2885,—statute, as we have called it,—authorizing the father to make such testamentary appointment, as that section we have shown does not create any civil disability in the wife, and consequently cannot have the effect to impose or recognize any civil disabilities upon her. Our conclusion, then, is that the statute, or section 2885, must stand intact as it has been enacted, so far as section 2998 is concerned. Nor is this result different from what counsel for the appellant would have it, since the plain purpose of section 2998 is not to amend or modify, but to repeal; and to give it that effect upon section 2885 would be fatal to their claim.

We now come to construe section 2878, and it is upon the latter clause of this section that counsel more confidently rest their argument for the authority of the wife or mother to appoint a testamentary guardian. That section provides: "(1) That the rights and responsibilities of the parents in the absence of misconduct shall be equal; and (2) that the mother shall be as fully entitled to the custody and control of their children and their earnings as the father; and (3) *in case of the father's death, the mother shall come into as full and complete control of the children and their estate as the father does in case of the mother's death.* All laws or portions of laws inconsistent with the foregoing are hereby repealed." Of this section, it is the italicized clause upon which the right of the mother to appoint a testamentary guardian is chiefly urged. We are to understand, however, at the outset, that all laws or portions of laws inconsistent with, or which deny the mother, in case of the father's death, as full and complete control of the children and their estate as the father has in case of the mother's death, are hereby repealed. Before the enactment of this section, the father had the right to appoint a testamentary guardian, who took office at his death, and if the mother was living could deprive her of the custody and estate of the children; but she had no such right. But, before the enactment of the statute which gave the father the right to appoint such guardian, his right, at common law, was full and complete to control his children and their estate. This statute added nothing to his right to the full control of the custody and tuition of his children while he lived, whether the mother be living or dead. In this matter their relations were grossly unequal. The right conferred by the statute only gave him the power to extend the custody and tuition of the children to another after his death, to the deprivation of the mother of the society of her offspring, with all its untold sufferings. But the right of the father to their custody did not depend on the right to appoint a testamentary guardian. That existed before the right was conferred to make such appointment, and may exist without it. The existence,

therefore, of the right in the father to make such appointment is not, nor ever was, necessary or essential to his full and complete control of the custody and tuition of his children. He had such custody before the right to make such appointment was conferred, and the presence or withdrawal of that right can in no way affect his right to the custody of his children. The case stands in this wise: That, at the father's death, the mother cannot come into the full and complete control if the father chooses to exert the right conferred by the statute against her, but her death in no way affects his right to such full and complete control of the children irrespective of his right of testamentary appointment. What, then, is the purpose of the statute when it proposes in direct terms to give the mother the full control and custody of the children and their estate at the father's death, as he enjoys at her death? Is it the right to appoint a testamentary guardian? There is no suggestion of that kind in the section. Besides, we have shown that such right to the custody of the children and their estates may devolve upon one, as it did upon the father, before the right to appoint a testamentary guardian was conferred, and, consequently, that such right of custody may exist without it. The mother, therefore, may have conferred upon her the control of her children and their estates, without the right to appoint a testamentary guardian, at the death of the father. But it is manifest that, while the right to make such an appointment exists in the father, it may be exerted to deprive the mother of the custody of the children and their estate, at the father's death, and that such right in him is inconsistent with the full and complete control contemplated by section 2878 to be conferred upon the mother at his death. If, for instance, the husband appoint a testamentary guardian, and dies, the wife still living, the right of such guardian to the custody of the children and their estate is utterly inconsistent with the full and complete control of the same which this section designs and intends to confer upon the mother at the death of the father. No question is made but what the upper clauses of that section contemplate an equality of rights in respect to the children during their lives, and none, it seems to me, can be made but what it is the purpose of the last clause to maintain such equality of rights as to the custody of the children and their estate at the death of either. To make them equal in this regard, and give her such control and custody, the right of the father to make a testamentary appointment must be modified or repealed. It cannot exist in him, intact and unabridged, consistently with the rights conferred upon her by this section; and to that extent, whether in whole or in part, it must be repealed. As the intentment, then, of section 2878 is that their rights during their joint lives in respect to their children shall be equal, and that at the death of either of them whatever of law or of statute shall prevent or deny the survivor from having the full and complete control of the children and

their estate shall be repealed, it follows that so much or all of the statute known as section 2885 as is in conflict therewith must be repealed. So that, when the father dies, the mother, in the language of the last clause of section 2878, "shall come into as full and complete control of the children and their estate as the father does in case of the mother's death;" but as the right to appoint a testamentary guardian is not essential to such control or custody, and its existence in the father as conferred is incompatible with the full enjoyment of the rights conferred upon the mother by this section, it must be modified or repealed to that extent. It was intimated at the argument that this mode of legislation was of questionable validity, but I have not deemed it necessary to examine it in that regard, but have endeavored to give the mother every right intended to be conferred by it, the right to as full and complete control of the children and their estates as the father has at the mother's death; but as the right to appoint a testamentary guardian is not suggested in terms or otherwise in the section, and such right is not essential or necessary to the full enjoyment of the custody of the children and their estate, it cannot be considered as included or conferred by this section. As a consequence, it follows that the decree must be reversed; and it is so ordered.

#### WINTERS v. HUGHES.<sup>1</sup>

(Supreme Court of Utah. Jan. Term, 1861.)

APPEAL—PARTIES—JOINT JUDGMENT—BOND.

1. Where, in a suit to foreclose a mortgage given to secure a joint and several note, the writ is returned "Served" as to one defendant, and "Not found" as to the others, and judgment is rendered against the defendant who appeared, he may, in the absence of any statutory regulation to the contrary, appeal alone from such judgment, and it is not necessary that the other defendant should join in the appeal.

2. It is no ground for dismissing such appeal that the bond filed therein erroneously described the judgment as being against defendant alone, since under the Laws of Utah the bond is not essential to the validity of the appeal, but is only given to effect a *supersedeas*.

Appeal from district court, Carson county.

J. H. Ralston, for respondent.

KINNEY, C. J. Hughes, the appellee, files the following motion to dismiss the appeal:

(1) Because said judgment is joint against said Winters and Atchison and said Atchison has not joined said Winters in prosecuting said appeal. (2) Said Winters, in his appeal-bond herein filed, does not refer to, or describe, the judgment set out in the record, but refers to a judgment in favor of said plaintiff, and against said Winters alone. In deciding this motion, the court will consider the points separately.

Was it necessary for Atchison to unite with Winters in the appeal, in order to give the court jurisdiction? The record

<sup>1</sup> This case, filed at January term, 1861, is now published by request, with 16 others, in order that the Pacific Reporter may cover all cases in volume 3, Utah Reports.

discloses the fact that the foundation of the suit was a joint and several note executed by Atchison and Winters for the sum of \$15,000. To secure the payment of this note, a mortgage deed was given, signed by the makers respectively, and, as the note was not paid, a petition in chancery was filed to foreclose the equity of redemption of the mortgagors in the premises described. The writ was returned "Served" as to Winters, and "Not found" as to Atchison. Winters alone appeared and pleaded to the suit. By counsel he conducted the defense, filed bills of exception in his own name, and appears to be the sole party over whom the court acquired jurisdiction. It is now gravely asserted that he alone could not appeal, but that Atchison must join. If the court acquired no jurisdiction of the person of Atchison, he was not a party to the proceedings in court, and the decree against him is a nullity. He could not become a party in this court, without being first made a party in the court below. This is not a court of original but appellate jurisdiction. A judgment must be first rendered in the court below against persons brought into court by either actual or constructive service, before such judgment can be reviewed on its merits in this court. Is the case then properly appealed by Winters? The organic act provides that writs of errors, bills of exceptions, and appeals shall be allowed in all cases from the final decisions of the district courts to the supreme court, under such regulations as may be prescribed by law. While the legislature cannot take away the right of appeal, it is to be regretted that no specific mode has been provided for taking the appeal. The only law on the subject is to be found on page 136 of the Laws of Utah, which provided that an appeal may be taken. How, in what manner, within what time, or whether by one or all of the parties aggrieved, is not specified. While writs of error may issue without the aid of a statute, appeals are purely statutory. Because the statute is silent as to the manner, this court is not deprived of the power to hear, under the organic act, if the appeal is before us. As the law now is, nothing more is necessary than obtaining the record of the court below, and filing it in this court by the party properly in court, against whom judgment is rendered. There is no provision for praying an appeal giving notice to the adverse party, or filing a *supersedeas* bond in order to entitle the party to the right of appeal; and as all these wholesome statutory provisions are omitted, and as the organic act has constituted this an appellate court, the court will take jurisdiction of the case, providing there is a final judgment against the party in court, and the record is in due form of law. Such appeal is before us in this case. The error in the court below, in rendering a decree against a person not in court, cannot prejudice Winters, who did appear and defend, or prevent him from having his rights adjudicated in this court. Suppose the decree had been against Winters and a person deceased, could it be claimed that Winters could not appeal?

If so, the organic act on this subject means nothing, and this is not an appellate court. The dead man certainly could not join in the appeal, and the judgment as to him would be void. But, according to the argument, all the co-defendants must join in order to give the court jurisdiction. How could Atchison unite when he was not in court, and, by the return of the marshal, not in the county? We are not inclined to controvert the doctrine that the party plaintiffs or defendants, over whom the court has acquired jurisdiction, and against whom it has power to render judgment, must, as a general rule, join in the appeal; but even the decision cited by counsel on this point has been made upon statutes that are inapplicable to the case at bar.

But the second ground for dismissal is that Winters in his appeal-bond does not describe the judgment set out in the record, but a judgment against him alone. As we have already stated, no appeal-bond was necessary to entitle Winters to the appeal. Such bond is only necessary as a *supersedeas* to the issuance of execution; and if an improper bond has been filed, a bond reciting a different judgment than the one appealed from, the party had a right to his execution upon the judgment not set out in the bond. The bond is not essential to the validity of the appeal under the organic act and Laws of Utah, neither will the appeal stay execution in the absence of a bond. It is not given for the purpose of taking the appeal, but to stay execution, and Winters cannot be denied a hearing in this court by a misdescription of the judgment in his bond. If the court would entertain the appeal without a bond, it follows as a necessary corollary that it will do so with a defective one. The motion, for the reasons here given, is overruled.

CROSBY, J., concurred.

#### THORP v. PEOPLE.<sup>1</sup>

(Supreme Court of Utah. Jan. Term, 1861.)

GRAND JURY—SUMMONING AND IMPANELING.

Under the Utah act relating to grand juries, § 5, providing that the clerk of the district court shall, at least 30 days prior to the time of holding said court, issue a writ to the marshal specifying the time and place of holding the court, and requiring him to summon 24 men to serve as grand jurors, where the writ is issued to the marshal, and returned into court three days afterwards, and the jury thus summoned are, on the same day, impaneled and sworn, they are not a lawful grand jury, and have no authority to act.

Error to third district court.

James & Broadhead, for plaintiff in error. A. Wilson, U. S. Dist. Atty., for the People.

CROSBY, J. Plaintiff in error, after the presentment of the indictment by the grand jury, challenged the array on the ground that the grand jurors were not selected according to law. The court

<sup>1</sup> This case, filed at January term, 1861, is now published by request, with 16 others, in order that the Pacific Reporter may cover all cases in volume 8, Utah Reports.

overruled the motion, and this is assigned as error. It appears by the record, a *venire* issued on July 25, 1889, to the United States marshal, directing him to summon a grand jury of 24 men, the number required by law, and that he returned the same into court on July 28th; that the jury were on the same day sworn and charged, and on July 30th came into court, and preferred the indictment for burglary against the plaintiff in error. The question is simply this: Were the grand jury found in the manner prescribed by statute? since, if they were not, they had no power to find a valid indictment. Section 5 of the act in relation to grand and petit jurors provides that, when a district court is to be held, whether for a district or county, the clerk of said court shall, at least 30 days previous to the time of holding said court, issue a writ to the marshal or any of his deputies, if said court is to be held for a district, or to a sheriff, or any of his deputies, of the county in which said court is to be held, if it is to be held for a county, specifying the time and place of holding said court, and requiring him to summon, if for a grand jury, 24 eligible men to serve as grand jurors. The manner of summoning, the time required, the mode of selecting, are all expressly laid down, leaving nothing to be implied or in doubt. The law is explicit, and must in every respect be complied with. It is apparent in this case that its requirements have not been fulfilled. The *venire* is issued to the marshal, returned into court three days afterwards, and the jury thus summoned are on the same day impaneled and sworn. It is true, as a general rule, that, when the indictment is duly exhibited in open court, and indorsed "A true bill," it is evidence that it was duly found by a legal grand jury; but, when the records of the court show that the grand jurors were not legally selected, and had no authority to act, it is evidence of a higher grade, and shows that the indictment could not have been found, exhibited, and indorsed by legal authority. See *Dutell v. State*, 4 G. Greene, 125. The challenge to the array should have been allowed. Judgment reversed.

KINNEY, C. J., concurred.

KLIMER *et al.* v. SCHNORF.<sup>1</sup>

(*Supreme Court of Utah*. Jan. Term, 1861.)

APPEAL—REVIEW—AGREED STATEMENT OF EVIDENCE.

Where there were no exceptions taken in the trial court, but on appeal the parties stipulate that the cause shall be tried on the record and an agreed statement of evidence, the supreme court cannot consider such statement of evidence, where no reference is made to it in the record, and it is apparent that it was made up after the decision of the case in the trial court.

Appeal from district court, Carson county.

W. M. Stewart, for appellant. S. De Wolf, for respondents.

<sup>1</sup>This case, filed January term, 1861, is now published by request, with 16 others, in order that the Pacific Reporter may cover all cases in volume 3, Utah Reports.

CROSBY, J. This was a suit in chancery brought in the district court for the second judicial district of the territory of Utah, to set aside a deed, or bill of sale, made by the above plaintiff, Schnorf, to the respondents, Klimer *et al.*, on the ground of fraud in its procurement. The answer of respondents denies the use of fraud in obtaining the deed, and also denies the existence of any title in the plaintiff in the property conveyed by the deed. No exceptions were taken in the court below; but the parties in this case, by written stipulations accompanying the record, agree that this case shall be tried in the supreme court, upon the record and an agreed statement of evidence, which is not only not referred to in the record, but it is apparent has been made up after the decision. This court cannot entertain such evidence. In all cases of appeal, only that can be taken into consideration which is shown by the record of the court below to have been there acted upon or referred to; otherwise the whole character of this court would be changed, and, instead of an appellate, it would become a court of original jurisdiction. When there are no errors in the record, and a cause is tried on evidence, unless the contrary is made to appear, it must be presumed that the evidence was full and sufficient to justify the court in coming to its decision. Judgment affirmed.

KINNEY, C. J., concurred.

YOUNG *et al.* v. MARTIN.<sup>2</sup>

(*Supreme Court of Utah*. Oct. 10, 1887.)

APPEAL—WAIVER OF ERRORS—PLEADING OVER.

1. Plaintiff, by pleading over after his demurrer to defendant's answer had been overruled, waives the error, if any there be, in such ruling, and it cannot be reviewed on appeal.

2. The error in overruling a motion for judgment on the pleadings is likewise waived by proceeding to trial before the jury.

McCURDY, J., dissenting.

Appeal from third district court.

Baskin & Hempstead, for appellants.  
Marshal & Catter, for respondent.

DRAKE, J. This case is brought into this court by an appeal taken by the plaintiffs to the judgment and rulings of the district court for the third judicial district. The appellants have assigned the following as errors: (1) The court erred in overruling the demurrer filed by the plaintiffs to the defendant's answer. (2) The court erred in ruling thereon that the defendant had a lien on the goods of E. R. Young & Sons, now in his possession for freight, both by McWhirt and Irvin trains. (3) The court erred in ordering the plaintiffs to reply as though the demurrer had not been filed. (4) The court erred in overruling the verbal motion of plaintiffs for judgment and damages on

<sup>2</sup>This case, filed October 10, 1887, is now published by request, with 16 others, in order that the Pacific Reporter may cover all cases in volume 3, Utah Reports.

the pleadings. The defendant has filed a motion to dismiss the appeal, and the following are assigned as reasons in support of the motion: (1) The plaintiffs in the lower court waived their exceptions to the ruling on the demurrer when they pleaded over, and said demurrer was thereby withdrawn. (2) That the verbal motion for judgment was but a repetition of the demurrer, made under a different name, and embracing the same points as those embraced in the demurrer. And the appeal is taken and the assignment of errors is based on those two alleged errors, which exceptions the plaintiffs waived by pleading and going to trial on the merits in the court below, and therefore have no standing in this court. The counsel for and against the motion to dismiss the appeal having been heard, it is now for the consideration of the court. The second and third errors assigned are incidental to the first; they arise out of it, or are evolved by it, and by no fair construction can they be considered as separate and distinct; and they will be governed by the same rules and abide the same determination which awaits the first. The fourth assignment of errors relates to a motion made by the plaintiffs for judgment on the pleadings, as they were perfected after the demurrer had been overruled. To give to this motion any proper and beneficial effect, we must consider it in the nature of a demurrer,—a second demurrer, not a repetition of the first. After the first demurrer was overruled the pleadings were perfected, and the condition thereof was changed, and the party had a right to file another demurrer, and to have all the advantages, taking therewith all the hazards, attending the first. It is a rule of law not to be controverted, that when a party demurs to the pleading of his adversary, and the demurrer is overruled, he must not proceed any further by pleading or going to trial, if he would avail himself of any error in the ruling of the court upon the demurrer. The latest decision upon this point which has come under my observation is that in the case of *Bell v. Railroad Co.*, 4 Wall. 598. The same doctrine was held in the case of *Pierce v. Minturn*, 1 Cal. 470. It is said that this decision was made at an early day in the history of that state, and that subsequent decisions are otherwise. They have enacted a code of practice, and, whatever may be the rule there now, it cannot be doubted but that decision reflected the law of the land and throughout the United States at the time it was made, when it was not controlled by statutory enactments. In the case of *U. S. v. Boyd*, 5 How. 30, the doctrine is most clearly and emphatically laid down. It is useless to seek for other authorities upon this subject. I know of no case where the party seeking relief in a court of review, either upon appeal or writ of error, where this doctrine has not been maintained if the question arose. It is so well founded in common sense that no argument can disturb it. To doubt it, or to seek to overthrow it except by legislative enactment, would be the evidence of judicial dissension. The proceedings in this

case seem, from the frequent repetition of counsel, to have been, first, a declaration by the plaintiffs; a plea in abatement by the defendant; then an answer; then a demurrer by the plaintiffs; then a replication to the answer; then a rejoinder by the defendant; then a surrejoinder by the plaintiffs; and then a motion for judgment; and then a trial by jury, in which both parties participated by giving evidence and addressing the jury.

Of the exact nature of some of the pleadings we are left to conjecture, for, on inspecting the record, we find nothing to make conjecture a certainty. We may believe the plaintiffs filed a demurrer to the answer, but what was the form or substance of that demurrer we have no means of ascertaining. It is not to be found in the record. Should it become important for us to determine whether the demurrer was one of form or substance, by what rule should we be led? It is claimed by the plaintiffs that the court below erred in overruling or denying the motion for judgment. What was the form of this motion, or what reason for its allowance accompanied it, we know not. This important motion was not reduced to writing. All the interest of the parties in this important matter is left to rest upon a verbal motion. Such a pernicious practice ought not to be indulged. We may believe all that is said of it; but, if we look to the record, we have nothing to determine the exact nature and purpose of the motion. It may be that the deficiency in the record and proceedings is immaterial in the solution of the questions before us; but, if the security of the rights of parties does not require a greater degree of strictness and attention, yet the reputation and success of the practitioner does. Again, I remark there is no bill of exceptions accompanying this record. Is it expected that these varied and important questions, arising upon exceptions to the ruling of the court below, are to be heard and settled by us without a bill of exceptions before us? The idea is repulsive. It is preposterous, and I hope, for the honor of the profession, that hereafter no such occurrence will arise. Giving to these omissions the very least importance, putting the most favorable construction upon the acts and proceedings of the parties, it is manifest that should we hear the argument of counsel upon the errors assigned in this appeal, it could result in nothing more than a rehearing of the questions arising upon the demurrer, and upon the motion for judgment. These have been heard in the court where they were made, and the party seeking redress here has, by his own acts, placed them beyond the reach of review; and whatever may have been the errors of the court in its ruling upon the demurrer or motion, the party by pleading over and going to trial has taken it out of the power of this court to correct those errors on review. Therefore, the motion to dismiss must prevail, and the order of the court should be in conformity.

TITUS, C. J., concurred. McCURDY, J., dissented.



CRAMER v. UNION PAC. R. CO.<sup>1</sup>

(Supreme Court of Utah. Jan. Term, 1875.)

## MASTER AND SERVANT—NEGLIGENCE OF MASTER—PLEADING.

In an action against a railroad company for injuries to an employe, where the complaint alleges that the injuries resulted from a collision that occurred by reason of the negligence of defendant, it is error to sustain a demurrer to the complaint on the ground that a master is not responsible to his servant for injuries resulting from the negligence of a fellow-servant.

Appeal from third district court.

*Hempstead & Kirkpatrick*, for respondent.

BOREMAN, J. The complaint shows that the plaintiff (appellant) was employed as a common workman by the defendant, the railroad company, to dig gravel, and to help load and unload the construction train with the same. As part of the contract, he was boarded by the defendant in its construction boarding-cars, and carried to and from his work by the defendant. In thus returning from his dinner on one day in October, 1869, a collision occurred between the construction train upon which the plaintiff was being carried, and a locomotive running out of time, and without notice. By this collision the plaintiff's leg was crushed, whereby he has been greatly disabled. This suit was brought to recover damages for this injury. The defendant demurred to the complaint upon the ground that the complaint did not state facts sufficient to constitute a cause of action. The court below sustained the demurrer, and gave judgment against the plaintiff. From this action of the court below the plaintiff appeals to this court. The only question which we are now called upon to consider is the one upon which the demurrer is based. The principal ground relied upon to sustain the demurrer is that a master is not responsible to his servant for injuries resulting from the negligence, carelessness, or misconduct of a fellow-servant engaged in the same general business. This question was argued at great length by the attorneys, both of the appellant and of the respondent, yet no such point necessarily arises upon the demurrer. The position assumed by the defendant may be true as a principle of law, and yet this complaint be entirely sufficient. The injury is not charged to the carelessness, negligence, or misconduct of a fellow-servant, but is charged directly upon the defendant. The collision and consequent injury are not only charged entirely to the negligence of the defendant, but it is alleged also that the same were "without any negligence on the part of the plaintiff." Some of the numerous allegations of the complaint may be defective, but there are enough good allegations to support a judgment for the plaintiff, if one should be had. The judgment of the court below is therefore reversed, with costs, and the order sustaining the demurrer is revoked, and the cause remanded

<sup>1</sup> This case, filed at January term, 1875, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 8, Utah Reports.

to the court below for further proceedings in accordance with this opinion.

McKEAN, C. J., and EMERSON, J., concurred.

MINTER v. UNION PAC. R. CO.<sup>2</sup>

(Supreme Court of Utah. Oct. Term, 1873.)

## MASTER AND SERVANT—NEGLIGENCE OF MASTER—PLEADING.

1. In an action against a railroad company for personal injuries to an employe, the complaint alleged that defendant negligently attached to one of its cars a defective and dangerous brake, whose condition it might have known by the exercise of ordinary care, but which plaintiff did not, and could not, have known in the course of his duties as brakeman; that, while he was performing such duties, this defective brake gave way, thereby throwing him to the ground, so that the wheels of the car ran over and crushed his hand. *Held*, that the complaint states a cause of action.

2. An allegation that defendant was a corporation, and that plaintiff was in its employ for a long time prior to the injury, is a sufficient allegation that defendant was a corporation, and was in existence at the time of the injury.

Appeal from third district court.

*R. N. Baskin*, for appellant. *Hempstead & Kirkpatrick*, for respondent.

EMERSON, J. This was an action brought by the appellant against the respondent to recover damages for injuries received by him while in the employ of the respondent, as brakeman upon one of its cars, by reason of the negligence of said respondent in failing to provide a proper and safe brake for said car. The complaint was filed on the 1st day of February, A. D. 1871. It contains but one count, and avers "that said defendant is a foreign corporation, incorporated under an act of congress, transacts business, has property and acknowledged agents in Utah territory, and within the jurisdiction of this court; that on the 6th day of March, A. D. 1870, and for a long time prior thereto, said plaintiff was in the employ of said defendant, as a brakeman on the railroad of said defendant; that said defendant, disregarding its duty and obligation to said plaintiff, carelessly and negligently attached to one of its cars a defective, insufficient, and dangerous brake; that said brake was so defective, insufficient, and inadequate to the secure and safe running of said car that said defendant, by the exercise of proper and ordinary care and skill, might have known these facts; that said plaintiff, neither at the time nor before he received the injuries hereinafter mentioned, knew that said brake was defective and dangerous, and, in the course of his duties, could not have known of said defects at and before the time of his said injuries; that said brake was so defective as to render the running of said car dangerous to the life and limbs of the employes of said defendant on said car; that, on the said 6th day of March, A. D., 1870, in said territory of Utah, while

<sup>2</sup> This case, filed at October term, 1873, is now published by request, with 16 others, in order that the Pacific Reporter may cover all cases in volume 8, Utah Reports.

said plaintiff was performing his duties as brakeman of said defendant on the car aforesaid, by reason of the defectiveness of said brake, the same broke and gave way, whereby said plaintiff was [without any negligence or want of due care and skill upon his part] violently thrown from said car, and one of the wheels of the same passed over the right hand of said plaintiff, whereby said hand was crushed, and its use entirely destroyed; that, by reason of said injury, said plaintiff suffered great pain and sickness, and was compelled to incur the cost and expense of medicine and medical attendance, and was also rendered unable for about five months to pursue his business, and is still unable, and will ever so remain, to perform ordinary manual labor with his hand,"—and claims damages in the sum of \$50,000. The defendant appeared in the cause by its attorneys, who filed a demurrer to the complaint, and assigned the following cause of demurrer: "That the said complaint does not state facts sufficient to constitute a cause of action against this defendant." The cause was brought on to argument in the court below on the demurrer, and that court, on the 19th day of September, A. D. 1873, sustained the demurrer, and the plaintiff declined to amend the complaint, and elected to rest the case upon the demurrer; thereupon judgment was rendered against the plaintiff for costs. From this order and judgment the plaintiff appeals.

At the hearing of this case, the counsel upon both sides argued, at great length and with marked ability, the question of the liability of a master to his servant for the negligence of a fellow-servant. This question is not raised by the record, and we decline to go into the consideration of it. The complaint alleges, not that any agent or servant of the defendant, for whose acts it is liable, but that the defendant itself, was guilty of the acts of which the plaintiff complains, and by reason of which he suffered the injuries complained of, and this without any fault or negligence or want of care and skill upon his part. The defendant, by its demurrer, admits this to be true. The complaint may properly be construed as charging personal negligence on the part of the defendant. While it is true that a corporation can act only through or by some person or set of persons, yet the court will not assume that the acts and omissions charged as the acts and omissions of the defendant itself were really the acts and omissions of one of its agents or employees, for which the corporation is not liable to another agent or employee. For aught that the court can know, the plaintiff may be prepared to prove that the president of the company, its general superintendent, or some superior officer of the corporation, was in such a position and so circumstanced that, by the exercise of ordinary care and vigilance, they would have known of the defects in this very car, or were so circumstanced as to charge the company itself with the want of the exercise of that ordinary care and diligence which the law imposes upon them. It was not necessary for the plain-

tiff to set this up in detail in his complaint. It is sufficient for him in this respect to charge personal negligence on the part of the defendant. The complaint should state the facts in "ordinary and concise" language, and not the evidence by which these facts are to be established. It is true that the plaintiff undertook his engagement with the company in contemplation of the ordinary hazards of the business, and upon the incidental condition, not that the company will insure him against accidental injuries, but will exercise reasonable and ordinary care and diligence in the discharge of its duties in regard to the business; but where the company is in fault as to its own duties, and the injury is occasioned by means of its neglect of that reasonable and ordinary care which it must be presumed to exercise in regard to its own business, it is liable in damages, unless the plaintiff was also in fault, and his negligence or misconduct contributed as a proximate cause to the injury. This complaint alleges that the defendant attached this dangerous and defective brake to this car. It also alleges the dangerous defect in the car, and that the defendant might have discovered the defect by the exercise of proper care and vigilance; that the plaintiff himself, not only did not know it, but, "in the course of his duties, could not have known of said defect;" and that said injury occurred without any negligence or want of due care and skill upon his part. The burden of proof is upon the plaintiff, and, if he can upon the trial establish the averments in his complaint, there can be no doubt about his right to recover; or, if the defendant should make default, the complaint lays a sufficient foundation for a recovery and judgment.

At the hearing it was claimed upon the part of the defendant that the complaint does not show that the defendant was a corporation, or in existence, at the date of the alleged injury, but alleges the corporate existence only at the date of filing the complaint. There is no merit in this objection. The language of the complaint is "that said defendant is a foreign corporation incorporated under an act of congress." It is the same defendant, *i. e.*, a foreign corporation incorporated under an act of congress, in whose employ the plaintiff was at the time of receiving the alleged injuries. The judgment is reversed, and the cause remanded, with directions to the court below to overrule the demurrer.

BOREMAN, J., concurred.

McKEAN, C. J. The complaint being demurred to, its allegations must be presumed to be true; and, according to those allegations, it was impossible that the plaintiff, by any negligence of his own, should have contributed to the injury which he sustained. In this respect this case differs from many cases reported in the books, and from some cases that have been before the courts of this territory. I therefore concur in the opinion that the judgment of the district court should be reversed.

## REAM v. HOWARD.

'Supreme Court of Oregon. Oct. 21, 1890.)

## NOTICE OF APPEAL.

1. A notice of appeal which describes a judgment for the recovery of a specific sum of money is not sufficient to bring into the appellate court a judgment in an action for the recovery of specific personal property.

2. A notice of appeal which gives the name of the court and of the parties to the action, the date of the judgment, without any other description, and informs or makes known to the respondent that the appellant appeals from the judgment in said action, is sufficient.

(Syllabus by the Court.)

Appeal from circuit court, Multnomah county; E. D. SHATTUCK, Judge.

This action was originally commenced in the justice's court of East Portland, where the plaintiff had judgment from which an appeal was taken to the circuit court. Upon respondent's motion, the appeal was dismissed, on the ground of the insufficiency of the notice, from which last-named judgment this appeal was taken. The verdict and judgment in the justice's court are as follows: "In justice's court for East Portland precinct, Multnomah county, Oregon. W. P. Ream, Plff., vs. J. F. Howard, Deft. We, the jury in the above-entitled action, find for the plaintiff for the goods and chattels described in the complaint, or, if return cannot be had, for the value, to-wit, \$80, and \$31 damages for the detention and withholding of the same from plaintiff. WASH. F. ALLEN. S. F. WISHARD. R. MERRICK. W. H. H. GRANT. JAMES POWELL. It is therefore ordered that the defendant deliver to plaintiff the goods and chattels named in the complaint, and the sum of \$31 damages for the detention of goods, and the costs and disbursements taxed at—Justice's fees, \$7.00; constable, \$8.45; witnesses, \$11.60; notary fees, \$3; and that execution issue therefor." The notice of appeal is as follows: "In justice's court for East Portland precinct, state of Oregon, county of Multnomah—ss.: W. P. Ream, Plaintiff, vs. J. E. Howard, Defendant. Notice of appeal. Civil action. To W. P. Ream, and to Messrs. Doud & McCoy, his attorneys: Please take notice that the defendant in the above-entitled action appeals from the judgment rendered therein, on the 11th day of April, A. D. 1890, in favor of the said plaintiff, and against the said defendant, for the sum of one hundred and forty-one dollars and ninety-five cents, and costs, and from the whole of said judgment, to the circuit court of the state of Oregon, for the county of Multnomah. C. J. McDougall, Attorney for Defendant."

C. J. McDougall, for appellant. Doud & McCoy, for respondent.

STRAHAN, C. J., (after stating the facts as above.) The tendency of all the recent decisions of this court on the subject of appeals is not to dismiss them if they could be retained for trial, for the simple reason that courts are established to hear and determine judicial questions, and not to arbitrarily turn the parties out of court, without the opportunity of being heard; but we cannot dispense with the necessary

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papers to bring an appeal into this court. In the construction of appeal papers, we have applied the most liberal rule of construction, and have allowed undertakings to be filed and papers supplied whenever we had the power to do so; but, under any view of the subject, we think the judgment appealed from must be affirmed. If the notice of appeal had simply contained the title of the court, the names of the parties, the date of the judgment, and had made known to the respondent that an appeal was taken from the judgment in that action, without any attempt to further describe it, the notice would have been sufficient. But here the judgment is so entirely misdescribed that we must conclude that the appeal is from some other judgment than the one contained in this record. The judgment in the record is for the recovery of specific personal property, or its value, in case delivery could not be had, together with damages for its detention, and costs and disbursements. The judgment described in the notice is for a specific sum of money. These discrepancies are too great to be reconciled, according to any principle or authority. Counsel for appellant relies upon *Lancaster v. McDonald*, 14 Or. 264, 12 Pac. Rep. 374, but that case neither in its facts nor reasoning will sustain appellant's contention. The judgment appealed from must be affirmed.

## SONNEBORN v. PORTLAND &amp; V. RY. CO.

(Supreme Court of Oregon. Oct. 20, 1890.)

## APPEAL—NOTICE.

The notice of appeal must contain a specification of the errors, upon which the appellant intends to rely upon the appeal. *Swift v. Mulkey*, 17 Or. 532, 21 Pac. Rep. 871, approved and followed.

(Syllabus by the Court.)

Appeal from circuit court, Multnomah county; E. D. SHATTUCK, Judge.

This is an action to recover damages for negligence. The complaint alleges, in substance, among other things, that heretofore, on the 14th day of October, 1888, the plaintiff, David McMillan, and one John Antona had charge and possession of a certain steam-saw used for sawing cord-wood into proper lengths to suit customers; and that said defendant, its superintendent, agents, and servants, then and there requested the plaintiff and his associates to move their said steam-saw up to a certain pile of cord-wood, located on the line of said railway, within a few feet of the track of said railway, in front of the first block of land south of Munk's grocery store, in the town of Albina, on Margaretta avenue, and then and there requested the plaintiff and his said associates to set up said steam-saw between said wood-pile and the track of said railway, and to saw wood enough and sufficient for the use of the engine and cars that defendant was then and there operating on said railway that day; and that, in pursuance of said request, the plaintiff and his said associates did move said steam-saw up to said wood-pile, and did set up said steam-saw at the place aforesaid; and that it was ascertained by the plaintiff and his asso-

ciates before and at the time said steam-saw was placed in position that, by moving in the engine and train of cars that defendant was then operating on said railway, slowly, cautiously, and in a careful manner, in passing said steam-saw, said engine and train of cars would pass without touching said saw, or in any wise interfering with said saw, or any of its attachments, or the plaintiff or his associates, and it was then and there agreed between the plaintiff and the defendant that the said train of cars, in passing said saw, should slow down and pass said saw in a slow, cautious, and careful manner, and would take on wood near said saw, and that, at Munk's grocery store, about one block distant from said saw, said train would stop to take on and let off passengers in going each way, and plaintiff and his associates were then and there assured by the defendant, its agents and servants, that said train would stop at Munk's grocery store and pass said saw in a slow, cautious, and careful manner; that plaintiff relied upon said agreement and representations, and commenced sawing wood, until said train passed said saw three times safely, as agreed upon. But the plaintiff avers that, on the return trip from Vancouver, and being the fourth time that said train passed said saw, the defendant, its agents and servants, disregarding said agreement and assurance, carelessly and negligently moved said train at a high rate of speed, and passed Munk's grocery store and said saw without stopping, and did not slow down or slacken the speed of said train, and did not pass the plaintiff's said saw slowly or in a cautious or careful manner, but did pass Munk's grocery store and said saw at a high rate of speed, which caused said train and cars to oscillate upon said track, and to sway back and forth, and that in passing said saw the cross-beams and stake boxes and seats on the flat-cars attached to said train swayed over and struck against the shaft of said saw, which was then in motion, and struck said shaft, and knocked the same and said saw and gearing out of line, and caused said saw to break in pieces, some of the pieces of which were forced and thrown against the plaintiff's right leg, below the knee, and instantly cut it off. Other personal injuries are also alleged. It is then alleged that defendant's road was not properly constructed, but was constructed in a careless and negligent manner. The plaintiff then alleges with greater particularity how said train was made up, the width of the cars and coaches causing the collision already set forth. After alleging many other particulars not necessary to be specially noticed, the plaintiff claims damages in the sum of \$15,000. The defendant's answer denied the material allegations of the complaint, except that it owned the road, and operated the cars. A trial before a jury resulted in a verdict and judgment in favor of the defendant, from which this appeal is taken. The appellant's notice of appeal contains the following assignments of error: "*First*. That the offence is insufficient to justify the verdict; *second*, that the verdict is against law; *third*,

that the court erred in his instructions to the jury; *fourth*, that said instructions are against law; *fifth*, that said instructions were misleading to the jury, *sixth*, that said instructions are contrary to the testimony taken at the trial; *seventh*, that the court erred in overruling the plaintiff's motion for a new trial."

*C. B. Bellinger*, for respondent. *Jones & Stewart* and *E. O. Doud*, for appellant.

*STRAHAN, C. J.*, (after stating the facts as above.) Upon the trial here all of the assignments of error were abandoned, except the third, fourth, fifth, and sixth, which relate to the supposed misdirection of the court in charging the jury. Several pages of instructions are copied into the bill of exceptions, but the assignments of error contained in the notice are not sufficiently explicit to enable us to know from an inspection of the record upon what particular errors counsel for appellant intend to rely. None are pointed out by the notice of appeal, and these assignments of error may relate to any exception to the charge contained in the record. This court has many times held such assignments to be too general to raise any question for review on appeal. The latest expression on that subject is *Swift v. Mulkey*, 17 Or. 532, 21 Pac. Rep. 871, which is decisive of this case. We could not enter upon an examination of the alleged errors in this record without setting at naught all of the precedents in this court on that subject. The practice is too firmly established to be disturbed. It is, perhaps, hardly necessary to say that new trials being in the discretion of the trial court, their rulings on motion upon that subject present no question for review here. It follows that the judgment appealed from must be affirmed, and it is so ordered.

#### STATE V. LEWIS.

(*Supreme Court of Oregon. Oct. 20, 1890.*)

#### EMBEZZLEMENT—EVIDENCE.

In a prosecution for embezzlement, where evidence is admitted tending to prove other acts of embezzlement from the same parties about the same time as the one charged in the indictment, for the sole purpose of showing guilty intent, the court must limit the effect of such evidence to such purpose by instructions to the jury.

(*Syllabus by the Court.*)

Appeal from circuit court, Multnomah county; *L. B. STEARNS*, Judge.

The defendant was indicted and convicted of the crime of embezzlement, from which judgment this appeal is taken. The charging part of the indictment is as follows: "That said *Herman Lewis*, on the 21st day of January, A. D. 1890, in the county of Multnomah, and state of Oregon, was the agent of *J. Baumgartner, Godfrey Fisher, and A. L. Brown*, copartners, doing business under the name and style of *J. Baumgartner & Co.*, and *Solomon Reiss, Isaac Reiss, Achille Reiss*, copartners, doing business under the name and style of *Reiss Bros. & Co.*, and as such agent he did receive and take into his possession, and have under his care and control, by virtue of his said employment as such agent, the sum of \$94, lawful money

of the United States of America, the numbers and denominations of which said money is unknown to the grand jury, of the value of \$94, and of the moneys of the said firm of J. Baumgartner & Co., and Reiss Bros. & Co., composed as aforesaid; and, having said money in his possession, as aforesaid, he, the said Herman Lewis, did then and there, fraudulently and feloniously, take, secrete, and embezzle, and fraudulently convert to his own use, said sum of \$94, with intent to embezzle the same." On the trial in the court below, the state gave evidence tending to prove that on the 21st day of January, 1890, the defendant receipted to one H. L. Clemens for \$94 on account of Baumgartner & Co., and Reiss Bros. & Co., and that said sum of money had never been accounted for by him. A. L. Brown was also called as a witness on the part of the state, and, after testifying as to who composed the firm of Baumgartner & Co., the district attorney asked him to state whether he had examined the books kept by the defendant, and whether he had discovered any other acts of embezzlement or defalcation by him committed. To this question, counsel for the defendant objected, for the reason that the same was irrelevant, immaterial, and incompetent, and related to matters not charged in the indictment, and was not the best evidence. When these objections were made, the district attorney stated that his purpose was to make proof of these circumstances in order to show a criminal knowledge and intent on the part of the defendant to negative the inference that his conduct in relation to the \$94 was accidental, and compatible with honesty. Thereupon, the court overruled the defendant's objections, and admitted the evidence for the purpose suggested by the district attorney. The witness then testified that the cash-book and ledger were in his handwriting, and were under his control, and that there appeared on said ledger, in defendant's handwriting, items showing the receipt by him of six different sums of money from six different persons, aggregating \$300, due said firm; that none of these items appeared upon the cash-book; and that the defendant had failed to account for any of them to said firms; and that said ledger showed that these receipts were all before January 21, 1890, and after November, 1889. The defendant then introduced evidence tending to prove that at the time he made the receipt for \$94 to Clemens he received no money, but that in fact Clemens deeded to him a lot valued at \$80, and agreed to pay for defendant a drug bill of \$14, which he owed at a drug-store in town. It did not appear whether Clemens had in fact paid the drug bill or not. At the conclusion of the evidence, counsel for defendant asked the court to charge the jury as follows: "(1) If the jury believe under the evidence that the defendant never received the \$94, but merely got the benefit of it in real estate, or in an account, he cannot be convicted. The specific money must have come into his hands, no matter how fraudulent was his act. No matter what breach of trust may have been committed to convict of this

charge, the money must have come into his hands actually, not constructively. If you believe the evidence of the witness Clemens, he cannot be convicted. (2) The law requires that the defendant should have received into his possession the specific money described in the indictment, as fiction in criminal law is not permitted. Therefore, if you believe the evidence of the witness Clemens, he cannot be convicted. The circumstances of other embezzlements can only be considered as determining guilty knowledge and intent." These instructions were refused by the court, but he charged that "if upon the 21st day of January the defendant had in his possession moneys which he had collected belonging to his employers, which he fraudulently converted to his own use, then he would be guilty of the crime charged in the indictment, no matter from whom such money was received; that the specific money must have come into his hands,—no matter how fraudulent his act, no matter what breach of trust may have been committed, to convict of this charge, the money must have come into his hands actually, and not constructively;" to all of which rulings of the court the defendant severally excepted.

*Alfred F. Sears, Jr., for appellant.*

*STRAHAN, C. J., (after stating the facts as above.)* The only questions presented by this appeal arise upon the refusal of the court to give the instructions requested by the defendant, and in giving the one to which an exception was taken. They are all resolvable into a single question, and that is, whether or not it was competent for the state to rely for conviction upon the evidence given by the witness Brown in relation to other embezzlements than the particular one which was attempted to be proven by the introduction of the Clemens receipt for \$94; and we are all of the opinion that it was not. For the purposes of this case, it may be conceded, without deciding that other acts of embezzlement from the same parties might be shown for the purpose of proving guilty knowledge or intent, still such evidence, if received, must be confined strictly to the purposes of its introduction, and cannot be used to prove a substantive or independent crime. *Wharton, Crim. Ev. § 46; Mayer v. People, 80 N. Y. 384; Shipplly v. People, 86 N. Y. 375; Pinckord v. State, 13 Tex. App. 468; Com. v. Shepard, 1 Allen, 575.* In *Com. v. Shepard, supra*, it was expressly held that another act of embezzlement committed by a defendant in the same week with one charged against him in an indictment is competent only for the purpose of proving a guilty intent on his part in the commission of the principal act; and the admission of such evidence in a case which, after a verdict of guilty, is reported by a judge of the superior court for the determination of this court, is sufficient ground for a new trial, if it does not appear that it was limited to its legitimate effect by instructions to the jury. The sole object of the instructions asked by the appellant was to limit the effect of Brown's testimony to the very purpose for which it was admitted by the court;

but, instead of limiting the effect of such evidence, the court thought proper to give an instruction broad enough to allow the jury to convict on evidence admissible solely for the purpose of proving guilty knowledge. Such an instruction was manifestly erroneous, and requires the reversal of the judgment, and that the cause be remanded to the court below for a new trial; and it is so ordered.

#### LOVE V. MORRILL.

(Supreme Court of Oregon. Oct. 20, 1890.)

##### EQUITY—JURISDICTION—BOUNDARIES.

1. At common law, to give a court of equity jurisdiction in cases of disputed boundary, there must be—*First*, a dispute as to the boundary; and, *second*, some equity superinduced by the act of the parties.

2. The act of 1887 (Laws 1887, p. 53) was intended to and did give courts of equity jurisdiction in such cases where a mere dispute or controversy exists as to the boundary, without regard to any other equity.

3. Courts of equity have no jurisdiction to try purely legal titles disentangled of any equity.

4. Where in a suit, under the statute, it appears from the pleadings and evidence the only controversy between the parties is the legal title to a strip of land claimed to have been acquired by adverse possession, the complaint will be dismissed, and the parties required to try the legal title at law.

5. Where the facts necessary to give a court of equity jurisdiction are stated in the complaint, and are denied by the answer, the question of jurisdiction becomes one of fact to be determined on the hearing, and is not waived; and where, during the progress of the trial, want of jurisdiction appears, it is the duty of the court to dismiss the complaint.

(Syllabus by the Court.)

Appeal from circuit court, Multnomah county; L. B. STEARNS, Judge.

This is a suit to establish the boundary or dividing line between lots 3 and 4, block 116, in the city of Portland, and is brought under the act of the legislature providing a mode of procedure in the matter of ascertaining, determining, establishing, and marking boundary lines, where the same are in dispute, between adjacent lands. Laws 1887, p. 53. Plaintiff and respondent is the owner of lot 4, and defendant and appellant of lot 3. The complaint alleges that there is a dispute as to the boundary line between these lots, and describes the location of the lines as claimed by plaintiff. The answer denies that there is any dispute as to this boundary line, but sets out what defendant claims to be the correct line, which is the same as the line claimed by plaintiff, except that one of defendant's buildings projects over some 16 or 18 inches on a portion of lot 4, and she claims that her line should be so run as to include that part of lot 4 covered by this building. The answer also alleges title, by adverse possession, to all that part of lot 4 covered by defendant's building, being a strip 16 inches wide at one end, and 19 inches at the other, and about 12 feet long. The reply denies the adverse possession by defendant of this strip of land, and upon this issue the case was tried. There is no dispute, as disclosed by the evidence, between the parties to this suit as to the location of the line dividing

lots 3 and 4, nor is there any dispute as to the boundary lines of that portion of lot 4 to which defendant claims to have derived title by adverse possession; but the real and only controversy is as to the title to that portion of lot 4 claimed by defendant.

*Mitchell & Tanner* and *R. R. Giltner*, for appellants. *M. C. George*, for respondent.

BEAN, J. The first question presented in this case is as to whether the act of 1887 applies, or was intended to apply, to cases of this kind. The determination of this question renders it necessary to first inquire what the common-law rule is, and what innovation, if any, has been made therein by the statute in question. Issuing commissions to ascertain lost boundaries was a very ancient branch of equity jurisdiction, and where the boundaries between two adjacent parcels of land had become confused, or obscure, equity has from an early period exercised a jurisdiction to settle them. The mere fact, however, that certain boundaries were in controversy was not of itself sufficient to authorize the interference of equity. In addition to the naked confusion of the controverted boundaries, before a court of equity would interfere, there must have been suggested some peculiar equity which had arisen from the conduct, situation, or relation of the parties. 3 Pom. Eq. Jur. §§ 1384, 1385; *Wolcott v. Robbins*, 26 Conn. 236; *De Veney v. Gallagher*, 20 N. J. Eq. 33; 2 Lead. Cas. Eq. 318; *Tyler, Bound.* 266, 274; 1 Story, Eq. Jur. §§ 616–621; *Wetherbee v. Dunn*, 36 Cal. 249. Courts of equity would always take cognizance of controversies in respect to boundaries of land, where courts of law did not afford adequate relief, or where equitable circumstances were shown calling for the interference of a court of equity. Although, as a rule, unless some statute exists upon the subject, the existence of a controverted boundary was not of itself a ground for relief in equity, other circumstances must be shown which seem to require the interposition of the court. Whenever such circumstances did exist, it may be observed that full and actual possession was sufficient to maintain a suit for settling boundaries. A strict legal title was never inquired into in cases of this kind. This was so declared in *Penn v. Lord Baltimore*, 1 Ves. Sr. 444, by Lord HARDWICKE, many years ago, and the rule has never been changed. *Tyler, Bound.* 266. Courts of equity would not grant relief, unless it was shown that, without the assistance of the court, the boundaries could not be found, and this is the rule now, unless changed by statute. Two things were requisite to give the court jurisdiction—*First*, a controversy as to the boundary; and, *second*, some equity superinduced by the act of the parties. In *Wake v. Conyers*, 1 Eden, 331, it was established as a principle, which has been followed and maintained ever since, that the court has no jurisdiction to fix the boundaries of legal estates, unless some equity is superinduced by the act of the parties. It was also held in *Godfrey v. Littell*, 1 Russ. & M. 59, that a court of equity will not try title to land in a suit to establish boundaries. This question

being purely legal was one for the courts of law, assisted as they are in respect to the findings of fact by a jury. *Penn v. Baltimore*, 1 Ves. Sr. 444; *Norris' Appeal*, 64 Pa. St. 275.

As to what constituted a sufficient equity to give the court jurisdiction in cases of this character, soon became a vexed, uncertain, and difficult question, and much conflict exists in the decision of courts thereon. In this condition of the law, the statute of this state was enacted and was intended, we think, to give a court of equity jurisdiction, in cases where any dispute or controversy exists between two or more owners of adjoining or contiguous lands in this state, concerning the boundary lines thereof, without requiring the existence of any other equity. It was intended to simplify the proceedings in cases of this kind, and to relieve suitors and courts from the difficult task of determining what facts would constitute a sufficient equity to give the court jurisdiction. It is only necessary, under the statute, that a dispute or controversy exists to give the court, by the aid of a commission, the power to settle, and permanently locate or work out upon the ground, the disputed line.

It was not the intention of the statute to withdraw cases relating purely to the legal title to land from the ordinary tribunals of law. The establishment of a line, under this statute, is not deemed to be, nor does it acquire validity as, a conveyance of a new title, but it simply ascertains and determines the extent of land had under pre-existing titles. In other words, it simply renders certain that which was before uncertain. This seems manifest from the first section of the act, which requires a dispute or controversy to exist concerning the boundary or dividing line,—not a dispute or controversy concerning the title,—in order to give the court jurisdiction, and also provides that a suit in equity may be maintained for the purposes of having such controversy or dispute determined, and such boundary line or lines or dividing lines ascertained and marked by proper monuments upon the ground. The subject-matter of the suit is the dispute concerning the lines, and not the titles, and the court is only authorized to ascertain and determine these lines, leaving all questions of legal title to be determined in the proper forum, unless there exists some equity independent of the controversy about the lines to give a court of equity jurisdiction to try the question of title. *HINMAN, C. J.*, in the case of *Ecclesiastical Soc. v. Baptist Church*, 35 Conn. 119, uses the following language, which is peculiarly applicable to the case at bar: "Suppose a proprietor had encroached upon an adjoining proprietor for so long a time and under such circumstances that he could not be divested of his possession, no one would claim that he could call upon the court to fix the boundary for him up to the line that he had occupied; and there is as little reason for claiming that his adjoining proprietor could call upon the court to determine by a committee where the original line really was so long as the original monuments

which defined that line remained." Where the parties claim by adverse titles, without any superinduced equity, the remedy is purely at law. 1 Story, Eq. Jur. § 620; *Wetherbee v. Dunn*, 36 Cal. 249. If, under the statute, the court should undertake to determine purely legal titles, when there is no dispute as to the boundary, as was said by *SHARSWOOD, J.*, in *Norris' Appeal*, supra: "It would draw within the maw of a court of equity, questions of a purely legal character, which have heretofore been cheaply and expeditiously settled in courts of law, with the necessarily accompanying right of trial by jury." Under this statute, where there is a dispute as to the boundary, a court of equity has jurisdiction to settle and determine the same, but this power cannot be invoked merely to try conflicting titles to land, or to usurp the place of ejectment actions at law. The fundamental basis of equity jurisdiction is the want of a full and complete remedy at law, and indeed this is the provision of the statute of this state. 1 Hill, Code, § 380. The right to trial by jury is guaranteed by the constitution of this state, and the act of 1887 must be read in the light of that provision. If the contention of respondent's counsel is to prevail, and the construction suggested by him is adopted, there can scarcely be a limit to the right to have a court of equity adjudicate titles to land in dispute between adjoining proprietors.

The only question presented in the case at bar is the legal title to that portion of lot 4 covered by the building of defendant. This being a purely legal question, disentangled of any equitable feature, the remedy at law is adequate and complete, and should be tried in that forum. (*Phipps v. Kelly*, 12 Or. 213, 6 Pac. Rep. 707,) and does not come within the provision of the act of 1887. It was, however, insisted, with much learning and ability by counsel for respondent, that defendant had waived the question as to whether a court of equity could try the title to this land by answering to the merits. The complaint is in the form prescribed by statute, and states facts sufficient to constitute a cause of suit under its provisions. The answer tendered an issue on the material allegations of the complaint which could only be determined from the evidence, and, if it appears from the evidence that the real dispute between the parties is not recognizable by a court of equity, the complaint should be dismissed. The want of jurisdiction did not, and could not have, appeared until the evidence was taken, and therefore we fail to see how defendant is precluded from urging this question on its hearing in this court. When the facts necessary to give the court jurisdiction are stated in the complaint, and are denied by the answer, the question of jurisdiction becomes one of fact to be determined on the hearing, and is not waived; and where, during the progress of the trial, want of jurisdiction appears, it is the duty of the court to dismiss the bill. *Way v. Way*, 64 Ill. 406. Having reached this conclusion, it is unnecessary to discuss the other questions presented in the case; and it follows that plaintiff's complaint must be dis-



missed. Since we have concluded that plaintiff's remedy is at law, and not in equity, his complaint will be dismissed without prejudice.

**BARTEL V. MATHIAS.**

(*Supreme Court of Oregon. Oct. 20, 1890.*)

**CONTRACTS — LIMITATION OF ACTIONS — FINDINGS OF REFEREE.**

1. Where an agreement embraces several distinct subjects which admit of being separately executed and closed, and the facts show that they were so separately performed, and the compensation agreed upon and apportioned to each of them, such an agreement is to be taken severally, and a right of action accrued as to each of them when the services were rendered.

2. The statute of limitations begins to run when the right of action is complete, and, this being so, a right of action accrued upon each of these matters when the services were rendered, and each transaction closed.

3. Where there are several of such distinct claims for services, a payment appropriated upon each of them will interrupt the running of the statute of limitations.

4. The findings of a referee are conclusive as to the facts found, if there is any evidence before him having a tendency to establish such facts.

(*Syllabus by the Court.*)

Appeal from circuit court, Multnomah county; E. D. SHATTUCK, Judge.

This was an action brought by the plaintiff for services as the general agent of the defendant, on an agreement, made about the 1st of April, 1878, to take charge of his property and business, and to act generally as such agent, in the payment of his taxes and insurance, in procuring loans, in leasing and selling and caring for his property, etc. The complaint alleges that the plaintiff fully complied with all the conditions of said agreement, and that he forthwith entered upon such service, and remained in the employment of the defendant until about the 1st of September, 1883, when, with the consent of the defendant, he left his service, and discontinued to labor for him. The complaint is accompanied with an account, containing an itemized bill of said services and payments in detail, which is made a part thereof, etc. The answer puts in issue the material matters alleged. Except as to several items it alleges payment as a defense for all services performed therein, and concludes with the further defense that the right of action, as to each and all of said items, etc., did not accrue within six years prior to the commencement of this action, etc. The reply denies the new matter set up, and alleges affirmatively that the sums paid by the defendant were a part payment of plaintiff's entire claim, and that plaintiff's right of action did accrue within six years prior to the commencement of this action, and denies that they are barred by the statute of limitations, etc. The issues being thus joined, the cause was, by consent, referred to a referee to take the testimony, and to determine the issues of fact, and the conclusions of law involved. After hearing the testimony, and being fully advised in the premises, the referee found: "*First.* That in the month of Feb-

ruary, 1878, plaintiff and defendant entered into an oral agreement that plaintiff should act as the general agent of defendant, take charge of his property and business, \* \* \* *Second.* That, at the time of making such agreement, there was no rate of compensation agreed upon between the plaintiff and defendant for such services so to be performed by plaintiff for defendant, and that no time was fixed for the performance or ending of such agency, or for payment for services rendered thereunder. *Third.* That, after entering into said agreement, and during said month of February, 1878, plaintiff entered into the service of defendant as his general agent, pursuant to said agreement, and continued in and performed the duties of such agency continuously from February, 1878, to and including February, 1883. *Fourth.* That during the continuance of such agency, plaintiff paid out of his own funds, for the benefit of defendant in the management of his property and business, the full sum of \$384, exclusive of taxes and insurance prior to November 20, 1882. *Fifth.* That the reasonable value and compensation for plaintiff's services in such agency performed during said term, in attending to payments of taxes, insurance, and leasing property, time and expenses in traveling and in correspondence with defendant, and expenses incident thereto, was and is \$283. *Sixth.* That during the term of such agency, at the request of the defendant, plaintiff effected and procured for the defendant three several loans of money, for which it was then agreed that the defendant should pay the plaintiff \$100 in each case, and that the sum thereof is \$300. *Seventh.* That during the term of such agency, at the request of defendant, plaintiff procured a purchaser for and effected a sale of block 99 in East Portland for defendant, and it was then agreed by them that the plaintiff should have for his services therein \$300, and the defendant gave a note or memorandum thereof in writing to plaintiff for said sum. *Eighth.* That during the term of such agency, at the request of defendant, plaintiff procured a purchaser for blocks 4 and 19 in East Portland, at a price and sum for which the defendant desired to sell the same; and that the defendant then agreed to pay plaintiff for his services in procuring such purchaser \$600, and defendant gave a note or memorandum in writing to plaintiff for said sum. *Ninth.* That in the month of July or August, 1883, the plaintiff informed the defendant that he had lost the two several notes hereinbefore found to have been given by the defendant to the plaintiff, and it was thereupon agreed between said parties that the amount of money represented by said notes should stand upon the defendant's liability to pay said amount disregarding the evidence of said notes; and thereafter, by the mutual understanding of said parties, said amount of moneys represented by said notes, together with all demands existing between them, stood as an open account between said parties. *Tenth.* That on November 20, 1882, a settlement was made between plaintiff and defendant for all advances of money at and prior to said date made by the plaintiff

for the defendant in payment of defendant's taxes and insurance, and otherwise. *Eleventh.* That payments have been made on general account hereinbefore found, as shown by findings 4, 5, 6, 7, 8, and 9, at times, in the amounts and manner as follows: 1879, paid by defendant, \$25; September 6, 1879, paid by J. Paquet for defendant's account, \$25; July, paid by defendant in person \$10, thereafter \$1; July 17, 1887, paid by defendant in person, \$50,—and that no other payments have been made. *Twelfth.* That no settlement or accounting has been made between the plaintiff and defendant touching the matters of account involved in this action, save as found in finding 10 above. *Thirteenth.* That the balance of said account due and owing to plaintiff by defendant, after deducting all payments made thereon, is the sum of \$1,756." And, as conclusions of law, that "plaintiff is entitled to recover of and from the defendant \$1,756, and to have judgment therefor against the defendant. [Signed] JOHN H. WOODWARD, Referee." Upon motion of the defendant to set aside the report and findings of the referee, the cause was tried before the circuit judge, and the said report in all respects confirmed, and a judgment directed to be rendered in favor of the plaintiff for the sum of \$1,756, and costs and disbursements in conformity with the recommendation and finding of the referee. From this judgment the defendant has brought this appeal to this court.

A. S. Bennett, for defendant. A. F. Sears and W. W. Thayer, for plaintiff.

LORD, J., (after stating the facts as above.) The items of plaintiff's claim for services under his alleged contract extend from the year 1878 to 1883, and as this action was commenced in 1889, unless the payment of \$50 found by the referee to have been made in July, 1887, was a part payment of all of such indebtedness, embraced in such items, it is not disputed that the claim is barred by the statute of limitations. For the plaintiff it was argued that his whole claim was based on an entire contract, and that the statute of limitations did not begin to run until the completion of his services under the contract, and that the payment of the \$50 at the time alleged was necessarily a part of the entire claim for such services as sued upon, and precluded the operation of the statute. On the other hand, the contention was that the facts as found from the evidence show that the claim consists of several distinct and separate items for services which were rendered at different times, and in respect to different subject-matters, and that the price to be paid was agreed upon and apportioned to each item when the services were to be performed, and that, when so performed, were fully complete and ended as to each item, constituting in themselves distinct and independent transactions upon which a right of action then accrued, so that, when the \$50 was paid, there being several specific debts, unless there was specific reference to or an appropriation upon each of them, the payment was a general

payment, and would not interrupt the running of the statute.

It is no doubt true that there are cases which hold to the effect that where there is a long-continued service performed by one person for another, and no time of payment or term of services being stipulated, and small payments have been made from time to time to apply upon the balance due, the services are deemed to be continuous, and a payment made within six years renews the whole claim for the previous services. In *Smith v. Velie*, 60 N. Y. 111, GROVER, J., said: "The proof shows that the intestate let the plaintiff have, in every year, various sums of money, and different articles of goods, of which he kept an account against her, which was to apply upon her wages. Whenever he did this, her services being continuous, and no time fixed by agreement for the payment of any part, the presumption is that it was to apply upon the balance he at that time owed her, and not upon the wages of any particular year. Indeed, I think the claim of the plaintiff at any and all times for previous services was an entire account, and that she could have maintained but a single action thereon against the defendant; that she could not maintain a separate action for each year of services, or any other specified part, after all had been rendered. A payment by the intestate upon the balance due the claimant took the entire balance out of the operation of the statute." In *Littler v. Smiley*, 9 Ind. 117, it was held that, upon an account for work and labor done under an agreement for payment without specifying at what time such payment should be made, or how long such labor should be performed, the statute of limitations would not commence running until such labor was ended. But in *Davis v. Gorton*, 16 N. Y. 255, where the services were performed under a general retainer, without any agreement as to the time or measure of compensation, or the term of employment, it was held to be a general hiring from year to year, the pay for each year's service becoming due at the end thereof, so that the statute began to run on each year's wages from the end of each year. See, also, *In re Gardner*, 103 N. Y. 535, 9 N. E. Rep. 306; *Mosgrove v. Golden*, 101 Pa. St. 605; *Mims v. Sturtevant*, 18 Ala. 359. But the case at bar differs in essential particulars from those referred to, and to which our special attention has been asked; and that the agreement here embraces a number of distinct subjects, all of which admit of and were separately executed and closed, constituting, in themselves several and independent transactions, and for which the price to be paid for the services rendered was agreed upon and apportioned to each of such subjects. Such a case is not like a general hiring for services, as a farm hand or housekeeper, etc., although no rate of compensation as wages, nor term of employment, is stipulated. In the nature of things, it would be difficult to fix the time of performance, or rate of compensation for services to be rendered in respect to the various and distinct subjects embraced in the claim or

agreements, and the facts as found from the evidence show that these subjects were, mainly, separately executed and closed, indicating that they were several and independent transactions. Take the claims for commissions for the sale of real estate, or for procuring loans. It is incontrovertible that they were all severally executed and closed at different times, and for a price agreed upon and apportioned to each transaction. The first item in the itemized bill filed by the plaintiff as part of his complaint is as follows: "Feb. 7, 1879. To selling block 99 to John Kratz for \$2,600, commissions as per contract, \$300."

The facts as found by the referee show that, at the request of the defendant, the plaintiff procured a purchaser, and effected a sale of that block, and that it was then agreed that the plaintiff should have for his services therein \$300, and gave him a note or memorandum in writing for that sum. The same is true for the services rendered in respect to blocks 4 and 19, and for procuring three different loans of money, except as to giving the note, but for which the price was apportioned to each transaction at the time the services were performed. These were all subjects embraced within the agreements, but which were separately executed and closed, and the amount to be paid agreed upon and apportioned to each one of them. Such a contract is not entire, but severable; and a right of action accrued when such services were rendered and ended. It is a familiar principle that the statute of limitations begins to run when the right of action is complete, and this being so a right of action accrued upon each of these matters when the services were rendered and the transaction closed. The claims being thus several and distinct, the contention for the defendant now is that the payment of the \$50 was a general payment, and not a payment to be applied in part payment of these several items found by the referee, and, consequently, did not prevent the running of the statute. But the findings show that in the latter part of the year 1882, there was a settlement between the plaintiff and the defendant for all advances of money at and prior to that date made by the plaintiff for the defendant in payment of the defendant's taxes and insurance and otherwise; that, subsequently, in August of 1883, the plaintiff informed the defendant that he had lost the two several notes given by the defendant to him, and that it was thereupon agreed between them that the amount of money represented by these two notes should stand upon the defendant's liability to pay them, without regard to the evidence of said notes, and that thereafter, by the mutual understanding of the parties, the said amount of moneys represented by said notes, together with all demands existing between them, should stand as an open account between the plaintiff and the defendant. These facts tend to indicate that, after the elimination of all matters included in the settlement, there was a mutual understanding reached, not only as to the moneys represented by the notes and the liability there-

for, but that there were other existing demands of the plaintiff against the defendant, all of which were to be deemed and treated as an open account. Distinct as they may have been, the claims were recognized as existing, although unsettled. The evidence also tends to show that, at the time the \$50 was paid by the defendant, he thought that the aggregate of these several items was about \$1,200, and not so much as the plaintiff claimed, which tends to show that he knew of and recognized the existence of these several claims, and had considered them in the aggregate, only differing as to the gross amount of his indebtedness upon them. This amount, as computed by him, is much greater than the largest amount in any one item, and exceeds all the others aggregated without it, which tends to indicate at least that, when the \$50 was paid, the defendant knew and understood that he was not making a part payment on any specific item, but that he was considering all the claims in the aggregate, and intended it to be applied in part payment of them all; or, in other words, for the whole service performed, represented by these several claims considered in the aggregate. The referee finds that the payments made, including the \$50 in July, 1887, was made and to be applied upon these several claims, and specifies them by enumeration, "as shown by findings 4, 5, 6, 7, 8, and 9," and finds that the balance due and for which the defendant is entitled to judgment is the sum of \$1,756. It is admitted that the findings of the referee are conclusive as to the facts found, if there is any evidence before him having a tendency to establish such facts. Such being the case, it matters not how much we might differ with the referee, if we were permitted to pass upon the facts; his finding is conclusive upon us, and we have no other alternative than to affirm the judgment.

ROSEVILLE ALTA MIN. Co. *et al.* v. IOWA  
GULCH MIN. Co.

(Supreme Court of Colorado. June 20, 1890.)

FIXTURES—WHAT CONSTITUTE.

A party in occupation of a mining claim on public land constructed thereon an engine-house, and within it erected an engine, placed on a frame bolted down to timbers, which were sunk in the ground, and earth tamped around them. The boiler was set on rock-work, and had the ordinary connections with the engine. The machinery was necessary for the development of the mine. Gen. St. Colo. p. 177, § 223, provides that the terms "land" and "real estate" shall embrace mining claims. *Held*, that the engine and boiler were fixtures.

Commissioners' decision. Appeal from district court, Lake county.

J. W. Easton and H. P. Krell, for appellant. J. A. Ewing, for appellee.

RICHMOND, C. This was an action of replevin brought to recover the possession and damages for the detention of one 15-horse-power engine and boiler, including smoke-stack, rope, and hoists; also one pair bellows, one truck, and three buckets. The defense was that the articles above enumerated were personal property, sub-

ject to execution, and were levied upon by virtue of an execution issued in a certain cause wherein the plaintiff herein, the Iowa Gulch Mining Company, was defendant, and one William H. Eaker and N. N. Robertson were plaintiffs. The validity of the judgment and subsequent proceedings are not questioned. The only point in issue in this court is whether the engine and boiler mentioned were fixtures, and a part of the realty, and therefore not liable to seizure and sale under an execution as personalty. The cause was tried by the court, and it was found that the engine and boiler were so attached to the land as to become chattels real, and not subject to levy under the execution as personal property; that appellee was entitled to their possession; that they were of the value of \$1,000; and that plaintiff had sustained damage by the loss of their use in the sum of \$475. Upon these findings, judgment was rendered in the usual form.

The facts, as they appear, are that the appellee, the Iowa Gulch Mining Company, was in the occupation of a certain mining claim, known as the "Scooper Lode," in the California mining district, Lake county, Colo. All of the articles levied upon were used by the company in and about the development and mining of the said claim. On the claim was constructed an engine-house, shaft-house or shed. Within the engine-house was erected the engine, placed upon three sets of timbers laid crosswise and lengthwise, sunk in the ground, and earth tamped around them, and on these was placed a frame that the engine stood on, which was bolted down to the timbers. The boiler was set about three feet from the engine, on rock-work, and connected with the engine by the ordinary connections. The claim was upon public land. The question presented by this state of facts is whether this engine and boiler were fixtures. It is contended by appellants that there can be no such thing as a fixture upon public land. We cannot agree with this position. Section 225, p. 177, Gen. St., provides that "the terms 'land' and 'real estate,' as used in this chapter, shall be construed as co-extensive in meaning with the terms 'lands,' 'tenements,' and 'hereditaments,' and as embracing all mining claims, and other claims and chattels real." "Occupancy of public land possesses the legal character of real estate." This is the conclusion of this court in *Gillett v. Gaffney*, 3 Colo. 351. A title by occupancy is, under our statute, an interest in real estate, and such an interest as is the subject of conveyance by deed. *Sears v. Taylor*, 4 Colo. 38. This doctrine is maintained in California. *Merritt v. Judd*, 14 Cal. 60; *McKiernan v. Hesse*, 51 Cal. 595. Our courts having recognized the interest acquired by occupancy of public land as a legal estate, it necessarily follows that the title to or interest in the land, however defined, carries with it the title to the structure annexed to the soil. Was the property here sought to be recovered a part of the realty? In *Merritt v. Judd*, 14 Cal. 60, it was held that "an engine and pump became a part of the realty although located upon public land." The

engine and pump referred to were attached to two timbers 10 or 12 feet long, and from 20 to 30 inches in diameter; were placed side by side upon the ground. They were only bedded in the ground sufficiently to make them level. On these bed timbers was placed a frame of 4 timbers, each about 8 inches in diameter, the side timbers about 7 feet long, and the end ones about 3 feet. These frame timbers were bolted or spiked together, and bolted or spiked to the bed logs. The boiler and the engine were spiked or bolted to this frame. The boiler, engine, and pump were attached together by the usual connections, the pump itself extending into the shaft. Over the whole was a roof or shed, which was constructed merely for the protection or shelter of the machinery. The machinery was not attached to the building in any way except that the pump was stayed by rods, reaching to the rafters of the roof. We give the full statement of facts in that case, because they seem to be analogous to the facts as they appear in the case at bar. The court in its opinion, after carefully reviewing a number of authorities, concluded as follows: "We think that the principle to be extracted from the modern cases covers the case at bar; that this apparatus was necessary to the working of the ledge; that it was attached for that purpose permanently to the soil; and its use accessory, if not essential, to the inheritance for its only valuable purpose,—the extraction of the gold." Such seems to be the situation of the property here in controversy. It must be admitted that in order to enjoy the benefits of the mining claim, to develop the mine, and bring to the surface the ore, the engine and boiler here sought to be recovered were absolutely essential. Many cases can be found in the books in which a similar connection with realty made by the owner thereof has been considered a sufficient annexation. *Oves v. Ogelsby*, 7 Watts, 106; *Merritt v. Judd*, supra, and cases cited; *Noble v. Bosworth*, 19 Pick. 314. The intention of the owner in attaching the machinery must be considered; and, if it appears that he attached the property with a view that it should remain there permanently, it must be treated as real estate. This intention is to be inferred from the nature of the article affixed, the relation and situation of the party making the annexation, the structure and mode of annexing, and the purpose for which the annexation has been made. 1. *Freem. Ex'ns*, § 114; *Palmer v. Forbes*, 23 Ill. 301; *Hunt v. Bullock*, Id. 320; *Titus v. Mabec*, 25 Ill. 257. The conclusions reached by the court below are clearly sustained by the law and the evidence. The judgment should be affirmed.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is affirmed.

#### HOWLETT v. TUTTLE.

(Supreme Court of Colorado. Oct. 3, 1890.)

#### EXEMPLARY DAMAGES.

It is the settled rule of this state, when not controlled by legislation, that exemplary or punitive damages as a punishment or example should

not be awarded in civil actions for injuries resulting from torts where the offense is punishable under the criminal laws. But see *Sess. Laws 1889*, p. 64.

(*Syllabus by the Court.*)

Error to district court, Arapahoe county.

*B. M. & C. J. Hughes, Jr.*, for plaintiff in error. *J. W. Horner*, for defendant in error.

**PER CURIAM.** The plaintiff below sued to recover damages on the ground, as alleged in the complaint, that defendant, maliciously intending to injure plaintiff, had wantonly and willfully made a breach in a certain irrigating ditch, when full of water, and so flooded and injured a large tract of plaintiff's land, and totally destroyed certain other property. Plaintiff prayed judgment against defendant for the sum of \$600 as the actual damages to his property, and for \$900 as punitive or exemplary damages. The jury returned a verdict in favor of plaintiff, assessing his damages generally at the sum of \$400. The defendant brings the case to this court, and assigns for error, *inter alia*, that the court instructed the jury to the effect that if they believed from the evidence that defendant committed the acts complained of with a malicious intent towards the plaintiff,—that is, with intent to flood plaintiff's property with water and sediment, and so injure it,—then they might, in addition to the actual damages sustained by plaintiff by reason thereof, assess against the defendant in favor of the plaintiff exemplary damages,—that is, damages by way of punishment of the defendant's malice. At and prior to the time when this cause was tried, in December, 1882, the rule thus laid down by the trial court had been very generally recognized as correct by the courts of England and America, though able jurists and law-writers had been somewhat at variance as to what were the true elements of damage in cases of this kind. In 1884, this court, in the case of *Murphy v. Hobbs*, 7 Colo. 541, 5 Pac. Rep. 119, in an elaborate opinion, held that it was more in accordance with good reason and sound logic that exemplary or punitive damages, as a punishment or example, should not be awarded in civil actions for injuries resulting from torts where the offense is punishable under the criminal laws. The *Murphy-Hobbs* case has been followed by other decisions of this court; and the doctrine therein announced may now be considered as settled in this jurisdiction when not controlled by legislation. It will be observed in this connection that the decisions of this court indicate a liberal rule for the recovery of full compensatory or actual damages in cases of willful and malicious injuries to person or property. *Railway Co. v. Yeager*, 11 Colo. 345, 18 Pac. Rep. 211; *Publishing Co. v. Miner*, 12 Colo. 77, 20 Pac. Rep. 345; but see *Laws 1889*, p. 64. Considering the state of the law at the time this action arose, the charge of the trial court concerning exemplary damages must be held to be error; and, as the verdict was general, we are not able to say that the erroneous charge did not

lead the jury to include in their verdict something more than the actual damages sustained by plaintiff. It is unnecessary to notice other assignments of error. The judgment of the district court is reversed, and the cause remanded.

**ROBERTS et al. v. ARTHUR et al.**

(*Supreme Court of Colorado. Oct. 3, 1890.*)

**INJUNCTION—DISSOLUTION—APPEAL.**

1. Where an injunction has been awarded after notice, it is error to dissolve the same in vacation; but, on an appeal from the final judgment in the action, such error is not ground for reversal unless it appears that such premature dissolution was prejudicial to the substantial rights of the plaintiff in the final adjudication.

2. When a party has acquired a prior right to the water of a natural stream by a valid appropriation thereof to a beneficial use, another party cannot justify an interference with such prior right by merely showing that he is wholly dependent upon the same supply of water; but, in an equitable proceeding for some purposes, even though not as a bar to such prior right, it may be proper for defendant to allege such dependence in connection with other averments of the answer; and it is not error to refuse to strike out such matter unless it is made to appear that its retention, in some way, may have improperly affected the final decision of the cause.

3. Under the appeals act of 1885, unless the printed abstract shows that all the material evidence was taken by deposition or before a referee, and that the evidence and exhibits are full and complete, it is not incumbent upon the appellate court to sift and weigh the evidence, nor will the findings of the trial court in such case be reversed upon the mere weight of evidence.

(*Syllabus by the Court.*)

Appeal from district court, Fremont county.

*Waldo & Baker*, for appellants. *Jos. H. Manpin*, for appellees.

**ELLIOTT, J.** The appellants in this case, plaintiffs below, brought this action, claiming to be the owners of a certain ditch by means of which they had made appropriations of water from Coal creek and South Oak creek to supply the town of Coal Creek for domestic use; and that they had thereby acquired a priority of right to such water superior to the rights of defendants. They charged defendants with having begun the construction of another ditch above plaintiffs' head gate with the avowed purpose of taking all the water naturally flowing in said Coal creek, and so interfering and depriving plaintiffs of their said prior right thereto. In the complaint plaintiffs prayed that defendants be ever enjoined from further constructing their ditch; also, from cutting the channel of Coal creek or of South Oak creek; also, from taking or interfering, in any manner, with any of the waters of either of said creeks, for purposes of irrigation, or for any other purpose, whatever; and for such other relief as shall be deemed by the court just and equitable. Plaintiffs applied upon notice and obtained a temporary injunction against defendants. An answer and motion to dissolve the injunction were filed. The motion was heard, and the injunction dissolved, in vacation. This action of the court is assigned for error, as being in violation of

section 153 of the Code, which provides that, "where any injunction shall have been awarded after notice, no motion for the dissolution of such injunction shall be heard or made in vacation." The dissolution of the injunction occurred at a time when, under the act of 1885, such interlocutory order might have been made the ground of a separate appeal. No such appeal, however, was taken, and the proceedings in the main case were continued to final judgment, from which this appeal is prosecuted. Under such circumstances, the dissolving of the preliminary injunction in vacation, though erroneous, cannot be considered reversible error, unless 't shall appear that a dissolution at such time was prejudicial to the substantial rights of the plaintiff in the final adjudication. For since the court upon final hearing found against the plaintiffs and dismissed their action, such judgment would have carried with it the dissolution of the injunction in any event. It is assigned for error that the court refused plaintiffs' motion to strike the following paragraph from defendants' answer: "That the said defendants, and each of them, have to depend wholly upon said Coal creek for water sufficient to irrigate so much of their said lands as is tillable, and for domestic uses and purposes; and that they have no other water facilities on said lands."

It is urged by counsel for appellants that the foregoing allegation is no defense to plaintiffs' claim to priority of right, based upon their appropriation of the water of Coal creek, as alleged in their complaint. It is true, when one party has acquired a priority of right to the water of a natural stream by a valid appropriation thereof to a beneficial use, another party cannot justify an interference with such right by merely showing that he is wholly dependent upon the same supply of water; for, if the right of the prior appropriator must yield to the necessity of the junior appropriator, then the rule of priority of right as guarantied by the constitution may be altogether abrogated. But the answer denies the prior appropriation claimed by plaintiffs, and denies that defendants propose to take all or any considerable portion of the water of Coal creek. This was an equitable proceeding. A preliminary injunction had been obtained against defendants. For some purposes, therefore, even though not a bar to plaintiffs' action, it may have been proper for defendants to show their purpose in taking water from Coal creek; and so it may have been incumbent upon them to allege such purpose in connection with other averments of the answer. The printed abstract of the record, upon which this case is submitted, does not purport to contain the whole answer, nor the whole of the substance thereof; and, under the appeals act of 1885, we are not at liberty to speculate as to matters not contained in such abstract. We cannot undertake to determine for what purpose the above-quoted portion of the answer may have been retained, nor can we suppose that its retention in any way improperly affected the final decision of the cause. Hence, we cannot say there was error in refusing the

motion to strike. *South Boulder Ditch, etc., Co. v. Community Ditch, etc., Co.*, 8 Colo. 429, 8 Pac. Rep. 919; *Wilson v. Hawthorne*, 14 Colo. —, ante, 548. The printed abstract does not purport to contain the exhibits *in extenso* nor the evidence *in hæc verba* as taken at the trial; nor does it show that all the evidence was taken by depositions, or before a referee, so as to make it incumbent upon us to sift and weigh the same according to the former practice in chancery.

There are no assignments of error based upon the rulings of the court in the reception or rejection of testimony. The only assignments of error not already considered in this opinion, are to the effect that the decision of the court below is against the law and the evidence. The printed abstract shows the exhibits and the testimony of a large number of witnesses in condensed form. From these evidences it may be inferred that the controversy assumed various phases, and that difficult questions of fact were presented; but, so far as we are advised, the court made no special findings either of fact or of law, and entered no judgment except generally "against the plaintiffs that their complaint be dismissed," and for costs. Such adjudication must be sustained, if, upon any ground within the scope of the issues, the evidence failed to establish facts sufficient to entitle plaintiffs to the relief sought by their action. Upon an examination of the evidence in the light of the written briefs, but without the aid of oral argument as we requested, we discover no satisfactory grounds for disturbing the decision of the trial court. In this case, especially, the trial judge possessed great advantages in understanding the evidence. In the first place, some of the witnesses, and all of the evidence and exhibits, full and complete, were before him; in the next place, he had the advantage of viewing the maps referred to in the evidence, but not shown in the abstract. And, again, he had the benefit of oral arguments by counsel while the evidence was fresh in his recollection. It is unnecessary to restate the superior value which the law accords to his judgment upon questions of fact under such circumstances. The judgment must accordingly be affirmed.

# DE VOTIE et al. v. McGERR.

(Supreme Court of Colorado. Oct. 17, 1890.)

WIFE'S SEPARATE ESTATE—ESTOPPEL—FRAUD—INSTRUCTIONS.

1. A wife's separate property may become subject to the debts of her husband, in case he be permitted to deal with it, and obtain credit upon it as his own with her knowledge and consent.

2. An estoppel *in pais* cannot be proved under the general or specific denial provided by the Code, but must be specially pleaded as new matter, in order to be available as a defense.

3. In actions for the recovery of personal property, or damages for the conversion thereof, the principle applicable to pleadings, when fraud is relied on as a defense, may be stated thus: Where the defendant's claim of title springs out of or rests upon the alleged fraud or fraudulent conduct of the plaintiff, so that but for the fraud the title of plaintiff would be good, such fraud,

being the source and foundation of the defendant's claim, is essentially new matter, and must be pleaded, or it cannot be proved.

4. It is not error to refuse instructions which are not appropriate to the issue as tendered and accepted.

(*Syllabus by the Court.*)

Appeal from district court, Clear Creek county. On rehearing; former decision not reported.

This was an action brought by Annie McGerr, plaintiff below, to recover the value of certain live-stock, consisting of eight cows and three yearlings, which she claimed to own and possess as her own property, and which she alleges were wrongfully taken and converted by defendants to their own use. It appears that in September, 1885, two of the defendants, Bullock and Strickler, obtained a judgment in the county court of Clear Creek county against Thomas McGerr, husband of plaintiff, and that, by virtue of an execution to satisfy said judgment, their co-defendant, John C. DeVotie, sheriff of said county, levied upon and sold certain live-stock, including those claimed by plaintiff in this action. The principal defense relied on was that Thomas McGerr, and not the plaintiff, was the owner of the property in controversy, and that said property was liable to execution to satisfy the judgment obtained against him as aforesaid. The issue upon this defense was tried and submitted to the jury, who returned a verdict for the plaintiff. The defendants bring this appeal, and assign for error the refusal of the court to admit certain testimony, the refusal to give certain instructions prayed by defendants, and the giving of certain other instructions prayed by plaintiff.

*Morrison & Fillius*, for appellant. *C. C. Post*, for appellees.

ELLIOTT, J. The return of the property in controversy for assessment by Thomas McGerr as his own was not evidence against the plaintiff's title, unless accompanied by evidence that such return was with her knowledge and consent. So, too, a mortgage of the property by the husband as his own was not evidence against the wife's title, unless supplemented by evidence of her knowledge and consent. If there be satisfactory evidence of actual knowledge the evidence of consent need not be express; but consent may, perhaps, be inferred from long-continued acquiescence, or other pertinent circumstances. The trial court did not err in rejecting the assessment, return, and mortgage, the supplementary evidence not being produced or offered. The instructions prayed and refused, as well as those given at the trial, are very voluminous, and it is unnecessary to undertake to review them in detail. The instructions given fairly submitted the question arising upon the evidence under the pleadings as to whether or not plaintiff was the actual owner of the property in controversy, and limited her recovery to such property as the proof showed belonged to her separate estate. The law, in respect to the rights of married women to own, hold, and enjoy their separate

property, and to be protected therein, was fully considered in the cases of *Wells v. Caywood*, 3 Colo. 487, and in *Coon v. Rigden*, 4 Colo. 275. These cases have been several times cited and approved by this court. It is not necessary to restate the doctrine therein announced. Counsel for appellants in the court below undertook to avoid the force and effect of these decisions by the offer of evidence tending to show that the plaintiff permitted her husband, Thomas McGerr, to deal with the property in controversy as his own, and so to obtain credit upon it. They also requested the court to charge the jury to the effect that, even if the property in controversy was theseparate property of the wife, she could not recover damages for its conversion if she had allowed it to be used by her husband as a means of obtaining credit for the goods for the price of which it was seized and sold. This instruction was refused. Much reliance is placed upon the following paragraph from the opinion in *Coon v. Rigden*, supra: "Should the wife permit the husband to deal with and sell her separate property as his own, or obtain credit upon it as his own, undoubtedly this would be a fraud against which courts would extend their protection." Unquestionably, a married woman may, by her own voluntary conduct, forfeit protection to her separate estate. Being *sui juris* she is responsible for her own fraudulent acts as well as subject to the law of estoppel. *Railroad Co. v. Allen*, 13 Colo. 229, 22 Pac. Rep. 605. Some of the instructions prayed by defendants, and refused by the court, undoubtedly state correct propositions of law relating to such conduct. But the evidence tending to show that Mrs. McGerr permitted her husband to deal with the property in controversy as his own was not very strong, though probably sufficient to make it incumbent upon the court to give the instructions prayed upon that theory, if the issues in the case had been properly framed for that purpose. The foregoing quotation from *Coon v. Rigden* indicates that the acts of a wife which would cause her property to become liable for the debts of her husband must be such as would amount to a fraud, and thus estop her from asserting her title. "The ground of an estoppel by conduct commonly is fraud," says Mr. Bigelow, at page 636 of his work on that subject. It is a general rule that matters constituting fraud must be specially pleaded in order to be available as a defense. As this difficulty in the case had not been noticed by counsel in their original printed briefs, nor in the oral argument before the court upon the rehearing, we requested counsel to present additional briefs, which they have done, upon the following question: "Were defendants below entitled to have the jury instructed upon the theory that the property in controversy had become subject to the debts of Thomas McGerr by reason of plaintiff's supposed fraudulent conduct in respect thereto, without setting forth in their answer any defense of that character?"

Counsel for appellants now contend that it is unnecessary to plead specially



those matters which amount to an estoppel *in pais*; that such matters may be given in evidence under the general issue; and that, inasmuch as there was some evidence tending to show that plaintiff permitted her husband to deal with the property as his own, the question whether such evidence was sufficient to estop plaintiff from asserting her title should have been submitted to the jury. This view is supported by respectable common-law authorities. Bigelow, Estop. 669; Canal Co. v. Hathaway, 8 Wend. 480. But whatever may be the weight of common-law precedents upon this subject, reason, logic, and the general current of authority in the code states, concur in the rule that estoppels must be specially pleaded, and this rule includes estoppels *in pais*, as by fraudulent conduct, and the like. Section 56 of the Code of Colorado provides: "The answer of the defendant shall contain—*First*, a general or specific denial," etc.; "*second*, a statement of any new matter constituting a defense," etc. Commenting upon this section of the Code, Dr. Biles, in his excellent work on Code Pleadings, § 329, says: "Fraud, as a defense, is sustained by affirmative facts which do not contradict, but avoid the legal effect of, the facts stated by the plaintiff." Again, at section 330, it is said: "Keeping in view the logical rule that the new facts which may be proved under a denial are those which show that the plaintiff's statements are untrue, also that facts which are consistent with their truth, but show that he has no cause of action, are new matter, to be pleaded, we can seldom be deceived as to what may and may not be thus proved. \* \* \* It is held in most of the states that facts showing fraud as a defense, especially in acquiring title to the property claimed by the plaintiff, which title would be good but for the fraud, are new matter, to be specially pleaded." Again, at section 339, it is said: "A statement of new matter constituting a defense is but a statement of facts which do not appear in the plaintiff's pleading, and which show that, notwithstanding the facts stated by him, he suffers no wrong." Again, in section 364, the same author adds: "Matter of estoppel is equitable in its nature, yet, as forbidding a party to plead the truth, it should be set out with more certainty than will avail in ordinary defenses." With this section the author concludes the chapter upon the "Defense of New Matter" with the pertinent observation: "It is unnecessary, in this connection, to attempt to instance all the defenses which should be specially pleaded. In treating upon common-law pleading it might be necessary, inasmuch as the *allegata* bear so slight a relation to the *probata*, that the pleader cannot decide, upon principle, what should be specially pleaded, and what is provable under the general issue. But the rules given and illustrated in this and the last chapter will not permit a careful code pleader to make a mistake in this regard."

Dr. Pomeroy, in his valuable treatise on "Remedies and Remedial Rights by the Civil Action. According to the Reformed American Procedure," at section 712, says:

"According to the decided weight of authority, an estoppel *in pais* cannot be proved under a general denial, but is new matter." Wood v. Ostram, 29 Ind. 186; Dale v. Turner, 34 Mich. 417; Ransom v. Stanberry, 22 Iowa, 334; Warder v. Baldwin, 51 Wis. 450, 8 N. W. Rep. 257; Clarke v. Huber, 25 Cal. 597; Bray v. Marshall, 75 Mo. 327; Maxwell v. Longenecker, 89 Ill. 102. In Birch v. Steppeler, 11 Colo. 400, 18 Pac. Rep. 530, the answer contained a defense involving estoppel by conduct which was specially and successfully pleaded against the assertion of title to real estate. In order to make correct application of the foregoing doctrine to the question before us it becomes necessary to consider further the state of the pleadings in the case. The complaint is similar to an ordinary declaration in trover at common law. The answer denies—*First*, the plaintiff's ownership or possession of the property; *second*, the value of the property; *third*, the wrongful taking; and, *lastly*, pleads the judgment in favor of Bullock and Strickler against Thomas McGerr, the issuance of execution thereon, the levy by the sheriff upon the property in controversy "as the property of the said Thomas McGerr," and further alleges "that said goods or cattle were at the time of the levy under said writ in the possession of said Thomas McGerr, and were the property of said Thomas," etc. Nothing whatever of fraud, fraudulent conduct, or conduct on the part of plaintiff calculated to mislead any one as to the title is in any manner alleged. In this connection the case of Tucker v. Parks, 7 Colo. 70, 298, 1 Pac. Rep. 427, and 3 Pac. Rep. 486, is directly in point, where it is said: "Fraud must be specially pleaded in an answer, as well as in a complaint." The language of that opinion is, in substance, pertinent to the record before us. Neither fraud nor any other matter in avoidance of plaintiff's title is set up in the answer; nor are any facts stated in the answer apprising the plaintiff that her title to the property in controversy would be assailed on the ground of fraud. Hence defendants could not avail themselves of such a defense by evidence; and, since not by evidence, then not by instructions relating to such evidence. The evidence tending to show how the husband dealt with the property, to the extent the plaintiff had knowledge thereof, was admissible, and was received and submitted to the jury as tending to elucidate the question presented by the pleadings, to-wit: Was the property, in fact, the property of the plaintiff, or was it the property of Thomas McGerr, her husband? Unless the evidence reached far enough to overcome or equal plaintiff's evidence, based upon her affirmative allegation that she was the owner of the property, she was, under the pleadings, entitled to a verdict. The jury evidently considered that the preponderance of the evidence upon this issue was in favor of the plaintiff's title.

It has been suggested that the case of Benesch v. Waggner, 12 Colo. 534, 21 Pac. Rep. 706, is in conflict with the case of Tucker v. Parks, *supra*, in reference to the necessity of pleading fraud in actions like

the case now before us. Nothing, however, in either case, conflicts with the principle we have found applicable to such pleadings, and which may be stated thus: Where the defendant's claim of title springs out of or rests upon the alleged fraud or fraudulent conduct of the plaintiff, so that but for the fraud the title of plaintiff would be good, such fraud, being the source and foundation of the defendant's claim, is essentially new matter, and must be pleaded, or it cannot be proved. In the Benesch-Wagner Case, the plaintiff was the original owner of the property. He did not claim ownership on the ground of the fraud of the opposite party, but in spite of it. Hence, it was held that a general allegation of ownership was sufficient, and that there was no necessity for setting forth in the complaint the supposed fraudulent matter incidentally involved in the controversy. In the Tucker-Parks Case, also, the plaintiff claimed title by assignment from the original owners, and the allegations of the complaint were general. But the defendant, sheriff, who sought to justify the taking of the property in execution against the original owners, on the ground that the deed of assignment to the plaintiff was fraudulent, was not allowed to give evidence of the fraud, for the reason that the fraudulent character of the deed of assignment was essential to the validity of his levy, and so was new matter, the existence of which he must both allege and prove, and his answer contained no charge or allegation of that character. In the case now before us, if the property in controversy was indeed the property of plaintiff, then the right of defendants, if they had such right, to levy upon the same for her husband's debts, must have sprung out of and rested upon fraudulent conduct on the part of plaintiff in respect to the property. Such fraudulent conduct, if it had any existence, was new matter essential to be alleged and proved by defendants in order to sustain their levy. There being no issue of that character the court properly refused to give instructions based upon such a theory.

The defendants tendered the issue that the property in controversy was not the property of plaintiff, but of her husband. By the instructions prayed and refused, as above stated, they sought to try quite a different issue, to-wit, that the property, though the property of plaintiff, had become subject to the debts of her husband by reason of her fraudulent conduct. The trial court did not err in refusing to allow defendants to tender one issue, and recover upon another. The verdict of the jury upon the issue as tendered and accepted was well sustained by the evidence, and cannot properly be disturbed. The judgment of the district court will stand affirmed, for the reasons stated in this opinion.

BARKER V. FREEMAN. (No. 13,506.)

(Supreme Court of California. Sept. 8, 1890.)

SWAMP LANDS—RIGHT TO PURCHASE.

Under Act Cal. March 27, 1872, providing that "when application has been made to pur-

chase lands from this state, and payment made to the treasurer of the proper county for the same, in whole or in part, and a certificate of purchase or patent has been issued to the applicant, the title of the state to said lands is hereby vested in said applicant or his assigns, upon his making full payment therefor, provided that no other application has been made for the purchase of the same lands prior to the issuance of said certificate of purchase," the complaint of an applicant to purchase swamp lands from the state, alleging that at the time the certificate of purchase therefor was issued to defendant the lands had not been surveyed, and were not subject to sale, but also showing that complainant's application to purchase said lands was not filed until after the passage of said act, and after the certificate had been issued to defendant, is bad on demurrer.

In bank. Appeal from superior court, Kern county; R. E. ARICK, Judge.

J. B. Lamar and E. Rousseau, (Lamar & Castle, of counsel,) for appellant. Haggin & Van Ness, (Geo. C. Gorham, Jr., of counsel,) for respondent.

SHARPSTEIN, J. This case originated in a contest instituted in the state land-office by an application of the plaintiff, in 1888, to purchase a tract of swamp and overflowed land, of which defendant, upon an application in due form, obtained in 1871 a certificate of purchase from the register of the state land-office. The contest was duly referred to the proper court for adjudication. Plaintiff filed his complaint. Defendant demurred to it, on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained, and judgment entered for defendant. Plaintiff appeals. The contention of the respondent is that the complaint does not allege facts sufficient to show that the certificate issued to him in 1871 is invalid. Appellant insists that the facts alleged do show that it is invalid. The allegation upon which appellant relies is that at the time of the issuing of said certificate of purchase to defendant, on the 23d day of January, 1871, said land had not been surveyed, and was not subject to sale. This contention is based upon a clause in the act of the legislature of the 28th of March, 1868, which reads as follows: "The swamp and overflowed salt marsh and tide-lands belonging to the state shall be sold at the rate of one dollar per acre, in gold coin; payable, fifty per cent. of the principal within fifty days from the date of the approval of the survey by the surveyor general." The demurrer admits that no survey had been made at the time of the issuing of the certificate to the defendant. Conceding that the application filed before the approval of the survey by the surveyor general was invalid, it appears by the complaint that the application of the appellant to purchase the land was not filed before the year 1888, and the legislature, by the act of March 27, 1872, enacted that "when application has been made to purchase lands from this state, and payment made to the treasurer of the proper county for the same, in whole or in part, and a certificate of purchase or patent has been issued to the applicant, the title of the state to said lands is hereby vested in said applicant, or his assigns, upon his making full payment therefor, provided no other application

has been made for the purchase of the same lands prior to the issuance of said certificate of purchase." This act of the legislature was considered and construed by this court in *Yoakum v. Brower*, 52 Cal. 373, and again in *Rowell v. Perkins*, 56 Cal. 219. In the former case, we said: "The act is operative, not only upon applications which were defective in form, but upon those which were defective in substance, or were invalid for any other reason. \* \* \* If those steps in the proceedings for the purchase had been taken prior to the passage of the act, the act operated to validate and confirm the certificate." In the latter case, the court says: "From what has been said, it sufficiently appears that the defendant, who made first payment in the proper county, has, by virtue of the act of 1872, acquired a right to complete his purchase in the land-office, even if the lands applied for were not the property of the state, or were not subject to location or disposition when he filed his application." That construction of the act is quite satisfactory to us, and leaves little or nothing more to be said in this case. Upon the authority then of those cases, the demurrer was properly sustained. The demurrer was sustained without leave to plaintiff to amend his complaint. It does not appear that plaintiff asked leave to amend his complaint, and we cannot reverse the judgment on the ground that leave was not granted when none was asked. Judgment affirmed.

We concur: WORKS, J.; THORNTON, J.; MCFARLAND, J.; FOX, J.; PATERSON, J.

STONER v. FREEMAN. (No. 13,509.)

(*Supreme Court of California*. Sept. 8, 1890.)

In bank. Appeal from superior court, Kern county; R. E. ARICK, Judge.

J. B. Lamar and E. Rousseau, (*Lamar & Castle*, of counsel,) for appellant. Haggitt & Van Ness, (*Geo. C. Gorham, Jr.*, of counsel,) for respondent.

PER CURIAM. On the authority of *Barker v. Freeman*, ante, 926, (No. 13,506, this day filed,) the judgment is affirmed.

ETZENHOUSER v. FREEMAN. (No. 13,508.)

(*Supreme Court of California*. Sept. 8, 1890.)

In bank. Appeal from superior court, Kern county; R. E. ARICK, Judge.

J. B. Lamar and E. Rousseau, (*Lamar & Castle*, of counsel,) for appellant. Haggitt & Van Ness, (*Geo. C. Gorham, Jr.*, of counsel,) for respondent.

PER CURIAM. On the authority of *Barker v. Freeman*, ante, 926, (No. 13,506, this day filed,) the judgment is affirmed.

WILSON v. FREEMAN. (No. 13,507.)

(*Supreme Court of California*. Sept. 8, 1890.)

In bank. Appeal from superior court, Kern county; R. E. ARICK, Judge.

J. B. Lamar and E. Rousseau, (*Lamar & Castle*, of counsel,) for appellant. Haggitt & Van Ness, (*Geo. C. Gorham, Jr.*, of counsel,) for respondent.

PER CURIAM. On the authority of *Barker v. Freeman*, ante, 926, (No. 13,506, this day filed,) the judgment is affirmed.

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NOYES v. SOUTHERN PAC. R. CO. (No. 13,840.)<sup>1</sup>

(*Supreme Court of California*. Oct. 8, 1890.)

RAILROAD COMPANIES—ACCIDENTS TO PERSONS ON TRACK.

In an action against a railroad company for the wrongful death of an employee of one of its contractors, it appeared that deceased, with the knowledge and consent of the company, was walking to his work on the right of way, in a narrow place between a bluff and the sea traversed by two parallel tracks, with knowledge that two locomotives, one on each track, would shortly follow him in the same direction; that he received warning by the bell of one, and then perceived that they were approaching at such relative rates of speed as would probably bring them together at the moment of passing him; that he at first took refuge between the tracks where there was barely room to escape unharmed, but a moment later attempted to cross the track towards the bluff, where there was ample room, and was struck and killed while so doing. Held, he was guilty of contributory negligence, and a nonsuit was properly directed.

Department 1. Appeal from superior court, Contra Costa county; J. P. JONES, Judge.

Henry C. McPike, and D. M. Delmas, for appellant. L. D. McKissick and Fred B. Lake, (*Harvey S. Brown*, of counsel,) for respondent.

WORKS, J. This is an action by the appellant, as administrator, against the respondent for damages for injuries resulting in the death of Manuel F. De Mattos. The evidence on the part of the plaintiff being in, the defendant moved for a nonsuit, which was granted. The only question on this appeal is as to the correctness of this ruling. The facts disclosed by the pleadings and evidence are substantially as follows: The defendant owned and operated a railroad. At a point on its road, between Port Costa and what was known as the "Nevada Docks," there was a double line of tracks. The road at this point ran along the straits of Carquinez, and the width of the road-way was about 24 feet: on one side of the two tracks, and about four feet from the end of the ties, was a steep bluff rising from the road-bed, and on the other side the ends of the ties projected to the water's edge. There was a space of 8 feet between the rails of the two tracks in the center. One Edgar De Pue had been for more than two years engaged by the defendant as a contractor to load and unload its cars at the Nevada docks. In doing this work he kept in his employ a large number of men, many of whom resided at Port Costa. The road-bed of the defendant furnished the only convenient way for foot-passengers between these two points, and the men who lived at Port Costa had for a long time been accustomed to and did pass along this road-way daily, in going to and coming from their work. To facilitate the operation of loading and unloading the cars, the defendant had been in the habit of sending, daily, two locomotive engines from Port Costa to the docks. On their way

<sup>1</sup> Reversed in banc. See 28 P. 283, 92 Cal. 285.

to the docks, the locomotives frequently carried some of the workmen, and others would walk along the road-way of the defendant. On the morning of the accident, resulting in the death of De Mattos, a crew of men, under De Pue, started for Port Costa for their work at the docks. They were accompanied, as usual, by two locomotives. Some of the men took the locomotives, but about 20 others, including De Mattos, started on ahead of the engines on foot. They had gone but a short distance when they were followed by one of the engines, on the switch track, running at a slow rate of speed. They were overtaken while traveling the narrow part of the road-way above mentioned. They were warned of the coming of the first engine by the sound of its bell, and then beheld the second engine coming at a much greater rate of speed about 40 yards distant. It was reasonable to suppose that at the rate the two engines were coming they would be abreast of each other at about the point where the men were, and both of the tracks, and much of the space of the road-way, be thus taken up. The men were called upon to save themselves by some means without delay. Most of them succeeded in reaching the space between the track on the land side and the bluff, and were saved. One of their number jumped into the water on the other side, and escaped with but slight injuries; two others chose to occupy the space in the center between the tracks, and one of them was struck by one of the engines but not injured. De Mattos was in this space between the tracks, and, if he had remained there, would have escaped, but when the second engine was nearing him he made the hazardous attempt to cross in front of it, evidently with the intent to reach the space near the bluff, and in the attempt was struck by the engine, run over, and killed. As the second engine was coming, the track upon which it was moving was clear until the deceased stepped upon it, and then it was too late to stop the engine in time to save him. It is contended by the appellant that, the road-way having been used for so long a time by foot-passengers, it must be presumed that it was so used with the consent and acquiescence of the railroad company, and that therefore the deceased was not a trespasser, or wrongfully upon the respondent's road-way, and not guilty of contributory negligence, and that, for the same reason, the employees of the company were guilty of negligence in not sounding the bell of the engine, and in running at too high a rate of speed. It may be conceded for the purposes of this case that the continued use of the road-way of the respondent as a footway was sufficient to establish the fact that it was being so used with the consent and acquiescence of the company, and that therefore the deceased was not a trespasser. There are authorities holding such a doctrine. *Delaney v. Railroad Co.*, 33 Wis. 67, 70; *Troy v. Railroad Co.*, 99 N. C. 298, 6 S. E. Rep. 77; *Davis v. Railroad Co.*, 58 Wis. 646, 17 N. W. Rep. 406. But, if this be conceded, it does not follow that the deceased was not guilty of neg-

ligence. The evidence shows conclusively that he started out on the road-way knowing that the two locomotives would follow immediately. It was also known by the employees in charge of the engines that the workmen were in front of them. The first engine warned the men of their coming. As the second engine came on, the track upon which it was moving was clear, and the men had notice of its coming. The engine was not running at an unusually high rate of speed,—some of the witnesses say not more than 10 miles an hour. Conceding that the deceased was rightfully on the road-way, it was not necessary that he should have been on the track upon which the locomotive was coming, and as he had knowledge that the engine was following, and must necessarily overtake him on the way, it was negligence for him to travel on the track, or to attempt to cross the track in front of the moving engine. There was evidence sufficient to show that there was ample room for him to have traveled along the road-way, either between one of the tracks and the bluff or between the two tracks, and that, if he had done so, he would not have been injured. It is true, as counsel for appellant contend, that when the danger was upon him, and he was called upon to act instantly, and without time to reflect and choose the safest means of escape, it was not negligence on his part that he made a mistake in attempting to cross in front of the engine. 1 *Shear. & R. Neg.* § 89; *Karr v. Parks*, 40 Cal. 188, 193; *Lawrence v. Green*, 70 Cal. 417, 421, 11 Pac. Rep. 750; *Smith v. Railway Co.*, 30 Minn. 169, 14 N. W. Rep. 797; *Wilson v. Railroad Co.*, 26 Minn. 278, 3 N. W. Rep. 333. But this doctrine only applies where the party injured is placed in imminent peril without his fault. Such was not the case here. The deceased, knowing that the engines were following him, if he had acted the part of a prudent man, would not at the time of their coming, have been in a position where he would have to run risks in attempting to escape. He could have been in a place on the road-way where no choice, in the face of imminent danger, would have been necessary. His negligence consisted, not in mistaking the safest means of escape from danger, but in placing himself, beforehand, where a choice of different means of escape became necessary. It seems to us, also, that the very same facts which show that the deceased was negligent show also that the employees of the respondent were not guilty of negligence. They knew that the men who had preceded them had knowledge of their coming, and had a right to suppose that they would not be on either of the tracks when there was room for them to pass along safely at the side of the track. Besides, the evidence shows that, up to the instant the deceased was struck by the engine, the track upon which the engine was moving was clear, and there was no apparent reason for stopping or slowing up. The men in charge of the locomotive could not be expected to anticipate the fact that the deceased, who was then in a place of safety between the tracks, would place himself in danger by

stepping in front of the engine. We think the nonsuit was properly granted. Judgment affirmed.

We concur: FOX, J.; PATERSON, J.

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DOUTHITT v. FINCH. (No. 12,033.)

(Supreme Court of California. May 31, 1890.)<sup>1</sup>

**COSTS—OFFER OF JUDGMENT.**

Code Civil Proc. Cal. § 997, provides that if, after an offer of judgment, "plaintiff fails to obtain a more favorable judgment, he cannot recover costs, but must pay the defendant's costs from the time of the offer." Held that, where defendant, before the trial, served on plaintiff an offer to allow judgment to be taken for \$500, which offer was not accepted, and on the trial plaintiff obtained a judgment for \$400, the trial court properly allowed plaintiff the costs which he had incurred before the offer, and charged him with the costs which accrued after the offer.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco.

Tyler & Tyler, for appellant. D. William Douthitt, in pro. per.

VANCLIEF, C. This appeal presents only a question of costs. Before the trial, and after plaintiff had incurred and paid \$28 costs, the defendant regularly served upon the plaintiff an offer, in writing, to allow judgment to be taken for \$500, which was not accepted. Upon the trial the plaintiff recovered only \$400. The court allowed the plaintiff's cost-bill for the \$28 incurred before the offer of defendant to allow judgment for \$500, but charged plaintiff with costs after that offer. The appellant contends that no costs incurred before the offer should have been allowed. The solution of the question depends upon the meaning of the following language: "And if the plaintiff fail to obtain a more favorable judgment, he cannot recover costs, but must pay the defendant's costs from the time of the offer." Code Civil Proc. § 997. Precisely this language in section 385 of the New York Code of Procedure has been construed by the courts of that state as it was construed by the trial court in this case, (*Burnett v. Westfall*, 15 How. Pr. 432; *Magnin v. Dinsmore*, 15 Abb. Pr., N. S., 331;) and I think this construction accords with the general understanding of the profession, and with the practice in the superior courts, and therefore that the judgment and order appealed from should be affirmed.

BELCHER, C. C., and GIBSON, C., concurred.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

84 Cal. 590

DURKEE v. GARVEY. (No. 12,771.)

(Supreme Court of California. June 19, 1890.)

**COSTS OF APPEAL—REVERSAL ON CONDITION.**

The supreme court, on appeal, ordered that "the judgment and order of the superior court \* \* \* be, and the same are, reversed, and cause remanded for a new trial, unless the plaintiff shall, within 80 days after the going down of the *remittitur*, file in the court below a release of \$150, and his

costs in that court, and, if he does file such release, then the judgment and order shall stand affirmed." On the going down of the *remittitur*, plaintiff filed the release prescribed. Held, that a motion to recall the *remittitur* and modify the judgment of the supreme court, so as to require plaintiff to pay the costs of appeal, on the ground that the judgment of the trial court had been reversed, would be denied, as the judgment was reversed on condition, on compliance with which it was to stand affirmed, and plaintiff had complied with the condition. Defendant's remedy was to move for a rehearing within 30 days.

In bank. Motion to recall *remittitur* issued to superior court, Los Angeles county.

Smith & Clark and Shaw & Damron, for appellant. Bicknell, White & Barclay and Wilson & Reddick, for respondent.

WORKS, J. This cause was decided by this court, and the following judgment rendered: "It is adjudged and decreed by the court that the judgment and order of the superior court in and for the county of Los Angeles, in the above-entitled cause, be, and the same are, reversed, and cause remanded for a new trial, unless the plaintiff shall, within 30 days after the going down of the *remittitur*, file in the court below a release of \$150, and his costs in that court, and if he does file such release then the judgment and order shall stand affirmed." 21 Pac. Rep. 304. Upon the going down of the *remittitur*, the plaintiff, in compliance with the judgment of this court, filed his release of \$150 of his judgment and his costs in the court below. The defendant now moves this court to recall the *remittitur*, and so modify its former judgment as to require the plaintiff to pay the costs in this court. This is placed on the ground that the case was reversed, and, under the rules of the court, judgment for costs should have gone against the respondent. But the judgment was reversed on condition, and upon the performance of the condition named, the judgment was to stand affirmed. The condition was complied with, and therefore, from that time, the judgment was, and continues to be, affirmed, and must be enforced by the court below. This court imposed a penalty upon the plaintiff, which was the release of his costs below. If this had not been done, he would have been liable for the costs in this court, but might, upon a retrial of the case, have again recovered his costs in the lower court. This being so, it would hardly be just to recall the *remittitur*, and impose a new and additional penalty upon him. If the defendant had been put to the expense of a retrial in the court below, his claim for the costs in this court would be just, but, as it is, he was avoided a new trial, and escaped the costs of a former trial, and should be content. Besides, if the appellant was not satisfied with the judgment as rendered, his remedy was to ask for a rehearing, or a modification of the judgment within 30 days, and before the *remittitur* went down, which was not done. The present application comes too late. Motion denied.

BEATTY, C. J., and FOX, McFARLAND, and SHARPSTEIN, JJ., concurred.

5 Cal. Unrep. 748

HEILBRON v. CAMPBELL, Judge. (No. 13,-478.)

(Supreme Court of California. Sept. 3, 1890.)

## JUDGE—DISQUALIFICATION.

The answer of a judge to a petition to restrain him from further acting as judge in a case pending before him admitted that he claimed to be the owner of certain land. The petitioner, who was a party to such pending action, claimed in his petition that said land was involved in the said action pending before the judge. *Held*, that a prohibitory order would issue to such judge, though by his answer he declared that, his attention having been called to the fact that the land claimed by him was claimed to be involved in the suit, he would not further act in it. PATERSON, J., dissenting.

In bank. For former report, see 23 Pac. Rep. 122.

S. C. Denson, Geo. R. B. Hayes, and A. L. Hart, for petitioner. Garber, Boalt & Bishop, (Craig & Meredith, of counsel,) for respondent.

PER CURIAM. This case was originally heard upon demurrer to the petition, an answer being filed at the same time. The demurrer, though not in terms, was in legal effect, overruled, and a judgment final entered which was open to the construction that the same was given upon the petition and answer. Subsequently, upon motion, this decision was set aside, and the defendant was allowed to file an amended answer, and the case was placed on the Sacramento calendar for such further proceedings as counsel should be advised. Upon the call of the case, defendant moved the court for an order of reference to take testimony. This was met by a counter-motion for judgment in favor of plaintiff on the pleadings. Both motions were argued at some length, and the matter was submitted with the understanding, on the part of court at least, that counsel would confer, and see if they could agree upon issues which they deemed necessary to try, and if so upon a referee to be appointed; the plaintiff, however, insisting that he was entitled to judgment, as prayed, upon facts admitted in the amended answer.

We have not been advised of any agreement between counsel, and have therefore examined the case upon the motion for judgment. By his amended answer the defendant admits that in September, 1888, he purchased, and claims to be now the owner of, the lands embraced in swamp-land location No. 2,770. This tract of land plaintiff, in his petition, claims is a part of the lands in controversy in the case of Clarke et al. v. Heilbron et al. Defendant denies that it is a part of said tract. It is thus apparent that there is a direct conflict between the parties, at least on one side, of the case of Clarke et al. v. Heilbron et al. and the judge before whom the case is pending, as to the ownership of a portion of the land included in that suit. For the reasons stated in the former opinion filed herein, December 28, 1889, (23 Pac. Rep. 122,) it would therefore be highly improper for him to act as judge in the case. He admits that it was his intention to act upon the hearing of any motion or proceeding that might be taken in the case,

but says that now that his attention is called to the fact that it is claimed by one of the parties that the land which he claims is a part of the land involved in the suit, he will not further act in the premises, and, upon the faith of this statement, it is claimed in his behalf that this proceeding should be dismissed. Such a statement might be persuasive to the other party to make a voluntary dismissal of the case, but it does not authorize the court to order a dismissal. In view, therefore, of the fact that it appears from the answer that the defendant, Campbell, judge of the superior court of the county of Fresno, claims to be the owner of certain property claimed by the defendants, in the suit of Clarke et al. v. Heilbron et al., now pending before him, to be a part of the property constituting the subject-matter in controversy, it is by the court now here ordered and adjudged that the writ of prohibition issue in this cause, as prayed, commanding the said J. B. Campbell, judge of the superior court in and for the county of Fresno, to absolutely desist and refrain from sitting or acting as judge in any proceeding had or to be had in the case of Charlotte F. Clarke et al. v. August Heilbron et al., now pending in said superior court, or from making any further or other order in the cause, except such as may pertain to the arrangement of the calendar of his court, or for the transfer of the cause to some other court or judge, or such as may be agreed upon by counsel on both sides. It is further ordered that neither party recover costs in this case.

BEATTY, C. J., being disqualified, did not participate in the consideration or decision hereof.

PATERSON, J. I dissent. There is no necessity for a prohibitory order. The judge has declared in his answer herein that he "does not intend to, and will refuse to, hear or determine any motion, or to sit or act in any proceeding whatever," in the cause. Any prosecution of this proceeding after such a declaration is liable to be construed as an attempt to punish the judge for his past acts. I am at a loss to understand the object of the order.

85 Cal. 483

WARD v. WATERMAN et al., (STANFORD, Intervenor.) (No. 12,662.)

(Supreme Court of California. Sept. 5, 1890.)

## EQUITY—REFORMATION—MUTUAL MISTAKE—LIMITATION OF ACTIONS.

1. A declaration of trust recited that the title to certain land had been caused to be conveyed to one S. by the persons thereafter named as beneficiaries, to be by him managed and sold, and the proceeds to be divided among the beneficiaries in certain proportions. This declaration was executed by S. and the beneficiaries. In a suit by a judgment creditor of W., one of the beneficiaries, against him, and S., the trustee, to reach the interest of W., another of the beneficiaries, L. intervened and sought to have the declaration reformed to correspond to his agreement with W., that it should show that the proceeds of W.'s interest were to be paid to L. until W.'s debt to L. was satisfied. *Held*, that the other beneficiaries were not necessary parties to the proceeding for reformation.

2. The complaint of the intervenor alleged that, at the time of the conveyance of the land to S., the parties named in the declaration of trust were the equitable owners thereof in the proportion named in the declaration; that, at the time of the execution thereof, he was absent; that, before he went away, it was agreed between him and the other parties in interest that the title should be vested in some person to manage, sell, and distribute the proceeds, and that a declaration should be executed showing the nature of the trust, and the relative interests of the respective parties; and that it was agreed between him and W. that when such declaration was made, W. should have it show that the proceeds of W.'s interest were to be paid to L. until W.'s debt to L. was satisfied; that when the declaration was executed it was executed on behalf of L. by his attorney in fact, who knew nothing of the arrangement between L. and W., and, by a mutual mistake on the part of L., by his representative, and of W., the declaration failed to state the truth in regard to W.'s interest, and, on its face, showed that the proceeds thereof were to be paid to W. *Held*, that these facts showed a mutual mistake between L. and W. as to the instrument warranting a revision, it appearing that their minds had met as to what should be done when it should be executed, and it not being necessary that the trustee or the other beneficiaries or the attorney in fact of L. should have shared in the mistake.

3. The claim on which plaintiff obtained judgment was a note given by W. several months after the execution of the declaration of trust in renewal of a note which had for years been barred by limitation. *Held* that, even if any interest in the land subject to levy had remained in W. after the conveyance to S., and the declaration of trust, plaintiff could not avail himself of the fact that the debt of W. to L. was barred by the statute before the declaration of trust, the plea of limitation being in such case personal to the debtor.

Department 1. Appeal from superior court, Alameda county; W. E. GREENE, Judge.

*Stanly, Stoney & Hayes* and *J. Walter Ward*, for appellant. *J. E. Foulds*, for respondents *Waterman et al.* *Rhodes & Borden*, for respondent *Stanford*.

*Fox, J.* On the 11th day of February, 1885, the plaintiff commenced a suit against the defendant *Waterman* for the recovery of the sum of \$21,404.16, with interest, due from said defendant upon a promissory note, which suit was brought in the superior court in and for the city and county of San Francisco. At the time of commencing the action he caused a writ of attachment to be issued, directed to the sheriff of the county of Alameda, and, under it, caused the sheriff to attach all the right, title, and interest of the said *Waterman* in and to certain lands situate in said county of Alameda, standing of record in the name of the defendant *S. P. Smith*. In that suit such proceedings were had as that in due course the plaintiff recovered judgment, and caused execution to be issued directed to the sheriff of the city and county of San Francisco, who in due time returned the same *nulla bona*. Thereupon the plaintiff instituted this action, in the nature of a creditors' bill, in the superior court in and for the county of Alameda, against the defendants *Waterman* and *Smith*, alleging, among other necessary and proper things, that the defendant *Smith* held the legal title in and to the lands so attached as aforesaid, to the ex-

tent of one undivided eighth thereof, in secret trust for the said *Waterman*; that *Smith* paid no consideration therefor, or for any interest in the said land; that the purchase price of said land had been wholly paid by other parties, one-eighth thereof having been paid by the said *Waterman*, and that as to said eighth interest *Waterman* was the equitable owner thereof, but he had caused the legal title thereof to be vested in said *Smith*, to prevent the same from being subjected to the payment of the indebtedness of said *Waterman*, and thereby to defraud the plaintiff and the estate represented by him; that *Waterman* had no personal property out of which to make the judgment in favor of plaintiff; and that there was no real estate standing in the name of said *Waterman* in this state; and praying a decree adjudging the said *Waterman* to be the owner of said one-eighth interest in said land, and subjecting the same to the lien of plaintiff's judgment. The defendants answered jointly, setting up that, long prior to the conveyances by which *Smith* became vested with the title to said lands, the defendant *Waterman* was the owner of a contract for the purchase of an interest in said lands, amounting to an undivided eighth thereof, and had become entitled to a conveyance of said undivided interest; that while so entitled, and on the 14th day of March, 1877, at his request, *Stanford* had become accommodation indorser on promissory notes of *Waterman* to the amount of \$16,500, and that, to secure *Stanford* against loss by reason of such indorsements, *Waterman* had, in writing, assigned to *Stanford* his interest in said contract, and all his rights thereunder; that *Waterman* made default in paying the notes so indorsed, and *Stanford* had been compelled to pay the same; that subsequently, and on September 6, 1878, *Waterman* made a new note to *Stanford* for the amount which he had been compelled to advance as aforesaid, with interest, then amounting to the sum of \$19,315, payable March 15, 1879, with interest at the rate of 10 per cent. per annum, payable monthly in advance, and if not so paid to be added to the principal, and bear interest at the same rate, which said note was in like manner secured by said assignment; that no part of said note or the interest thereon had been paid except \$2,536 paid August 11, 1882; that, within two years next preceding the filing of said answer, and of the judgment referred to in the complaint, *Waterman* had, in writing, promised to pay said note and interest, and declared said assignment to be a subsisting lien upon any interest he had in the lands described in the complaint as security for such payment; that the said *Waterman* and other parties beneficially interested therein had caused said property to be conveyed to said *Smith* in good faith, and not for the purpose of defrauding the plaintiff or any other creditor of said *Waterman*, or of concealing said property, or placing the same beyond the reach of plaintiff, or of hindering or delaying the plaintiff, or of preventing the said *Waterman's* alleged interest from being subjected to the payment of said indebted-



ness; that the same was made to said Smith for the purpose of more conveniently making sales of said property, and in trust to divide the proceeds of such sales, after paying the expenses thereof, among the parties thereunto beneficially interested, and that the interest of said Waterman therein is now held in trust by said Smith for the purpose of paying the indebtedness of Waterman to Stanford, so far as the same can be applied to such payment. In this suit Stanford by leave of the court intervened, and set up substantially, among other things, that, at the time of and for a long time prior to the conveyance of said property to defendant Smith, certain persons named in the declaration of trust, a copy of which was annexed to said intervention, were and had been the equitable owners of the lands and premises described in the complaint, in the proportions in said declaration named; that they caused and procured the legal title to be conveyed to and vested in said Smith for the purposes expressly set forth in the said declaration of trust, or intended to be so stated; that, at the time of the execution of such conveyance and declaration of trust, the said Stanford was absent from the state, and in Europe; that, before he departed for Europe, it was understood and agreed between himself and the others interested that the title should be so vested in some one person, for convenience of management and sale, and distribution of the proceeds, and that a declaration should be made and executed showing the nature and character of the trust, and the relative interests of the respective parties, and that it was agreed between himself and Waterman that when such declaration was made Waterman should have it show that the proceeds of the interest of Waterman were to be paid to Stanford until the debt from Waterman to Stanford was satisfied; that when the declaration of trust came to be executed it was executed on behalf of Stanford by his attorney in fact, who knew nothing of the arrangement between his principal and Waterman, and by a mutual mistake on the part of Stanford, by his representative, and of Waterman, the declaration failed to state the truth in this regard, and showed upon its face that one-eighth of the proceeds of the sale of said property less the costs and expenses of the trust was to be paid to said Waterman; and prayed that the declaration be reformed accordingly. This is a substantial, though not a literal, statement of the allegations of the complaint in intervention, as it was finally amended. The declaration of trust attached recited that the title had been caused to be conveyed to the defendant Smith by the persons hereinafter named as beneficiaries, to be by him managed and sold off for the best prices to be obtained, in such subdivisions as might be determined upon, and the rents and profits, and proceeds of the sales thereof, less the costs and expenses of the trust, be divided between the said beneficiaries in the following proportions, to-wit: To Leland Stanford one-fourth; to D. O. Mills one-fourth; to James B. Haggin one-fourth; to Fred H. Waterman one-eighth; to Ephraim Dyer one-six-

teenth; and to Eben H. Dyer one-sixteenth. And the same was executed by the said beneficiaries and the said Smith. The plaintiff demurred to the complaint of intervention, and, this being overruled, he answered, denying the material allegations thereof, and pleading the statute of limitations against the claim of the intervenor. A trial being had, the court found the facts substantially as stated in the complaint of intervention, and by its decree reformed the said declaration of trust, so as to make the proceeds aforesaid payable by said Smith to the beneficiaries as follows: To Leland Stanford one-fourth; to D. O. Mills one-fourth; to James B. Haggin one-fourth, to Leland Stanford one-eighth thereof until the debt of said Waterman aforesaid shall be fully paid and discharged, and thereafter to said F. H. Waterman; to Ephraim Dyer one-sixteenth; and to said Eben H. Dyer one-sixteenth. And decreed, among other things, that the proceeds of the sales of the said one-eighth interest should be paid by said Smith to said Stanford until said indebtedness should be fully paid, thereafter to the plaintiff in this suit until the debt of Waterman to the plaintiff is satisfied, the residue, if any, to said Waterman. From this judgment the plaintiff appeals, and the case comes up on the judgment roll and a bill of exceptions. The first point made by the appellant is that the court erred in overruling the demurrer to the complaint in intervention.

1. For that the declaration of trust could not be reformed in the absence of the other beneficiaries, Mills, Haggin, and the two Dyers. Mills, Haggin, and the Dyers were not necessary parties to an action to reform the declaration in the particular in which reformation was sought. They were not parties to the arrangement between Stanford and Waterman; did not necessarily or in fact have any knowledge of that arrangement, and the proposed reformation would not in any manner affect any of their interests. *Story, Eq. Pl. §§ 72, 151; Settembre v. Putnam, 30 Cal. 490* As to each of these separate interests, the contract or declaration was several and not joint, and to reform it as to one of these interests it was only necessary to make those persons parties who were interested in that interest. *Moss v. Wilson, 40 Cal. 159.*

2. For that the complaint failed to show that there was any mistake, or mutual mistake, in the instrument; or that there was any intention of Stanford and Waterman, or either of them, at the time of the execution of the instrument, to create a trust in favor of Stanford; or that if there was any such intention it was known to Smith; or that as to him any mistake was made in its terms. We think the complaint in intervention sufficiently shows upon its face a mutual intention on the part of Stanford and Waterman to establish that trust as to that one-eighth interest, and that, by the oversight of Waterman, who had undertaken to see it done in the absence of Stanford, the instrument failed to correctly state the true intent of the parties in that regard. As to the trustee Smith, it was a matter of

entire indifference to him, and it made no difference whether he shared in the intention, or knew of the mistake, or not. He was the holder of a mere naked trust, not coupled with any interest, and will be entirely unaffected by the reformation asked for. An objection to the reformation on the ground that he had not shared in the alleged mistake, if made, is one purely personal to himself. He is a party to the suit, and has not made the objection. It does not lie in the mouth of Waterman, who did share in the mistake, or of his attaching creditor, to make it.

The next point made by appellant is that the facts found by the court were not such as entitle the intervenor to a revision of the declaration of trust. Upon this point the counsel argue that, to warrant a revision or reformation of the contract, the mistake must be not only mutual, but one which is common to all the parties who executed the instrument. This contention might be correct if the revision was sought as to a matter which affected all the parties: but, in a case like this, where the interests were several and not joint, and the mistake was as to one interest, not as to all, and affected only two of the parties, it is not perceived upon what principle the instrument may not be reformed in that particular, if there was a mistake common to the parties interested in that particular interest, whether the others had knowledge of it or not. It was the duty of the court to inquire what the instrument was intended to mean, and what were intended to be its legal consequences. Civil Code, § 3401. If it fails to speak the truth only as to one particular, why may it not be revised and corrected as to that particular without the presence of persons who will not be in any manner affected by the revision? The province of equity is to make the instrument conform to the agreement of the parties. This instrument contains the several and separate agreements of many parties. It is proposed to revise it only as to one of those agreements. This may be done without bringing in any but the parties to that particular agreement. It is also contended in this connection that the mistake must be as to the intention of the parties at the very moment of the execution of the instrument, and that the court does not find that such was the fact in this instance. The court finds, in substance, that before Stanford left for Europe his mind and Waterman's met as to what was to be put into this instrument when made, in regard to this one-eighth interest, and it was left to Waterman to see it carried out. The failure to carry it out was through oversight, not through design, on the part of Waterman. It being shown that the minds of the parties had met and agreed upon what was to be done when the time came to act, in the absence of proof to the contrary, the law presumes that they remained in the same condition of agreement until the act was done. Code Civil Proc. § 1963, subd. 32. It is a mistake to say that the minds which were required to meet at the time of the signing of the instrument, and whose condition at that time controls the question

of the right to revise, were not those of Stanford and Waterman, but were those of Lathrop, the attorney in fact of Stanford, and of Waterman. Lathrop was not thinking or bargaining for Stanford in that matter, but was acting as the mere hand of Stanford. He was charged with no discretion as to terms, and with no other power than to affix Stanford's name to the instrument which should be prepared and presented by Stanford's associates. Therefore, the intention to be considered was and is the intention that was in the minds of Stanford and Waterman, not that which was in the minds of Lathrop and Waterman. As to Smith, the court finds that his intention was to declare such a trust as the parties beneficially interested should agree upon, and this he supposed he had done. As we read it, the court does substantially find all the facts showing that *quoad* this one-eighth interest there was a mistake, mutual between Stanford and Waterman; that it was a mistake in and as to the instrument itself, and such a one as may by the court "be revised, on the application of a party aggrieved, \* \* \* so far as it can be done without prejudice to the rights acquired by third persons, in good faith and for value," as provided in section 3399, Civil Code.

Appellant also makes the point that the evidence was insufficient to justify the decision of the court below, and upon this point insists that a written instrument will not be reformed by a court of equity on the ground of mistake, unless the proof "be so clear and convincing as to leave no room for doubt;" citing *Cox v. Woods*, 67 Cal. 317, 7 Pac. Rep. 722; *Leonis v. Lazzarovich*, 55 Cal. 54; and *Lestrade v. Barth*, 19 Cal. 674. In each of the cases cited, the court does use substantially the language above quoted, but in none of them is it used in such connection, or under such circumstances, as to justify this court in disregarding the finding of the court below, where there is any evidence to support it. In each of the cases it is apparent that the mind to which the evidence is to be "clear and convincing" is the mind of the court below,—the court which heard the evidence, and is especially charged with the duty of passing upon the credibility of the witnesses,—a duty which is not imposed upon, and a right which is not vested in, this court. In *Lestrade v. Barth*, the court says: "The form in which relief will be given, when a mistake in a material particular is established in a written agreement, must necessarily depend upon the circumstances in the particular case. Courts of equity have a wide discretion in such matters, their object being to give the parties the same beneficial result which would have flowed from the agreement had the mistake never existed." And taking the whole case together, and the conclusion reached, it is an authority strongly supporting the decision of the court below in this case. In *Leonis v. Lazzarovich*, there was a sharp and direct conflict in the evidence as to whether there was a mistake in the deed or not, the witnesses being about equally divided on the subject. The court found in favor of the al-

leged mistake, and reformed the deed. This court reversed the judgment, but refused to rest its opinion, on the ground that the decision of the court below was not sustained by the evidence. In *Cox v. Woods*, the only testimony offered in support of the allegation of mistake was that of a single witness, and his testimony was contradictory in itself. On it the court below was not satisfied that a mistake had been made, and this court refused to reverse its decision. In *Jarnatt v. Cooper*, 59 Cal. 706, this court again uses the words "clear and convincing," but in that connection shows very clearly what is meant by their use. It says: "It is doubtless a well-settled rule that the party alleging fraud or mistake is bound to prove his allegation by clear and convincing evidence; that is, that the evidence which tends to prove the alleged fraud or mistake, if standing alone, uncontradicted, would establish a clear *prima facie* case of fraud or mistake. If it does not, this court may reverse the judgment on the ground of insufficiency of the evidence to justify the decision. But, where the evidence which tends to prove fraud or mistake, if standing alone, uncontradicted, is sufficiently clear and convincing, we cannot reverse the judgment on the ground that such evidence is contradicted by other evidence, because the right to pass upon the credibility of witnesses is not vested in this court. The only question which we have to decide in respect to the sufficiency of the evidence is whether that which tends to prove the alleged fraud or mistake, if standing alone, without contradiction, would make out a *prima facie* case." Applying that principle to the present case, there is no conflict whatever in the evidence tending to prove the alleged mistake. It is all one way. The credibility and appearance of the witnesses would necessarily have much to do with determining the weight to be given to this evidence, and, consequently, its sufficiency. The court below has found it sufficient to establish a *prima facie* case, and we cannot say that it erred in such finding.

It is claimed by appellant that the decision of the court below is against law, in several particulars, but we do not deem it necessary to discuss them all in detail. One is that the conclusion of law that Stanford's claim against Waterman was not barred by the statute of limitations, and that the plaintiff could not avail himself of the statute as far as the attached property was concerned, was error. Prior to the conveyance of the property to Smith, the defendant Waterman was the equitable owner of this one-eighth interest. He had purchased and paid for it, but had not received a conveyance thereof. He had assigned his interest in the contract of purchase to Stanford as security for the payment of his said indebtedness. For the purposes of this case it may be conceded that this assignment operated as a mortgage of his equitable interest as security for that indebtedness. The note therefor had become barred by the statute of limitations, and the court correctly held that the mortgage lien created by that assignment was extinguished by lapse of time be-

fore the declaration of trust was executed. But the court also correctly held that the plea of the statute of limitations was a personal privilege, and that the debt of Waterman to Stanford was not extinguished by lapse of time, unless he, Waterman, availed himself of the plea, which he did not do. *Lord v. Morris*, 18 Cal. 490, afterwards many times affirmed. Instead of that, it appears from the pleadings, the findings, and the evidence, that, after the time had arrived when he could have availed himself of that plea, he acknowledged the continued existence of the debt, and united with the other equitable owners in causing the property to be conveyed to Smith, and in the creation of the express trust evidenced by the declaration here under consideration. In and by that trust the court finds that it was intended to provide that the proceeds of the rents and profits, and of the sale, of that one-eighth interest, should be paid to Stanford, until his claim against Waterman was paid, and that the failure to so provide was through mistake, and not design; and it orders that the declaration be revised and corrected to read accordingly. This finding and judgment proceeds upon the theory that it ought to have been so written in the first instance, and if the judgment is sustained it will and must so read and operate as and from its original date. Equity presumes that that which ought to have been done was done, and gives it force and effect as if done. The right of Waterman to renew his personal obligation to Stanford, in any form that they might agree upon, cannot and will not be disputed. And it does not appear that, at the date of the creation of this trust, there was any legal or even moral objection to his incumbering, or (as he did do) actually and forever disposing of and parting with his interest in this real property. At that time the plaintiff had no enforceable claim against the defendant Waterman. It was not until several months after the creation of this trust, and after Waterman had parted with all title, legal or equitable, to, and all interest in, this land, that the note was given upon which plaintiff's action was brought. It was then given, as appears from the face of the complaint, in renewal of an obligation originally given to plaintiff's testator, and which had been barred by the statute of limitations for more than 10 years. At the time it was given, Waterman had no interest, and has never since acquired any, legal or equitable, in the property which plaintiff subsequently attached. It is true that plaintiff has proceeded upon the theory that Waterman had, at the time of the attachment, and still has, an equitable interest in that property, and that the claim of Stanford is in the nature of a mortgage upon that equitable interest, and is extinguished by the lapse of time. But this is a mistaken theory which has run all through the discussion of this case, and led to much confusion. The trust created in Smith is an express trust, under subdivision 1, § 857, Civil Code. It vests in Smith the whole title, legal and equitable. *Id.* § 863. By the very terms of the trust, whether we read

It as originally written or as revised. Waterman had no interest in the property, and could never acquire any interest, unless he purchased it, as any stranger might do. The only right that any beneficiary under the trust had or has, was to share in the proceeds of the rents and profits when realised, and of the sale of the land when sold, and the only remedy that of proceedings to enforce the execution of the trust. On either theory, however, the court was correct in holding that the plaintiff could not avail himself of the plea of the statute of limitations, since Waterman declined to make the plea. Even if Waterman had an interest in the attached property, the lien of the attachment would be subject to all equities. *O'Rourke v. O'Connor*, 39 Cal. 442; *De Celis v. Porter*, 59 Cal. 464. Even an unrecorded deed would prevail against the lien of the attachment. *Plant v. Smythe*, 45 Cal. 161; *Le Clert v. Oullahan*, 52 Cal. 252; *Hoag v. Howard*, 55 Cal. 564. It is held that a subsequent purchaser or mortgagee in good faith, and for value, may avail himself of the statute of limitations for the protection of his interest, even if his grantor or mortgagor does not make the plea. *Lord v. Morris*, supra; *McCarthy v. White*, 21 Cal. 496; *Grattan v. Wiggins*, 23 Cal. 16; *Coster v. Brown*, Id. 142; *Lent v. Shear*, 26 Cal. 862; *Wood v. Goodfellow*, 43 Cal. 185. But this is upon the principle that, *quoad* the property, the common debtor has for valuable consideration placed his grantee or mortgagee in his own shoes, and authorized him, for the purpose of protecting the property, to make any plea which he himself could have made. Not so with a mere creditor, who has acquired no contract lien, and parted with no value. He gets nothing but what is given him by the strict letter of the law, and it does not lie in his mouth to defeat the equities of third persons by means of that which is at best a mere personal privilege of his debtor. But, in addition to this, upon the true theory of this case, the plaintiff took nothing, and acquired no right, by the levy of his attachment. According to the allegations of his complaint the writ was levied, not by garnishment, but by direct levy, as upon real estate, upon all the interest of Waterman in the land. As we have already seen, Waterman had no interest in the land, legal, equitable, present, or prospective. "An attaching creditor can acquire no greater right in attached property than the defendant had at the time of the attachment. If, therefore, the property be in such a situation that the defendant has lost its power over it, or has not yet acquired such interest in or power over it as to permit him to dispose of it adversely to others, it cannot be attached for his debt." *Howell v. Foster*, 65 Cal. 173, 3 Pac. Rep. 647.

It is also claimed that the claim of the intervenor to have the declaration revised or reformed is barred by subdivision 4, § 338, Code Civil Proc. According to the pleadings, the findings, and the proof, this point is not well taken, for the mistake was not discovered until the attachment was levied, and that was less than three years before the commencement of this

suit, and the filing of the complaint of intervention.

There was no error in allowing the intervenor to amend his complaint at the trial, to conform to the proofs. This was a matter entirely within the discretion of the court, and fully authorized by section 470, Code Civil Proc. Judgment affirmed.

We concur: BEATTY, C. J.; PATERSON, J.

(85 Cal. 593)

MILNER v. REIBENSTEIN *et al.* (No. 13,769.)

(*Supreme Court of California*. Oct. 8, 1890.)

MUNICIPAL OFFICERS—SALARIES—CONSTITUTIONAL LAW.

St. Cal. 1889, p. 578 et seq., (charter of the city of Stockton,) framed and adopted under Const. Amend. No. 6, provides for a "municipal court" to be held and presided over by a city justice of the peace to be appointed by the mayor. The charter does not attempt to abolish the office of city justice, but adds thereto the duties theretofore performed by the police court, gives it a clerk, makes it a court of record, and declares that it shall not be deemed a new court, but a continuation of the courts theretofore existing. It further provides that the compensation of the municipal judge shall be fixed by the city council not to exceed \$1,500 per year, but provides that for the first two years it shall be \$1,200 per year. Code Civil Proc. Cal. § 103, fixes the tenure of office of justices of the peace, and provides \$2,000 per year as the compensation. Const. Cal. art. 11, § 9, provides that the compensation of a city or municipal officer shall not be increased during his term of office. Article 4, § 25, subd. 29, provides that the legislature shall not pass local or special laws affecting the salary of any officer. *Held*, that the salary of the justice remained \$2,000, as the charter did not intend to add thereto a compensation for the office of municipal judge, and could not change the compensation for the office of justice. BEATTY, C. J., dissenting.

In bank. Appeal from superior court, San Joaquin county; J. G. SWINNERTON, Judge.

*Ansel Smith, Wesley Mintz, and Nicol & Orr*, for appellant. *F. T. Baldwin and E. I. Jones*, for respondents.

Fox, J. Application to the superior court of the county of San Joaquin for a writ of mandate requiring the defendants, the mayor and clerk and comptroller of the city of Stockton, to issue a warrant upon the treasury of that city, in favor of the plaintiff, who is city justice of the peace in said city, for the sum of \$100, as and for his salary as judge of the municipal court, for the month of December, 1889. Upon a hearing of the cause, the court denied the writ, and entered judgment for defendants, from which plaintiff appeals.

The case is argued and presented as if it involved the question of the legal existence of the municipal court of the city of Stockton, and a reconsideration of the question passed upon in *Brooks v. Fischer*, 79 Cal. 173, 21 Pac. Rep. 652; *Ex parte Ah You*, 82 Cal. 339, 22 Pac. Rep. 929; and *People v. Toal*, 23 Pac. Rep. 203. In our judgment no such question is involved.

The sole question in this case is whether or not the plaintiff, who is regularly drawing and receiving his salary of \$2,000 per annum, as city justice of the peace, is entitled to draw and receive an additional

salary of \$1,200 per annum as judge of the municipal court. In 1884, the city of Stockton, then a municipal corporation under a special charter passed prior to the adoption of the present constitution, reorganized, as a city of the fourth class, under the "Act to provide for the organization, incorporation, and government of municipal corporations," approved March 13, 1883, (St. 1883, p. 223 et seq.) Of this corporation J. H. Tam was elected police judge, and the plaintiff, Milner, was elected city justice of the peace, each for the term of two years, commencing January, 1889. On the 2d of March, 1889, a charter framed and adopted under Const. Amend. No. 6, became, and ever since has been, the organic law of said city. St. 1889, p. 578 et seq. By the terms of this charter, the police court under the old charter, and the court of the city justice of the peace, were practically consolidated, (see sections 104-130,) under the title of "Judicial Department," to be held and presided over by a city justice, to be designated and appointed by the mayor. The city justice of the peace is an officer provided for by the constitution, and his election, term of office, and compensation are prescribed by the Codes. The charter does not attempt to abolish the office or the court of the city justice, but adds the duties which theretofore in the municipality were performed by the police court, gives it, for the performance of those duties, and the administration of the judicial department of the local government, a clerk and seal, makes it a court of record, calls it "Municipal Court," and declares that it shall not be deemed a new court, but a continuation of the courts theretofore existing. After the organization of the municipality under the new charter, and in May, 1889, Tam resigned the office of police judge, and the municipal court was organized, by the appointment of Tam, as clerk, and of the city justice, plaintiff, as judge thereof. This gave the plaintiff no new term, and no new office. It simply made him *ex officio* judge of the new court. No other person was eligible to act as such, as none but a city justice of the peace could be designated to act as such, except in a case in which he might be disqualified, when any justice of the peace in the county could be designated to act in his stead, (section 108;) and he was the only city justice of the peace. The compensation of plaintiff as city justice of the peace was and is prescribed by section 103, Code Civil Proc., and he was and is in the regular receipt thereof. Section 50 of the charter provides that the compensation of officers and employes of the city shall be fixed by the city council, not to exceed a certain limit therein named. This mentions municipal judge, and prescribes the limit at \$1,500 per annum. By a proviso to the section the salaries of all the officers of the city are fixed by the charter itself for the first two years, and in this proviso the municipal judge is mentioned, and his salary fixed at \$1,200 per annum. On the 8th of May, 1889, before the organization of the municipal court, the city council passed an ordinance fixing the salary of the municipal judge at the same sum named in this pro-

viso. The court below, after finding the facts in the case, found, as conclusion of law, that the plaintiff "herein is not entitled to have or receive from the said city of Stockton any salary as municipal judge of said city." In this conclusion we think the court was correct. To our minds, it was not the intention of the framers of the charter, or of the people in adopting, or the legislature in approving, it, to increase the salary of the city justice. It was not in the power of the legislature to do it, during his term of office, (Const. art. 11, § 9,) or by local or special law, (Id. art. 4, § 25, subd. 29.) The city justice of the peace is one of the justices of the peace of the state, an officer provided for by the constitution. The tenure of his office and his compensation is fixed by general law, and is prescribed in section 103, Code Civil Proc. If it is desired to change the measure of his compensation, it must be done by amendment of that general law, and cannot be done by special legislation; nor has the power been delegated to the people to do it by charter provision. The language of the charter, taken as a whole, does not justify the conclusion that it was intended to create a new and independent office, to be compensated by a new and added salary. On the contrary, it seems to us that the intention of the framers of the charter was to reduce the salary of the city justice of the peace, to make it \$1,200 per annum for the first two years, and then leave it to be fixed and regulated by the city council thereafter, but not to exceed \$1,500 per annum. But if such was the intention, as we think it was, it must fail of accomplishment, for that salary can only be changed by an amendment of the Code. Until the Code is amended, the city justice of the peace will be entitled to receive the salary of \$2,000 per year, and will not be entitled to receive other or more by reason of any added duties that may be imposed upon his office. Judgment affirmed.

We concur: SHARPSTEIN, J.; MCFARLAND, J.; THORNTON, J.; WORKS, J.

PATERSON, J. I concur in the judgment.

BEATTY, C. J., (*dissenting*.) If the decision, filed August 4th, in *People v. Toal*, ante, 603, from which I dissented, is to stand, the judgment in this case must be affirmed. For, under the doctrine there announced, all the provisions of the present charter of Stockton relating to its municipal court are null and void. But, if the validity of those provisions is assumed, I cannot see how the conclusion can be avoided that the plaintiff is entitled to the compensation provided in the charter. It is not increasing his salary as city justice to pay him the salary of another office, the duties of which are cast upon him by a new appointment.

86 Cal. 159

FLOYD *et al.* v. RANKIN *et al.* (No. 13,838.)  
(Supreme Court of California. Oct. 17, 1890.)

TRUST-DEED—CONSTRUCTION—DUTY OF TRUSTEES.

1. A deed of a large amount of property was made to certain persons named, in trust "to con-

vert the same into money (except as herein excepted) as rapidly as judicious management will permit, and out of the proceeds to make the payments hereinbelow directed; \* \* \* and in further trust to found and endow, at a cost of \$540,000, an institution to be called 'The California School of Mechanical Arts.' \* \* \* The institution shall be founded and endowed under the direction of [six persons named,] who are directed to acquire the site thereof, and to form a corporation, the only corporators being themselves; to own, control, and manage the said institution, the members of said corporation never to exceed seven, and vacancies in the membership to be filled from time to time by the survivors." *Held*, the persons last named, and not the trustees, are to have the active control of the founding of the institution, the selection and acquiring of the site, the erection and furnishing of the buildings, and the control of the expenditures. The power and duty of the trustees end with furnishing the money therefor.

2. The persons named cannot call for all the money at one time, and expend it themselves; but it is the duty of the trustees, whenever any money is required or directed to be expended by such persons, or the corporation to be formed by them, to furnish it as directed, so long as the expenditures are within and for the purposes named in the deed.

Department 1. Appeal from superior court, city and county of San Francisco; J. P. HOGG, Judge.

*John H. Boalt*, for appellants. *Cope, Boyd & Fifield* and *Nathaniel Holland*, for respondents.

**WORKS, J.** James Lick executed a deed of trust to certain persons named therein, by which large sums of money were to be realized from the property conveyed, and applied to various charitable and other beneficial purposes. Some changes were subsequently made in the trustees, which it is unnecessary now to notice. The plaintiffs in this action are the present trustees under the trust-deed, and bring this suit against the beneficiaries under the deed, and various persons appointed thereby to assist in carrying its provisions into effect, to have certain parts of the deed construed for their guidance. The deed recites certain facts necessary to a correct understanding of its objects and purposes, and to give it the proper legal effect names the trustees to act under it, describes the property, real and personal, conveyed by it, and provides that the property so conveyed shall be for the "uses and purposes hereinafter mentioned, and to have and hold the same unto the said parties of the second part, their successors and assigns, in trust for the following purposes, to-wit." The first clause defines the general powers and duties of the trustees, with reference to the property conveyed, and is as follows: "*First*. To enter into possession of, have, receive, and recover, the said property, and rents and profits thereof, (except as herein excepted,) and to let and to lease, until sale, and to sell, convey, and dispose of the same, and to convert the same into money, (except as herein excepted,) as rapidly as judicious management will permit; and out of the proceeds to make the payments hereinbelow directed; and a majority of said trustees shall determine when, on what terms, and what price, and on what credit the same shall be disposed of. And a majority of said trustees may

likewise execute, acknowledge, and deliver all deeds, transfers, conveyances, assignments, and other instruments necessary and proper for the purposes aforesaid, and in all other matters in the execution of the trusts herein declared. And in case of the absence from the state of any of the said parties of the second part, trustees aforesaid, a majority of them shall be capable of executing the trusts herein created, without any notice to such absent trustee or trustees." The second clause provides for the payment of certain sums named to relatives of the donor. The third clause provides for the expenditure of \$700,000 by the trustees in the purchase of land, and construction of a telescope thereon, with all the machinery appertaining thereto, and appropriately connected therewith, and a suitable observatory; and that upon the completion thereof the trustees convey the land, telescope, machinery, and observatory, to the regents of the University of California; and, if any of the moneys set apart for said purpose remain unexpended, that the same be paid over to said regents to be invested in certain bonds mentioned, the income to be devoted to the maintenance of the telescope and observatory, and in promoting science. The fourth, fifth, sixth, seventh, and eighth clauses provide for the payment of certain sums to various charitable and other institutions. The ninth provides for the erection of monuments at the graves of the father, mother, sister, and grandfather of the donor. The tenth and eleventh trusts are declared as follows: "*Tenth*. And in further trust out of the proceeds of said property to expend one hundred thousand dollars (\$100,000) to found an institute to be called the 'Old Ladies' Home,' to be located in San Francisco, as a retreat for women who are unable to support themselves, and who have no resources of their own; the right of admission thereto to be prescribed by A. B. Forbes, J. B. Roberts, Ira P. Rankin, Robert McElroy, and Henry M. Newhall, and the survivors of them, who shall receive the title to the lands on which the same shall be erected, and who shall hold the same until the same can be conveyed to a corporation authorized to maintain such an institution, said sum of one hundred thousand dollars (\$100,000) to be expended under the direction of said Forbes, Roberts, Rankin, McElroy, and Newhall, and the survivors of them, and the site for the institution to be selected and acquired by them as soon as possible. *Eleventh*. And in further trust to expend the sum of one hundred and fifty thousand dollars, (\$150,000,) under the direction of H. M. Newhall, Ira P. Rankin, Dr. J. D. B. Stillman, and John O. Earl, and the survivors of them, in the erection and maintaining in the city of San Francisco of free baths, the site or sites therefor to be acquired and held by the persons last named, and the survivors of them, in trust, to forever maintain such baths for the free use of the public, under proper and reasonable regulations; said baths to be erected as soon as practicable to raise the money after the money has been provided to erect said telescope." The twelfth clause provides for the erec-

tion of a monument in Golden Gate park, in the city of San Francisco, to the memory of Francis Scott Key, author of "The Star Spangled Banner." The thirteenth calls for the erection of a group of bronze statuary at the city hall in San Francisco. The fourteenth clause is as follows: "*Fourteenth.* And in further trust to found and endow, at a cost of five hundred and forty thousand dollars, (\$540,000,) an institution to be called 'The California School of Mechanical Arts,' the object and purpose of which shall be to educate males and females in the practical arts of life, such as working in wood, iron, and stone, or any of the metals, and in whatever industry intelligent, mechanical skill now is or can hereafter be applied; such institution to be open to all youths born in California. The institution shall be founded and endowed under the direction of said Dr. J. D. B. Stillman, Horace Davis, A. S. Hallidie, John Oscar Eldridge, John O. Earl, and Hon. Lorenzo Sawyer, and the survivors of them, who are directed to acquire the site therefor, and to form a corporation, the only corporators being themselves; to own, control, and manage the said institution, the members of said corporation never to exceed seven, and vacancies in the membership to be filled from time to time by the survivors." It is this fourteenth clause of the deed that we are called upon to construe, but we have set out other parts of the deed, because we believe they tend to throw some light upon the clause in controversy, and to show the intention of the grantor in making this provision for the California School of Mechanical Arts. Other parts of the deed need not be set out or referred to, as they do not affect the question before us, except the provision that the residue of the property, after making the payments mentioned, be made over, in equal parts, to the California Academy of Sciences, and the Society of California Pioneers, to be used by them in the construction of certain buildings, and for other purposes. The corporation mentioned in the fourteenth trust was organized before the site for the institution was acquired, the reason assigned therefor being that it was feared that on account of necessary delays in carrying out the trusts under said deed a sufficient number of the parties named would not survive to form the corporation at a later day. The California School of Mechanical Arts, the Society of California Pioneers, and the California Academy of Sciences, filed answers, each calling upon the court to give a construction of the fourteenth clause of the deed above set out. The court below found and decreed, in substance, that under the fourteenth clause the plaintiffs, as surviving trustees, and their successors, possessed the power, and it was their duty, to found, endow, and establish, ready to be put in operation, the institution named in said trust; that they are the executors of said trust, and the active promoters of the purposes of the donation; that in executing the trust the plaintiffs are to consult and seek the advice, guidance, co-operation, and concert of action of the persons named in said trust, and their survivors, or such of them as consent to act,

and that it is the duty of such persons in their individual capacity to extend to the plaintiffs their advice, guidance, and co-operation in the establishment of said institution, and select and secure a site for said institution, the title to which is to be taken in the names of the plaintiffs as surviving trustees, or their successors in the trust, and is to be paid for by the trustees out of said fund of \$540,000; that in case the parties named in the trust fail to co-operate with the plaintiffs, or refuse to select the site, the trustees have the power, and it is their duty, to acquire the site and establish the institution; that upon the establishment and completion of said institution, and that the same is ready to be put in operation, it is the duty of the trustees to convey, transfer, and set over the same to the corporation referred to in said trust, together with any balance remaining unexpended of said sum of \$540,000, and when so conveyed the said corporation is to own, control, and manage the said institution and the surplus fund as an endowment; that the corporation the California School of Mechanical Arts is a valid corporation; that the Honorable Lorenzo Sawyer, although he may have resigned as a member and director of said corporation, is still entitled to act as an individual under said trust; that no part of said fund is to be paid to the individuals named in said trust; that in case of disagreement among the persons named in said trust, or the survivors of them, as to the site or the advice to be given to the trustees, the latter may act upon the advice of such of said persons as they may think best. This construction was and is satisfactory to all of the parties concerned except the parties named in said trust, and the corporation organized thereunder, the California School of Mechanical Arts. They appeal from the judgment. The case was submitted in the court below on the pleadings, and the judgment was founded upon the construction of the deed, without other evidence.

The contention of the appellant is that the intention of the donor by this clause in the deed was to vest in the parties named therein the sole power of selecting and acquiring title to the site for the institution to be erected; that they should take the title thereto in themselves, and upon the organization of the corporation mentioned they should convey the same to such corporation, which should thereafter hold the title and control the institution; that the duty of founding and endowing the institution rested upon the persons named in the trust; and that the only duty of the plaintiffs, the general trustees, was to furnish the money required to be furnished for the purpose. On the other hand, the respondents contend that, taking the whole instrument together, the particular clause in controversy must be construed as imposing upon the general trustees the duty of founding and endowing the institution; that the title to the site must be taken in the name of the trustees, and the building constructed, furnished, and fitted up by them; that when completed, and ready for use, the trustees must convey the same to the



corporation, and that the only right and duty of the parties mentioned in the fourteenth trust is to co-operate with the trustees, and advise and counsel with them as to the selection and purchase of a site, and the construction and fitting up and equipment of the building, and to organize the corporation required to be organized. It must be admitted that, taking the fourteenth trust alone, or the whole of the provisions of the deed together, the meaning of this trust is ambiguous and uncertain. But, after a careful study of the whole deed, we feel ourselves constrained to disagree with the court below. The first clause in the deed gives the trustees power to deal with and dispose of the property conveyed, and has no relation to their powers and duties with respect to property to be purchased for charitable and beneficent purposes thereafter provided for. It simply gives them power to convert the property conveyed into money, and to place themselves in a position to furnish the means necessary to carry out the donor's benefactions. This clause, therefore, lends us no aid in this controversy. The same may be said of most of the trusts provided for, which consist merely of the payment of money for certain purposes, or to certain existing charitable or other corporations, to be used by the latter. In these cases nothing is to be done by the trustees but to pay over to the persons named the amounts specified. We must look for assistance, if any can be obtained from other parts of the deed, to those parts which provide for the acquisition and improvement of lands. Of these may be mentioned the third, which provides for the purchase of land, and the construction of a telescope and observatory. Here there is no question as to who shall select the land to be purchased, as it is provided in express terms that it shall be lands designated by the party of the first part; nor can there be any question as to who is to take and hold the title. The trustees are required to purchase the land, and, when the telescope and observatory are constructed, to convey it to the regents of the University of California, and turn over to said regents any surplus of the \$700,000 remaining unexpended. There is nothing uncertain in the declaration of this trust, nor does it aid us in arriving at the meaning and intention of the donor in the fourteenth clause of the deed. The tenth trust is more nearly like the one under consideration, and we think tends to show the general intent of the donor as to donations of this class. The tenth trust requires the trustees to expend \$100,000 to found an "Old Ladies' Home." The right of admission thereto is to be prescribed by certain individuals named, "who shall receive the title to the lands on which the same is to be erected, and hold the same until it can be conveyed to a corporation authorized to maintain such an institution; the money to be expended under the direction of the parties named, and their survivors, and the site for the institution to be selected and acquired by them as soon as possible. The eleventh trust is of a like kind, and is similar in its provisions. It provides that the trustees shall expend

the sum of \$150,000, under the direction of certain persons named, and their survivors, the site or sites therefor to be acquired and held by the persons named. In none of these provisions is the deed clearly or accurately worded, but the general intent of the donor is apparent. Whenever real estate is to be acquired and improved for a charitable or beneficial purpose, third parties are called in to acquire and hold the title, and direct the expenditure of the money; and the only duty imposed upon the trustees is to furnish the money to be expended. In neither of these cases could the parties properly take or hold the property in their own names. Although the fourteenth trust is even more inaccurately worded, we think the meaning and intent of this clause of the deed must be held to be the same as in the others. In this trust, the trustees are required, not to expend a certain sum of money under the direction of other persons, but to "found and endow the institution at a cost of a certain sum." This is to be done under the direction of certain persons named, just as in the other two trusts of a like kind. The words "found and endow," used in this connection, must be held to mean the same thing as the requirement in the two other trusts of a like kind that they shall expend the money for the purpose. This, it seems to us, is made clear by other provisions contained in the fourteenth trust. The parties named, and not the trustees, are required to acquire the site. This, of course, is equivalent to saying that they shall acquire the title to the site. They are not required to acquire the site for the trustees, nor are the trustees given any power or authority to act in the selection of the site, or in acquiring the title thereto. The parties named are to acquire the site, and form a corporation consisting of their own number to own, control, and manage the institution. The object of this provision must be apparent. The power to acquire the site, hold the title thereto, and manage the institution, is directly cast upon these parties; but, in order that their power may be perpetuated, they are required to form themselves into a corporation, and the manner in which vacancies in their number may be filled is provided. As we construe this trust, therefore, the trustees have no other power or duty in this connection than to furnish the money, up to the amount named, to be expended as directed by the other parties named. The latter are required to select the title to the site, and take the same in their own names; or, if the corporation provided for is formed before the title is acquired, it might, with equal propriety, be taken directly to the corporation, as the ultimate object of the trust is to vest the title in the corporation, and not in the individuals. We do not regard it as of any importance whether the corporation is formed before the site is acquired or after, or whether the title to the site is conveyed to the individuals named, and by them conveyed to the corporation, or is conveyed directly to the latter in the first instance. These matters relate to the mere form of procedure under the deed, and cannot affect the

substance of its provisions, which is that the title shall finally vest in the corporation. It is probable that action by the individuals, as such, was provided for with the idea that action might be necessary before a corporation could or would be formed, but what the reason for it was is not material.

The question whether the trustees are bound to pay over at once to the individuals or corporation the sum of money named, or to furnish it when needed, and in the amounts and for the purposes directed by them, is not so easily answered; but, in the light of the provisions of the other parts mentioned, and set out above, we are of the opinion that the parties who are required to acquire the site and direct the founding and endowment of the institution cannot call for the whole of this money, and expend it themselves. In this clause the other trustees are required to expend the money donated, under the direction of the parties mentioned. This, we think, is the meaning of this trust. The parties named are, however, the sole judges as to how, for what purpose, and when, the money is to be expended, subject only to the purposes mentioned in the trust. The trustees have nothing to say in this matter. They furnish the money to found and endow the institution, "under the direction" or as directed by the parties named; and whenever the expenditure of any money is required or directed by them, or by the corporation consisting of themselves and their successors, it is the duty of the trustees to furnish the same, so long as the expenditure is within and for the purpose named in the deed. And upon the institution being founded and endowed, as required by the deed, if there be a surplus of the money donated remaining in the hands of the trustees, it should be paid to the corporation, which is given the control and management of the institution. We have been unable to find anything in this deed tending to show an intention on the part of the donor that the parties mentioned in this trust are to act as the mere advisers of the trustees, or that the trustees may act without, or in opposition to, their direction, or that the title to the property should be taken by or in the name of the trustees, and by them conveyed to the corporation. On the contrary, the parties mentioned in the trust are to be the actors in the matter of acquiring the site, and directing the improvement of the property; and they alone could convey the title to the property, because they, and not the trustees, are expressly required to acquire such title. The court below was right in holding that the corporation provided for in the deed was a valid corporation. Counsel for the respondents, the trustees, ask us, in case we do not agree with the court below, to answer categorically certain questions, 18 in number, set out in the complaint, and affecting, as it is claimed, the proper construction of the trust under consideration. Many of these questions are repetitions of each other, or present the same questions in different forms. We have answered the material questions, and the really controverted ones, as pre-

sented by the record, and need not extend this necessarily long opinion by attempting to answer these numerous questions, the answers to which are not necessary to a proper and full determination of the matters in controversy. The judgment is reversed, with instructions to the court below to enter judgment in accordance with this opinion.

We concur: FOX, J.; PATERSON, J.

86 Cal 154

WILLARD V. DILLARD. (No. 20,692.)

(*Supreme Court of California*. Oct. 15, 1890.)

BILL OF EXCEPTIONS—SIGNING—EXTENSION OF TIME.

Pen. Code Cal. § 1171, provides that a party desiring to have a bill of exceptions settled must, upon not less than 2 days' notice to the district attorney, and within 10 days after the rendition of the judgment, or such further time as may be allowed by the court or judge, present the same to the judge for settlement. *Held* that, where defendant was given an extension of time within which to prepare and present a bill of exceptions, and within such time, and on 2 days' notice to the district attorney, presented the same, it was no reason for disallowing the bill that, when the extension of time was given, it was too late for defendant to have presented it on 2 days' notice within 10 days after judgment.

In bank. For former report, see ante, 789.

*R. B. Canfield* and *J. W. Taggart*, for petitioner. *John J. Boyce*, for respondent.

FOX, J. Application for a peremptory writ of mandate requiring the respondent, judge of the superior court of the county of Santa Barbara, to settle and certify a bill of exceptions in a criminal case tried in said court. By way of return to the alternative writ two papers are presented on behalf of respondent; one in the nature of a demurrer to the petition, and the other an answer. By the paper styled a "demurrer," exception is taken to the sufficiency of the petition, for that it does not sufficiently appear therefrom that the respondent is the judge before whom the criminal case referred to was tried, or who heard and determined the motion for new trial therein. It would perhaps have been better if the petition had specifically stated that fact; but it does not state that the respondent is the judge of that superior court. This court will take judicial notice of that fact, and also of the fact that he is the only judge of that court. The petition also shows that the criminal case was prosecuted in that court; that a trial has been had, verdict rendered, and judgment pronounced, and motion for new trial made and denied. When we look into the balance of the return,—for it is all one return, although in two papers, and called by two names,—sufficient appears to show that the respondent was in fact the judge who presided at the trial, and who heard and determined the motion for new trial, and that he is therefore the proper one to settle the bill of exceptions. If there are any omissions in the petition in this regard, they are sufficiently supplied by the answer.

It appears from the pleadings that the defendant in the criminal case was given an extension of time beyond that allowed by law, within which to prepare and present her bill of exceptions, but that such extension was not in excess of the time which the court was authorized by law to give. On the last day of the time so given by the court, and upon not less than two days' notice to the district attorney, counsel for the defendant applied to the court to settle and certify his bill of exceptions in the cause. The district attorney appeared and objected that the court had no jurisdiction then to settle or allow a bill of exceptions, on the ground that the right to have a bill of exceptions settled or allowed had been waived or lost before any order had been made granting an extension of time for that purpose. The order granting such extension was made on the day before the expiration of the statutory time within which the party was required to present his bill for settlement, but the district attorney contends that it was then too late, for the reason that the time had already expired within which he could give notice of an application to be made on the tenth day for the settlement of the bill, and no such notice having been given, and no order of extension made prior to the time when it would have been necessary to give notice of an application to be made on the tenth day, the right to make the application at all had been waived. The judge adopted this theory of the district attorney, and, according to the answer, for this reason, and this alone, refused to allow or settle any bill of exceptions in the case. This position is, in our judgment, altogether untenable. A party desiring to have a bill of exceptions settled must, upon not less than 2 days' notice to the district attorney, and within 10 days after the rendition of the judgment, or such further time as may be allowed by the court or judge, present the same to the judge for settlement, etc. Pen. Code, § 1171. The object of notice in this case is not like that in the case of a motion for new trial, to initiate the proceeding, or preserve a right to the moving party, but simply to enable the district attorney to be present, and be heard, if he desires, upon the settlement of a bill, which is the absolute right of the party to have settled according to the fact, if he prepares and presents it within the time allowed by the law or the court; and, if it is given two days prior to the actual application for such settlement, no waiver of a right to make the application or to have the bill settled can follow from failure to give it at an earlier period. Under the allegations of the answer there is really no issue as to whether or not a prepared bill was in fact presented to the judge for settlement at the time mentioned in the notice, and there appears no reason for a reference of the cause. Let the peremptory writ issue as prayed.

We concur: BEATTY, C. J.; WORKS, J.; THORNTON, J.; SHARPSTEIN, J.; PATERSON, J.; MCFARLAND, J.

## HOOKER v. THOMAS. (No. 12,942.)

(Supreme Court of California. Oct. 18, 1890.)

TRIAL BY COURT—FINDINGS—SEPARATE COUNTS.

A complaint contained three counts, alleging three entirely separate and distinct causes of action, each of which was put in issue by the answer. The court found on the issues under one count alone, and rendered judgment thereon in favor of the plaintiff. *Held*, the omission to find upon the issues presented by the other two counts is no cause for reversal.

Department 1. Appeal from superior court, city and county of San Francisco; JOHN F. FINN, Judge.

*Daniel Titus*, for appellant. *Pillsbury & Blanding*, for respondent.

WORKS, J. The complaint in this case contains three counts, alleging three separate and distinct causes of action. The material facts in each count were put in issue by the answer. The court below found on all of the issues, under one count, in favor of the plaintiff, and rendered judgment in his favor as prayed for in said count. No findings were made on the issues presented by the other two counts of the complaint. The only point made on this appeal is that the court below failed to find on all of the material issues presented by the pleadings, and therefore the cause should be reversed. In other words, the appellant asks us to reverse a judgment which is fully sustained by the findings, because issues which were material in determining another and different cause of action were not found upon. This, we think, we cannot do. All of the issues necessary to sustain the judgment rendered were found upon. Therefore, the fact that entirely separate and distinct issues, which might have been the basis of another and different judgment than the one appealed from, and which, if found upon, could not have affected the judgment actually rendered, were not covered by the findings, cannot justify a reversal of the judgment before us. Every fact material to the judgment appealed from was found, and the judgment must necessarily be affirmed. *Roberts v. Haley*, 65 Cal. 397, 402, 2 Pac. Rep. 385. The failure to find on the other issues was not prejudicial to the appellant, and for that reason is not cause for reversal. *Murphy v. Bennett*, 68 Cal. 528, 9 Pac. Rep. 738; *Mining Co. v. Deferrari*, 62 Cal. 162; *McCourtney v. Fortune*, 57 Cal. 617.

It is contended by the appellant that he was entitled to a finding upon the other causes of action, because such findings were necessary to shield him from another suit for the same causes of action. But we do not understand that a second suit can be maintained upon those causes of action because findings were not made thereon. Each of the causes of action alleged were put in issue, and the presumption is that they were litigated, and, if the judgment rendered did not cover these causes of action, and did cover the other one alleged, it must be presumed against the plaintiff that he was found and adjudged to be entitled to nothing more than was given him by the judgment rendered in his favor. In other words, the judg-

ment in his favor on a part of the issue, if he were to bring a second action, would be taken as a finding and judgment against him on the other issues. Of course the presumption that all of the issues were litigated is not a conclusive presumption where a second action is brought. It may be shown that, as a matter of fact, they were not litigated. But, if this were so, there would be no injustice to the appellant in presenting them the second time for adjudication. So, taking either view of it, he was not harmed by a failure to find upon the issues not affecting the judgment appealed from. Judgment and order affirmed.

We concur: FOX, J.; PATERSON, J.

3 Cal. Unrep. 297

TAYLOR v. FORD. (No. 12,982.)<sup>1</sup>

(Supreme Court of California. Oct. 18, 1890.)

#### RIGHT TO JURY TRIAL.

Plaintiff brought an action under Code Civil Proc. Cal. § 1050, alleging that defendant was making a claim against him for money upon a pretended promissory note; that the exact nature of the claim was unknown to plaintiff; and praying that defendant be compelled to set forth the nature and extent thereof, in order that the court might determine it to be invalid. Defendant answered in the form of an ordinary complaint on a promissory note, and to this plaintiff filed a reply, alleging fraud in procuring the note, mistake, and want of consideration. *Held*, the action being purely statutory and equitable in form, the reply to plaintiff's answer was unnecessary to the relief sought, and he was not entitled to a jury trial upon the issue thereby raised.

Department 1. Appeal from superior court, city and county of San Francisco; F. W. LAWLER, Judge.

Code Civil Proc. Cal. § 1050, provides: "An action may be brought by one person against another for the purpose of determining an adverse claim, which the latter makes against the former, for money or property upon an alleged obligation; and also against two or more persons, for the purpose of compelling one to satisfy a debt due to the other for which plaintiff is bound as a surety."

*Chas. F. Hanlon*, for appellant. *Page & Eells*, for respondent.

WORKS, J. This action was brought by the appellant under section 1050 of the Code of Civil Procedure, alleging in his complaint, in substance, that the respondent was making an adverse claim for money against him, on a pretended obligation, to-wit, a promissory note; that the exact nature of the claim was unknown to the plaintiff; that no suit had been brought on said claim; that he desired that said claim be brought forward and determined; and praying that the defendant "be compelled to set forth the nature and extent of said claim, and the particulars thereof, in a concise form, and that any cause of action that he pretends to have be fully alleged against this plaintiff, and that thereupon the same be determined by this court to be of no force and validity, and that the plaintiff have judgment against the defendant; that the defendant

take nothing under said claim; and that the plaintiff recover costs." The defendant answered by alleging that the plaintiff was indebted to him in the sum of \$2,600.44, on a promissory note, a copy of which note is set out in the answer. This answer is, in legal effect, the same as an ordinary complaint on a promissory note, and prays for judgment in like manner. The only allegations therein, not properly belonging to a complaint on a promissory note, are that the note set out is the obligation mentioned in plaintiff's complaint, and a denial of the allegation in the complaint that the plaintiff did not know the exact nature of the defendant's claim. The plaintiff treated the defendant's answer as a cross-complaint, so far as it set up and relied upon the note, and filed an answer thereto, alleging fraud in procuring the note, mistake, and want of consideration. On the issues thus formed the case went to trial. The court below found for the defendant, and rendered judgment in his favor on the note. The plaintiff moved for a new trial, which was denied, and he appeals. The plaintiff demanded a jury trial as to what he claims were the legal issues formed by the answer or cross-complaint, and his answer of fraud, mistake, and want of consideration. This was denied, and he complains that this was error. The respondent contends that there were no legal issues in the case; that the action was brought by the plaintiff; that it was statutory and equitable in its nature; that the issue presented was made by the complaint, and the answer of the defendant; and that the pleading on the part of the plaintiff by way of answer was unnecessary and superfluous. The question is not entirely free from doubt, but we think that the court below was right in denying the plaintiff a jury trial. The real issue presented by the pleadings was whether the defendant's claim was a pretended one, as alleged by the plaintiff, or a valid one, as averred by the defendant. If an invalid and pretended one, asserted against the plaintiff, he was entitled to judgment so declaring it. If a valid one, as claimed by the defendant, he was entitled to a judgment to that effect, and that it be enforced as such. The plaintiff, instead of waiting and allowing the defendant to bring his action on the note, saw fit to bring a purely statutory action, equitable in form, to have the claim declared invalid and set aside; and prayed in his complaint for such relief. The sole object of his complaint was to have the claim presented that he might have it so declared and set aside. It was only necessary for the defendant to set up his claim. This presented the whole issue. No pleading was necessary on the part of the plaintiff in reference to the defendant's answer. It was not a cross-complaint, nor was it pleaded as such. Under the allegations of his complaint the plaintiff might have proved every fact necessary to show the invalidity of the defendant's claim without further pleading. This was the gist of his complaint, and the very foundation of his right to maintain the action. The fact that le-

<sup>1</sup> Reversed in banc. See 28 Pac. 441, 92 Cal. 419.

gal issues, incidental to the main issue, which is equitable, must be determined in arriving at a decision of the case, does not entitle either party to a jury trial. *Downing v. Le Du*, 82 Cal. 472, 23 Pac. Rep. 202. In this case the cause of action being to declare an obligation invalid, and to set it aside, the real issue in the case was equitable, and the plaintiff, having chosen this equitable remedy, and thus brought the defendant into court to meet his equitable cause of action, cannot complain that a jury trial, which would have been his right, if he had allowed the defendant to maintain his common-law action on the note, was denied him. It is contended that the findings of the court below were not sustained by the evidence, and that they do not sustain the judgment. There was evidence to support each of the findings, and the weight of the evidence must be left to the determination of the trial court. The findings are sufficient to uphold the judgment. Judgment and order affirmed.

We concur: FOX, J.; PATERSON, J.

86 Cal. 179

*In re WELCH'S ESTATE.* (No. 13,875.)

(*Supreme Court of California.* Oct. 18, 1890.)

#### REMOVAL OF ADMINISTRATOR.

The court made an order allowing a fee of \$75, to be paid by the administrator, to an attorney appointed by the court to represent absent heirs in the administration of an estate. Before paying this the administrator was advised by his counsel that it was his duty so to do. Thereafter, on the representations of the attorney that he was in need and that he would eventually be allowed a fee of from \$750 to \$1,000 in the case, the administrator advanced from his own funds to the attorney different sums, amounting to \$212. The attorney then presented an order from the court for \$350, which the administrator paid, withholding the \$212. This order was, in fact, forged, and the administrator did not charge the amount paid to the estate, but paid it out of his own money. Certain notes belonging to the estate were by order of the court deposited in a certain bank. The administrator obtained an order allowing him to withdraw the notes. After collecting them, he deposited the money in the same bank in his own name. He did not, however, mingle it with his own money, and, in fact, had no money in that bank. *Held*, that these transactions did not show the administrator dishonest or incompetent, or justify an order for his removal.

Department 1. Appeal from superior court, city and county of San Francisco; *J. V. COFFEY*, Judge.

*John T. Greany*, for appellant. *Chas. A. Sumner*, for respondent.

**WORKS, J.** This is an appeal by an administrator from an order removing him from his trust, and revoking his letters. He was first suspended by order of the court, and an attorney appointed to represent some non-resident heirs, who filed a petition for the removal of the administrator, charging him with neglect, incompetency, using the money of the estate to his own profit and advantage and to the injury of the estate, mingling the property of the estate with his own, to the danger and detriment of the estate; that his claims with respect to said estate were ad-

verse to the estate; that he disobeyed, in letter and spirit, the lawful orders of the court; that he failed to account for money and property of the estate which came into his hands, or under his control; that, through his negligence and incompetency, he paid out money of said estate upon a forged order to persons not entitled thereto; and that, in each and all of said acts and omissions, he had exhibited and shown his unfitness and incompetency to be or to remain such administrator. The administrator denied each of the allegations of the petition, and upon a hearing he was removed and his letters revoked.

We have gone through all of the proceedings of the court, and the evidence at the hearing, as they appear in the record, and have searched in vain for any evidence or reason for removing the appellant from his trust. There are only two of the charges made in the petition that have even a semblance of evidence to support them, viz.: That he paid out money of the estate on a forged order; and that he disobeyed the orders of the court. As to the first charge, the facts are these, as shown by the evidence: One Price was appointed by the court below to represent absent heirs. Subsequently the court made an order allowing him a fee of \$75, as such attorney, to be paid by the administrator. The appellant, on the order being presented to him, applied to his attorney, and was advised that it was his duty to pay the amount. After this, Price, who was evidently a drunken and unreliable man, applied to the appellant for small amounts of money, representing that he was in need, and that he would be allowed a fee of from \$750 to \$1,000. On these representations the appellant let him have money until the amount ran up to \$212.90. Price then applied to him, representing that the court had allowed him a fee of \$350, and asking that he pay him the balance of the amount over and above what he had already received. This the appellant refused to do. He then said he would get an order of court, and subsequently came back, accompanied by a man, who, it was claimed, was his uncle, and presented what purported to be an order allowing him a fee of \$350. He was then in a state of intoxication. The appellant refused to pay the money to him in his then condition, but did pay it to his uncle. The order upon which the money was paid was a forgery. It does not seem to us to be at all surprising that the administrator should pay the money under such circumstances. He had a right to presume that a member of the bar, who had the indorsement of the court in the form of an appointment to represent absent heirs in an important estate running away up in the thousands, would not commit a felony to procure the small sum of \$137.10, the balance actually paid. He had already been advised that it was his duty to pay the attorney his fee on a similar order. Besides, the uncontradicted evidence shows that not a dollar of this money was paid out of the money of the estate, or charged against it. The appellant says that he let the attorney have the money paid before the order was presented, as a loan

out of his own money and as a matter of charity, supposing that when an order was made, allowing him a fee, he could withhold the amount advanced, and thus make himself whole; and that, when the order was presented, he did withhold the amount already advanced, and paid him the balance out of his own money, supposing the order to be genuine. As to the second of the charges, there were three promissory notes belonging to the estate, of \$10,000 each. The court ordered that these notes be deposited in the bank of California for safe-keeping. They were so deposited. Subsequently, the court made orders allowing the appellant to withdraw two of these notes. What for does not appear, and no subsequent order was made with reference to them. They were in fact withdrawn by the administrator for the purpose of collection. They were collected, and the money realized from them deposited in the same bank in his own name. He did not mingle the money with his own, as he appears not to have had any money of his own on deposit in that bank. He did deposit there \$2,000 of the money of the widow of the deceased, at her request, and for safe-keeping. In all this there was no disobedience to, or violation of, any order of the court, in its letter or spirit. The only claim made is that he should not have deposited the money in his own name, but it is apparent that he acted in perfect good faith, and without any intention of deviating from the orders of the court, or from his duty. Not a dollar of the money was ever drawn out by him, or used for his own purposes. It was shown to be on deposit in the bank untouched at the time he was removed. Surely there is nothing in either of these transactions that could justify an order of the court branding the appellant as either dishonest or incompetent. The evidence to support the other charges is even less satisfactory, if possible, than that given to sustain those specially mentioned. While it is the duty of the courts to protect, carefully, the interests of estates, the rights of those who are appointed to take charge of and manage them should not be overlooked; and an administrator should not be removed except for good and sufficient cause. We are thoroughly satisfied that no such cause existed in this case. The appellant, as the proceedings of the court show, was proceeding to settle and close up the estate with reasonable dispatch, and in an entirely proper manner. He had a claim against the estate, but it was referred to a referee, who heard evidence and reported in favor of its allowance, except as to a small sum the disallowance of which in no way reflected upon the administrator. He paid \$750 to an attorney for the estate as a retainer, which was reported by him in his first account. This was also referred to a referee, who approved of his action, and there is no claim made that the amount paid was excessive. His account filed with the court was approved by a referee, except as to some small items not material or affecting the fairness or integrity of the administrator. Each and all of these reports of the referee

were approved by the court. We find, on the whole, that there was no just cause or reason for the order removing the administrator, and revoking his letters. Order reversed.

We concur: FOX, J.; PATERSON, J.

#### DOTY V. BASSETT.

(Supreme Court of Kansas. Oct. 11, 1890.)

#### TAX-SALE—PETITION.

In a suit to collect delinquent taxes on real estate bid in by a county, under chapter 39 of the Laws of 1877, each tract of land or town lot should be described in the petition, to give the court jurisdiction over the subject-matter. Where a petition is so essentially defective as to show no description of the land against which a decree was rendered for alleged taxes, held, that such judgment and decree as to that particular tract of land, not described in the petition, is void for want of jurisdiction.

(Syllabus by Green, C.)

Commissioners' decision. Error from district court, Greenwood county; A. L. HAMILTON, Judge.

R. P. Kelley and R. S. Smedley, for plaintiff in error. D. B. Fuller and A. L. Redden, for defendant in error.

GREEN, C. This action was commenced by the plaintiff in error on the 8th day of August, 1887, to recover the S. E.  $\frac{1}{4}$  of section 17, township 23 S., of range 10 E., in Greenwood county, basing his title there to upon a patent from the United States, dated November 11, 1872, to A. P. Hamilton, who conveyed to Alvin Poor, by warranty deed, November 25, 1878. Poor conveyed the land to the plaintiff in error, by warranty deed, February 4, 1879. The defendant in error claims title to the same land under the following state of facts: That this land was assessed for taxation in 1871, and sold to the county in May, 1872, for the sum of \$4.84; that on the 30th day of October, 1877, an action was commenced in the district court of Greenwood county, to subject certain pieces of land to the payment of taxes, under the provisions of chapter 39 of the Laws of 1877. A judgment was rendered at the May term, 1878, of the district court of Greenwood county for the taxes upon the land in controversy, for the year 1871, and the penalties amounting to \$19.91, and that sum was declared to be a lien upon said land. An execution was afterwards issued, and this, with other lands, was bid in by the county, and retained until the repeal of chapter 39 of the Laws of 1877. On the 9th day of January, 1880, the board of county commissioners of Greenwood county sold some 14,000 acres, including this land, at private sale. The land in controversy has always been vacant. The taxes for the year 1872, and each year since, have been paid by the plaintiff in error or his grantors. The plaintiff in error claims that the taxes assessed against said land for the year 1871 were erroneous and void, as the land was not entered at the land-office until the 6th day of June, 1871; and that the entire proceedings in the district court of Greenwood county were void, including the judgment sale and deed made

thereunder, because the court had no jurisdiction over the land; that the petition filed in said proceedings was insufficient to give the court jurisdiction over the subject-matter of the action. The court below found that the defendant in error had the legal title to said land, and quieted the same in him, and against the plaintiff in error, who brings the case here for review.

The question for our determination is whether or not the district court of Greenwood county acquired jurisdiction of this land to make the findings and render the judgment it did in the proceedings to sell the land, under chapter 39 of the Laws of 1877, for the taxes of 1871. If the court had jurisdiction, the judgment having been of record more than five years, and the land being vacant, it is claimed by the defendant in error that the five-year statute of limitation would apply, and protect the title under such proceedings, no matter how irregular they might be. The petition in the proceedings to foreclose the alleged tax-lien upon this land is entitled, "The Board of County Commissioners of Greenwood County, Plaintiff, vs. The North-East Quarter of Section Seventeen, in Township Twenty-Two, of Range Ten, and Other Property, and T. Ward and Others, Unknown, and All Persons Having or Claiming an Interest Therein, Defendants." The following is the body of the petition: "The board of county commissioners of Greenwood county, the above-named plaintiff, complains of the north-east quarter of section seventeen, in township twenty-two, of range ten, and other property, and T. Ward and others, unknown, and all persons having or claiming an interest therein, the above-named defendants, and alleges that the said described real estate was sold at delinquent tax-sale in said county on the 7th day of May, 1872, for the delinquent tax of the year 1871, and the same was bid in by said county, and has ever since remained and still does remain unredeemed from the certificate of sale untransferred, and that a list is hereto attached, marked 'Exhibit A,' and made a part of this petition, which shows the amount of tax for which said real estate was sold, including penalties, rate per cent. interest, and costs of such sale, together with the amount of the subsequent tax levies for the years 1872, 1873, 1874, 1875, and 1876, charged up to said sale, and the amount of the penalties, interest, and costs due on such subsequent levies, and the total amount of all taxes, penalties, interest, charges, and costs now due and unpaid on said described real estate, together with the name of the owners thereof, as appears from the tax-rolls of said Greenwood county. And plaintiff further alleges that none of the said taxes, penalties, and interest, charges and costs have been paid, but that the sum of three thousand and sixty-five dollars and twenty-two cents, being the aggregate sums so due and unpaid, as aforesaid, is now due and payable. And the plaintiff further alleges that the above-named defendants each has or claims some interest in and to said described real estate, the extent and

nature of which is unknown to this plaintiff, except that they appear from the records of said county to be the owners thereof, and plaintiff alleges that their interests are that of owners." The statute under which this action was commenced required a petition to be filed containing a list of such real estate, describing the lands, lots, or pieces of ground, on which such taxes were due and unpaid. The petition is against the N. E.  $\frac{1}{4}$  of section 17, in township 22, range 10,—not the land for which suit is brought in this action,—and other property, and nowhere in the body of the petition describes the land in question in this action. The allegation is that said described real estate was sold at delinquent tax-sale in said county on the 7th day of May, 1872, for the delinquent taxes for the year 1871, and the same was bid in by the county, and remains unredeemed, and the certificate of sale untransferred, and that a list is attached and made a part of the petition, which shows the amount of tax for which said real estate was sold, including penalties and tax levies for subsequent years. This could not possibly refer to any other land than that described in the petition. But one tract of land is described in the petition, and the reference in each sentence is to said described real estate. Did the court acquire jurisdiction from this petition to sell the S. E.  $\frac{1}{4}$  of section 17, township 23, range 10? We do not think the petition contained sufficient matter to challenge the attention of the court, and thus give the court jurisdiction. If it did not, the judgment is void, as a judgment rendered without jurisdiction of the subject-matter is void, and a judgment rendered upon a petition not alleging a cause of action or pretense of a cause of action is void. *Greer v. Adams*, 6 Kan. 206; *Wap. Proc. in Rem.* § 60. We think a fair interpretation of the petition filed in the district court of Greenwood county to foreclose the alleged tax-lien upon the land in controversy in this action falls to show such a description as the statute required; and the petition is so essentially defective, as to show a want of jurisdiction in the court below over this particular tract of land, and the court erred in rendering judgment for the defendant for the recovery of this land. We recommend that the judgment of the court below be reversed, and this cause remanded for a new trial.

PER CURIAM. It is so ordered. All the justices concurring.

(44 Kan. 581)

#### STATE v. TILNEY.

(Supreme Court of Kansas. July 8, 1890.)

#### CRIMINAL LAW—APPEAL—BILL OF EXCEPTIONS.

The only way the evidence in a criminal prosecution can be made a part of the record is by bill of exceptions. If brought to this court in any other way it will not be considered.

(Syllabus by *Strang, C.*)

Commissioners' decision. Appeal from district court, Marshall county; *E. HUTCHINSON*, Judge.



*Case & Moss, for appellant. L. B. Kellogg, Atty. Gen., and W. A. Calderhead, for appellee.*

STRANG, C. This is an appeal from the district court of Marshall county, and, though the evidence seems to accompany the record, an examination thereof shows no bill of exceptions. The evidence comes here with no other identification than the certificate and affidavit of the stenographer of said court. Paragraph 5287, Gen. St. 1889, provides that bills of exceptions in criminal cases shall be settled, signed, and filed, as allowed in civil actions. Paragraph 4398, Gen. St. 1889, provides that bills of exceptions shall be allowed and signed by the judge, and filed with the pleadings, and then the matters therein contained become a part of the record of the case. The signing of a bill of exceptions is a judicial act, which cannot be supplied by any agreement of the parties, or certificate of the clerk. *Whitzell v. Forgiar*, 30 Kan. 526, 1 Pac. Rep. 823, and authorities there cited. To make the evidence in the case a part of the record, it must be included in a bill of exceptions, allowed and signed by the court, and ordered to be made a part of the record. *State v. Carr*, 37 Kan. 421, 15 Pac. Rep. 603. In *State v. McClintock*, 37 Kan. 40, 14 Pac. Rep. 511, the court held that "in a criminal prosecution, the only way to make the testimony of the witnesses introduced on the trial a part of the record, whether the testimony is taken by a stenographic reporter or not, is to embody such testimony in a bill of exceptions, allowed and signed by the trial court." In that case the evidence was not preserved by a bill of exceptions, but was made a part of the record of the case as presented in this court upon the certificate of the official stenographer of the court in which the case was tried. In this case, in addition to the certificate of the stenographer attached to the copy of the evidence, there is an affidavit of the stenographer that the copy of the evidence is a true copy. Counsel for the appellant ask this court, upon the strength of this affidavit, to consider the evidence a part of the record. We do not think the affidavit helps the matter any, and we decline to disturb the practice as settled in this court. Counsel also raise a question upon the information. They say the information fails to show the names of the witnesses indorsed thereon; that a statute of our state requires the names of witnesses to be indorsed on the information. That being the case, and none being indorsed on the information in this case, the presumption is that appellant was convicted without any evidence. But the judgment in the case, which is properly a part of the record here, recites that testimony on behalf of both the plaintiff and the defendant in the case was introduced and heard by the jury. The condition of the record in this case is such that we can do nothing but affirm the judgment of the trial court.

PER CURIAM. It is so ordered; all the justices concurring.

BROOK v. LATIMER.

(Supreme Court of Kansas. Oct. 11, 1890.)

PAROL EVIDENCE.

Parol evidence is admissible to show that a promissory note for the payment of \$10,000, executed by a daughter to her father, and made payable on demand, was in fact executed by the daughter and received by the parent as a mere receipt or memorandum of an advancement made by the parent to the child, and that a mutual understanding was had at the time of its execution and delivery that payment thereof would never be demanded or enforced.

(Syllabus by Simpson, C.)

Commissioners' decision. Error from district court, Anderson county; A. W. BENSON, Judge.

*James D. Snoddy, for plaintiff in error. Johnson, Poplin & Johnson, and M. L. Ritchie, for defendant in error.*

SIMPSON, C. The plaintiff in error, I. J. Brook, presented to the probate court of Anderson county for allowance a promissory note against the estate of Jessie E. Latimer (who was his daughter, intermarried with Walter Latimer) that reads as follows: "\$10,000. On demand I promise to pay to I. J. Brook ten thousand dollars, value received, this 12th day of June, A. D. 1882. JESSIE E. BROOK." Upon hearing, the probate court disallowed the claim, and an appeal was taken to the district court, where the case was tried by the court and a jury on the same pleadings upon which it was heard in the probate court. These consisted of the verified claim of the plaintiff in error for \$10,000, and the answer of the administrator of the estate of Jessie E. Latimer. This answer denied the execution of the note, denied any indebtedness by Jessie at the time of her death to her father, and further alleged that, at the marriage of Jessie, her father, the plaintiff in error, made an advancement of property and money to her; that she received an advancement out of her father's estate; and that the instrument presented for allowance against her estate was intended only to show the amount of money and property advanced to her whenever it became necessary to make a final settlement, and a fair distribution of the estate of her father. The trial in the district court of Anderson county resulted in a verdict and judgment for the defendant in error. A motion for a new trial was overruled, and the cause brought here for review.

The various rulings of the trial court upon the admission of evidence, and the exceptions to the instructions given to the jury, now urged here as erroneous, are all dependent upon the one controlling question, as to whether or not an absolute promise, in writing, to pay a certain amount of money, given by a child to a parent, may be shown to be intended between the parties to it as a mere receipt or memorandum to show that the parent had made an advancement of that amount of property and money to his child, and that it was the intention of the parent that it should never be collected. If in an action such as this, to enforce the payment of the demand note, such a showing is permitted,

then this judgment must be affirmed; but, if such evidence of intention to make an advancement is not admissible, the judgment must be reversed.

An advancement is an irrevocable gift by a parent to a child in anticipation of such child's future share of the parent's estate. In many of the states their statutes prescribe what evidence is necessary to establish the fact of advancement, as in Maine, Massachusetts, and Vermont, where there shall be a declaration to that effect in the grant or gift of the parent, or a charge by the intestate, or an acknowledgment in writing by the child. In some of the states where there are no statutory provisions like those cited from Maine, Massachusetts, and Vermont, it has been held that the declarations of the parent before, after, and at the time of the transaction are admissible in evidence to show the intention to make an advancement. *Mitchell v. Mitchell*, 8 Ala. 414; *Autrey v. Autrey*, 37 Ala. 614; *Butler v. Insurance Co.*, 14 Ala. 777; *Merrill v. Rhodes*, 37 Ala. 449; *Smith v. Smith*, 21 Ala. 761; *Fennell v. Henry*, 70 Ala. 484; *Phillips v. Chappell*, 16 Ga. 16; *Dillman v. Cox*, 23 Ind. 440; *Woolery v. Woolery*, 29 Ind. 249; *Middleton v. Middleton*, 31 Iowa, 151; *Cecil v. Cecil*, 20 Md. 153; *Graves v. Spedden*, 46 Md. 527; *Kingsbury's Appeal*, 44 Pa. St. 460; *Morris v. Morris*, 9 Heisk. 814; *Watkins v. Young*, 31 Grat. 84. Our statute provides "that property given by an intestate, by way of advancement, to an heir, shall be considered part of the estate, so far as regards the division and distribution thereof, and shall be taken by such heir towards his part of the estate at what it would now be worth, if in the condition in which it was so given him; but if such advancement exceeds the amount to which he would be entitled, he cannot be required to refund any portion thereof." Comp. Laws Kan. 1885, §§ 2264-65. These statutory provisions render us no aid in the resolution of the question we are considering, as they establish no rule of evidence by which the fact of advancement can be shown. While there are numerous decisions of this court contained in almost every volume of our Reports upon questions affecting the admission of parol testimony to vary or contradict the express terms of a written contract, the exact question here presented has not been discussed or decided. The various cases in this state alluded to in the briefs of counsel do not, in our judgment, in any way indicate or control the decision of the case at bar. The question of advancement in all cases is entirely dependent on the intention of the donor. That intention can be best ascertained by the declarations of the parent at the time of the transaction, and by his acts done and performed in pursuance of his declarations. In many cases, his declarations made prior to the advancement, or his statements made thereafter, are admissible to establish the fact. It may be established by the adoption of a particular rule or system in the treatment of his children, with respect to gifts, or loans of money, or by a general policy adopted with reference to his donations to the members of his family. The

doctrine of advancement is in aid of that equal and impartial distribution of the estate of an intestate that has become the fixed policy of this state by long-continued statutory enactment, so that equality between the heirs is equity as well as statutory command. We do not deem the admission of evidence tending to show that a promissory note, absolute by its express terms, is a mere evidence of an advancement by a parent to a child, to be a violation of that rule of evidence that forbids a written instrument to be varied or contradicted by parol. The numerous reported cases, including deeds that recite a moneyed consideration, bonds under seal, and promissory notes in absolute terms, justify the admission of such evidence, on the principle that the consideration recited in the instrument is always subject to judicial inquiry. This court is usually liberal in the application of the rule that permits such inquiry. In almost every reported case in which the controlling question was whether or not such parol evidence was admissible to show that some written instrument of indebtedness taken by a parent from a child was in fact a mere receipt or memorandum of an advancement, it is held that such evidence should be received. This case, however, differs from all the reported cases that have been cited, or that we have examined, in this respect. The parent that made the advancement is still alive, and is now insisting that the memorandum or receipt, showing the amount of the advancement at the time it was made, is both *prima facie* and conclusive evidence of a debt. We have already stated that an advancement is an irrevocable gift, and it has been repeatedly held that a donor cannot change an advancement into a debt or trust. *Haverstock v. Sarbach*, 1 Watts & S. 390; *Miller's Appeal*, 31 Pa. St. 337; *Sherwood v. Smith*, 23 Conn. 516; *Arnold v. Barrow*, 2 Pat. & H. 1; *Dudley v. Bosworth*, 10 Humph. 9; *Thompson's Appeal*, 42 Pa. St. 345; *Cleaver v. Kirk*, 3 Metc. (Ky.) 270. Applying the principle that parol evidence is admissible to prove the intent of the parent to the facts developed on the trial, we have an abiding faith that there is not only some evidence to support the verdict of the jury, but that it was rendered in accordance with the preponderance of the evidence, and it therefore becomes our duty to recommend an affirmance of the judgment of the district court of Anderson county.

PER CURIAM. It is so ordered; all the justices concurring.

(44 Kan. 487)

SMITH et al. v. BURLINGHAM.

(Supreme Court of Kansas. Oct. 11, 1890.)

APPEAL—OBJECTIONS WAIVED—JURY TRIAL.

Where a party objects to the reference of a cause, and demands a jury trial, which objection and demand are overruled, but subsequently consents to the appointment of a referee, he will be held to have abandoned his former objection and demand, and to have waived a jury trial and the

right to insist on the error, if any there was, in the first order of the court denying such trial. (*Syllabus by the Court.*)

Error from district court, Lyon county; CHARLES B. GRAVES, Judge.

J. A. Smith, for plaintiffs in error. Cunningham & McCarthy, for defendant in error.

JOHNSTON, J. E. P. Burlingham, who was a general agent of the New York Life Insurance Company, engaged W. R. Smelser to solicit applications for insurance on the lives of persons acceptable to the company, and to collect and pay over premiums on such insurance, when effected. Smelser executed and delivered a bond in the sum of \$1,000 to Burlingham, with F. E. Smith and E. N. Weaver as sureties, conditioned that he would faithfully carry out his engagements, and pay over to Burlingham the moneys received by him as premiums. Smelser procured numerous persons to take out insurance policies, and collected the premiums thereon; and, on failing to account and pay over to Burlingham the moneys so received, this action was brought, in which it was alleged that there was due from Smelser to Burlingham the sum of \$3,381.83. Judgment for that amount was asked against Smelser, and against the sureties upon the bond to the extent of their liability. When the case came on for trial, the plaintiff below requested the court to refer the case, for the reason that it involved the taking of a long account between the parties. The defendants Smelser and Weaver consented to a reference, but the defendant Smith objected, and demanded a jury trial. The objection and demand were overruled, and the cause referred. The report of the referee showed a balance due from Smelser to Burlingham of \$1,408.13, for which judgment was rendered against Smelser, and a judgment for \$1,000 was given against Smith and Weaver, the sureties upon Smelser's bond. Error is assigned on the ruling of the court appointing a referee.

The plaintiffs in error are not in a position to question the authority of the court to compel a reference of the cause. The pleadings showed that a somewhat long and intricate account must be examined, but the question of whether a compulsory reference could be made by the court is not necessarily involved in the case, and will not be decided. It is true that Smith at first objected to a reference, and demanded a jury trial, but it further appears from the record that he, with all the other parties, subsequently consented that a referee should be appointed, and the person so agreed upon by them was appointed by the court, and served as referee. Instead of insisting upon and availing himself of his objection and demand, he joined with the other parties, and consented to the appointment of a referee. The two positions are absolutely inconsistent, and, in taking the latter, he must be held to have abandoned his former objection and demand. The subsequent consent and agreement to the appointment of a referee constituted a

waiver of any right to a trial by jury which he might have, and cured the error, if any there was, in the first order of the court denying the demand for a jury trial. The judgment of the district court will be affirmed. All the justices concurring.

#### STATE V. BRADY.

(*Supreme Court of Kansas. Oct. 11, 1890.*)

##### **LIBEL—CRIMINAL PROSECUTION—EVIDENCE.**

1. The following words: "Tis now almost forgotten that Governor Harvey pardoned his own brother out of the penitentiary. The convict Harvey had been sent to Lansing from Salina,"—published in a newspaper, if false, are, under the facts and circumstances surrounding this case, libelous.

2. To constitute criminal libel, it is not necessary that the alleged libelous article reflect upon the conduct of any particular person, but, if directed against a family, it is libelous.

3. In prosecutions for libel, it is not necessary to prove express malice, where the alleged libelous article is libelous *per se*.

(*Syllabus by Green, C.*)

Commissioners' decision. Appeal from district court, Morris county; M. B. NICHOLSON, Judge.

Mohler & Milliken, for appellant. L. B. Kellogg, Atty. Gen., J. K. Owens, and R. A. Lovitt, for appellee.

GREEN, C. This case comes here on appeal from the district court of Morris county, where the defendant was prosecuted and convicted of criminal libel for publishing, in the Salina Daily Republican, of which he was the proprietor, at Salina, Kan., on the 12th day of November, 1889, the following statement: "Tis now almost forgotten that Governor Harvey pardoned his own brother out of the penitentiary. The convict Harvey had been sent to Lansing from Salina." The information charged that the libel was published of and concerning James M. Harvey, John A. Harvey, George E. Harvey, Z. T. Harvey, J. E. Harvey, and W. S. Harvey. The evidence showed that Dr. W. S. Harvey was a resident of Salina at the time of the publication, and a brother of Ex-Governor James M. Harvey. The publication was admitted. The claim is made by the defendant that the language published was not libelous *per se*; that the court below erred in not giving the following instruction to the jury: "The publication charged as libelous in this case is not libelous *per se*; and before the jury can find the defendant guilty in this case, express malice must be proven." This instruction was refused by the trial court, and the following given: "I instruct you, gentlemen of the jury that to print and publish, concerning any person, that he has been a convict in the state penitentiary of the state of Kansas, is libelous *per se*, unless the same is true; and in this connection I further instruct you that there is no attempt on the part of the defendant in this case to prove the truth of the matter charged as libelous, or to show that the same was published for justifiable ends."

1. The defendant insists that the above instruction given by the court was erro-

neous as applied to this case, and greatly prejudiced the substantial rights of the defendant. This is the decisive and controlling question in this case. Ordinarily, the instructions to the jury should be considered together, and a judgment will not be reversed because some one of them fails to state the law applicable to the facts with sufficient qualifications, provided the defects becur in other instructions. *Rice v. City of Des Moines*, 40 Iowa, 638; *State v. Maloy*, 44 Iowa, 104. In the eleventh instruction, which is complained of, the court said to the jury that to print and publish concerning any person that he had been a convict was libelous *per se*, unless the same was true. We see no error in this, taken in connection with the instructions as an entirety. "Libel" has been defined by Judge STORY to be any publication, the tendency of which is to degrade and injure another person, or to bring him into contempt, hatred, or ridicule, or which accuses him of a crime, punishable by law, or of any act odious and disgraceful in society. *Dexter v. Spear*, 4 Mason, 115; *Newell, Defam.* 37. In this case the alleged libel charged that Gov. Harvey had pardoned his own brother out of the penitentiary; that the convict Harvey had been sent to Lansing from Salina. This was certainly charging that one of the Harvey brothers had been convicted of a felony, and comes clearly within the definition of "libel," as defined by the crimes act: "A libel is the malicious defamation of a person made public by any printing, writing, sign, picture, representation, or effigy, tending to provoke him to wrath, or expose him to public hatred, contempt, or ridicule, or to deprive him of the benefits public confidence and social intercourse, or any malicious defamation, made public as aforesaid, designed to blacken and vilify the memory of one who is dead, and tending to scandalize or provoke his surviving relatives and friends." Paragraph 2444, Gen. St. 1889. To call a person a returned convict, or otherwise to falsely impute that he has been tried and convicted of a criminal offense, is actionable. *Newell, Defam.* 109; *Fowler v. Dowdney*, 2 Moody & R. 119; *Bell v. Byrne*, 13 East, 554. We think the trial court committed no error in giving the eleventh instruction.

2. The appellant again contends that the statement published referred to no particular one of the Harvey family as having been a prison convict. While this objection might be urged with some force in a civil suit for damages, we do not think it is good in a criminal prosecution for libel. The law is elementary that a libel need not be on a particular person, but may be upon a family, or a class of persons, if the tendency of the publication is to stir up riot and disorder, and incite to a breach of the peace. *Rex v. Williams*, 5 Barn. & Ald. 595; *Rex v. Osborn*, 2 Barnard. 166; *Anon.*, Id. 138; 2 Bish. Crim. Law, (7th Ed.) § 934; 2 Starkie, Sland. & L. 213; *Russ. Crimes*, (1st Amer. Ed.) 305, 332. A scandal published of three or four, or any one or two, persons, is punishable at the complaint of one or more or all of them. *Holt, Libel*, 247. In *Palmer v. City of Concord*, 48 N. H. 211, the supreme court

said: "As these charges were made against a body of men, without specifying individuals, it may be that no individual soldier could have maintained a private action therefor. But the question whether the publication might not afford ground for a public prosecution is entirely different. Civil suits for libel are maintainable only on the ground that the plaintiff has individually suffered damage. Indictments for libel are sustained principally because the publication of a libel tends to a breach of the peace, and thus to the disturbance of society at large. It is obvious that a libelous attack on a body of men, though no individuals be pointed out, may tend as much or more to create public disturbance as an attack on one individual; and a doubt has been suggested whether "the fact of numbers does not add to the enormity of the act."

3. The defendant claims there was error in the court's refusing the fourth special instruction asked, that, before the jury could convict, express malice must be proven. We do not think this is the legal rule. In prosecutions for libel, malice is inferred from the nature of the charge, and, when the publishing of words libelous *per se* is once proven, malice is inferred, as a person is presumed to have intended the consequences of his own acts. Chief Justice SHAW has clearly stated the rule: "It is not necessary, to render an act malicious, that the party be actuated by a feeling of hatred or ill will towards the individual, or that he entertain and pursue any general bad purpose or design. On the contrary, he may be actuated by a general good purpose, and have a real and sincere design to bring about a reformation of matters; but in pursuing that design he willfully inflicts a wrong on others which is not warranted by law, such act is malicious." *Newell, Defam.* 317; *Com. v. Snelling*, 15 Pick. 340; *Pledger v. State*, (Ga.) 3 S. E. Rep. 320. The want of actual intent to vilify is no excuse for a libel; and if a man deems that to be right which the law pronounces wrong, the mistake does not free him from guilt. *Curtis v. Mussey*, 6 Gray, 261; 1 Bish. Crim. Law, § 309; *Reynolds v. U. S.*, 98 U. S. 145. Upon a careful examination of the errors complained of, we are satisfied that the court below committed no error, and recommend an affirmance of the judgment.

PER CURIAM. It is so ordered; all the justices concurring.

#### STATE v. CRADDOCK.

(Supreme Court of Kansas. Oct. 11, 1890.)

CRIMINAL COMPLAINT—FOLLOWING LANGUAGE OF STATUTE.

A complaint, under paragraph 2893, Gen. St. 1889, charging an offense in the language of the statute, is sufficient.

(Syllabus by Strang, C.)

Commissioners' decision. Appeal from district court, Montgomery county; J. D. McCUE, Judge.

S. M. Porter, for appellant. J. B. Kellogg, Atty. Gen., O. P. Ergenbright, for the State.

STRANG, C. On the 18th day of July, 1889, D. Wesner filed a complaint before H. D. GRANT, a justice of the peace of Montgomery county, Kan., charging Francis Craddock with having, on the 22d of June, 1889, at the county of Montgomery, and state of Kansas, "unlawfully and willfully disturbed the peace" of him, the said D. Wesner, contrary to the statute, and against the peace and dignity of the state of Kansas. A warrant issued describing the offense in the language of the complaint, upon which Craddock was arrested, and brought before said justice, where, after several continuances, he was tried by a jury of four, and convicted, and was thereupon sentenced to pay a fine of one dollar, and costs. Craddock appealed to the district court, where he filed a plea in abatement, which was overruled. He then applied for a continuance, which was also overruled, and the case brought to trial before the court and a jury of 12, which trial resulted in a conviction of the defendant. Motion for a new trial was presented and overruled, and defendant sentenced to pay a fine of \$10, and costs, from which judgment the defendant appeals to this court, and alleges that the judgment of the trial court should be reversed for the following reasons: *First*, that the complaint and warrant are void, for the reason that no public offense is charged in either. The section of the statute under which the prosecution is brought reads as follows: "Every person who shall willfully disturb the peace and quiet of any person, family, or neighborhood, shall, upon conviction thereof, be fined in a sum not exceeding one hundred dollars, or by imprisonment in the county jail not exceeding three months." It will be seen that the complaint follows the language of the statute in charging the offense, except that the complaint alleges that the appellant, unlawfully, as well as willfully, disturbed the peace of the complainant. The charge against the appellant is a petty misdemeanor. We think the complaint and warrant in this case must be held to be sufficient. Paragraph 5173, Gen. St. 1889; State v. McGaffin, 36 Kan. 315, 13 Pac. Rep. 560. The appellant complains that, in the trial in the justice's court, the jury were not legally impaneled, and that the verdict of the jury thereon was void for uncertainty. The judgment of the court, including the verdict of the jury, was vacated by the defendant's appeal to the district court, where he had a trial *de novo*. Hence these errors, if they existed as alleged, are not the subject of review here. The appellant filed a plea in abatement in the district court, which was overruled, and of which ruling he complains. We think the plea in abatement was properly overruled. It raised no question except possibly the question of the sufficiency of the complaint and warrant, and that question should have been raised by motion to quash. The other matters alleged in the plea do not constitute grounds for a plea in abatement.

The appellant alleges that the court erred in refusing his application for a continuance. We think the court very properly refused the application for contin-

uance. The alleged evidence set up in the affidavit in support of the application was immaterial, if not incompetent. It is alleged that the court erred in the admission of testimony; that the court misdirected the jury in matters of law; and that the verdict is not sustained by evidence. But as the instructions of the court are not in the record, and as none of the evidence is preserved, these complaints may not be considered. We recommend that the judgment of the court below be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

#### WAFFER V. HAMILL.

(Supreme Court of Kansas. Oct. 11, 1890.)

##### NEW TRIAL—MATTER OF RIGHT.

Where the plaintiff's action is for the recovery of real property, and also for rents and profits, and, pending the action, the defendant abandons the property, and the plaintiff then in effect dismisses that portion of his action which relates to the recovery of the real property, and proceeds with his action only as an action for rents and profits, and obtains a verdict and judgment for the value of the rents and profits, *held*, that the defendant is not entitled, under section 599 of the Civil Code, to another trial merely by demanding the same.

(Syllabus by the Court.)

Error from district court, Harvey county; L. HOOK, Judge.

W. E. Lathy and James D. Snoddy, for plaintiff in error. *Ady, Peters & Nicholson*, for defendant in error.

VALENTINE, J. This was an action brought in the district court of Harvey county on September 8, 1885, by David Hamill against John F. Wafer, M. H. Lakin, and Robert M. Hamill, for the recovery of certain real estate, and also for rents and profits. A trial was had before the court and a jury, and, during the trial, the plaintiff dismissed his entire action against Lakin and Robert M. Hamill, and in effect dismissed that portion of his action as against Wafer by which he sought the recovery of the real property, and proceeded with his action only as against Wafer, and only for rents and profits. At the close of the trial, the jury found a verdict in favor of the plaintiff, and against the defendant, Wafer, for \$1,250. Wafer then demanded another trial, we suppose under section 599 of the Civil Code. The court, however, refused this demand, and then Wafer filed a regular motion for a new trial, setting forth various grounds therefor, which motion the court overruled, and then rendered judgment in favor of the plaintiff, and against the defendant, Wafer, for the amount of the verdict, and for costs; which judgment the defendant, Wafer, as plaintiff in error, now seeks to have reversed.

The plaintiff in error, defendant below, claims that the court below erred in refusing his demand for another trial. As before stated, we suppose that this demand was intended to be made under section 599 of the Civil Code; but as this action was finally disposed of, not as an action for the recovery of real property, but as

an action merely for rents and profits, we do not think that that section can have any application. That section applies only to actions for the recovery of real property. It is true that in the beginning this action was not only an action for rents and profits, but also an action for the recovery of real property, but this double action was finally converted into an action for rents and profits only. The defendant, Wafer, did not at any time claim to own the real property, or to have any estate therein. The only interest in the property which he ever claimed to have was as follows: As sheriff of Harvey county he levied an attachment in favor of J. V. Farwell & Co., against Robert M. Hamill, upon certain goods belonging to Robert M. Hamill, situated in a building which stood upon the real property originally sued for in this action, which building and real property belonged to the plaintiff, David Hamill. This levy was made on May 5, 1884, and, after the levy, Wafer took the possession, not only of the goods, but also of the real property, and continued to hold the same against the expressed will of the plaintiff, David Hamill, until September 30, 1885, when he abandoned the same. The evidence tended to show that during that time the rent of the property was worth from \$75 to \$80 per month. The trial in this case was had on May 10, 1878. At the time of the trial, the plaintiff did not ask for any verdict or judgment except for the value of the rents and profits of the real estate during the time while the defendant had the possession thereof, and for interest and costs, and he did not obtain any verdict or judgment for anything else; and hence section 599 of the Civil Code has no application to this case, and the court below did not err in refusing the defendant's demand for another trial.

Other rulings of the court below are complained of, but we do not think that any material error was committed. Certainly no material error is shown by the record brought to this court. It does not appear that we have all the evidence either introduced or excluded, nor does it appear that we have all the instructions either given or refused; and, without any such showing, we cannot determine whether the court below committed any material error or not in the matters complained of, but, with the showing as made, we do not think that the court below committed any material error. The judgment of the court below will be affirmed. All the justices concurring.

#### MOSIER v. CLAPP.

(Supreme Court of Kansas. Oct. 11, 1890.)

##### PUBLIC LANDS—GRANTS.

In an action brought by C. against M. to recover a tract of land, C. offered evidence tending to show that the land was granted by the United States to a railway company, through which C. claimed the land. M. subsequently attempted to pre-empt the tract as public land, claiming that, while it was within the limits of the grant, it was excepted from it; but the only evidence offered to support his claim was a notice of a decision by the local land-officers, made three days prior to the trial, and which was not

pleaded by him, which purported to decide some controversy between the railway company and M., adversely to the company, but the questions involved and decided were not shown. *Held*, that the notice did not overthrow the *prima facie* showing of a right of recovery in C., and that there was sufficient evidence to sustain the judgment in her favor.

(Syllabus by the Court.)

Error from district court, Woodson county; L. STILLWELL, Judge.

M. C. Smith and T. L. Davis, for plaintiff in error. G. R. Stephenson, for defendant in error.

JOHNSTON, J. In an action of ejectment in the district court of Woodson county, Mary Clapp obtained a judgment against J. S. Mosier for the recovery of a quarter section of land, and enjoining him from interfering with her possession and ownership of the land and improvements thereon. He seeks a reversal of the judgment, upon the sole ground that the testimony is insufficient to support it. To establish her right to the land, the plaintiff below showed that it was within the limits of a grant by the United States to the Missouri, Kansas & Texas Railway Company, the right of which attached December 3, 1866, and the withdrawal of which took effect April 3, 1867; and it was agreed that the land in question had been selected by the railway company. A sale of the land in question by the railway company to one Lee Clark on March 11, 1884, and a transfer and assignment by Clark to Mrs. Clapp on May 12, 1884, were shown. After purchasing the land, she went into possession thereof, and made improvements thereon. It appears that Mosier did not go into possession of the land until June, 1885, when he found it fenced, and in the possession of Mrs. Clapp. He attempted to file on the land in question in 1883, but his application was refused, and he appealed from the decision of the local officers to the commissioner of the general land-office, where the appeal was decided adversely to him, for the reason that the lands were withdrawn from the market. He then appealed from the decision of the commissioner to the secretary of the interior, and this latter appeal was pending and undetermined at the time of the trial in the court below. The right of the railway company to the land under the grant was sufficiently shown, and the sale and transfer through Clark to Mrs. Clapp is not disputed. For some reason not disclosed, Mosier seems to claim that the tract was excepted from the grant to the railway company, and was subject to pre-emption as a part of the public domain. However, in the trial of the case in the court below, the fact that the land was within the limits of the grant was admitted; and that the company acquired the land under the grant was not questioned except by the introduction of the following notice: "United States Land-Office, Independence, Kansas, March 7, 1888. Land in Contest. M., K. & T. R. R. Co. vs. John S. Mosier. N. E.  $\frac{1}{4}$ , sec. 22, tp. 25, R. 14 E. You are hereby notified that on the 7th day of March, 1888, a decision in the above-entitled cause was ren-

dered by the register and receiver in favor of defendant, and that, if you feel aggrieved at such decision, you have thirty days in which to file an appeal and argument from such decision to the Hon. Commissioner of United States Land-Office, and that, if such appeal be not taken in that time, said decision will be made final. CLATE M. RALSTIN, Register." This notice, if admissible at all, did not overturn or disturb the *prima facie* showing that had been made of a grant to the railway company, and the right that Mrs. Clapp obtained through the company. The notice does not disclose what the controversy between Mosier and the railway company was, whether it was a question of law or fact; nor did it show that the decision in any way affected the right of Mrs. Clapp to a recovery of the land. More than that, the decision referred to in the notice appears to have been made on March 7, 1888, while the trial occurred only three days later, on March 10, 1888. The issues in the case were closed by a reply, October 17, 1885, and no supplemental pleading was filed by Mosier setting forth the decision in question, or any decision affecting the rights of the parties in the present action, nor alleging any facts material to the present controversy occurring since the issues were closed. If Mosier acquired a right to the land subsequent to the commencement of the action, he should have filed a supplemental pleading, setting forth his claim under such right; but even if such a claim had been properly made, the vague statements contained in the notice would have proved nothing. The naked notice introduced of a decision not pleaded, made 3 days prior to the trial, and which was to become final at the end of 30 days, and which does not disclose the questions or interests that were involved in the decision, furnishes no evidence against the established right of Mrs. Clapp to the land. Under the testimony in the record, the judgment was rightly given, and it will be affirmed. All the justices concurring.

#### STATE V. CHILD *et al.*

(Supreme Court of Kansas. Oct. 11, 1890.)

#### NOLLE PROSEQUI—SECOND INDICTMENT—LIMITATION.

1. The mere entry of a *nolle prosequi*, or the dismissal of an indictment, with the consent of the court, is no bar to the filing of another indictment or information for the same offense.
2. Where a prosecution fails on account of a defective indictment or information, the time during which it is pending is not to be computed as a part of the time limited for prosecution; and the accused, after the *nolle* or dismissal of an indictment or information, may, within the time prescribed, be again proceeded against for the same offense.
3. The failure of a defective indictment or information, and the presentation of a new and correct indictment or information after the statute has begun to run, does not revive the statute. The statute of limitations is put aside by the presentation and filing of an indictment against a defendant, and remains silent until the legal proceedings thereon are terminated. If a defective indictment is *nolled* or dismissed, with consent of the court, and an information is filed charging the defendant with the same offense, the

information continues the legal proceedings which were commenced by the presentation and filing of the original indictment.

(Syllabus by the Court.)

Appeal from district court, Chautauqua county; M. G. TROUP, Judge.

L. B. Kellogg, Atty. Gen., and J. D. McBrien, for the State. Dan Carr, C. J. Peckham, and W. S. Fitzpatrick, for appellees.

HORTON, C. J. On April 2, 1888, Harold Child and Lee Bowman were indicted for assault with a deadly weapon upon Willie Watson. The offense charged was committed on November 18, 1887. Trial was had upon the indictment, and a conviction had at the June term, 1888. At the January term, 1889, of this court, the judgment was reversed, and the case remanded for a new trial. 40 Kan. 482, 20 Pac. Rep. 275. At the March term, 1889, the defendants were again tried in the district court, and a second conviction obtained. A second appeal was taken to this court, and at the July term, 1889, the second judgment of conviction was reversed, and the case remanded for further proceedings. 42 Kan. 611, 22 Pac. Rep. 721. The indictment was pending against the defendants from the 2d day of April, 1888, until the 25th day of February, 1890, at which time the county attorney, with the permission of the court, entered a *nolle prosequi*, without prejudice to his right to file an information against the defendants for the same offense. On that date, an information was filed against the defendants for the same offense, and this information was amended on the 4th day of March, 1890. The information was filed more than two years after the commission of the offense charged, but recited the finding of the indictment against the defendants of the 2d of April, 1888, and the pendency of that indictment until a *nolle prosequi* was entered, on the 25th of February, 1890. The district court quashed the amended information, upon the ground that it did not show the commission of any public offense within the statutory limitation of two years. Under the statute, the prosecution for an offense charged in the information must be commenced within two years after its commission, (paragraph 5095, Gen. St. 1889;) but where any indictment or information is quashed, set aside, or judgment reversed, the time during which the same was pending shall not be computed as a part of the time of the limitation prescribed for the offense, (paragraph 5097, Id.) It is immaterial whether the indictment or information is quashed, set aside, *nolled* or the judgment reversed. The accused, for such action, may, within the time prescribed, be again proceeded against for the same offense. State v. Curtis, 29 Kan. 384; State v. Rust, 31 Kan. 509, 3 Pac. Rep. 428; State v. McKinney, 31 Kan. 570, 3 Pac. Rep. 356; Whart. Crim. Pl. & Pr. § 325; Gill v. State, 38 Ark. 524; Bube v. State, 76 Ala. 73; Com. v. Sheriff, 3 Brewst. 394; State v. Johnson, 5 Jones, (N. C.) 221; State v. Duclos, 35 Mo. 237; State v. Primm, 61 Mo. 166; State v. Owen, 78 Mo. 367. In the Primm Case, in 61 Mo. 166, an indictment was found within the statutory time, and, at the convening of the court, a *nol*.



pros. was entered, by reason of the defects found in the indictment. Afterwards, and at the time beyond that provided in the statute of limitations, a second indictment was found against the defendants for the same offense. The defendants contended that, inasmuch as the former indictment was neither quashed nor reversed, the state was not entitled to the benefit of the statute in extending the period of limitation. The court held that there was no substantial difference between the entering of the *nolle* and the quashing or setting aside of an indictment by reason of its defects, and that the statute was applicable. Therefore, under the statute and the authorities, if a new indictment had been returned, and filed against the defendants, on February 25, 1890, it would have been presented within time. In the place of a new indictment, the prosecution filed a complaint charging the same offense alleged in the indictment; and thereupon a preliminary examination was had, and thereafter the information was filed, and subsequently amended. The information took the place of another indictment, and was only a continuation of the legal proceedings against the defendants commenced April 2, 1888. The statute of limitations, as to the particular offense charged, was put aside by the commencement of the legal proceedings on April 2, 1888, and remained silent until those legal proceedings terminated.

As the information filed against the defendants on February 25, 1890, continued the legal proceedings before that time commenced, the statute of limitations had not run, because the time during which the indictment was pending cannot be computed as a part of the time limited for the prosecution. The ruling of the court in quashing the information was therefore erroneous. The judgment of the district court will be reversed, and cause remanded for further proceedings. All the justices concurring.

STATE v. RATNER.

(Supreme Court of Kansas. Oct. 11, 1890.)

CRIMINAL LAW—RECORD ON APPEAL—INTOXICATING LIQUORS.

1. Instructions given by the court in a criminal case not preserved by a bill of exceptions form no part of the record, and cannot be considered on an appeal to the supreme court. *State v. Smith*, 38 Kan. 194, 16 Pac. Rep. 254.

2. An information charging that, at a certain time and place, the defendant "did then and there unlawfully sell and barter spirituous, malt, vinous, fermented, and other intoxicating liquors, contrary to the statutes in such cases made and provided," and to which no objection for indefiniteness was made before or during the trial, will not be held bad after verdict, upon a motion in arrest of judgment.

(Syllabus by the Court.)

Appeal from district court, Kingman county; S. W. LESLIE, Judge.

Ashbaugh & Steck, for appellant. L. B. Kellogg, Atty. Gen., and Linn D. Hay, for the State.

JOHNSTON, J. S. M. Ratner was accused of the unlawful sale of intoxicating liquors. The information contained 11 counts, but he was only convicted upon

the tenth count, in which it was alleged that, at a certain time and place, he "did then and there unlawfully sell and barter spirituous, malt, vinous, fermented, and other intoxicating liquors, contrary to the statutes in such cases made and provided." He appeals, and now insists that the case was submitted to the court upon an erroneous theory. He claims that he was simply charged with an unlawful sale, but that the court instructed the jury that he was on trial for having sold liquor to a person in the "habit of becoming intoxicated." It is said to have been admitted on the trial that the appellant was a duly-registered pharmacist, holding a legal permit to sell intoxicating liquors; and that the sales were made on proper applications, under oath, to William Armstrong; and that the only issue submitted to the jury by the charge was whether William Armstrong was a person in the habit of becoming intoxicated. There is no evidence preserved in the record, and the charge of the court, to which alone we are referred to substantiate the appellant's claim, is not properly in the transcript. A certified copy of what purports to be a charge of the court is attached to the transcript, but it is not embodied in a bill of exceptions, and it can only become a part of the record by means of a bill of exceptions. *State v. Smith*, 38 Kan. 194, 16 Pac. Rep. 254. The record, therefore, does not sustain the error assigned.

There was no error in overruling the motion in arrest of judgment. While the offense is charged in general terms, it must be held sufficient as against such a motion. A motion to quash was filed in the case, but it was not directed against the count under which the conviction was had, and no objection was made that the charge was indefinite before or during the trial, nor until after a verdict of guilty had been returned, when the motion in arrest of judgment was made. If the attention of the court had been called to the indefiniteness of the charge, it probably, and properly, would have required the state to describe the offense with greater particularity. The fact that a charge in an information is stated in general terms will usually not be held bad after verdict and judgment, although it might have been held insufficient on a demurrer or motion to quash; and the information in the present case cannot be held fatally defective upon an objection made after the verdict. *Gen. St.* 1889, par. 2540; *State v. Knowles*, 34 Kan. 393, 8 Pac. Rep. 861; *City of Kingman v. Berry*, 40 Kan. 625, 20 Pac. Rep. 527. The judgment of the district court will be affirmed.

All the justices concurring.

STATE v. HASTIE.

(Supreme Court of Kansas. Oct. 11, 1890.)

APPEAL—DISMISSAL—DEFECTIVE BILL OF EXCEPTIONS.

Where the only record upon which an appeal from the district court is founded is an original bill of exceptions, which is not authenticated by the clerk of the district court, the supreme court acquires no jurisdiction, and the appeal should be dismissed.

(Syllabus by the Court.)

Appeal from district court, Sumner county; JAMES A. RAY, Judge.

*Charles Willie and McDonald & Parker*, for appellant. *L. B. Kellogg*, Atty. Gen., and *W. T. McBride*, for the State.

JOHNSTON, J. The defendant was convicted of a violation of the prohibitory law, and from that conviction he attempts to appeal to this court. It is insisted on the part of the state that the record brought here is not in a condition to justify an examination and a review of the proceedings of the district court. No transcript of the record in the district court has been brought to this court, and, before the defendant is entitled to a consideration of his appeal, he must bring to this court a transcript of all the pleadings, papers, and proceedings which are of record in the district court, duly authenticated as such by the clerk of that court. There has been filed in this court what appears to be the original bill of exceptions, attested by the clerk of the district court; but this bill of exceptions has no place outside of the district court, and should not have been removed therefrom. While it appears to contain pleadings, orders, and judgments, which are not properly included in a bill of exceptions, there is still no certificate by the clerk that they are correct copies of the pleadings, orders, and judgments filed and entered in the case. The certificate of the judge that the bill of exceptions contains copies of the pleadings, orders, and proceedings does not authenticate them, nor meet the requirements of the statute. Nothing short of a full and true transcript will suffice; and, in the absence of this, the appeal of the defendant must be dismissed. *State v. Lund*, 28 Kan. 280; *State v. Nickerson*, 30 Kan. 545, 2 Pac. Rep. 654; *State v. Cash*, 36 Kan. 623, 14 Pac. Rep. 283; *State v. McFarland*, 38 Kan. 664, 17 Pac. Rep. 654; *State v. Prater*, 40 Kan. 15, 19 Pac. Rep. 358; *State v. Ricker*, 40 Kan. 14, 19 Pac. Rep. 357.

#### STATE V. GATLIF.

(*Supreme Court of Kansas*. Oct. 11, 1890.)

Appeal from district court, Sumner county; JAMES A. RAY, Judge.

*Charles Willie and McDonald & Parker*, for appellant. *L. B. Kellogg*, Atty. Gen., and *W. T. McBride*, for the State.

JOHNSTON, J. This (*State v. Gatliff*) involves similar questions, and stands in the same condition, as the case just decided. *State v. Hastie*, ante, 953. Nothing has been brought here except the original bill of exceptions, and even it has not been authenticated by a certificate of the clerk. Following the decision of the *Hastie* Case, the appeal will be dismissed. All the justices concurring.

#### MARTIN et ux. v. FIX.

(*Supreme Court of Kansas*. May 10, 1890.)

IMPLIED TRUSTS—CONVEYANCE BY TRUSTEE—BONA FIDE PURCHASER.

Where F. furnishes money to C. to purchase a piece of land for him, (F.) and C. purchases the land with F.'s money, and, without the knowledge of F., takes the title in his own name, C. is the agent of F. in the transaction,

and holds the land in trust for F. If, afterwards, and before conveying the land to F., C. makes a general assignment for the benefit of his creditors, and then deeds the land to F., and such deed is at once recorded, and C.'s assignee then deeds the land to H., held, that the deed of C. to F. conveying the legal title to him, being on record at the time of the transfer of the land by the assignee to H., imparts constructive notice to H.; and, in an action of ejectment by F. to recover the possession of the land from H. or his grantees, F. should succeed. Held, also, that F. being the equitable owner of the land, and C. holding the legal title only, the assignee of C., not being a purchaser for value, acquired under the assignment no greater interest therein than C. held, and could convey to his grantee H. no greater interest than he had; and, in an action of ejectment by F. against the grantees of H., F. ought to recover.

(*Syllabus by Strang, C.*)

Commissioners' decision. Error to district court, Shawnee county; JOHN GUTHRIE, Judge.

*H. H. Harris*, for defendant in error. *D. E. Sowers* and *Hazen & Isenhardt*, for plaintiffs in error.

STRANG, C. Action of ejectment to recover the possession of the N. E.  $\frac{1}{4}$  of section 27, township 12 S., of range 17 E., in Shawnee county, commenced July 31, 1886. Same day answer filed; and, on the issues as thus made, June 15, 1887, the case came on for trial, it being the second trial of the case. The court, after making findings of fact, and conclusions of law, rendered judgment in favor of the plaintiff below, George Fix, for the possession of the land above described, upon payment of the sum of \$1,151.56 taxes, interest, and costs due the defendants, and for costs of suit. Motion for new trial. Motion overruled, and case brought here for review, alleging that—*First*, the decision of the court is contrary to the evidence; *second*, decision of the court is contrary to law; *third*, errors of law occurring at the trial and excepted to. To recover, the plaintiff relied upon a patent for the land from the government to W. R. Shoars, dated June 15, 1860; the death of W. R. Shoars and wife, and proof that the only surviving heirs were Clara N. Stevens, formerly Clara N. Shoars, and Whitfield S. Shoars; quitclaim deed from Clara N. Stevens and Whitfield S. Shoars to W. T. F. Clark, dated December 31, 1885, recorded June 21, 1886; quitclaim deed from W. T. F. Clark, dated June 17, 1886, with proof that plaintiff furnished the money to Clark to purchase the land of Clara N. Stevens and Whitfield S. Shoars. The defendants below relied upon a tax-deed from Shawnee county to Joshua Knowles, dated August 24, 1886; deed from Knowles and wife to George W. Watson, dated May 9, 1887; and deed from Watson and wife to the plaintiffs, dated November 24, 1873. It was conceded this tax-deed was void on its face, but that under it plaintiffs went into possession of the land. Defendants further relied upon a deed of assignment from W. T. F. Clark to Millard F. Rigby, dated May 8, 1886; deed from S. L. Seabrook, permanent assignee of W. T. F. Clark, to William R. Hazen, dated March 16, 1887; and a warranty deed from W. R. Hazen and wife to the plaintiffs, dated March 16, 1887.

This case turns upon the effect to be given to the deed of W. T. F. Clark to George Fix, dated June 17, 1886. The court found, among other things, the following facts: That Fix furnished the money to Clark with which to buy the land in controversy; that, in the purchase of said land, Clark was the agent of Fix, and purchased the land for Fix; that though Clark took the deed from Mrs. Stevens and her brother, Whitfield S. Shoars, in his own name, he held the land therein described in trust for Fix, and had himself but the naked title thereto; that the deed of assignment from Clark to Rigby contained no description of the land in question; that Hazen was a purchaser for a valuable consideration, and without actual notice of any claim of George Fix to said land. Under these circumstances was the deed from Clark to Fix constructive notice to Hazen of Fix's interest in said land? If it was, then the judgment of the court below was right; if not, the judgment of the court below was wrong, and should be reversed. The court below, as a conclusion of law from the facts found, held that the deed from Clark to Fix was constructive notice to Hazen of Fix's claim to the land in controversy. We think the court was right in such conclusion. The deed from Clark to Fix was on record 10 months before Hazen purchased from Seabrook, Clark's assignee. Hazen could acquire no more interest in the land than Seabrook had, and, whatever interest Seabrook had, he acquired from Clark. Hazen was bound to go through Seabrook's title to that of Clark's, and, when he came to examine Clark's title, he must discover the deed from Clark to Fix, which charges him with inquiry into the character of Fix's interest in said land, and imparts notice to him of Fix's claim of ownership in said land.

Again, Seabrook took the land as assignee of Clark. He was not a purchaser for value, and therefore acquired only what was vested in Clark, which, at the utmost, was the mere naked title. Hazen, who purchased from Seabrook, took by his purchase no greater interest in the land than Seabrook had, and therefore acquired a mere naked title, while Fix was the owner of the equitable title to the land, and had been ever since it was deeded by Mrs. Stevens and Whitfield S. Shoars to Clark, because, as the court finds, he furnished the money to purchase the land, and Clark purchased it for him as his agent. It is true Clark took the legal title in his own name instead of in that of his principal, Fix; but Fix did not know that Clark was taking the title in his own name, and he never consented that Clark should do so. The equitable title being in Fix before and at the time Clark took the legal title to the land, and such equitable title remaining in Fix all the time down to the commencement of this suit in the court below, Fix ought to recover without regard to the subsequent acts of Clark affecting such land, unknown at the time to Fix, and never afterwards consented to by him. Otherwise Clark could have wholly defeated the trust resulting from the relation of himself to Fix and to the land, and wiped out

Fix's equitable interest therein. We think the findings of the court below are supported by sufficient evidence, and its conclusions of law are correct. We, therefore, recommend that the judgment of the court below be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

(44 Kan. 529)

STATE *ex rel.* KELLOGG, Attorney General,  
v. NICKOLS *et al.*, County Commissioners.  
(*Supreme Court of Kansas. May 10, 1890.*)

LOCATION OF COUNTY-SEAT—PETITION FOR ELECTION.

A petition to the board of county commissioners to order an election to relocate the county-seat, when said county-seat had been originally located by a vote of the people of the county, and had remained for more than five years, must contain three-fifths of the names of the electors of the county, as shown by the last assessment rolls of both real and personal property, to be sufficient to authorize the board to order such an election.

(*Syllabus by Simpson, C.*)

Commissioners' decision. *Mandamus.*  
*Edwin A. Austin, L. K. Pratt, M. A. Wilson,* and *S. W. McElroy*, for defendants.  
*W. W. & W. F. Guthrie, D. Rathbone, John D. Hays, and S. D. Becker*, for plaintiff.

SIMPSON, C. This is an original action in this court to compel the board of county commissioners of Rawlins county to order an election for the relocation of the county-seat of that county. On the 28th day of February, 1888, a petition was presented to the board requesting an election to be ordered upon the question of the removal of the county-seat from Atwood to Blakeman. For more than five years before the presentation of such petition the county-seat of Rawlins county had been located at Atwood by a vote of the people, and hence, to authorize an election, the petition must contain the names of three-fifths of the electors of the county as they appear on the last assessment rolls. The petition presented by the Blakeman people to the board of county commissioners, on the 28th day of February, 1888, contained the names of 1,010 electors of the county, whose names appeared on the last personal property assessment roll. We place the number on that petition at 1,010 electors, not because the testimony clearly demonstrates that it contained that number, although it may be said that there is evidence tending to establish this as the number, but because we desire to give the relator the benefit of his strongest claims on all questions arising in this case. The personal property lists required by section 65 of the tax law (paragraph 6911, Gen. St. 1889) on file in the county clerk's office of Rawlins county, at the date of the presentation of this petition, contained 1,817 names. Of these, it appears that 330 are the names of females, deceased persons, non-residents, corporations, and partnerships, and this number is to be deducted, leaving 1,487 as the number of electors of said county, as shown by this list. If the personal property list is the only list or assess-

ment roll contemplated by section 4 of the chapter on county-seats, (paragraph 1899, Gen. St. 1889,) it is apparent that the petition of the Blakeman people contained the names of more than three-fifths of the electors of Rawlins county, and it was the duty of the county board to order the election as prayed for. But it is claimed that the board of county commissioners had a right to consider and be governed by the real-estate assessment list, as required by section 48 of the tax law, the same being paragraph 6889, Gen. St. 1889, and by the real-estate assessment list returned in the odd years. This claim is urged for two reasons, the first being the plain reading of section 4 of the county-seat act, and the second being the injustice of excluding those real-estate owners who are electors of the county, but whose names do not appear on the personal property lists from any participation in such an election. On the other side, it is contended that the proper construction of section 4 of the county-seat act is settled by his court in the Linn County-Seat Case, 15 Kan. 500, and the case of State v. Phillips County, 26 Kan. 419. To commence with the earlier case, it may be said that the statute under consideration in that case is not the present section 4 of the county-seat act; it was a section in the General Statutes of 1868, that read as follows: "For the purposes of this act the number of the legal electors of the county shall be ascertained from the last assessment rolls of the several township assessors in the county." At the time of the passage of this act the only assessment roll prepared by township assessors was that of personal property. The real-estate assessment was made by the county assessor, and continued to be so made by the county assessor until March, 1869. The court, construing this section in the light of the existing statutes providing for the assessment of property, held that it meant the personal property lists only. BREWER, J., says: "The only assessment roll prepared by township assessors required or authorized at the time of the passage of this county-seat act was that of personal property, on which the assessor was required to place a list of persons, companies, or corporations in whose name the personal property was listed. Gen. St. p. 1040, § 61." This construction was followed in the case of State v. Phillips County; but in neither of these cases was it urged or claimed that the section included the real-estate assessment lists. There is a single expression in the last case only that warrants the claim that is made for that case being an authority to govern us in this case, but we reiterate the statement that neither in brief, argument, nor opinion, in the latter case, was the question of real-estate assessment lists thought of or mentioned. The only question decided in the Phillips County Case was that, in considering the sufficiency of the petition, the board of county commissioners had a right to add to the personal property list the names of such persons whose property statements were found on file in the county clerk's office that were omitted by the township assessors

when they made out the personal property list. The present section was passed in March, 1883, long after it was made the duty of the township assessors to list and value both real and personal property. It reads: "For the purposes of this act the county commissioners shall be governed by the last assessment rolls of the several township and city assessors of the county, and no petitioner shall be deemed a legal elector, unless he be an elector and his name appears on said rolls." At a time when only personal property was assessed by township assessors, the legal electors were to be ascertained from their assessment rolls. At a time when both real estate and personal property are assessed by city and township assessors, the county boards are to be governed by their last assessment rolls. Construing these two sections in the light of the duties imposed by other statutes upon township assessors, we have no doubt but that the legislature intended to include both the assessment rolls of real estate, as well as that of personal property, as a basis to govern the county board in determining the sufficiency of such a petition. In sections 76, 77, and 82 of the tax law, the words "assessment rolls" are used with reference to both real and personal property, but in one of the most important sections of the law (section 139) it refers to the real-estate assessment roll exclusively; so that, gathering the intent of the legislature, as expressed in section 4, from the use of similar language in the other statutes that define what assessment rolls consist of, it must be apparent that the assessment rolls referred to mean the assessors' returns of both real and personal property. We conclude, therefore, that by the amendment of the original section 4, as made by the legislature in 1883, under which this case originated, in determining the sufficiency of the petition, the board of county commissioners of Rawlins county must be governed by the last assessment rolls of the real estate and personal property made in the county prior to the presentation of this petition; that while the true construction was given the original section in the Linn and Phillips County-Seat Cases, and these cases were properly decided, they do not control the construction of the amended section; and that we cannot give this section the construction claimed by the relator without doing violence to its plain language, and antagonizing several sections and provisions of the tax law. Then there must be added to the 1,487 names found on the personal property assessment roll, the names of electors that appear on the real-estate assessment roll, and are not on the personal property list. This petition was presented to the board of county commissioners in February, 1888. The last returns assessing the real property of Rawlins county were those of the even year 1886, and those of 1887 that included the title to such real estate as was acquired from the United States between March 1, 1886, and March 1, 1887. The real-estate assessment roll of 1886 contained 1,522 names, and that of 1887 contained 431 names, making a total of 1,953 names. It is claimed on one

side that after the real-estate assessment rolls have been purged, by excluding therefrom all non-residents, females, corporations, partnerships, and the names of those who are also on the personal property assessment rolls, there remain the names of 502 electors. This is the number practically settled upon by the board of county commissioners, and probably the weight of the evidence is in its favor. On the other side, it is asserted that, after the real-estate rolls are thus purged, there remain but 218 names. So far as the decision of this case is concerned, it does not practically make any difference which number we adopt, as the result of either is fatal to the relator. If 502 is added to 1,487, making 1,989, the three-fifths necessary would be 1,193, while, if only 218 is added to the 1,487 on the personal property list, the necessary three-fifths would be 1,023. In any event, the petition would lack from 13 to 183 electors. If we were disposed to be more critical, and weigh the evidence closely, as to the number of legal electors on the Blakeman petition, and as to the number of names that should be stricken from the personal property list of 1887, these figures would be stronger against the relator. In this computation we take no account of the "Atwood strike-off," because it seemed to be conceded on the argument that, if the real-estate assessment rolls were to be considered, the Blakeman petition is insufficient. It is recommended that a peremptory writ of *mandamus* be denied the relator.

PER CURIAM. It is so ordered; all the justices concurring.

#### WILSON v. BECK.

(Supreme Court of Kansas. Oct. 11, 1890.)

#### DEMURRER TO EVIDENCE.

Where in the trial of an action a demurrer is interposed to the plaintiff's evidence, on the ground that it does not prove any cause of action, *held*, that unless there has been a total failure upon the part of the plaintiff to prove a case, or some material fact in issue, the demurrer should be overruled. *Brown v. Railroad Co.*, 31 Kan. 1, 1 Pac. Rep. 605, and *Gardner v. King*, 37 Kan. 671, 15 Pac. Rep. 920, followed.

(Syllabus by Green, C.)

Commissioners' decision. Error from district court, Crawford county; GEORGE CHANDLER, Judge.

John T. Voss and B. F. Pursel, for defendant in error. D. B. Van Syckle, for plaintiff in error.

GREEN, C. The plaintiff in error sued the defendant in the district court of Crawford county, to obtain the office of director of school-district No. 54, in said county, claiming to have been elected to that position on the second Thursday of August, 1886, by the legal voters of the district, and to have qualified and demanded the office of the defendant, his predecessor. After the plaintiff below had introduced his evidence, the defendant interposed a demurrer thereto, which was sustained by the court, and which the plaintiff claims was error. The facts material to this case show: That, on the 12th day

of August, 1886, the qualified voters of this school-district met at the school-house, in said district, to hold the annual school meeting. The officers of the school board were present, and about 35 of the electors of the district. Judges and clerks were selected, and the election board qualified. As the election for director was being held, a number of the electors, including the chairman of the meeting, the clerk of the school board, one of the judges, and one of the clerks of the election board, withdrew and absented themselves from the meeting. Those who remained filled the vacancies. A record was kept of this meeting by one of the electors present, who signed it as secretary of the meeting. This record showed that the plaintiff received 21 votes for director, and the defendant 9. A report of this meeting was made by the person signing the record as secretary of the meeting, to the clerk of the school-district, but he declined to receive it. Several efforts were made to introduce this record, and the same is embodied in the record brought to this court, but it appears that it was not received in evidence. When offered by the plaintiff, objection was made by the defendant and sustained by the court. But it does appear that the ballots cast at such election were admitted in evidence, and these ballots showed that 21 votes were cast for Wilson, and 9 for Beck. The evidence of the clerk of the school-district was to the effect that this meeting was held at the time fixed by law for the annual school meeting. We are satisfied, from an examination of the record in this case, that there was some evidence to show plaintiff's election and qualification as director of this school-district. While we are free to say that it may not have been the best evidence, still the court should have permitted it to go to the jury. The law in this state has been clearly settled that, unless the plaintiff has utterly failed by all of his evidence, to prove his case, or some material fact in issue in the case, a demurrer to the evidence should be overruled. *Brown v. Railroad Co.*, 31 Kan. 1, 1 Pac. Rep. 605; *Gardner v. King*, 37 Kan. 671, 15 Pac. Rep. 920. We recommend that the judgment of the court below be reversed, and the cause remanded for a new trial.

PER CURIAM. It is so ordered; all the justices concurring.

#### FITZGERALD et ux. v. HOLLAN.

(Supreme Court of Kansas. Oct. 11, 1890.)

#### ACTION TO ESTABLISH TRUST—EVIDENCE—AMENDMENT OF PLEADING.

1. In an action to declare the holder of the legal title to real estate trustee for the equitable owner, a running personal account between the parties, in no way connected with the trust, is not proper matter of defense.

2. It is not error at the close of plaintiff's case in chief, to permit the petition to be amended so as to conform to the proof.

(Syllabus by Strang, C.)

Commissioners' decision. Error from district court, Cloud county; E. HUTCHINSON, Judge.

*Caldwell, Ellis & Cook*, for defendant in error. *Sturges, Kennett & Peck*, for plaintiffs in error.

STRANG, C. This case was begun in the district court of Cloud county, September 19, 1885. October 18, 1885, plaintiffs in error filed their demurrer to what they term the first, second, third, and fourth counts of the petition, alleging, as grounds therefor, that neither of said counts states facts sufficient to constitute a cause of action. The demurrer was overruled, to which ruling objection was made and exception allowed. September 3, 1886, answer was filed containing — *First*, general denial; *second*, allegation of ownership by defendants, detention of possession by plaintiff, and claim for mesne profits; *third*, an offset consisting of a running personal account between J. E. Fitzgerald and Hollan. November 5, 1886, reply was filed denying all new matter. February 29, 1887, case was tried by court without a jury. The trial resulted in a judgment for the plaintiff below that Fitzgerald and wife were trustees holding the title to land for Hollan, and requiring them to deed the same to him, subject to a lien for money paid out for taxes and interest thereon. The judgment of the court below was based upon findings of fact and conclusions of law thereon. They bring the matter here by a case made, and assert that the court below erred as follows: *First*, court erred in overruling the demurrer to the petition; *second*, in excluding testimony offered by defendants; *third*, in allowing plaintiff to file amended petition; *fourth*, in making findings of fact not sustained by the evidence; *fifth*, court erred in not rendering judgment for plaintiff on the findings; *sixth*, court erred in its conclusions of law; *seventh*, in overruling motion for new trial.

The first error assigned is that the court erred in overruling the demurrer. The petition was not skillfully drawn, but we think the court below put the correct construction on it in treating the several sections of the petition as numbered, as paragraphs of one petition, alleging one cause of action, instead of counts asserting different causes of action. The demurrer, being to separate counts, was, under this view of the petition, necessarily, and therefore properly, overruled. There was no demurrer to the petition as a whole, and besides we think the petition as a whole stated a cause of action.

We will treat the third error, as assigned, as the second, because it comes second in the natural order of the trial. In this it is asserted that the court erred in allowing the plaintiff to amend his petition. The record shows that, when the plaintiff's evidence in chief was in, he asked leave to amend his petition so as to conform it to the proof as made. The Code of Procedure (paragraph 4222, Gen. St. 1889) provides for such amendments. See, also, *Organ Co. v. Lasley*, 40 Kan. 521, 20 Pac. Rep. 228. There is therefore no error in this assignment.

Next, it is claimed the court erred in excluding certain testimony of the defendants. The action was in equity to require

the court to declare the defendants trustees holding the title to certain real estate for the use of the plaintiff, and to require them to turn the title over to their *cestui que trust*. The offer of the defendants was to prove a personal account, running between J. E. Fitzgerald and Hollan, the plaintiff, in which it was alleged by the defendants that there was a balance due from the plaintiff to J. E. Fitzgerald. We do not think such account a proper subject of investigation in this case. It is not a matter of defense to the plaintiff's claim. It is a mere personal account. It did not, in any way, grow out of or concern the trust, and it was not between the parties to the action. The evidence of such account was therefore properly excluded.

*Fourth*. We will not investigate as to whether a preponderance of the evidence in the case supports the findings of the court, or otherwise. There is certainly evidence in support of all the material findings of the court, and under the law of this court that is sufficient to sustain such findings. It is asserted that the court found the value of the land in controversy without any evidence as to value. However that may be, such finding is wholly immaterial, and therefore cannot affect the validity of the other findings. The findings of fact being sustained, we see no error in the conclusions of law thereon. The court finds as a fact that the Fitzgeralds agreed to take a deed to the premises, because they owned other lands, and could on that account obtain a larger loan on the land than Hollan could obtain,—that is, \$800, the amount Hollan required to pay out on the land,—and, after the loan was obtained, deed the land to Hollan, subject to the mortgage. Upon this fact the court found, as a conclusion of law, that the Fitzgeralds were trustees, holding the title to said land in trust for Hollan. We notice, above, the principal finding of fact and conclusion of law in the case, and we think the latter a correct legal deduction from the former.

The question raised by the other assignments are included in those already considered, the motion for a new trial being founded upon the foregoing alleged errors. It is therefore recommended that the judgment of the court below be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

#### *In re EBERLE.*

(Supreme Court of Kansas. Oct. 11, 1890.)

#### HABEAS CORPUS.

Where an application is made by a prisoner for his discharge upon *habeas corpus*, and the evidence fails to show the commission of any crime on the part of the petitioner, he should be discharged.

(Syllabus by Strang, C.)

Commissioners' decision. Original proceeding in *habeas corpus*.

John Muckle, H. G. Webb, and Jess Brockway, for petitioner. L. B. Kellogg, Atty. Gen., and J. H. Morrison, for respondent.

STRANG, C. Some time in March, 1889, the grand jury of Labette county, Kan., returned to the district court of said county an indictment against H. A. Eberle, charging him with the offense of having obtained by means of false pretenses the signature of Samuel Tilton to a promissory note for \$270, dated October 11, 1888, and payable on or before October 11, 1889, to the order of Dr. H. A. Eberle. Upon said indictment a warrant was issued, and the defendant not being found in the state of Kansas, a requisition was obtained and the defendant arrested on the 9th of April, 1889, in the state of Missouri, and extradited to Kansas. Afterwards the defendant applied to this court for his discharge from said arrest upon *habeas corpus*, for the reason that said indictment did not charge the petitioner with any offense, which application was allowed, and an order made directing his discharge, pursuant to which he was, on the 13th day of May following, discharged. Immediately upon his discharge, he was rearrested upon a warrant issued by Hon. J. D. McCUE, judge of the district court of Labette county, Kan., and at once reincarcerated in jail; the charge in said warrant being that the defendant, on October 11, 1888, obtained the signature of Samuel Tilton to a joint note of Samuel Tilton and Elizabeth Tilton for \$270, payable to Dr. H. A. Eberle on or before October 11, 1889, with interest at 10 per cent. after maturity. After said last imprisonment, the petitioner applied to the Honorable J. D. McCUE, judge of the district court of Labette county, for his discharge upon *habeas corpus*, which application was refused, and petitioner remanded to the custody of the sheriff of Labette county, whereupon he again comes to this court with an application for his discharge from arrest and imprisonment, and alleges that he should be discharged for the following reasons: *First*, because, having been extradited from Missouri upon papers that this court upon examination thereof held did not charge an offense, his arrest in the state of Missouri was illegal, his extradition unwarranted, and, having been discharged, he could not be rearrested in this state upon any charge until he was given time to return to the state of Missouri; *second*, that the charge upon which he was rearrested, and is now held, is another and different offense from that upon which he was extradited, and that, therefore, he should, under the law, be discharged; *third*, that the evidence to sustain the charge against him does not show that any offense was committed.

The evidence in this matter shows that on the 11th day of October, 1888, the petitioner was at the home of Samuel Tilton, in Labette county, in company with one of Mr. Tilton's acquaintances, who introduced the petitioner to Tilton as a physician, and said he wanted to see Mrs. Tilton, who was an invalid; that, after some conversation between Tilton and the petitioner, the latter was introduced to Mrs. Tilton, and proceeded to question her, and examine her as to her condition, after which he informed her and her husband that she was suffering from a complica-

tion of chronic irritation of the spine, and other difficulties, and was in a pretty bad condition. He declared, however, that she could be cured; that the institute of which he was a member, the "Medical and Surgical Health Institute," of Kansas City, Mo., could cure her, but it would take time, would take 10 months; that finally he offered to enter into a contract for said institute with Tilton and wife to take her case, furnish medicine, attention, and apparatus, and cure her in 10 months, for \$270, which proposition Tilton and wife accepted, and executed a promissory note for \$270, payable to Dr. H. A. Eberle, on or before October 11, 1889, with interest at 10 per cent. after maturity; that the petitioner executed a contract on the part of said institute, embodying the agreement, and also containing a statement of the note made to him, and included therein the condition that the note should be null and void unless a cure was effected. The evidence also shows that, during the conversation between the petitioner and Samuel Tilton, the former said they owned the building in which they were doing business in Kansas City, a picture of which was at the head of the contract given by him to the Tiltons; that he also said that the institute was doing a good business, and was responsible, and he was responsible, and that he promised not to negotiate the note given him; that Samuel Tilton testified he would not have given the note if the petitioner had not said he was responsible financially, and the institute which he represented was responsible financially. The above is the substance of all the evidence presented to this court. Three questions of more or less importance are presented in this application, but, as the last is the one upon which the merits of the case must finally rest, we have concluded to confine our investigation thereto. The petitioner is charged with obtaining the signature of Samuel Tilton to a promissory note by means of false pretenses, with intent to cheat and defraud Samuel Tilton. Does the evidence sustain the charge? We think not. It is said that the petitioner represented that he knew what was the matter with Mrs. Tilton, and it is alleged that he did not know what ailed her. Who knows whether he did or not? What is there in the evidence in the case that proves that he did not know what ailments, or complication of ailments, Mrs. Tilton was suffering from? We cannot gather from the evidence that he did not know. No medical testimony is offered to show that she was not suffering from the difficulties named by the petitioner. There is no medical proof that he did not properly diagnose her condition; nor is there any medical or other evidence to show that the petitioner was not a learned member of the medical profession, and fully competent to diagnose disease. It is also said the petitioner represented that Mrs. Tilton, notwithstanding the complication of diseases from which she was suffering, could be cured, and that the Medical and Surgical Health Institute, which he represented, could cure her in 10 months; and it is alleged that such representation was false. It may



have been; but who knows it was false? What is there in the evidence that establishes its falsity? The representation was that they could and would cure her in 10 months, provided she took the medicine according to instructions for that period of time; but she quit taking the medicine when the period had but half expired, and her husband had the petitioner arrested, and put in jail. Who knows but she would have been cured in 10 months? What is there in the evidence that establishes the fact that she could not have been cured in 10 months according to the petitioner's representations, which included a 10-months trial? There is no medical evidence on this point. We see nothing in these representations that justifies a criminal prosecution against the petitioner. And yet, as we read Samuel Tilton's evidence, these are the representations that induced him to sign and deliver the note, the signature to which the petitioner is alleged to have obtained. The evidence shows that the petitioner said he wanted the note to hold until the contract had been performed, and that he did not have to negotiate it because the institute was doing a good business, and was in good shape financially. The evidence does not disclose or attempt to disclose the financial condition of the institute in October, 1888, nor the financial responsibility at that time of the petitioner. It does not show but that the institute at that time was doing a good business. The evidence upon this question is that of the witness Gates, whose evidence is so general and indefinite as to be but slightly material upon any question connected with the case, and he testifies that the first time he called at the institute was in January, 1889, and again in March after. His evidence shows that he knew very little at any time about the institute financially or otherwise, and nothing at all about it in October, 1888. The evidence fails to show the falsity of his statements when made in October, 1888, that the institute was doing a good business, and that the institute and petitioner were then financially responsible; nor does the evidence negative his statement that they did not have to negotiate the note. The whole statement concerning the negotiation of the note was practically a promise that he would not negotiate the note; but a promise not to do a thing in the future is not a false pretense. The important question is what induced Samuel Tilton to sign and deliver to Dr. H. A. Eberle the note for \$270. We think it was the fact that Samuel Tilton believed the statements of Dr. Eberle that he knew what ailed Mrs. Tilton, and that the institute of which he was a member could cure her in 10 months, coupled with his desire to have her cured, that induced him to sign the note, and not the casual statements of the doctor as to the financial responsibility of the institute, or of himself. The contract, as reduced to writing and delivered to the Tilttons, says nothing about the financial responsibility of the institute. Taking the evidence as a whole, we do not think it discloses a case of obtaining the signature of Samuel Tilton to the note in

question by means of false pretenses. We, therefore, recommend that the application of the petitioner be allowed, and an order for his discharge entered.

PER CURIAM. It is so ordered; all the justices concurring.

#### VAN FLEET V. STOUT.

(Supreme Court of Kansas. July 3, 1890.)<sup>1</sup>

INJUNCTION—CONDITIONAL ORDER—OBJECTION TO EVIDENCE—WITNESS—HUSBAND AND WIFE.

1. An order conditionally granting a temporary injunction is not operative until a bond is filed in conformity with law and the order of the court or judge granting the same.

2. Where a party objects to the admission in evidence of a writing, upon the ground that the opposite party had failed and refused, upon demand, to give him a copy of the same, it is essential for him to show the failure or refusal of his demand for such copy in order to exclude the giving of the original in evidence.

3. A husband is a competent witness in a case brought by his wife as an executrix of the estate of a deceased person, except as to communications made by one to the other during marriage.

(Syllabus by the Court.)

Error to district court, Harvey county; L. HOUK, Judge.

*Brown & Kline*, for plaintiff in error.  
*Green & Shaver and Joseph Crow, Jr.*, for defendant in error.

JOHNSTON, J. Mary F. Stout, as executrix of the last will and testament of Elizabeth Van Fleet, deceased, brought an action against William K. Van Fleet, and alleged that, in 1882, Elizabeth Van Fleet, who was then the owner and holder of \$800 in United States 4 per cent. bonds, placed them in the hands of William K. Van Fleet, who was to hold them in trust, and transmit the interest coupons to her as they matured; that he so held them until 1883, when he sold the bonds, in violation of his trust, and converted the proceeds to his own use. It is averred that he has refused, upon demand, to turn over the bonds or the proceeds of the same. Judgment was demanded in the sum of \$1,075, with interest. The answer of the defendant was a general denial, and that the bonds in question were a donation to him, his brother, and sister. The cause was tried without a jury, and judgment in favor of Mary F. Stout, as representative of the estate of decedent, for \$1,115.59, was given. William K. Van Fleet complains, and alleges four grounds of reversal.

The first objection is that the court proceeded with the trial, although a temporary injunction previously granted was in force, enjoining the further prosecution of the action. In a supplemental answer the defendant below alleged that a proceeding had been instituted in another state to set aside the will, under which Mary F. Stout had been appointed executrix, and asking the court to enjoin the prosecution of the action until these proceedings in the other state were concluded, and finally to grant a perpetual injunction. Upon this application a temporary injunction was granted to take effect up-

<sup>1</sup> Publication delayed pending rehearing.

on the giving of a good and sufficient undertaking in the sum of \$2,000. The defendant thereupon gave an undertaking, but, the attention of the court being called to the same, it was held not to be in compliance with law and the order of the court. Additional time was then given to defendant to file the required bond, but it was not filed, and the court treated the order previously given as ineffectual, and, about a year thereafter, proceeded with the trial of the cause. The injunction was not to take effect unless the conditions imposed were complied with. The bond tendered to the court was examined by it, and held to be insufficient. The granting or refusal of a temporary injunction is largely within the discretion of the court, and the matter being still before the court, in this instance, it determined at once whether the bond tendered was in conformity with its order, and, having held adversely, proceeded upon the theory that no injunction was yet in force. The defendant, however, was given further time and opportunity to file such bond as would make the order operative. The mere order of the court granting an injunction upon conditions to which the party did not conform was no obstacle against proceeding with the trial of the cause. The failure to give the required undertaking rendered the order inoperative, and warranted the court in ignoring it. Civil Code, § 242; *State v. Commissioners*, 35 Kan. 150, 10 Pac. Rep. 535; *State v. Commissioners*, 42 Kan. 739, 22 Pac. Rep. 735. The defendant was not hurried into a trial, nor was he limited in his defenses, by reason of the refusal of an injunction. He was given abundant opportunity to make full preparation to present any and every defense which he might have, without regard to whom was the representative of the decedent's estate.

The next objection is that the court erred in admitting in evidence certain letters written by the defendant below to the decedent, and Peter S. Stout, one of the witnesses in the case, upon the ground that they had demanded a copy of all writings intended to be offered in evidence at the trial, and the plaintiff had failed to grant the defendant or his attorneys an inspection of the letters or copies of the same. The record shows that a notice was served upon the plaintiff's attorneys, demanding an inspection and copy of all deeds, instruments, and writings intended to be offered in evidence at the trial, but we find no evidence in the record that there was a failure or refusal on the part of the plaintiff to comply with the requirements of the notice. Before the court could exclude the letters it was essential for the plaintiff to show, not only that the demand had been made, but that there had been a failure and refusal to comply with the same. Even if proof of a refusal had been made, the admission of the letters would not require a reversal. We have read the letters that were introduced, and find that they are not inconsistent with the defendant's admissions in other letters not objected to, and in his testimony. The case was tried by the court, and not by a jury, and we think that the receiving

of these letters was in no event prejudicial.

The third objection is that the court erroneously permitted the executrix to testify to transactions and communications had personally by her with the deceased; but the record does not bear out this claim. The communication or letter referred to appears to have been written by Peter S. Stout, instead of the executrix.

The final objection is the admission of the testimony of Peter S. Stout, who was the husband of the executrix. It is contended that it is in violation of section 323 of the Code, which provides: "The following persons shall be incompetent to testify:

\* \* \* *Third.* Husband and wife, for or against each other, except concerning transactions in which one acted as the agent of the other, or when they are joint parties and have a joint interest in the action; but in no case shall either be permitted to testify concerning any communication made by one to the other during the marriage, whether called while that relation subsisted, or afterwards." There is no claim that Stout testified concerning any communication between him and his wife, but it is contended that she comes within that prohibition of the statute which forbids a husband or wife to testify for or against each other. It is to be noted that Mary F. Stout did not bring this action in her own behalf, but only as a representative of the estate of Elizabeth Van Fleet. Peter S. Stout was not called to testify in behalf of his wife, but was called to give testimony in behalf of the estate, and hence, did not come within at least the strict terms of the statute. At common law, the husband and wife were incompetent to testify for or against each other in any proceeding where the other was a party, or which involved the pecuniary interest of the other; but our statutes have made radical changes in the relations and rights of married persons. In legal contemplation, they were formerly regarded as one person, and, as the husband could not testify in his own behalf, his wife, whose interest is the same, could not. The identity of interests was the principal ground for excluding the testimony of one in behalf of the other. This ground of exclusion has been entirely removed by section 319 of the Code, and hence, the common-law rules invoked, and the decisions that have been cited thereunder, are not applicable or controlling. The provisions of our Code relating to this subject were fully considered and discussed in *Higbee v. McMillan*, 18 Kan. 133. In that case, Chief Justice Horron remarked that, "as our statute has opened wide the door to all persons to be witnesses, without regard to their interest in the suit, excepting as affecting their credibility, we ought not to keep up the disqualification as to the wife being a witness, on account of the interest of the husband, unless the plain provision of the law forbids any other conclusion." It was there held that the exception which precluded the husband or wife from testifying for or against each other should be confined strictly within the terms of the statute, and that it "should only apply where the letter of the law makes the same indis-

pensable." Following this rule, it cannot be held that the husband or wife is incompetent as a witness in a case brought by or against the other in a representative capacity. If the rule insisted upon by the plaintiff in error obtained, it would exclude the wife as a witness, when the husband, as the attorney general or other prosecuting officer, brought an action in his name in behalf of the state, or where he was a party as a receiver or sheriff, or in any other of the various representative capacities in which an action may be brought for or against him. The decisions of this court, following the spirit of the legislation of the state, have been in favor of lessening rather than extending the limitations as to the competency of husband and wife to testify for or against each other. *Ruth v. Ford*, 9 Kan. 18; *Furrow v. Chapin*, 13 Kan. 107; *Higbee v. McMillan*, supra; *State v. Buffington*, 20 Kan. 599; *Jaquith v. Davidson*, 21 Kan. 341; *McCartney v. Spencer*, 26 Kan. 65. It appears that the executrix is one of the legatees under the will of Elizabeth Van Fleet, and she was, therefore, indirectly interested in the result of the litigation; but "the law has abolished interest as a bar to the competency of the witness," and hence, the reason that she might at some time receive a share of the estate is no ground for excluding the testimony of her husband. *Higbee v. McMillan*, supra. From an examination of the record we are satisfied that no injustice was done to the plaintiff in error by the judgment that was given, and, finding no prejudicial error, the judgment will be affirmed. All the justices concurring.

(44 Kan. 481)

**CLAY v. HILDEBRAND et al.**

(Supreme Court of Kansas. Oct. 11, 1890.)

**REOPENING JUDGMENT—NEW MATTER IN DEFENSE.**

Where a person, whom the plaintiff intended to make one of various defendants in an action, procures the judgment rendered in the case to be set aside as to him, upon the ground that no sufficient service of summons was ever made upon him, and afterwards he files an answer in the action setting up new matter and grounds for affirmative relief, which would affect the rights and interests of several of the other parties and other persons, without giving such other parties or persons any notice or any opportunity to appear and defend, the court may, upon the hearing on such answer, without committing material error, refuse to grant the relief prayed for in such answer, and, in effect, dismiss this new proceeding without prejudice.

(Syllabus by the Court.)

Error to district court, Chase county; L. HOUK, Judge.

*Thomas O'Kelley*, for plaintiff in error.  
*S. N. Wood* and *C. N. Sterry*, for defendants in error.

**VALENTINE, J.** All the proceedings now presented for review, have grown out of an action commenced in the district court of Chase county, on June 4, 1884, by E. A. Hildebrand, George O. Hildebrand, and S. F. Jones, partners as Hildebrand Bros. & Jones, against L. W. Clay and his wife, Polly Clay, Adam M. Clay, John Walruff, John Quinn, I. G. Thomas and his wife, Pauline Thomas, George Newman, Henry

Harris, and his wife, Tabitha Harris, and Theodore Zoelner. In the original action the plaintiffs sought to foreclose three separate mortgages. The defendant Walruff sought to have a certain deed reformed and declared to be a mortgage, and then foreclosed; and the defendant Quinn sought to have a certain mortgage foreclosed. All the other defendants failed to make any appearance in the action, and were in default. A trial was had as between the plaintiffs and Walruff and Quinn, and their rights and priorities as between themselves were determined, and an affirmative judgment was rendered in favor of each. The case was then brought to the supreme court by L. W. Clay and wife, and the judgment of the court below as to all the parties was affirmed. *Clay v. Hildebrand*, 34 Kan. 694, 9 Pac. Rep. 466. Afterwards an order of sale was issued from the district court, and a portion of the mortgaged property was sold, and the sale confirmed, and sheriff's deeds to the purchasers were executed. Afterwards the defendant Adam M. Clay moved the court to set aside "the judgment heretofore rendered herein so far as the same affects the rights and interests of this defendant," for the reasons that no service of summons had ever been made upon him, and that the plaintiffs' petition did not state any cause of action as against him. It does not appear that any party or person, except the plaintiffs and Adam M. Clay, ever had any notice of this motion prior to its submission to the court, and the action of the court thereon. The court sustained the motion, but, over the objections and exceptions of Adam M. Clay, permitted the plaintiffs to amend their petition; and then required the defendant Adam M. Clay to answer thereto, which he afterwards did, and the plaintiffs replied. A trial was then had upon the said petition, answer, and reply, and the court denied nearly all the relief asked for in the defendant's answer; and the defendant, as plaintiff in error, brings the case to this court for review.

The most of the facts of this case will be found stated in the case of *Clay v. Hildebrand*, 34 Kan. 696 et seq., 9 Pac. Rep. 466, and they will not be repeated in this case except in very general terms. This case involves interests in the following town lots, to-wit: Lots Nos. 11, 13, 15, 17, 18, 19, 20, 22, 24, and 28, in block No. 2, in Strong City; but the plaintiff in error, Adam M. Clay, claims an interest only in lots Nos. 11, 13, and 15, and his interests and equities, as compared with the interests and equities of the other parties and other persons, stated very briefly, are, substantially, as follows: (1) The plaintiffs' first mortgage, which was from Harris and wife, the original owners, to George Collett, dated April 1, 1879, and assigned to the plaintiffs, includes all the above-mentioned lots. (2) The plaintiffs' second mortgage, which was from L. W. Clay and wife, purchasers, to Harris, dated July 6, 1880, and assigned to the plaintiffs, includes all the above-mentioned lots. (3) Deed from L. W. Clay and wife to Adam M. Clay, dated November 16, 1881, for lots Nos. 11 and 13. (4) Deed from L. W.

Clay and wife to John Walruff, dated March 21, 1882, for lot No. 13; but in equity it was a mortgage from L. W. Clay and wife to John Walruff, dated March 21, 1882, for lot No. 15. (5) Mortgage, L. W. Clay and wife to Adam M. Clay, dated April 26, 1882, for lot No. 15. (6) Deed from L. W. Clay and wife to John Quinn, dated December 6, 1882, for the west half of lots Nos. 18, 20, 22, 24, and 26, and a mortgage from L. W. Clay and wife to Quinn of same date for all the property mentioned in all the deeds and mortgages except that portion deeded to Quinn. (7) The plaintiffs' third mortgage, from Thomas and wife, purchasers of lots Nos. 17 and 19, to L. W. Clay, dated March 27, 1883, for said lots Nos. 17 and 19, and assigned to the plaintiffs. (8) June 4, 1884, this action was commenced as aforesaid. (9) July 23, 1884, judgment was rendered in favor of the plaintiffs and Walruff and Quinn on the foregoing mortgages belonging to each respectively; and their priorities were determined as aforesaid. (10) August 2, 1884, Quinn assigned his judgment to the plaintiffs, and they released, in the office of the register of deeds, but not in the office of the clerk of the district court, their first two mortgages with regard to the west half of lots Nos. 18, 20, 22, 24, and 26. (11) August 7, 1884, an order of sale was issued on all the foregoing judgments, and for all the aforesaid property. (12) September 23, 1884, the sheriff, after advertisement, sold the following property on the aforesaid order of sale: Lot No. 11 to Dennis Rettiger, for \$300; lot No. 13 to E. A. Hildebrand for \$250; Lot No. 15 to E. A. Hildebrand for \$1,200; and lots Nos. 17 and 19 to B. Lantry for \$1,100. None of the other property was sold. (13) About April 23, 1885, or afterwards, the aforesaid sale was confirmed, and sheriff's deeds to the purchasers were ordered and executed. (14) December 8, 1885, Adam M. Clay, as above stated, moved the court to set aside the plaintiffs' judgment,—possibly all the judgments so far as it or they affected any of his rights or interests. (15) December 19, 1885, Adam M. Clay's motion was sustained, but, at the same time, the plaintiffs were permitted to amend their petition, and Clay was required to answer to the plaintiffs' amended petition within 80 days, to which rulings, as against him, he duly accepted. (16) January 16, 1886, Adam M. Clay filed his answer to the aforesaid amended petition. (17) January 25, 1886, the plaintiffs replied. (18) July, 1886, the case was tried upon the aforesaid pleadings, as between the plaintiffs and Adam M. Clay, and between them alone, and taken under advisement by the court. (19) July 8, 1887, the court rendered its decision, making special findings and conclusions, and rendering judgment in favor of Adam M. Clay and against L. W. Clay and wife for \$964, and costs, and finding that Adam M. Clay owned lots Nos. 11 and 13, and that he held a mortgage on lot No. 15, but all subject to other mortgage liens, and denied any other or further relief to Adam M. Clay; and, further, adjudged that such judgment should not bar Adam M. Clay in any other action from asserting

any rights or interests which he might have. In effect, it was a dismissal of Adam M. Clay's proceeding against the plaintiffs for affirmative relief without prejudice. And this is the judgment which Adam M. Clay now seeks to have reversed.

We cannot say that the court below erred. For the purposes of this case we shall assume, as the defendant Adam M. Clay claims, that he was not a party to this action prior to his filing his motion on December 8, 1885; and therefore that none of his rights or interests were adjudicated or affected by the judgments rendered in the case on June 23, 1884, or by any of the other proceedings had in the case prior to the time of his filing his motion; and therefore that his motion, appearance, and answer in the case virtually instituted new proceedings. On January 16, 1886, he filed a full answer in the case in the nature of a cross-petition, setting up new matter, and asking for affirmative relief, which relief, if granted, would affect the rights and interests of nearly all the other parties to the action; and there were a great many parties to the action, as we have already seen, and he asked for this affirmative relief although he never gave to any one of these parties, except to the plaintiffs, any notice of his proposed action, proceedings, or claims. Nor did any one of these parties, except the plaintiffs, ever have any such notice or ever make any appearance in the case after Adam M. Clay made his said appearance. Upon this proceeding of Adam M. Clay against the plaintiffs, without any notice to any of the other parties, Adam M. Clay obtained a supposed judgment against L. W. Clay and wife for \$964 and costs, and that they had conveyed two lots, and mortgaged one lot to him. Is this judgment of any value? They had no opportunity to set up any defense against Adam M. Clay's supposed claims. John Walruff also had interests in lot No. 15 apparently paramount to the supposed mortgage interests of Adam M. Clay in the same property. Are not Walruff's rights and interests entitled to some respect? May not he be permitted to show, if he can, that the supposed deed and mortgage from L. W. Clay and wife to Adam M. Clay are mere shams and pretenses? And may not Dennis Rettiger, the purchaser of lot No. 15, be permitted to protect his interests in such lot? And may not he be permitted to show that Adam M. Clay has no honest or legal claim to any of such property? Is it possible that the proceedings in an action involving the rights and interests of various parties and persons, had before Adam M. Clay became a party to the action, may be overturned, demolished, and destroyed, simply for the reason that Adam M. Clay was not given any opportunity to defend and protect his rights and interests in the action? And then may all the rights and interests of these various interested parties and persons be settled, adjudicated, and determined, and held for naught, in their absence, and without giving them any opportunity to appear, or any opportunity to defend and protect their rights and interests in the courts? Adam M. Clay might

have had the other interested parties and persons brought into court by notice or summons, but it does not seem that he chose to do so. Also, the court might, upon its own motion, have ordered them to be brought in, but it was not bound to do so. The plaintiffs also might have asked to have them brought in, but, as the plaintiffs were not then asking for any affirmative relief, they were not bound to do so; and as no party is now complaining of the action of the court below, except Adam M. Clay, he must show that he did all that he could to have all necessary parties brought in before he can claim that the court below committed any material error as to him in refusing to finally determine the case without the presence of such other parties. We think that, as some of the necessary parties were not in court and had no opportunity to answer the new claims made by Adam M. Clay, the court below did not commit any error by virtually dismissing his proceedings without prejudice. If he has any rights with regard to said lots Nos. 11, 13, and 15, which need any further protection, he can commence a new action, and make all the interested parties defendants. The judgment of the court below will be affirmed. All the justices concurring.

#### STATE V. ALLISON.

(Supreme Court of Kansas. Oct. 11, 1890.)

#### CRIMINAL LAW—VERIFICATION OF COMPLAINT— APPEAL—RECOGNIZANCE.

1. In a case of misdemeanor before a justice of the peace, the defendant was convicted and sentenced, and he then gave bond and appealed to the district court, where he procured a continuance and entered into a recognizance for his appearance at the next term of the district court, and in such court was afterwards tried and convicted and sentenced, and he then appealed to the supreme court; but, before his trial in the district court, he moved to set aside the recognizance, which motion the court overruled. *Held*, no error.

2. In such case the original complaint filed with the justice of the peace was sent to the district court but was not certified to by the justice of the peace, but the defendant went to trial upon such complaint without making any objection upon the ground that it was not so certified; and after trial and conviction, and after a motion made by him for a new trial was overruled, he then filed a motion in arrest of judgment, and, in such motion, and for the first time, made the objection that the complaint had not been properly certified to by the justice of the peace. *Held*, that the objection came too late, and that the irregularity was waived.

3. In the justice's court the defendant pleaded "not guilty," and went to trial without objection. *Held*, that he thereby waived any supposed insufficiency of the verification of the complaint.

4. Other objections not considered for the reason that no part of the evidence nor any part of the instructions has been preserved by any bill of exceptions.

(Syllabus by the Court.)

Appeal from district court, Thomas county; CHARLES W. SMITH, Judge.

Joseph A. Gill, for appellant. L. B. Kellogg, Atty. Gen., and James L. Loar, for the State.

VALENTINE, J. This was a criminal prosecution commenced before a justice of

the peace of Thomas county, in which the defendant was charged in three separate counts with selling intoxicating liquors in violation of law. Two trials were had before the justice of the peace, at the first of which the jury disagreed, and at the second the defendant was found guilty on the first count of the complaint, and was sentenced to pay a fine of \$100, and costs. The defendant then appealed to the district court, where three separate trials were had, at the first two of which the jury failed to agree, and at the third the defendant was found guilty on the said first count, and sentenced to pay a fine of \$100, and costs, and be imprisoned in the county jail for 30 days, and from this sentence he now appeals to this court.

1. The first alleged error is that the district court erred in refusing to set aside a certain recognizance given by the defendant at a previous term of the district court, on a continuance procured by himself, for his appearance in the district court at its next term. We think no error was committed in this respect, and certainly no material or available error was committed.

2. The second alleged error is that the defendant was tried upon a paper purporting to be the original complaint filed with the justice of the peace, but which complaint was not certified to, by the justice of the peace, as being the original complaint. The defendant was tried three times in the district court upon this same complaint, and, upon the third trial, he was convicted, and at no time did he raise this question as to a want of a proper certificate to the complaint, until after his conviction, and until after a motion for a new trial had been made by him, and had been overruled by the court,—and then he raised the question for the first time by a motion in arrest of judgment. The defendant was, undoubtedly, tried upon the original complaint filed with the justice of the peace, although, probably, the same was not certified to by the justice, as required by law. See act prescribing the jurisdiction and procedure before justices of the peace in cases of misdemeanor, §§ 21, 22. We shall decide this case upon the theory that the complaint upon which the defendant was tried was the original complaint, but that it was not certified to by the justice of the peace at all. In the case of *State v. Anderson*, 17 Kan. 89, the defendant was tried, over his objections made before the trial, upon a certified copy of the complaint, and not upon the original complaint at all. In the case of *State v. Anderson*, 34 Kan. 116, 8 Pac. Rep. 275, the defendant was tried, over his objections made before the trial, upon a complaint not certified to at all. Neither of the foregoing cases necessarily controls this, because, from the entire record in this case, and from the action of the parties, it would seem that the defendant must have been tried upon the original complaint, and he was tried before any objection was made that the complaint had not been properly certified to by the justice of the peace. In the case of *State v. English*, 34 Kan. 629, 9 Pac. Rep. 761, the defendant was tried in the district court

upon the original complaint filed with the justice of the peace, but such complaint had not been certified to by the justice of the peace. In that case it was held that, as the defendant went to trial upon the complaint without objection, he waived the want of the certification. The present case, we think, comes within the last case cited. The defendant cannot be permitted to take the chances of trial and of a possible acquittal upon a complaint sufficient in every respect, except, merely, that it does not appear to have been certified to by the justice of the peace, and then, when he is convicted, and after his motion for a new trial has been overruled, raise the question for the first time that the complaint has not been properly certified to by the justice of the peace. We might further state in connection with this point that neither has the evidence nor have the instructions of the court below been preserved by any bill of exceptions. We might also state that the defendant did urge objections to the aforesaid complaint before his last trial in the district court, but he did not urge the one which we are now considering. He moved to quash the complaint upon various grounds, but none of such grounds included the one that the complaint had not been properly certified to by the justice of the peace; and, after the second trial in the district court, and before the third, on being arraigned, he refused to plead, standing mute, and giving no reason for his refusal. The arraignment, however, at this time was wholly unnecessary, for he had previously been arraigned on the same complaint in the justice's court, and had then and there pleaded, "not guilty," and had subsequently defended himself against the charges therein contained, on two separate trials in the justice's court, and on two additional trials in the district court, all prior to this arraignment in the district court. The defendant's objection that the complaint was not certified to came too late.

3. The third objection made by the defendant is that the complaint was verified by the county attorney on information and belief only, and that such verification alone was insufficient for the issuance of a warrant for the arrest of the defendant. Even if it were true that the complaint was verified only upon information and belief, the defect was waived by the defendant in pleading "not guilty" in the justice's court, and going to trial upon the complaint without objection. The defendant also went to trial the first time, and, probably, also, the second time, in the district court upon this complaint without objection. And there was also attached to the complaint the testimony of two witnesses, sworn to positively, tending to support the complaint.

4. The other objections urged by the defendant cannot be considered, for the reason that no part of the evidence, nor any part of the instructions, has been preserved by any bill of exceptions. We think, however, no error was committed. The judgment of the court below will be affirmed. All the justices concurring.

## STATE v. SPIDLE.

(Supreme Court of Kansas. Oct. 11, 1890.)

COUNTY COMMISSIONERS—CORRUPT VOTING.

1. Where an indictment charges the defendant, a member of the board of county commissioners, with corruptly voting for and allowing a claim in a sum too large, it is error to permit the introduction of evidence to prove that a warrant had been issued in payment of said claim in a sum larger, dollar for dollar, than the amount of the claim as allowed, without proving that the defendant voted to issue the warrant for said larger sum.

2. It is error in a trial court to refuse to set aside a verdict of the jury and grant a new trial when there is no evidence to support the verdict.

(Syllabus by Strang, C.)

Commissioners' decision. Appeal from district court, Ness county; V. H. GRINSTEAD, Judge.

J. G. Ibach and S. I. Hale, for appellant.  
L. B. Kellogg, Atty. Gen., and George C. Brownell, for the State.

STRANG, C. This is a criminal prosecution under paragraph 1662, Gen. St. 1889, charging the defendant with a willful violation of paragraph 1888, Id. The case was begun by indictment containing three counts, and was tried by the court and a jury, January 29, 1890, resulting in a verdict of guilty on the first count and not guilty on the second and third counts. On this verdict, the court entered judgment against the defendant, assessing his punishment at \$100 fine and cost of prosecution. From this judgment the defendant appeals to this court, and alleges among other things "that the verdict of the jury is not sustained by the evidence." The evidence in the case shows that on April 9, 1888, Jacob B. Spidle was a member of the board of county commissioners of Ness county, Kan.; that on that day the board decided to build a bridge across the Pawnee river; that on the 8th day of June, thereafter, said Spidle, together with the other members of the county board, let the contract for building said bridge to Ed. Grant and M. G. Cowles, agreeing to pay said Grant and Cowles therefor the sum of \$1,850. Afterwards, July 2, 1888, Grant and Cowles presented their claim to the board of commissioners, the defendant being one of them, in session at Ness City, which claim was allowed in the sum of \$1,850; that on the 9th day of the same month a warrant was issued in payment of said claim in the sum of \$2,035, signed "H. R. Corning, Chairman," and attested by G. D. Barber, clerk. This is all the evidence in the case relating to the first count in the indictment, the only one upon which the defendant was convicted. The criminalizing words of the first count in the indictment are: "And afterwards, to-wit, on the 9th day of July, 1888, the said Jacob B. Spidle, in the said county of Ness, being then and there a member of said board of county commissioners, and then and there acting in the official capacity of a member of said board of county commissioners, did then and there, unlawfully, willfully, and corruptly, vote for and allow the payment to said Ed. Grant and M. G. Cowles for said bridge in the sum of \$2,035, whereby

the said Jacob B. Spidle did then and there, willfully and corruptly, violate and fail to perform his duty as county commissioner of said county of Ness, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Kansas." Under this indictment, and the evidence in the case, was the defendant properly convicted? We think not. First, the indictment charges him with having voted for, and allowed Grant and Cowles on the contract for building the bridge, a sum of money larger than the contract price, and therefore a larger sum than they were entitled to under the law; but the evidence to sustain this charge, and all the evidence there is in the record upon this question, shows that he voted to allow the claim of Grant and Cowles, and they were allowed on their contract \$1,850, that being exactly the amount of their contract price. It follows then that there is a total want of evidence to sustain the verdict upon the charge that the defendant voted for and allowed the claim of Grant and Cowles in too large a sum,—a sum larger than the amount of their claim. The evidence shows that a warrant was issued to Grant and Cowles in payment of their claim in the sum of \$2,035. Was the defendant properly convicted on this evidence? We think not. The indictment does not charge him with the offense of issuing a warrant to Grant and Cowles in a sum larger than the amount allowed on their claim, dollar for dollar, which is, under paragraph 1888, Gen. St. 1889, a separate and distinct offense from that of voting for and allowing a claim in too large a sum. All the evidence of the issuance of a warrant to Grant and Cowles in payment of their claim for a sum larger than the amount allowed them by the board when their claim was presented and allowed was improperly received, and therefore error, for which the case would have to be reversed. But there is nothing in the record showing that Spidle, the defendant, had anything whatever to do with the issuing of the warrant, and the presumption is that he did not. The law (paragraph 1648, Gen. St. 1889) provides that county orders shall be signed by the chairman, and attested by the clerk, the other commissioners not signing them. And the warrant introduced in this case was so signed. The warrant also shows by its date that it was issued seven days after the claim for the payment of which it was issued was allowed. There is nothing to show that the board was in session when the warrant was issued, and we would think from the time which had elapsed from the date of the allowance of the claim, July 2d, to the date of warrant, July 9th,—seven days,—that the meeting of the board had adjourned, and the chairman had remained, and signed warrants, after the adjournment, as is usually the case. There being nothing in the record showing that defendant had anything to do with the issuing of the warrant to Grant and Cowles for \$2,035, and presuming the state put in all the evidence it had upon the subject, the records being in

court, it would follow that the defendant could not be convicted, if the indictment was so amended as to charge him with the offense of wrongfully issuing the warrant introduced in evidence. It is therefore recommended that the judgment of the district court be reversed, and the defendant discharged.

PER CURIAM. It is so ordered; all the justices concurring.

#### STATE V. CORNING.

(*Supreme Court of Kansas. Oct. 11, 1890.*)

#### COUNTY COMMISSIONERS—COMPENSATION—ISSUING WARRANTS.

1. Under paragraphs 1662, 1888, and 1889, Gen. St. 1889, it is a misdemeanor for a board of county commissioners, or the chairman of the board, to issue county warrants upon an account, claim, or demand, when allowed, for more than the actual amount so allowed, dollar for dollar; but a charge in an indictment that the defendant, as the chairman of a board of county commissioners, unlawfully, willfully, and corruptly, voted for and allowed to contractors \$2,035 for the construction of a bridge, when the contract price was \$1,850 only, is not sustained by testimony showing that all the members of the board voted for and allowed \$1,850 for the bridge, but that the chairman, without any other vote or direction, issued a county warrant for \$2,035 on the claim of \$1,850, after it was duly allowed.

2. In a county having less than 10,000 inhabitants, the compensation of the members of a board of county commissioners for their services in attending the regular and special meetings of the board cannot exceed the sum of \$100 for each commissioner in any one year, but this compensation will not prevent the members of the board of county commissioners from charging additional compensation while attending meetings to equalize assessments, to levy taxes, or to canvass the returns of elections. Hence, where it is sought to charge in an indictment a member of the board of county commissioners with unlawfully receiving, for his services as a commissioner in any one year, a sum exceeding \$100 in a county having less than 10,000 inhabitants, the indictment and the testimony offered in support thereof should show that such compensation was received by him for only attending the regular and special meetings of the board of county commissioners.

(*Syllabus by the Court.*)

Appeal from district court, Ness county; V. H. GRINSTEAD, Judge.

J. G. Ibach and S. I. Hale, for appellant. L. B. Kellogg, Atty. Gen., and George C. Brownell, for the State.

HORTON, C. J. During the year 1888, Henry R. Corning was the chairman of the board of county commissioners of Ness county. On the 7th day of February, 1889, an indictment was returned and filed against him, embracing three counts. The first count charged him with having on the 9th day of July, 1888, unlawfully, willfully, and corruptly, voted for and allowed the payment of \$2,035 for the building of a bridge for the county, the contract price of which was \$1,850. The third count charged him with having unlawfully and willfully presented claims against the county of Ness for his services as county commissioner for the year 1888, amounting to \$219, and having willfully and unlawfully obtained payment there-



on, when the statute permitted him to receive for his services as county commissioner the sum of \$100 only. He was convicted upon the first and third counts of the indictment, and sentenced to pay a fine of \$100 upon the first count, and also \$100 upon the third count, together with all the costs of the prosecution, and to be committed to the county jail of Ness county until the fines and costs were paid. He appeals to this court.

It is contended that the evidence did not sustain the verdict of the jury or the sentence of the court upon either count of the indictment. Upon a contract entered into between the board of county commissioners of Ness county and Ed. Grant and M. G. Cowles, on the 8th day of June, 1888, Grant and Cowles constructed a bridge across the Pawnee river, near Riverside, for the sum of \$1,850. On July 2, 1888, the board of county commissioners, in regular session, voted for and allowed the account or claim of Grant and Cowles of \$1,850 for the bridge. On July 9, 1888, there was issued to them upon the account or claim so allowed a county warrant for \$2,035. This was signed by Henry R. Corning, as chairman, and attested by G. D. Barber, as clerk. On July 19, 1888, it was presented to the county treasurer of Ness county, but not paid for the want of funds. It was, however, regularly registered at that time, and paid on July 31, 1888. Although the defendant, Corning, issued a county warrant upon a claim allowed for more than the actual amount so allowed, dollar for dollar, and in doing so violated the provisions of the statute, yet this offense is not charged against him in the indictment. Paragraphs 1662, 1888, 1889, Gen. St. 1889; *State v. Spidle*, ante, 965, (just decided.)

The indictment charged that Corning "had, unlawfully, willfully, and corruptly, voted for and allowed the payment to Ed. Grant and M. G. Cowles for the furnishing of the material and the construction of a bridge for the sum of \$2,035," when the contract price for the bridge was \$1,850. As the evidence clearly shows that Corning did not vote for or allow the claim of Grant and Cowles for more than \$1,850, the evidence does not sustain the alleged offense in the first count of the indictment, and in the record there is no evidence whatever sustaining the offense alleged in that count. It is argued, however, that, as Henry R. Corning, as chairman, unlawfully issued a county warrant for \$2,035, the issuance of such warrant by him was an allowance of a greater sum on the amount or claim of Grant and Cowles than the amount actually due thereon, within the terms of the statute. The issuance of a county warrant or order upon an account or claim is not the allowance thereof by the board of county commissioners. Gen. St. 1889, par. 1647. When an account against a county is properly made out, and verified by affidavit, it is presented to the county board for allowance. A vote is taken thereon, and if the board of county commissioners, or a majority of them, vote in favor of the account or claim, then such an account or claim is said to be allowed. Subsequent-

ly the chairman and clerk of the county board are to sign and issue a county warrant for the amount allowed upon the account or claim, but for nothing more. The issuance of a county warrant follows the allowance on an account or claim, and, therefore, is not in itself the legal allowance thereof. If it were intended to charge the defendant with having issued a county warrant or order upon the account or claim of Grant and Cowles, when allowed, for more than the actual amount so allowed, dollar for dollar, such a charge should have been embraced in the indictment. There was a variance between the charge in the indictment and the proof offered; and, as there was no proof offered under the first count of the indictment sustaining the charge that the defendant voted for and allowed any greater sum to Grant and Cowles than the amount actually due upon their account or claim presented, no offense was established against the defendant, within the language of the indictment. *State v. Spidle*, supra.

The third count of the indictment alleged that "the said Henry R. Corning, being then and there one of the county commissioners of said county of Ness, and being entitled by law to receive as compensation for his services as said county commissioner a sum not exceeding one hundred dollars, during the year aforesaid, did then, and during said official year, willfully and unlawfully, present to said board of county commissioners of the said county of Ness divers illegal vouchers in evidence of compensation alleged therein to be due him, the said Henry R. Corning, for services as county commissioner of said county of Ness during the official year, in all amounting to the sum of two hundred and nineteen dollars; and thereby did then, and during said year, willfully and unlawfully, obtain the payment to himself of the sum of two hundred and nineteen dollars, as compensation for services as county commissioner of said county of Ness during said year, said sum being more than he, the said Henry R. Corning, was entitled to by law." Paragraph 1623, Gen. St. 1889, reads: "The board of county commissioners shall meet in regular session, at the county-seat of the county, on the first Monday of January, and the first Monday after the first Tuesday of April, and the first Mondays of July and October, in each year, and in special session, on the call of the chairman, at the request of two members of the board, as often as the interest of the county may demand: provided, the pay for such services, including all regular and special meetings, shall never exceed the sum of one hundred dollars to each commissioner in any one year." In *Burroughs v. Board*, 29 Kan. 196, it was decided that the limitation of \$100 contained in the proviso above quoted does not include pay for the services of the members of a board of county commissioners while attending meetings to equalize assessments, to levy taxes, or to canvass the returns of elections. Hence, the indictment should have charged that the defendant unlawfully received a sum exceeding \$100 for his services as com-

missioner during the year of 1888 for attending the regular and special meetings of the board of county commissioners of Ness county. The testimony to support such an offense must also have shown that he received more than \$100 for his services in attending the regular and special meetings of the board of county commissioners during the year 1888.

Various accounts allowed to the defendant by the board of county commissioners of Ness county were presented in the testimony, but, with the exception of two or three of the accounts, they did not show on their face whether they were for regular or special meetings of the board, or for services as county commissioner while attending meetings to equalize assessments, to levy taxes, canvass the returns of elections, or other like services. Therefore neither the third count of the indictment nor the proof offered clearly showed that the defendant received more than \$100 as his compensation for services rendered in attending the regular and special meetings of the board of county commissioners of Ness county during his official year, commencing on the second Monday of January, 1888, and ending on the second Monday of January, 1889. We are therefore compelled to say that the verdict and the sentence of the defendant upon the third count cannot be sustained. The judgment of the district court will be reversed, and the cause remanded. All the justices concurring.

#### SCRAFFORD *et al.* v. GIBBONS.

(Supreme Court of Kansas. May 10, 1890.)

#### CHATTEL MORTGAGE—DESCRIPTION—EVIDENCE OF OWNERSHIP—INSTRUCTIONS.

1. In a chattel mortgage, the property in controversy was described as 40 milk cows, and the increase or calves of said cows; 1 gray horse, about 10 years old; 1 bay horse, about 10 years old; 1 sorrel pony, about 4 years old; and 1 mule, about 12 years old,—and the mortgage provided that the property should remain in the possession of the mortgagor until default in the payment, and, further, provided that the property was not to be moved from Nemaha county; and the evidence showed that the property in question was levied upon in Nemaha county, as the property of the mortgagor. *Held*, that the description is sufficient under the circumstances of the case, and that the mortgage was not void for uncertainty in the description of the property.

2. A chattel mortgage is competent evidence to show the special ownership in property, notwithstanding the fact that it does not correspond with the date of the note referred to in the mortgage, when the evidence shows they were executed at the same time.

3. The special instructions requested by the defendant, and general instructions given, examined, and *held*, that no error was committed by the trial court.

(Syllabus by Green, C.)

Commissioners' decision. Error from district court, Nemaha county; R. C. BASSETT, Judge.

W. C. Webb and Conwell & Wells, for plaintiffs in error. W. D. Webb and Hayden & Hayden, for defendant in error.

GREEN, C. This is an action in replevin by the plaintiff below to recover possession of 25 head of cows, 1 sorrel pony, 1

large brown mule, 1 gray horse, and 1 bay horse, alleged to be worth, in the aggregate, \$930. The plaintiff in the court below claimed possession of the property by virtue of a special ownership, under a chattel mortgage executed by one William Speedy, on the 2d day of February, 1887, and filed in the register of deed's office on the 3d day of February, of the same year. The property in question was levied upon by the sheriff of Nemaha county, under an execution issued out of a justice's court of said county, on a judgment against William Speedy, and in favor of Sarah C. Coffman, and by her assigned to the plaintiffs in error. The execution was issued on the 25th day of February, 1887, and, on March 1st following, the sheriff levied upon the property in controversy in this action as the property of William Speedy. The return of the sheriff shows that the property was found and seized by the sheriff, while in possession of Speedy, in Harrison township, and was taken by him to the city of Seneca, in another township, and advertised and sold on the 16th day of March, 1887, for the sum of \$512.45. The action was commenced against M. B. Lohmuller, the sheriff, but the plaintiffs in error were substituted for him, and the action proceeded against them. The trial in the court below resulted in a verdict and judgment for the plaintiff, Mrs. Gibbons, for the sum of \$949.71. A motion for a new trial was made by the defendant below, which was overruled and excepted to, and the plaintiffs in error now seek a reversal of the judgment, upon a number of grounds, but the principal one relied upon is the admission in evidence of the chattel mortgage, under which the plaintiff below claimed the property in question. The property in controversy is described in the mortgage as "forty milk cows, and the increase or calves of said cows; one gray horse, about ten years old; one bay horse, about ten years old; one sorrel pony, about four years old; and one mule, about twelve years old." The mortgage provided that the property should remain in possession of Speedy until default be made in the payment of the debt and interest, or some part thereof, and that said property was not to be removed from Nemaha county. The residence of the parties is not given in the mortgage.

This mortgage is challenged upon a number of grounds, but the principal one relied upon is that the description of the property intended to be pledged was so generally indefinite and uncertain that the instrument, when recorded, did not impart notice to the world. This court has upheld some very imperfect descriptions in chattel mortgages, and we readily see the justness of the rule, as it is almost impossible to set out in the instrument each and all the articles which may be embraced in it with such precision that any one, by an examination of the mortgage, without the aid of other evidence, could identify the property. Hence the rule adopted and supported by a long array of authorities is: If a description will enable third persons, aided by inquiries which the instrument itself suggests, to identify the prop-

erty, it is sufficient. *Jones, Chat. Mortg.* § 54; *Mills v. Lumber Co.*, 26 Kan. 576. Can this description be upheld, under this rule? In the case of *Mills v. Lumber Co.*, supra, this court says: "We think, under the circumstances of the case, the description of the property in the chattel mortgage is sufficient. Of course the description in the mortgage is not sufficient to enable a third person, without the aid of other facts than those contained in the mortgage, to identify the horse. But that is not necessary. A description which will enable a third person, aided by inquiries which the instrument itself suggests, to identify the property, is sufficient. Indeed, personal property can seldom be described in any instrument so as to enable a stranger to select it from other property of like kind, without the aid of other facts than that mentioned in the instrument itself. \* \* \* Resort must be had in nearly all cases to other evidence than that furnished by the mortgage itself, to enable third persons to identify mortgaged property. \* \* \* In the present case the defendant Mills was bound to take notice of the mortgage, for it was properly recorded. He was bound to know that a bay horse, six years old in 1878, owned by and in possession of John G. Raner, was mortgaged. We think he was bound to know from the mortgage itself that the property was situated in McPherson county, November 2, 1878, when the mortgage was executed. \* \* \* And he knew when he attached this property that he attached it in McPherson county, and as the property of Raner, and that it was mortgaged. Under such circumstances, we think, as between the mortgagee, the Kansas Lumber Company, and the defendant Mills, we must hold that the description was and is sufficient." On page 578, the court says that the mortgage "shows by inference that all the property was situated in McPherson county, for, if it had not been in McPherson county, it could not have been removed therefrom." Again, "when the defendant attached the property, he attached the same in McPherson county, as the property of said John G. Raner, and was then told by a son of Raner that he got him (the horse) from John G. Raner, subject to the mortgage." In this case the mortgage provides that the property shall remain in the possession of Speedy; that it should not be removed from Nemaha county. The record is silent as to whether Speedy had any property other than that described in the chattel mortgage. The evidence in the case shows that the property in question was levied upon as the property of William Speedy; that it was found in his possession; and that one of the plaintiffs in error knew at the time that the sheriff levied upon the property that the plaintiff below held a chattel mortgage upon the same. While we regard the description as imperfect, and not as full as it should be, we are inclined to hold the description as sufficient, under the numerous authorities and decisions of this court. *Adams v. Hill*, 10 Kan. 627; *Brown v. Holmes*, 13 Kan. 482; *Shaffer v. Pickrell*, 22 Kan. 619; *King v. Aultman*, 24 Kan. 246;

*Mills v. Lumber Co.*, supra; *Muse v. Lehman*, 30 Kan. 514, 1 Pac. Rep. 804; *Griffiths v. Wheeler*, 31 Kan. 17, 2 Pac. Rep. 842; *Schmidt v. Bender*, 39 Kan. 437, 18 Pac. Rep. 491.

2. A further objection is made to the introduction of the mortgage, because the date of the mortgage did not correspond with the date of the note, to secure the payment of which the mortgage was given. We do not think this objection is good, for the reason that the chattel mortgage might have been given for any other purpose; and simply because the date of the note and the date of the mortgage did not correspond, if the mortgage is otherwise valid, would not be sufficient ground for excluding the mortgage as evidence.

3. A further objection is made that the court erred in refusing certain instructions, and giving certain instructions which were objected to. We have examined the instructions which were requested, and find that the court instructed the jury fully, as we think, upon the same matters as embodied in the instructions asked by the defendant below; and we do not find, upon an examination of the instructions which the court did give, anything which was calculated to mislead the jury, or any imperfect statement of the case at issue. We find no errors apparent of record in this case, and therefore recommend that the judgment of the court below be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

#### MISSOURI PAC. RY. CO. v. BARBER.

(Supreme Court of Kansas. July 3, 1890.)

DEATH BY WRONGFUL ACT—PLEADING—DEFECTIVE CAR RECEIVED FROM ANOTHER COMPANY.

1. In an action brought under section 422 of the Code, by an administratrix of an intestate whose death it is alleged was caused by the wrongful act of a railroad company, to make the petition sufficient in that respect, it is only necessary to allege that the deceased left surviving him as his next of kin the plaintiff, who was his mother.

2. It is the duty of a railroad company to inspect a freight-car, and to see that it is reasonably fit for service before it is received from another company, and, in the event that a freight-car is received with a brake-beam in such a defective condition that a brakeman, whose duty it is to couple the foreign car with those used by the company receiving it, is injured in his attempt to make such coupling, and the brakeman has no knowledge of the condition of such brake-beam, and its condition cannot be readily seen, the company that employs him and received such car in a defective condition is liable for such injury.

(Syllabus by Simpson, C.)

Commissioners' decision. Error to district court, Morris county; *M. B. Nicholson*, Judge.

*David Kelso*, for plaintiff in error. *Kellogg & Sedgwick* and *J. K. Owens*, for defendant in error.

SIMPSON, C. This suit was commenced on the 22d day of February, 1887, in the district court of Morris county by Mary A. Barber, administratrix of the estate of J. F. Barber, deceased, to recover damages

against the Missouri Pacific Railway Company for the death of the said J. F. Barber, caused by the wrongful acts of the railway company. The petition alleges that the intestate, at the time of his death, left surviving him as his next of kin, this plaintiff, who was and is his mother. The first question raised is that the petition does not state a cause of action. This question was raised by an objection to testimony under the petition, and by a demurrer to the evidence. The argument in support of it, contained in the brief of the plaintiff in error, is "that the plaintiff below had no right to sue and recover a judgment in this case for her individual benefit." "There is no allegation that he did not leave a widow or children." "The mother's right to recover in this case is dependent upon the non-existence of a widow or children of the intestate, which she must allege and prove." This action is brought under section 422 of the Civil Code, by the personal representative of the deceased, and, in the event of a recovery, the judgment inures to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased. A judgment in favor of the personal representative of the deceased is a bar to any other action for the same cause. The distribution of the amount of the recovery is a matter to be determined by the probate court, out of which the letters of administration issue. It does not concern the railroad company. This action is rightfully brought by the personal representative, and all allegations about next of kin are only for the purpose of showing that the deceased left heirs. There is no force in the objection to the sufficiency of the petition. The deceased was a young man about 19 years old, contributing to the support of his mother, and employed as a brakeman on the train of the defendant railroad company. He was killed at Emporia early in the morning, while in the act of coupling two freight-cars. One of these cars was the ordinary freight-car in use on that road, with a single dead-wood bumper. The other was a Pennsylvania Central freight-car, having double dead-wood bumpers, one on each side of the draw-head. The standing car was the Missouri Pacific one, the Pennsylvania Central car being the moving one. The brake-beam on the moving car was out of repair, swinging loose in such a manner that when the cars struck together it swung entirely out of its place, and struck the deceased, who was endeavoring to make a difficult coupling, on the legs, knocked him down onto the track, lacerated and injured one of his limbs, by stripping off the flesh to the bone from near the ankle to the knee, held him fast, and caused his death. It is said by counsel for plaintiff in error that there is no evidence that tends to show that the death was caused by the brake-beam. The only witness who was standing in a position to clearly see, so states. He was an employee of the railroad company. He is illiterate and unskilled in expressions; but his story is a well-connected narrative, and consistent in every respect, and, in addition to

this, the defective condition of the brake-beam is established by other evidence. The railroad company offered no evidence. The injury resulting in the death of the young man is not attempted to be accounted for on any other theory. The fact of injury, resulting in death, occurring at the time the deceased was engaged in making the coupling of these particular cars, is established beyond question. The defective condition of the brake-beam is fairly well proven, and this supports the story of the eye-witness, and makes it consistent with all the attending circumstances. Under the stress of these facts, the jury could not have come to any other conclusion but that the death was occasioned by the defective brake-beam.

The remaining questions in the case arise out of the inquiry as to whether the railroad company or the brakeman had notice of this defective brake-beam. The record gives no account of the Pennsylvania car, except at Emporia, on the morning the injuries happened. It is equally silent as to the train, where it was made up, and as to its destination. If it was received that morning at Emporia by the Missouri Pacific Railway Company from another company, it was the duty of the former company to have inspected it carefully, and, if it was not reasonably fit for use, it should not have been received. See generally on this subject the case of *Gutridge v. Railway Co.*, 94 Mo. 468, 7 S. W. Rep. 476, the court saying: "The defendant contends that it had a right to assume that the car, being a foreign one, was reasonably safe and fit for the use for which it was being used. We do not agree to the proposition as thus broadly stated. If the car had obvious defects which renders it unfit for use, defendant was under no obligations to receive it, and should not have received it. Cars coming from one road to another must necessarily be subjected to wear, and are liable to be rendered unfit for use in the course of transportation, and this must be known to the receiving company. It is but the result of the most common observation. While it is not incumbent on the receiving company, on the receipt of the car, to make tests to discover hidden defects in the construction or in the materials used in the construction, still it is bound to inspect foreign cars just as it would and is required to inspect its own after they have been in use. This duty devolves upon the company as much in the one case as in the other." This commends itself to our judgment as being a clear exposition of the law on this question. It was the primary duty then of the Missouri Pacific Company to have made such a careful inspection of the foreign car as to be reasonably well satisfied that it was in all respects fit for use on its road. This duty the company failed to perform. It is true that Bosman, the company's car inspector and repairer, testifies that he made an inspection of this car, but he states that he did so as the train moved slowly past him. He failed to discover any defects, and it must have been a glaring one that could be noticed by such an inspection. Even after the accident, he made an in-

spection, and failed to notice the defect in the brake-beam that is established by the evidence of McGinnis. This neglect of the company's agent to make a reasonable inspection of the condition of the Pennsylvania car before its reception is one of the important facts tending to fasten liability. The company receiving the car must act first; then it was the duty of the deceased to have noticed the defect, if its condition was patent to all observers. In this case he was required to make a coupling to this particular car for the first time, so far as we know, and the record discloses. Without the defect was a patent one, or he had knowledge of it, he had the undoubted legal right to assume that the car was in a fit condition for use. So far as the evidence contained in the record discloses, the first time that young Barber ever saw this car was when he was called upon to make a coupling to it as it stood on the track. We then have this case presented by the record: A foreign car with a defective brake-beam causes such injuries to the brakeman that his death resulted. If the company did not know of the defect at the time of the reception of the car from another company, a reasonable inspection would have disclosed it. No such inspection was made, or rather, was shown. The brakeman had a right to assume that the car was fit for service by reason of its reception by the company, unless the defect was one that could easily have been discovered, or he had actual knowledge of the same. These views were substantially embodied in the various instructions given by the court to the jury, so that we find no tenable objection to any of these instructions, except as to the sixth, and as to that instruction a vigorous fight is waged. The instruction reads as follows: "It is the duty of a railroad company, towards those who are in its employ, to furnish suitable cars, constructed of good and sound material, so far as this is reasonably practicable, having in view the business done upon the road. In their construction they should equal those of the average roads doing the same class of business, so far as relates to the safety of its employes, and the care and vigilance which is reasonably practicable must be bestowed by the company to keep them in safe condition." The deserving criticism on this instruction is confined to the words therein, "In their construction they should equal those of the average roads doing the same class of business," not that they are so bad of themselves, but because there was no evidence in the case descriptive of the construction of this foreign car, except that it had double deadwood bumpers, one on each side of the draw-head, and that the brake-beam was in a defective condition. The first is material as tending to show that the brakeman was engaged in making a novel and dangerous coupling, and the other is material because it is alleged to be the proximate cause of the injury. No general description of the car was alleged or proved. Admitting that this language ought not to have been used in the instruction, we have to go still further if we reverse this

judgment, and say that it is of such a character that the railroad company was necessarily prejudiced by it; that it was in some measure influential in controlling the jury in favor of a verdict for the plaintiff below. This we cannot do. There is nothing in the use of the language that would authorize such an inference, and there is no showing that it was prejudicial. Upon the whole record, having an abiding conviction that the evidence that went to the jury justified the verdict, and that the law applicable to the facts established was fairly stated in the instructions of the trial court, we recommend an affirmance of the judgment.

PER CURIAM. It is so ordered; all the justices concurring.

#### NEWBY et al. v. MYERS.

(Supreme Court of Kansas. Oct. 11, 1890.)

#### TRIAL BY THE COURT—FINDINGS—PLEADING AND PROOF—APPEAL.

1. The evidence in a case must correspond with the allegations of the pleadings, and be confined to that point, or points, in issue.

2. The findings of fact of a trial court must be upon the issue or issues made in the pleadings, and every finding of fact not found upon any issue is a nullity.

3. Where the only issue presented by the pleadings to recover upon a promissory note is whether the defendants ever executed the note, and the court finds as a fact that the defendants never executed or authorized the note to be executed for them, it is error, in the absence of any amendment to the pleadings, for the court, in order to show that the defendants are estopped from denying the execution thereof, to receive evidence and make findings showing that, subsequently to the execution of the note, the defendants, by their acts and declarations, are estopped from contesting their signatures, or their liability upon the note.

4. In order to have the question whether the evidence supports the findings and judgment examined, the case made should show that it contains all the evidence. A statement to that effect in the certificate of the district judge settling the case, or in the notice served with the case upon the opposing party, when such notice is not a part of the case made, is insufficient.

(Syllabus by the Court.)

Error to district court, Elk county; M. G. TROUP, Judge.

*Nichols & Jackson*, for plaintiff in error.  
*J. D. McCue and Scott & White*, for defendants in error.

HORTON, C. J. On the 28th day of December, 1887, S. E. Myers filed his petition against N. Davis, D. Newby, and C. W. Bogue to recover \$1,244.65 upon a promissory note, payable to his order, dated March 8, 1887, and alleged to have been executed by N. Davis, D. Newby, and C. W. Bogue. The defendants D. Newby and C. W. Bogue filed their separate answers, duly verified, alleging they never signed or executed the note described in the petition, and also alleging they never authorized any one to sign their names for them. Trial had before the court, a jury being waived. The court, after hearing the evidence and the arguments of counsel, made and filed the following findings of fact: (1) That the defendants D. Newby and C.

W. Bogue did not, nor did either of them, sign the promissory note described in plaintiffs' petition; nor did said defendants, or either of them, authorize any person to sign the name or names of Newby and Bogue, or either of them, to the promissory note. (2) That the defendant D. Newby, by his acts and conduct in regard to the promissory note, is estopped from denying the execution of the same, and is liable thereon. (3) That the defendant C. W. Bogue, with full knowledge that he had not signed the promissory note, upon presentation thereof to him, ratified and adopted the execution thereof as his own act, and, by reason of his conduct and acts in regard to the note, is estopped from denying his liability on the note, and he is liable thereon. Subsequently, upon the findings of fact, the court rendered judgment in favor of the plaintiff, and against all of the defendants, for \$1,381.46, and the costs of the action, taxed at \$139.55. To the rulings of the court, to the second and third findings of fact, and the judgment rendered, the defendants D. Newby and C. W. Bogue excepted, and bring the case here.

As the first finding of fact by the trial court was favorable to Newby and Bogue, that finding is not challenged; but it is contended that there is no evidence in the record sustaining or tending to sustain the other findings. The certificate of the judge who settled the case made stated that it contains all of the evidence offered upon the trial of the cause, excepting the evidence offered to prove or disprove the genuineness of the signatures of Newby and Bogue to the promissory note sued on. A like statement is contained in the notice served by Myers upon Newby and Bogue at the time the case made was handed to their attorney. This notice also requested Newby and Myers to suggest amendments to the case, as permitted by the statute. It is not stated in the case made that it contains all the evidence introduced upon the trial upon the controverted issues. As the court found against Myers, and in favor of Newby and Bogue, against the genuineness of their signatures, it was unnecessary for the evidence upon this matter to be embraced in the record brought to this court, provided all the other material evidence was in the record. A statement in a certificate of the judge, or in the notice served with the case, but which is no part of the case, is insufficient. In order to have the question whether the evidence supports the findings and judgment examined, the case made should show that it contains all the evidence. *Eddy v. Weaver*, 37 Kan. 540, 15 Pac. Rep. 492; *Railroad Co. v. Grimes*, 38 Kan. 241, 16 Pac. Rep. 472; *Bartlett v. Feeney*, 11 Kan. 504; *Brown v. Johnson*, 14 Kan. 377; *Insurance Co. v. Hogue*, 41 Kan. 524, 21 Pac. Rep. 641. Therefore the evidence offered upon the trial is not before us for our consideration. The record, however, discloses objections made to testimony, as well as the rulings of the court thereon. The record also shows that exceptions were taken to the second and third findings of fact, and the judgment rendered

thereon. The question is therefore presented whether, upon the pleadings and the findings of fact, the judgment can be sustained. We think not. The evidence in a case must correspond with the allegations of the pleadings, and be confined to the point or points in issue. 1 Greenl. Ev. § 50.

Again, findings of fact of a trial court must be upon the issue or issues made in the pleadings. Findings of fact, which are not in issue by the pleadings, may be wholly disregarded, and treated as immaterial. *Brenner v. Bigelow*, 8 Kan. 496; *Mays v. Foster*, 26 Kan. 518. In this case the petition alleged the execution of the promissory note sued on by Newby and Bogue. The answer of the defendants, denying the execution of the note, was verified, and therefore the only issue of fact upon which the court was required to find was whether Newby and Bogue, or either of them, signed the promissory note sued on, or authorized any person to sign it for them. Upon this issue the court found in favor of Newby and Bogue and against Myers. Upon the issue, therefore, presented by the pleadings, the defendants succeeded. Upon that issue it is conceded by both parties that none of the evidence is here. Upon the finding of the court that neither Newby nor Bogue signed the note, nor authorized it to be signed, Myers was not entitled to recover. There were no allegations in the petition, or in the reply of the plaintiff below, setting forth any words or any acts of Newby and Bogue, either of omission or commission, showing or tending to show they were estopped from denying the execution of the note. The question of estoppel was not in issue by the pleadings, and therefore the evidence offered tending to show matters of estoppel only, did not correspond with the allegations of the pleadings, and was not upon the point in issue.

The second and third findings of fact of the court were not on matters in issue by the pleadings. If plaintiff below intended to charge Newby and Bogue with a liability, because of things done long after he received and accepted a note which they never signed, then allegations tending to show such a liability, by estoppel or otherwise, should have been alleged in the petition or in the reply. Nothing of the kind was done.

It is conceded that Davis forged the names of Newby and Bogue to the note sued on. To hold Newby and Bogue, or either of them, liable on the note on account of subsequent language, or conduct, Myers must show that, by their declarations and acts made knowingly and deliberately, they induced him to believe certain facts to exist, and that he rightfully acted on the belief so induced, and was misled thereby to his detriment or injury. As the trial court received evidence and made findings upon matters wholly outside of the issue presented by the pleadings, it committed error greatly to the prejudice of the defendant below. The judgment of the trial court will be reversed, and cause remanded for further proceedings. All the justices concurring.

LYNCH *et al.* v. CITY OF KANSAS CITY *et al.*  
(*Supreme Court of Kansas.* Oct. 11, 1890.)

**STREET ASSESSMENTS—INJUNCTION.**

Section 253 of the Code of Civil Procedure is amended, so far as restraining the collection of an assessment is concerned, by the provisions contained in section 1, c. 101, Sess. Laws 1887, incorporated into the General Statutes of 1889 as paragraph 590.

(*Syllabus by Simpson, C.*)

Commissioners' decision. Error to district court, Wyandotte county; O. L. MILLER, Judge.

*Jenkins & Wells*, for plaintiff in error.  
*William S. Carroll*, for defendant in error.

SIMPSON, C. On the 12th day of May, 1887, the mayor and councilmen of the city of Kansas City passed the following resolution: "Resolved by the mayor and councilmen of the city of Kansas City that it is necessary to pave Third street from the west end of the Kansas river bridge to the north line of Minnesota avenue," etc. Third street is one of the public streets in said city running due north and south. At its southern termination it intersects or runs into a street called "Ferry Street." The latter street extends north-easterly and south-westerly past the southern termination of Third street, forming an obtuse angle. Ferry street is near the bank, and runs parallel with the Kansas river. There are two iron bridges across the river, one near the intersection of Third and Ferry streets, and the other a block further south-west, and terminating in Ferry street. On the 30th day of November, 1887, the council passed an ordinance declaring it necessary to pave Third street with cedar blocks from the west end of the Kansas river bridge to the north line of Minnesota avenue. This was approved by the mayor on the 5th day of December following its passage. The ordinance directed the city clerk to advertise in the official paper of said city for proposals for curbing and paving said street, but no such advertisement was thereafter made. Prior to the passage of said ordinance, to-wit, on the 17th day of September, 1887, the city clerk published a "notice to contractors," stating that "sealed proposals will be received at the city clerk's office until 5 p. m., Tuesday, October 11, 1887, for curbing and paving Third street, (north side,) from the west end of Kansas river bridge to Minnesota avenue, according to plans and specifications of city engineer now on file at this office." February 18, 1888, the mayor of said city published a notice that "there will be a special meeting of the city council on Tuesday evening, February 21, 1888, at 7 o'clock, for the purpose of hearing any and all complaints that may be made as to the valuation assessed by the appraisers of real estate abutting on Third (8d) street from Minnesota avenue to Ann street, and Ferry street from Ann street to the iron bridge, (north side,) and also to hear any and all complaints as to the validity and fairness of the assessments or special taxes to be assessed and levied on all lots, pieces, and parcels of ground liable for the payment of paving said Third

(8d) street between the points named. The following named lots, pieces, and parcels of ground are liable for the assessment of paving Third (8d) street in the city of Kansas City, Kansas." Then follows a detailed list of property, including the several lots of the plaintiffs set forth in the petition. Under the above proceedings the mayor and council let the contracts, and caused to be curbed with stone, and paved with cedar blocks, said Third street from Minnesota avenue south, to the end thereof, at its intersection with Ferry street, and also Ferry street from the south end of Third street to the second bridge from that point across the Kansas river. Bonds were issued by said city, and sold to raise money to pay for said improvements, and, subsequently, a short time before this suit was brought, a levy of special taxes was made by said mayor and council on all real estate abutting on said Third street, and also on Ferry street, and to the center of the block on either side thereof, from Minnesota avenue to a point south and south-west as far as said Third and Ferry streets were paved, for the purpose of raising a revenue to pay the first installment (one-tenth) of said bonds, and accrued interest then due. The plaintiffs Lynch, House, Stevens, Flanagan, and McCarthy own the lots respectively described in the petition, abutting on Ferry street, and the plaintiff Hannan two lots on Barnett street, as described in their petition, and are in the taxing district upon the real estate of which said levy was made. December 1, 1888, this action was brought by plaintiffs praying for an injunction against defendants to restrain the collection of said special taxes levied against their said lots, and a temporary restraining order was granted by the judge of the district court.

Defendants, by their answer filed at the hearing of said motion, admit, in substance, the facts set forth in the petition, but claim: *First.* That Third street and that portion of Ferry street between the west end of the bridge across the Kansas river, to the eye, in location, direction, and in fact, constitute one and the same street, "said portion of Ferry street being a continuation eastward of Third street," and "is commonly known as, and called by all classes of the people of the city as, 'Third-Street Extension.'" *Second.* "That plaintiffs knew at the time of the passage of the resolution and ordinance to pave Third street that it was the intention of the city to pave a portion of Ferry street also, and saw the work done, accepted the benefits thereof, and took no steps to prevent the same at the time, and are therefore estopped from being now heard to complain in regard to the premises, and are not in equity entitled to any injunction to restrain the defendants from proceeding to collect the taxes upon their property so levied for the making of said improvements upon said Ferry street, and in payment of the bonds so issued therefor." And, *third*, that the plaintiffs did not commence this action "within thirty days from the time the amount due on each lot or piece of ground liable for said



assessment was ascertained." Therefore the suit is barred by the limitation "contained in section one of chapters 102 and 101 of the Laws of 1887." December 8, 1888, the case was heard on the motion of plaintiffs for a temporary injunction, and taken under advisement by the court. March 2, 1889, the court overruled said motion, and denied plaintiffs' application for a temporary injunction, but retained in force the restraining order for 30 days, till the case was filed in this court. Of this judgment of the district court the plaintiffs complain, and allege the same as error.

1. An attempt is made by the attorneys of the plaintiffs in error to have this action classified as one instituted under section 253 of the Code of Civil Procedure. For the purposes of such a classification, the action was commenced against the city of Kansas City, and the treasurer of said city, and the treasurer of Wyandotte county. The petition alleges a levy of a special assessment against the real property of the plaintiffs below, and in error here, the certification of that levy by the city clerk to the county clerk, and that the same has been placed on the tax-roll of the county for collection with other taxes of the present year. In the prayer an injunction is called for restraining the officers named from the collection of such alleged illegal taxes. It is evident, from the history of the case heretofore given, that the burden complained of is not the ordinary taxation for state, county, municipal, or school purposes, but special assessments made against city lots owned by the plaintiffs in error, for the improvement of a street or streets upon which their lots abut. Section 253 of the Code of Civil Procedure reads as follows: "An injunction may be granted to enjoin the illegal levy of any tax, charge, or assessment, or the collection of any illegal tax, charge, or assessment, or any proceeding to enforce the same, and any number of persons whose property is affected by a tax or assessment so levied may unite in the petition filed to obtain such injunction." It will be seen that this section authorizes the restraining of the levy or collection of any tax, charge, or assessment, and in this connection it hardly becomes necessary to dwell on the plain distinction between "tax" and "assessment," as used in this section. The sole object of this petition is to restrain the collection of the assessment made by the city council on the real property of these plaintiffs in error for the cost of curbing and paving Third street from the west end of the Kansas river bridge to the north line of Minnesota avenue. It is said by the city that section 253 of the Code of Civil Procedure is amended, so far as restraining the collection of an assessment is concerned, by the provisions contained in section 1, c. 101, Sess. Laws 1887, incorporated into the General Statutes of 1889 as paragraph 590. This section provides that "no suit to set aside the said special assessments, or to enjoin the making of the same, shall be brought, nor any defense to the validity thereof be allowed, after the expiration of thirty days from the time the amount due on

each lot or piece of ground liable for such assessment is ascertained." In the case of *City of Topeka v. Gage*, ante, 82, this court, commenting on these words of limitation, have said: "The language of this statute is such as to leave little or no room for construction. Its provisions are plain, direct, and positive, and seem sufficiently broad to cut off all defenses not asserted within the period of time named therein. It says that no suit shall be brought, nor any defense allowed, after the expiration of thirty days from—what? From the time the amount due on each lot is ascertained." With this broad and liberal interpretation of this statute, a conflict inevitably arises between it and certain parts of section 253, as above given. Section 1 of the act of 1887 provides that, in cities of the first class, when streets are improved, and the expense is chargeable to the abutting property, the payment may be provided for, either in installments or by levying the whole cost at one time; but, if the installment plan is adopted, improvement bonds may be issued, payable in installments of equal amounts each year, such bonds not running longer than 10 years, nor with interest greater than 7 per cent. The adoption of the plan of the issue of improvement bonds furnishes money with which to pay the contractors for the improvement of the street when the same is completed, and gives the owners of abutting property 10 years within which to pay the bonds and interest in yearly installments. The act also provides that the owner of abutting property liable to such a special assessment may redeem his property from such liability by paying the entire amount chargeable against his property 30 days before the issue of such bonds, and then adds the words of limitation heretofore recited. The plain intent of these various provisions is to cause litigation, if any there is to be, to be commenced before the issue of the bonds, so as to avoid any uncertainty about their legality that might affect their market value. The 30-days limitation within which the assessments that are the basis of the bonds can be attacked is a wise one, is reasonable as to time, and is of unquestioned validity in every respect. To give it force we must hold that it changes the time within which an action of this kind can be instituted under section 253 of the Code, and leaves that section to apply only to illegal taxes and illegal charges. The word "assessment," as used in section 253 of the Code, and in paragraph 590 of the General Statutes of 1889, means the specific amount charged on the property, and not the mere act of valuation. It is said by the plaintiffs in error that, by reason of the declaratory resolution and the ordinance not mentioning in words "Ferry Street," and for other reasons enumerated in their briefs, the city council never obtained the power or jurisdiction to act, and that the special assessments are void, and, being void, that the 30-days limitation has no application. We do not think so. The street, or the portion of the street or streets that are to be improved, must be plainly indicated, so that not only the general public,

but the owners of the particular abutting property, must be advised of the proposed improvement. The mention of a prominent landmark, as a monument, such as an iron bridge across the river, as a designation of one of the termini of the proposed improvement, is better than a particular description, and, in case of a conflict, would control such a description. We have no doubt but that every property holder along Third and Ferry streets knew, from the declaratory resolution and the ordinance, the exact limits within which these streets were to be improved. The action was not commenced in time. We recommend an affirmance of the judgment.

PER CURIAM. It is so ordered; all the justices concurring.

MARSHALL *et al.* v. CITY OF LEAVENWORTH.

(Supreme Court of Kansas. Oct. 11, 1890.)

STREET ASSESSMENT—ACTION TO SET ASIDE—  
LIMITATION.

1. The limitation of 30 days within which an action can be brought to defeat or avoid a special assessment for street improvements, under section 1, c. 101, Laws 1887, is constitutional and valid, and the time when the "assessment is ascertained," and when the limitation commences to run, is when the ordinance levying the assessments, and designating the amount of the assessment levied upon each particular lot or piece of ground, is published, and takes effect.

2. The protest provided for by section 14 of the act relating to cities of the first class to be available must be of "two-thirds of the owners of the property resident in the city liable to taxation" for the street improvements, and not merely of "two-thirds of the property owners liable for the tax to be paid for said street improvements," without regard to residence.

(Syllabus by the Court.)

Error to district court, Leavenworth county; ROBERT CROZIER, Judge.

J. H. Gillpatrick, for plaintiffs in error.  
William C. Hook and C. F. W. Dassler, for defendant in error.

VALENTINE, J. This was an action brought in the district court of Leavenworth county on September 5, 1887, by S. A. Marshall and others against the city of Leavenworth, a city of the first class, to perpetually enjoin the defendant as a municipal corporation from all further proceedings to collect or enforce certain special assessments levied upon the property of the plaintiffs for the payment of certain street improvements made upon a certain street upon which the plaintiffs' property abuts. The defendant demurred to the plaintiffs' petition, and also to their amended petition, upon the ground that the same did not state facts sufficient to constitute a cause of action, and both of such demurrers were sustained by the court; and the plaintiffs, as plaintiffs in error, bring the case to this court for review. Various irregularities are alleged in the plaintiffs' petition and amended petition as having occurred in the proceedings upon which the aforesaid assessments are founded; and the plaintiffs make the claim that such irregularities render the aforesaid assessments absolutely void; while

the defendant claims that such irregularities do not render the assessments either void or voidable, but whether void or voidable, still the defendant claims that the plaintiffs did not commence their action in proper time, under section 1, c. 101, Laws 1887, (Gen. St. 1889, par. 590,) and therefore that their supposed action is barred by the limitation contained in the aforesaid statute. It appears that the proceedings upon which the assessments were founded were commenced on March 22, 1887, by the passage of certain resolutions declaring that it was necessary to pave and curb a certain portion of Olive street in said city, (which portion of such street we will hereafter mention merely as Olive street, or as said street, etc. :) that such resolutions were published for four consecutive weeks in the official newspaper of the city; "that, within the 20 days prescribed by law, said plaintiffs did file in the office of the clerk of said defendant city a protest against paving said part of Olive street, signed by two-thirds of the property owners liable for the tax to be paid for said street improvements, with the understanding of all the signers of the protest that they were protesting against paving, and curbing also, and four-fifths of the owners of the property would have signed it, had it been presented to them;" that, on May 9, 1887, the city passed an ordinance providing for grading, curbing, guttering, paving, etc., streets, alleys, etc., in said city, making special assessments therefor, paying installments thereon, issuing bonds, etc.; that on May 17, 1887, estimates of the costs for paving and curbing said street were made and filed by the city engineer; that on May 19th to 21st an ordinance was passed declaring it necessary to curb said street, and ordering the same to be done in conformity with the plans and specifications of the city engineer, and ordering that assessments be made, and bonds issued, etc.; that, at the same time, another ordinance was passed declaring it necessary to pave the aforesaid street, and ordering the same to be done in conformity with the plans and specifications of the city engineer, and providing for assessments and the issue of bonds, etc.; that, on May 31, 1887, the city entered into a contract with J. B. Smith & Co. for paving said street, and with Geiger & Campbell for curbing the same; that afterwards, appraisers were appointed to appraise the abutting lots, and the appraisements were made and filed as required by law; that on July 28, 1887, an ordinance was passed by the city council fixing the specific amount of the assessment against each particular lot on said street; that this ordinance was approved by the mayor on July 29, 1887, and was published on August 1, 1887, at which time it took effect; that on August 9, 1887, a notice to each lot-owner of the assessment upon his property was mailed to him. This action was commenced on September 5, 1887, as aforesaid. All the irregularities in the proceedings upon which the aforesaid assessments were founded, except the city's disregard of the aforesaid protest, may be passed over and disregarded: for, as we think, all the other irregularities are

waived and cured by the plaintiffs' failure to commence any action within 30 days after the publication and the taking effect of the ordinance making the specific assessments upon each portion of the abutting property. *Wahlgren v. City of Kansas City*, 42 Kan. 243, 21 Pac. Rep. 1068; *City of Topeka v. Gage*, 45 Kan. —, ante, 82; *Lynch v. Kansas City*, ante, 973, (just decided.) The aforesaid limitation reads as follows: "No suit to set aside the said special assessment, or to enjoin the making of the same, shall be brought, nor any defense to the validity thereof be allowed, after the expiration of thirty days from the time the amount due on each lot or piece of ground liable for such assessment is ascertained." Laws 1887, c. 101, § 1; Gen. St. 1889, par. 590. The assessment referred to in this statute is certainly "ascertained" when the ordinance making the assessment, and designating the specific amount of the tax assessed against each particular lot or piece of ground abutting on the street, is published. The plaintiffs, however, claim that the amount of the assessment is not ascertained until the owner of the property receives the notice mailed to him by the city clerk under the following provision, which is found in the same section in which the aforesaid limitation is found, which provision reads as follows: "The owner of any piece of property liable to any such special assessment may redeem his property from such liability by paying the entire amount chargeable against his property, upon the city clerk mailing him a written or printed notice thirty days before the issuance of the bonds." Now, this provision has nothing to do with the aforesaid limitation. The notice to the lot-owners need not be mailed within 30 days after the amount of the assessment is ascertained, but only within "thirty days before the issuance of the bonds," and the bonds may not be issued for months after the amounts of the assessments are ascertained and made a fixed charge upon the property. Besides, the notice may then be mailed to the several lot-owners on different days, and be received by them on different days; and some of the notices may never be received at all. Indeed, the post-office address of some of the lot-owners might not be ascertainable; and this should certainly not render the amount of the assessment unascertainable, as it would if it "is ascertained" only when the lot-owner receives the notice. The notice, however, is given, not for the purpose that the amount of the assessment shall be ascertained by it, but for the purpose that each lot-owner may, if he chooses, pay the whole of the assessment against his property at once, and before any bonds shall be issued, and thereby save interest. If he permits the bonds to be issued before he pays his assessment, he must then pay interest, whether he pays the whole of the assessment at one time or pays it in installments. Another provision of the statute following immediately after the provision last above quoted, and as a part of the same section and of the same sentence, reads as follows: "Or, after the issuance of the bonds, by paying all the installments of the assessments which have been

levied, and also the amount of unlevied installments, with interest on the latter at the rate of eight per centum per annum, from the date of the issuance of the bonds, to the time of maturity of the last installment."

We now come to the question whether the aforesaid protest renders the aforesaid assessments, and indeed all the proceedings subsequent to the protest, void. The plaintiffs claim that it does, while the defendant claims otherwise. The plaintiffs rely upon section 14 of the act relating to cities of the first class, which reads, as far as it is necessary to quote it, as follows: "Sec. 14. When the mayor and council shall deem it necessary to pave or macadamize any street, lane, avenue, alley, or part thereof, within the limits of the city, for which a special tax is to be levied as herein provided, such council shall, by resolution, declare such work or improvement necessary to be done; and such resolution shall be published for four consecutive weeks in the official newspaper of the city; and, if two-thirds of the owners of the property resident in the city, liable to taxation therefor, shall not, within twenty days thereafter, file with the clerk of said city their protest against such improvement, then such council shall have power to cause such improvements to be made, and to contract therefor, and to levy the taxes as herein provided; and the work may be done before, during, or after the collection of the special assessments, as may be deemed proper by the mayor and council." Laws 1887, c. 99, § 5; Gen. St. 1889, par. 558. The plaintiffs' petition, original and as amended, alleges that the protest was filed by the plaintiffs, but whether they were residents or not of the city or county of Leavenworth, or of the state of Kansas, is not shown. It also alleges that the protest was "signed by two-thirds of the property owners liable for the tax to be paid for said street improvements;" but whether any one or more of such signers was a "resident in the city" of Leavenworth, as required by the above-quoted statute, is not shown. Indeed, it is not shown that any one of such signers was even a resident of the state of Kansas. Also the protest was only against paving, and was not against curbing, except that the signers understood that they were protesting against the curbing also. In order that the protest should be of any value, the statute requires that it should be the protest of "two-thirds of the owners of the property resident in the city liable to taxation therefor," while the petition shows that it was merely the protest of two-thirds of the property owners liable for the tax to be paid for said street improvements; and no mention of the residence of the protesters is made. Now, the city authorities may have disregarded this protest for the reason that the protesters were not residents of the city; and the court below, in considering the demurrers to the petition and amended petition, may also have disregarded the protest for the same reason. We are inclined to think that, whenever the mayor and council of any city of the first class shall pass a resolution declaring

it necessary to make particular street improvements, and shall publish the resolution for four consecutive weeks in the official newspaper of the city, as provided by said section 14 of the act relating to cities of the first class, and that two-thirds of the property owners resident in the city, liable to special taxation to pay for such improvements, shall, within 20 days thereafter, file with the clerk of the city their protest against the making of such improvements, that then the city authorities will not have any power or authority to cause such improvements to be made; and that any proceedings afterwards had for any such purpose, or any assessment made to pay for such improvements, would be absolutely null and void, and the parties protesting would not be required, under the aforesaid limitation contained in section 1, c. 101, Laws 1887, to commence any action within 30 days after the making of the assessment to set aside the assessments, or to defeat or avoid the same, in order to relieve themselves from the payment of the same. But it is not shown in the present case that the parties protesting were residents of Leavenworth city, and hence the plaintiffs' petition, original and amended, with all the facts stated therein, does not state facts sufficient to constitute a cause of action. If the signers of the protest were, in fact, residents of the city of Leavenworth, and if they, in fact, constitute two-thirds of the owners of the property supposed to be liable for the payment of the aforesaid assessments, then we would think that the plaintiffs might, upon such terms as would be just, be permitted by the district court to amend their petition by setting up the fact that the parties protesting were residents of Leavenworth city. The judgment of the court below will be affirmed. All the justices concurring.

**MARYSVILLE INVESTMENT CO. v. MUNSON  
et al.**

(Supreme Court of Kansas. Oct. 11, 1890.)

**TOWN COMPANY—CORPORATE EXISTENCE—TOWN-SITE TRUST—DUTY OF PROBATE JUDGE.**

1. The Palmetto Town Company was created by an act of the legislature, approved February 5, 1857, which failed to provide the duration of its existence. *Held*, that it ceased to exist 10 years after its creation, and that it was thereafter powerless to execute a conveyance of real estate.

2. It is the duty of a probate judge who has entered a town-site in trust for the benefit of the occupants thereof, under the act of congress of May 23, 1844, entitled "An act for the relief of citizens of towns upon the lands of the United States under certain circumstances," to convey the same to occupants of the town-site, and the legislature cannot prescribe a rule for the execution of the trust which will change its character or divert the property to others than the occupants of such town-site; and, where the probate judge has executed a deed conveying the town-site, it will be presumed, in the absence of a contrary showing, that the grantees therein were the beneficiaries of the trust, and entitled to a conveyance.

3. The probate judge who entered the town-site of Palmetto executed a conveyance of the same to 12 persons, who were described in the deed as "members of the Palmetto Town Company." Subsequently, the grantees executed individual deeds to the plaintiff, and, later, the

plaintiff brought an action against the defendants for the recovery of a portion of the town-site. *Held*, that the conveyance of the probate judge was not void, and that the deeds of his grantees were admissible in evidence in that action.

(Syllabus by the Court.)

Error from district court, Marshall county; R. B. SPILLMAN, Judge.

A. E. Park, W. A. Calderhead, and Glass & Pollock, for plaintiff in error. Cal. T. Mann and E. Hutchinson, for defendant in error.

JOHNSTON, J. This is a proceeding to review the rulings and judgment of the district court of Marshall county given in an action of ejectment, brought by the Marysville Investment Company against Harriet J. Munson, A. K. Munson, and J. D. Farwell, for the recovery of six lots in the town of Palmetto, now a part of the city of Marysville, in Marshall county, and also for damages in withholding the possession of the same. The greater part of the evidence offered by the plaintiff was excluded by the court, and these rulings are now assigned for error. The plaintiff first offered in evidence a patent from the United States conveying to Joshua E. Clardy, probate judge of Marshall county, a quarter section of land, "in trust for the several use and benefit of the occupants of the town-site of Palmetto, according to their respective interests." The tract so conveyed includes the land in controversy, which then formed the town-site of Palmetto, and now constitutes a part of the city of Marysville. There was next offered in evidence a deed for the same real estate from Joshua E. Clardy, as judge of the probate court, to F. J. Marshall, A. Morrell, W. S. Bruster, O. D. Prentiss, J. A. Quarles, R. Y. Shibley, J. P. Miller, R. A. West, A. S. Vaught, J. R. S. Alston, J. H. Myers, and James S. Magill, who are mentioned in the deed as "members of the Palmetto Town Company." The date of this conveyance is October 28, 1858. Testimony was offered tending to show that the town-site had been platted and subdivided into lots, blocks, streets, and alleys. The plaintiff offered in evidence a deed bearing date July 10, 1888, from the Palmetto Town Company, to the Marysville Investment Company, purporting to convey the lots in controversy, and also a large number of other lots which had formed a part of the Palmetto town-site, and which had been entered by Probate Judge Clardy in trust for the use and benefit of the occupants, but this deed was excluded by the court. The objection to the deed, and the ground of its exclusion, was that prior to the time of its execution the town company had ceased to exist as a corporation, and was without power to execute a conveyance of real estate; and of this ruling complaint is made. The Palmetto Town Company was created by a special act of the territorial legislature of Kansas, which took effect on February 5, 1857, (Laws Kan. 1857, p. 353.) There was no limitation in the act creating the corporation as to the period of its existence, but the general law relating to corporations which was then in force provided that, where there was no limitation

In the charter creating the corporation, it should only exist for a period of 10 years. Laws 1855, p. 185. Applying this limitation, the Palmetto Town Company ceased to exist as a corporation in February, 1867, more than 20 years prior to the date of the deed which it undertook to execute. It was then powerless to execute a conveyance, and the deed in question was open to the objection made by the defendants, and was properly excluded by the court. *Krutz v. Town Co.*, 20 Kan. 397. The plaintiff then offered in evidence a deed dated December 28, 1888, executed by F. J. Marshall and his wife to the Marysville Investment Company, purporting to convey their interest in the quarter section of land that had been entered as the "Palmetto Town-Site," including all the lots remaining unsold, or which had been conveyed, by the Palmetto Town Company. This deed was rejected by the court, as were a number of other deeds of like character and of or about the same date, executed by the grantees mentioned in the deed from Probate Judge Clardy, and who were described as members of the Palmetto Town Company. It was urged that the deeds were incompetent, because the only title which the grantors had in the property was derived from the deed of Probate Judge Clardy to F. J. Marshall and others, and that as the deed of the probate judge does not purport to convey title to the Palmetto Town Company, but by its terms undertakes to convey to F. J. Marshall and others, as individuals, such conveyance was not in accordance with the rules and regulations prescribed by the legislature of the territory of Kansas relating to the entry and disposal of town-sites; and the court held that the deed from the probate judge was ineffectual to convey any title to the grantees named therein as individuals, and as they individually acquired no title by that deed, they could not as individuals convey any title to the Marysville Investment Company.

We think the court erred in holding the deed of the probate judge to F. J. Marshall and others to be void, and also in excluding the individual deeds executed by these parties to the Marysville Investment Company. It is conceded that the Marysville Investment Company is a corporation having power to purchase and hold real estate, and also to sell and convey the same. It is further shown that F. J. Marshall, and the other grantees named in the deed from the probate judge, were actual occupants of the town-site of Palmetto at the time the deed was executed by the probate judge, and therefore were equitable owners of at least a part of the town-site, and it was the duty of the probate judge, who only held the naked legal title, to convey the same to the occupants of the town-site. It is contended, however, that the deed by the probate judge was not made in conformity to the act of congress under which the land was entered, nor with the rules and regulations prescribed by the legislature of the territory relating to the sale and disposition of town-sites. The act of congress, under which the Palmetto town-site was entered, authorized the probate judge to en-

ter lands settled and occupied as a town-site, "in trust for the several use and benefit of the occupants thereof, according to their respective interests," and provided that "the execution of which trust as to the disposal of the lots in such town, and the proceeds of the sales thereof, to be conducted under such rules and regulations as may be prescribed by the legislative authority of the state or territory in which the same is situated." There was a further provision "that any act of said trustees, not made in conformity to the rules and regulations herein alluded to, shall be void, and of none effect." 5 U. S. St. at Large, 657. The territorial legislature of 1858 passed an act to regulate the entry and disposal of town-sites under this act of congress, and provided that where "the persons who selected or laid out such town-site, or their assigns, have been, or shall hereafter be, incorporated as a town company, with power to purchase and hold the land on which such town-site is situated, it shall be the duty of the person or persons entering such town-site to convey the land thus entered to such incorporated company; and, where the persons who laid out such town have not been incorporated, it shall be the duty of the persons entering such town-site to convey the land and lots embraced in such town-site to the persons who laid out such town or to their assigns." Pub. Laws Kan. 1858, c. 72, § 2. It is contended that, as the Palmetto Town Company was incorporated, it was the duty of the probate judge to convey the town-site to that company, and not having done so, according to the rule prescribed by the legislature, the deed which he did make to the individuals was void. It is true that the Palmetto Town Company was incorporated in 1857 by a special act of the legislature, and it is also true that the deed of the probate judge conveyed the town-site to certain individuals instead of to the Palmetto Town Company; but these facts alone do not render the deed ineffectual and void. The occupants of the town-site, whoever they may have been, were the equitable owners of the land settled upon and occupied, and they were entitled to a conveyance from the probate judge. Their rights were fixed by the act of congress, and the legislature was powerless to prescribe a rule which would give the land and lots to others than the occupants thereof. The provisions of the legislative act mainly conform to the act of congress, but so far as they may conflict with that act they must be held to be void. If the town company was an occupant of any portion of the town-site, it was entitled to a conveyance of its respective interest; but if it was not an occupant, or if it was not organized and in existence at the time the deed was made, then it was not entitled to a conveyance of the town-site or any part thereof. The probate judge having made the deed to these individuals it will be presumed, in the absence of evidence to the contrary, that the parties to whom the deed was made were occupants, and entitled to a conveyance, and that the town company was not an occupant, nor entitled to a conveyance. Independent of this

presumption in favor of the grantees in the deed of the probate judge, there is proof in the record that they had settled upon and were actual occupants of the town-site before and at the time of the conveyance. In *Sherry v. Sampson*, 11 Kan. 611, a question affecting the same town-site and the same deed under consideration was before the court. It was there said that "it was the duty of said probate judge, when he entered said land, to make deeds for the same to the actual occupants thereof, respectively. The town company may or may not have been an occupant. The individual members of the town company may or may not have been occupants. And other persons, not members of the town company, may or may not have been occupants. It was therefore not necessarily the duty of the probate judge to convey all of said land to said town company, as is claimed by the plaintiff; and it is possible that it may not have been his duty to convey any portion of the same to said town company. When the probate judge has made a deed for any portion of said land to any person it will be presumed, in the absence of anything to the contrary, that he has made the deed to the proper person; and a person who has no interest in the land will not be allowed to raise any question as to whether the probate judge has made the deed to the proper person or not." See, also, *Town Co. v. Maris*, Id. 128. Whether or not there were other occupants of the town-site than those named as grantees in the deed of the probate judge does not appear, and what was the individual interest of each grantee in the town-site is not shown. They may have been the only occupants, and entitled to the entire town-site, and the fact that the whole site was conveyed to all the grantees together, instead of conveying to each one a distinct share of the same, while possibly irregular, will not render the conveyance void. If they were the only occupants, and acquired the whole title, they could, by uniting, convey a complete title to others, and the deeds made by them, or any of them, would be receivable in evidence. If the land was conveyed to them as trustees, as provided in section 10 of the act regulating the entry and disposal of town-sites, then a conveyance from them would transfer their title, and the deeds made by them would be competent evidence. Pub. Laws 1858, c. 72, § 10. The rights of the parties and the effect of the conveyances cannot, however, be determined in this case. The testimony was cut short by the exclusion of the conveyances referred to, and as the rights and relations of F. J. Marshall and other grantees in and to the town-site in question were not fully disclosed, we will not at this time undertake to define their rights, or the effect of the conveyances which they made. The interest claimed in the land by the defendants was not set out or shown, and hence the case is in no condition for the final decision of the rights of the respective parties. We only decide that the conveyance of the probate judge was not void, and that the deeds of the grantees in that conveyance were admis-

sible in evidence. The judgment of the district court will be reversed, and the cause remanded for a new trial. All the justices concurring.

# HESS v. SPARKS.

(Supreme Court of Kansas. Oct. 11, 1890.)

## SLANDER—WORDS ACTIONABLE PER SE—EVIDENCE—INSTRUCTIONS.

1. The following words: "What are you doing with that nine-dollar blackmailer here!" spoken of a woman, are actionable *per se*.

2. The evidence in this case examined, and held, that the relation existing between the parties showed that the alleged slanderous words were not privileged.

3. In an action for slander it is not error for the trial court to instruct the jury that if they believe from the evidence that the words alleged to have been spoken were spoken, and spoken maliciously, by the defendant they were authorized to assess punitive damages against the defendant.

(Syllabus by Green, C.)

Commissioners' decision. Error from district court, Cowley county; M. G. TROUP, Judge.

*Pyburn & Jeffries* and *Peckham & Henderson*, for plaintiff in error. *W. P. Hackney*, for defendant in error.

GREEN, C. This was an action for slander by the defendant in error against the plaintiff in error. Two causes of action were set out in the petition: "First. That the defendant on the 1st day of February, 1887, in the presence and hearing of divers persons, did, falsely and maliciously, speak and publish of and concerning the plaintiff the following false, malicious, and defamatory words, that is to say, 'What are you doing with that nine-dollar blackmailer here?' Meaning thereby that the said plaintiff had committed the offense of extortion of money from a person or persons by threats of accusation or exposure, or opposition in the public prints, and that she was a common blackmailer and extortioner. Second. That on said 1st day of February, 1887, in the presence and hearing of divers persons, said defendant did, falsely and maliciously, speak and publish of and concerning the said plaintiff the following false, malicious, and defamatory words, to-wit, 'She [meaning the plaintiff] tried to blackmail some one over at Sparks'; meaning thereby that said plaintiff had tried to levy, blackmail, or extort money from some person or persons at Dr. Sparks', in said Arkansas City, by threats of accusation or exposure, or by opposition in the public prints, for the purpose of obtaining money thereby." To this petition the defendant below interposed a general denial. A trial was had to the court and jury, and resulted in a verdict and judgment for the plaintiff below for \$1,300. Plaintiff in error brings the case here for review, and his first contention is that the petition did not state facts sufficient to constitute a cause of action, or that the matters charged in the petition were not actionable *per se*.

The evidence, upon the trial, showed that the plaintiff below was a young woman, engaged, at the time the alleged

slandrous words were charged to have been spoken, in the Arkansas City Cracker Factory, making boxes and packing crackers on a salary of nine dollars a week, and were addressed to the president of the cracker company. Did these words, spoken under the circumstances, charge the plaintiff below with the commission of such an offense as would occasion pecuniary damages to her? "When language is used concerning a person, or his affairs, which, from its nature, necessarily must, or presumably will, as its natural and proximate consequence, occasion him pecuniary loss, its publication *prima facie* constitutes a cause of action, and *prima facie* constitutes a wrong without any allegation or evidence of damage, other than that which is implied or presumed from the fact of publication; and this is all that is meant by the term 'actionable *per se*,' etc." Newell, Defam. 181. Applying this rule to the case at bar, what is meant or understood by the word "blackmailer," or to charge one with being a blackmailer, as that is the substance of the charge in this case? The word "blackmail" has a well-defined meaning: The extortion of money from a person, by threats of accusation, or exposure, or opposition in the public prints; hush-money; bribe to keep silence; the extortion of hush-money; obtaining of value from a person as a condition of refraining from making an accusation against him, or disclosing some secret calculated to operate to his prejudice. These definitions, given by the best lexicographers, convey to the mind what is intended to be understood by the use of the word. In speaking of the word "blackmail," and its understood meaning, Judge MONELL says: "In common parlance, and in general acceptance, it is equivalent to and synonymous with 'extortion,' the exaction of money, either for the performance of a duty, the prevention of an injury, or the exercise of an influence. Not unfrequently it is extorted by threats, or by operating upon the fears or the credulity, or by promises to conceal, or offers to expose, the weaknesses, the follies, or the crimes of the victim. There is moral compulsion, which neither necessity nor fear nor credulity can resist. It cannot be doubted, I think, that the term 'blackmailing' is invariably regarded as an unlawful act; and though, from its indefiniteness and comprehensiveness, the offense is not classified as a distinct crime, nevertheless it is believed to be criminal, and to charge a man with 'blackmailing' is equivalent to charging him with a crime." Edsall v. Brooks, 26 How. Pr. 482. The doctrine of construction has been well stated by Mr. Starkie, in his treatise on Slander, page 44: "Both judges and jurors shall understand words in that sense which the author intended to convey to the minds of the hearers, as evinced by the whole circumstances of the case. It is the province of the jury, where doubts arise, to decide whether the words were used maliciously, and with a view to defame,—such being matter of fact, to be collected from all concomitant circumstances,—and for the court to determine whether such words, taken in the malicious sense im-

puted to them, can alone, or by the aid of the circumstances stated upon the record, form the legal basis of an action." Courts and juries will understand them in the same way that other people would. Walton v. Singleton, 7 Serg. & R. 451. Lord MANSFIELD remarked, in the case of Peake v. Oldham, Cowp. 275, 278, "that where words, from their general import, appear to have been spoken with a view to defame a party, the court ought not to be industrious in putting a construction upon them different from what they bear in the common acceptance and meaning of them." Goodrich v. Woolcott, 3 Cow. 239; Proctor v. Owens, 18 Ind. 21; Edgar v. McCutchen, 9 Mo. 768; Ranger v. Goodrich, 17 Wis. 80.

The charge alleged by the defendant in error, against the plaintiff in error, was that she was a blackmailer; that is, that she was guilty of extortion, illegal compulsion. This, the plaintiff below alleges, meant that she had committed the offense of extorting money from persons, by threats of accusation or exposure, or opposition in the public prints, and that she was a common blackmailer and extortioner. This is the innuendo to explain what the plaintiff below claimed was meant by the use of the words: "What are you doing with that nine-dollar blackmailer here?" The purpose and object of the innuendo is to make certain what might otherwise be uncertain. One of the means of insuring certainty in a petition for slander or libel is an innuendo. Henicke v. Griffith, 29 Kan. 516; Townsh. Sland. & Lib. § 835; Rodebaugh v. Hollingsworth, 6 Ind. 339. Now, taking the innuendo in connection with the words charged, we think the language imputed an offense which was punishable under the laws of this state, and the petition stated facts sufficient to constitute a cause of action; and the court committed no error in submitting the matter to the jury to determine whether it was so understood or not.

2. It is insisted that the words spoken were privileged. We do not think the plaintiff in error was in a position to claim that the words charged were privileged. Text-writers have enumerated four kinds or classes of privileged communications: *First*, when the speaker of the alleged slander acted in good faith in the discharge of a public or private duty, legal or moral, or in the prosecution of his own rights or interests; *second*, anything said by a master concerning the character of a servant who has been in his employ; *third*, words used in legal proceedings; and, *fourth*, words used in ordinary parliamentary proceedings. The very words charged, "What are you doing with that nine-dollar blackmailer here?" would clearly indicate that the relation of master and servant did not exist, and that the communication was not privileged, and not made for honest motives.

3. The last error complained of is that the court below instructed the jury that if they believed from the preponderance of the evidence that the words alleged to have been spoken were spoken, and spoken maliciously, by the defendant, that then they were authorized to assess punitive dam-



ages against the defendant. We do not think the court erred in giving this instruction. If the words were spoken maliciously, the jury had the right to assess punitive as well as compensatory damages. The words charged and proven, in our judgment, were actionable *per se*; and it was the province of the jury to determine, in view of all the evidence, whether punitive damages should be allowed or not. The rule seems to be quite well settled that where the jury are satisfied by proper evidence that there was actual malice they may allow punitive damages. *Klewin v. Bauman*, 53 Wis. 244, 10 N. W. Rep. 398; *Bergmann v. Jones*, 94 N. Y. 51; *Wood v. Hilbish*, 23 Mo. App. 389; *Casey v. Hulan*, 21 N. E. Rep. 322.

We cannot say, from all the facts which surround this case, that the damages were excessive. It is the peculiar province of a jury, in cases of this kind, to consider the whole of the circumstances of the case, the occasion of the speaking of the slanderous words, the relationship between the parties, and the determination of the amount of the recovery, under proper instructions from the court; and, unless there has been an abuse of these prerogatives, courts will not interfere. We do not think this case presents such a state of facts as warrants an interposition. We recommend an affirmance of the judgment of the court below.

PER CURIAM. It is so ordered; all the justices concurring.

#### HOWARD *et al.* v. BURNS.

(Supreme Court of Kansas. July 3, 1890.)

##### CHATTEL MORTGAGES—RIGHT OF MORTGAGEE—AGISTER'S LIEN.

1. A mortgagee entitled to the possession of personal property covered by his mortgage may maintain trover against a third party, who has converted the same, without first obtaining a judgment against the mortgagor, and without making him a party to the action.

2. A party wrongfully converting stock to his use is not entitled to an agister's lien for feeding and caring for the same as against one who is entitled to the possession thereof.

(*Syllabus by Strang, C.*)

Commissioners' decision. Error to district court, Harvey county; L. Houk, Judge.

*Brown & Kline and Ady & Nicholson*, for plaintiffs in error. *Vandeveer & Martin and Whiteside & Gleason*, for defendant in error.

STRANG, C. This was an action of trover to recover damages for the conversion of certain sheep, begun in the district court of Harvey county on the 18th day of February, 1886. The right of the plaintiff below to recover was based on certain chattel mortgages which had become absolute, and an unsuccessful demand for the possession of the sheep. The defendants answered—*First*, a general denial; *second*, superior claims in themselves and third parties whom they ask to have made parties; *third*, claim an agister's lien. To

which plaintiff's reply was by a general denial. On the 14th day of May, 1887, the case was tried by the court and a jury resulting in a verdict and judgment for the plaintiff for \$1,922.60. A motion for a new trial followed, which was overruled, to which ruling the defendants excepted, and file their case made in this court asking a reversal of the judgment of the district court.

February 13, 1885, the plaintiff below was the owner of 1,500 sheep, which on that day he sold to H. C. Reeder for \$3,000, taking Reeder's notes therefor in the sum of \$1,500 each, the last note due to run 10 months; and to secure the payment of said notes he took a chattel mortgage on the sheep sold by him to Reeder. Said mortgage was placed of record in Reno county, February 20, 1885, and in Harvey county, October 24, 1885. January 2, 1885, Reeder gave to the Bank of Burrton a mortgage on 200 head of sheep with some other property to secure the payment of a debt of \$1,622.10. This mortgage was recorded January 21, 1885. January 19, 1885, Reeder gave to J. E. Howard a mortgage on 3,000 sheep to secure the payment of a note for \$3,000. This was recorded March 28, 1885. July 10, 1885, Reeder gave to the First National Bank of Newton a mortgage on 600 yearling sheep, mixed wethers and ewes, to secure a debt of \$500. This mortgage was recorded July 11, 1885. Defendants below took possession of all the sheep Reeder had on the 8th day of September, 1885, and refused to return to the plaintiff the sheep covered by his said mortgage, whereupon the plaintiff brought this suit.

The first question raised by the plaintiffs in error is that the petition of the plaintiff below does not state a cause of action; that Reeder, the maker of the notes and mortgage under which the plaintiff below claims, was not a party to the suit; that the indebtedness against him in favor of the plaintiff below had never been judicially ascertained; and that an action will not lie on behalf of the plaintiff against the defendants below until the indebtedness between the mortgagee, the plaintiff below, and Reeder, the mortgagor, is liquidated, without making Reeder a party thereto. We do not think this position is tenable. This is an action of trover; an action sounding in tort. The gist of the action is the conversion, the wrongful act of the defendants, and not the right of the plaintiff to recover anything of Reeder. While the plaintiff's right to the possession of the sheep flows from his mortgage thereon and the breach of its conditions, yet it is wholly unnecessary to ascertain the amount of the indebtedness between plaintiff and Reeder before bringing suit against the defendants, because, by this breach of the conditions of his mortgage by Reeder, the plaintiff at once became entitled to the possession of the sheep, and, being entitled to the possession, he may bring his action to recover the possession, as an action of replevin, or he may bring his action to recover damages for the wrong done him by taking and withholding from him the possession, as an action of trover or an action of trespass. This suit was not brought by the plaintiff below against the defendants below to recover from the defendants his

debt against Reeder. It was to recover damages of the defendants for the wrong done the plaintiff in taking and withholding from him the possession of the sheep which he was entitled to, and the only relation the indebtedness between the plaintiff and Reeder sustains to this suit is that the law has declared the measure of damages between the plaintiff and the defendants to be the amount due the plaintiff on his debt secured by the mortgage from Reeder. The plaintiff's right to maintain this action is thus founded in reason, and it is supported by an unbroken line of authorities so far as we have been able to discover. In *Smith v. Konst*, 50 Wis. 360, 7 N. W. Rep. 293, Mr. Justice TAYLOR says: "The respondent, as mortgagee, after condition broken, had the legal title to the property, and the right to the possession thereof, against everybody; and his right to recover against every person unlawfully converting the same in hostility to his rights as mortgagee was just as perfect as if he had been the absolute owner thereof; the only difference being that, as against persons claiming under the mortgagor or his assignees, his right to damages would be limited to the amount due upon his mortgage." In *Corbin v. Kincaid*, 33 Kan. 649, 652, 7 Pac. Rep. 145, Judge VALENTINE says: "The defendant below had actual knowledge of the plaintiff's mortgage and his rights, and took possession of the property with such knowledge, claiming to have the prior right thereto, in violation of the plaintiff's rights; and all this transpired within less than one year after the execution of the plaintiff's mortgage, and at a time when no one would claim or even pretend that any renewal affidavit was necessary. A cause of action in replevin or conversion then arose in favor of the plaintiff and against the defendant, and that cause of action was not satisfied, annulled, or barred by any failure on the part of the plaintiff to afterwards file a renewal affidavit." "A second mortgagee of a chattel, who takes the same from the possession of the mortgagor and sells it, and receives the full consideration of the sale, without regard to the rights of the senior mortgagee, is liable to the latter in an action for the conversion of the chattel." *Lowe v. Wing*, 56 Wis. 31, 13 N. W. Rep. 892; *Bailey v. Godfrey*, 54 Ill. 507; *Welch v. Sackett*, 12 Wis. 245; *Frisbee v. Langworthy*, 11 Wis. 375; *Badger v. Manufacturing Co.*, 70 Ill. 302; *Gregory v. Thomas*, 20 Wend. 19; *Frank v. Playter*, 73 Mo. 672; *Briggs v. Mette*, 42 Mich. 12; *Spriggs v. Camp*, 2 Speers, 181. Reeder owned a lot of sheep, and gave the Bank of Burrton a mortgage on sheep and other personal property for \$1,622.10 to secure so much alleged indebtedness. Afterwards he gave a mortgage to J. E. Howard on 3,000 sheep to secure an alleged indebtedness of \$3,000. Afterwards Reeder purchased 1,500 sheep of Burns, and gave Burns a mortgage thereon to secure the purchase money, \$3,000. The mortgages to the Bank of Burrton and to J. E. Howard were given in January, 1885, the former on the 2d, and the latter on the 19th. The mortgage to Burns was given on the 13th of February,

1885. Of course the mortgages to the Burrton Bank and J. E. Howard could not be a lien on the sheep contained in the Burns mortgage, because they did not cover the Burns sheep. Reeder did not have the Burns sheep at the time he made the mortgages to the Burrton Bank and Howard. The mortgage to the First National Bank of Newton was made by Reeder, July 10, 1885, but it recites that the sheep covered by it were the same sheep mortgaged by Reeder to Gorman, October 28, 1884. So the mortgage to the Newton Bank did not cover any of the Burns sheep, and therefore could not be a lien thereon, no matter when recorded. So far then as these mortgages were concerned, only the Burns mortgage was a lien on the Burns sheep. It is admitted that the defendants took all the sheep Reeder had on September 8, 1885, into their possession. The condition of the Burns mortgage was broken, and Burns thereby became entitled to the possession of the sheep covered by his mortgage in the hands of Howard and the Bank of Burrton, and if they refused to surrender them to him he could, as we have seen, maintain his action to recover damages for the conversion of them. But it is alleged that, at the time when the sheep were taken possession of by the Burrton Bank and Howard, they were sick and lame, and they cared for them, doctored and fed them, and that they were entitled to a lien on them therefor. We do not think that is true. There is nothing in our statutes that gives a lien on stock under such circumstances. The defendants took the sheep from Reeder in defiance of the rights of the plaintiff, and held them all the time, adversely to Burns and his rights. They took them under claim of right under chattel mortgages, which, as against Reeder, under our statutes, gave them the title thereto, and in fact they claim the sheep. If the sheep belonged to them they could not have a lien thereon for feeding and doctoring them, and if the sheep were not theirs, but belonged to Burns under his mortgage, and they took them without his consent, thus depriving him of his right of possession against his will, they were guilty of a tort as to Burns which could not be the basis of any such relation between themselves and Burns as would give them the right to a lien thereon. The fact that under the law Burns could maintain trover for the conversion of the sheep excludes the idea that defendants could have a lien upon the sheep for feeding and doctoring them. We have examined the alleged errors growing out of the admission of evidence, and do not think any material error was therein committed. Burns only testified as to the value of fat sheep. He said he had noticed the quotations of such sheep in the Kansas City market, and then stated what the market price of fat sheep was in Kansas City. In view of the fact that it was proved there was no market value for such sheep at home, his evidence as to the market prices at Kansas City was probably admissible. But, as it seems to be conceded that there were no fat sheep, the evidence of Burns thus given was not material. And the

same may be said of Reeder's statement as to what he was told about the value at Kansas City. The claim that Burns' mortgage was void because not immediately filed in Harvey county is not good, (*Corbin v. Kincaid*, 33 Kan. 649, 7 Pac. Rep. 145; *Wilson v. Leslie*, 20 Ohio, 161;) and besides defendants had actual knowledge of plaintiff's mortgage all the while.

This brings us to the last question. Was the verdict so excessive that it must have been given under the influence of passion and prejudice, and therefore ought to be set aside? The plaintiff went to the county of the defendants to bring his suit, and there it was tried. Burns says there were seven or eight hundred of his sheep when taken by defendants. Rodgers says there were 500 in February, 1886. Defendants assert many of the sheep had died before that. Just how many of Burns' sheep were taken by Howard and the bank, and what they were worth, we do not know; but the jury having considered all the evidence on this subject, and their finding thereon having been approved by the trial court, and there being some evidence upon which to base their finding, this court will not set it aside. We have examined the instructions, and fail to find any error therein. And we also believe they are sufficiently full, and cover all the questions involved in the case. We therefore recommend that the judgment of the district court be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

(44 Kan. 549)

HOWARD *et al.* v. FIRST NAT. BANK OF HUTCHINSON.

(Supreme Court of Kansas. July 3, 1890.)

CHattel Mortgages—Conversion of Mortgaged Property—Subsequent Purchasers.

1. A mortgagee entitled to the possession of personal property covered by his mortgage may maintain an action against a third party, who has converted the same, without first obtaining a judgment against the mortgagor and without making him a party to the suit.

2. A subsequent mortgagee with notice of prior mortgage is not a subsequent mortgagee in good faith under paragraph 8905 of the General Statutes of 1889.

3. The words "subsequent purchasers" and "subsequent mortgagees in good faith," in paragraph 8905, mean only purchasers and mortgagees who purchased or took their mortgages after the expiration of the year from the filing of the mortgage.

4. The taking of a second mortgage to secure the same debt secured by a first mortgage, and upon the same property, does not operate as a satisfaction and release in law of the first mortgage.

(Syllabus by Strang, C.)

Commissioners' decision. Error to district court, Harvey county; L. HOUK, Judge.

*Ady & Nicholson* and *W. E. Brown*, for plaintiffs in error. *Whiteside & Hutchinson* and *Vandever & Martin*, for defendants in error.

STRANG, C. Action for damages for the conversion of certain sheep, begun by the

plaintiff below in the district court of Harvey county, February 18, 1886. Plaintiff's right to recover was based upon a chattel mortgage covering the sheep, which had become absolute, and an unsuccessful demand of the defendants below for the possession of said sheep. The defendants answered: (1) General denial; (2) possession of the sheep under other and prior mortgages; and (3) an agister's lien. To which plaintiff replied: (1) General denial; (2) want of consideration and fraud in the mortgage under which defendants below took possession of the sheep; and (3) that the notes and mortgages of defendants below were taken with full knowledge on their part of the mortgages of plaintiff below. The case was tried by the court and a jury, on the 10th day of May, 1887, resulting in a verdict for the plaintiff, for the sum of \$779.38. A motion for a new trial followed, which was overruled and judgment entered, to which ruling and judgment the defendants excepted, and file their case made in this court, asking a reversal of the judgment of the district court. December 1, 1884, H. C. Reeder gave the defendant, plaintiff below, a mortgage on certain sheep to secure the payment of a note for \$500. January 2, 1885, Reeder gave a mortgage to the Bank of Burton on certain sheep and other property, to secure a claim of \$1,022.10. January 19, 1885, said Reeder gave a mortgage to J. E. Howard on 3,000 head of sheep, to secure an alleged claim of \$3,000. May 21, 1885, Reeder gave a mortgage to the plaintiff below, the Bank of Hutchinson, on certain sheep and other property, to secure a loan for \$175. July 10, 1885, Reeder gave a mortgage to the First National Bank of Newton on sheep for \$500, to secure a claim for \$500. The mortgage to the plaintiff below, December 1, 1884, was recorded in Harvey county, December 3, 1884. The mortgage to the Bank of Burton was recorded in Harvey county, March 28, 1885. The mortgage for \$175 to the Bank of Hutchinson was recorded in Harvey county, May 21, 1885. The mortgage to the Bank of Newton was filed for record July 10, 1885, in Harvey county, Kan. On the 29th day of June, 1885, Reeder gave the plaintiff below a renewal note and mortgage, renewing the two notes for \$500 and \$175 with \$25 added to the latter note, covering the same sheep included in the mortgage of December 1, 1884, with their increase. This mortgage was recorded in Harvey county June 30, 1885. Reeder lived in Harvey county, and the sheep were kept there. The first question discussed in the brief of the plaintiffs in error is that the petition of the plaintiff below does not state a cause of action. They say that the petition fails to show that the indebtedness between the plaintiff below and Reeder, the mortgagor, was ever judicially ascertained, and the petition does not make Reeder a party to the suit. We have discussed this question in the case of *Howard v. Burns*, ante, 981, (decided at this term,) and cited authorities covering the question, and now hold in this case that this objection is not good, upon the strength of that case, and the authorities there cited. The second prop-

osition of the plaintiffs is that the renewal affidavit attached to the mortgage of December 1, 1884, is not sufficient, and therefore the said mortgage expired at the end of the year from its date. We do not care to discuss the sufficiency of the affidavit, as we believe with the trial judge that, under the circumstances of this case, the renewal affidavit is not a material matter. The affidavit could only be material in case there were subsequent purchasers, or mortgagees in good faith. But there are no subsequent purchasers and no subsequent mortgagees in good faith—*First*. Because all the mortgagees had full knowledge of the mortgages of the plaintiff below, and of the claims they secured. They each knew that the claims secured by such mortgages were not paid in whole or in part. In *Gregory v. Thomas*, 20 Wend. 17, Mr. Justice Cowen says: "To say that a man takes in good faith when he acts with notice, and of course under conscious hostility to another, who has before taken a similar title, would be a legal solecism. The object of the statute here is that of all the other registry acts,—to prevent imposition upon subsequent purchasers and mortgagees, who must many times govern themselves by appearances. When everything is actually explained to them, they have the best kind of notice, and must be holden to take subject to prior incumbrance." *Second*. Because the language of the statute, (paragraph 3905, Gen. St. 1889,) "every mortgage so filed shall be void as against the creditors of the person making the same, or against subsequent purchasers or mortgagees in good faith, after the expiration of one year after the filing thereof, unless, within 30 days next preceding the expiration of the term of one year from such filing, and each year thereafter, the mortgagee, his agent or attorney, shall make an affidavit, etc.," does not include intermediate purchasers or mortgagees, that is, purchasers or mortgagees who purchased, or whose mortgages were taken, intermediate the time of filing of such mortgage and the end of the year during which it remains in force without the renewal affidavit, but means only purchasers and mortgagees who purchased or took their mortgages after the expiration of the year, and after it became necessary to file a renewal affidavit to continue the mortgage in force. This construction is based upon reason. He who purchases after the year has expired during which a mortgage remains in force has a right, in the absence of the renewal affidavit, to suppose the mortgage has been paid, even though not released on the record. But he who purchases before the year expires, takes with notice of the mortgage and the rights of the mortgagee under the same. If, therefore, the mortgagee fails at the end of the year, and within the time prescribed by the statute, to file his renewal affidavit, the purchaser is not affected adversely by the failure to file the affidavit, though the lien of the mortgage as to him remain intact. His rights are unaffected. They remain the same as before. He has invested nothing upon the strength of the failure of the mortgagee to file his renewal affidavit. At the time he purchased he

knew of the incumbrance. This knowledge continues, and he may not be said to be a purchaser in good faith. The same reasoning applies to intermediate mortgagees; but we are not left to a decision of this question solely upon reason or principle. The great weight of authority sustains this view.

In the case of *Meech v. Patchin*, 14 N. Y. 71, DENIO, C. J., says: "It was enacted by the third section of the Laws of 1833, p. 402, that mortgages thus filed should cease to be valid as against the creditors of the person making the same, or against subsequent purchasers or mortgagees in good faith, after the expiration of one year from the filing thereof, unless they should be refiled within 30 days before the expiration of the year, with a statement showing the same to be still on foot. A person about to deal with the possessor and apparent owner of chattels, could, by resorting to the proper clerk's office, ascertain whether he had mortgaged them to another party. Should he find a mortgage on file, he could not determine, without the help of the third section, whether the lien still continued, whatever length of time had elapsed since the filing; but, by means of the provision in that section, he could be certain that the mortgage had ceased to be a lien, if he found it had not been renewed within one year. If his examination was made within the year, he must proceed at his peril, or take other means to ascertain whether the mortgage remained a lien. When the plaintiffs in this case took their mortgage, the defendant's mortgage was on file, and they accordingly had the notice of it which the statute contemplated. The year from the time it was filed had not elapsed, and no default or want of diligence had, therefore, happened on the part of the defendant. The defendant's mortgage was in full vigor, and the plaintiffs' was taken subject to it. The care which the plaintiffs exercised to file their mortgage, and to preserve its validity by annually refileing a copy, was a suitable precaution against parties coming after them; but it had not, as I conceive, any effect against the defendant's prior mortgage. The priority of the respective mortgages was fixed as soon as the last one, that of the plaintiffs, had been executed. If the controversy had arisen within the year from the filing of the defendant's mortgage, there could not have been any pretense but that the defendant would have had the prior title. Their respective rights having become thus fixed, the diligence or want of diligence of either, as to preserving their liens against subsequent purchasers or mortgagees by refileing their respective mortgages, was of no importance as against each other. This seems to me the necessary construction of the statute, as well from its language as upon its general policy. Its language is: 'Every mortgage filed, etc., shall cease to be valid, etc., against subsequent purchasers or mortgagees, unless it shall, within 30 days before the expiration of the year, be again filed.' 'Subsequent,' I think, means after the time when it ought to be again filed to preserve its validity."

In *Dillingham v. Bolt*, 37 N. Y. 198, Justice PARKER says: "As against Parmelee, Everts & Co., who purchased before the expiration of the year from the first filing of the mortgage, no refiling with a statement was necessary. It was held in *Meech v. Patchin*, 14 N. Y. 71, that the omission to refile a chattel mortgage, pursuant to the third section of the act on that subject, (Laws of 1833, p. 402,) does not render it invalid against purchasers or mortgagees, intermediate the original filing and the ending of the year; and that the term 'subsequent,' in the provision in that section that 'every mortgage filed in pursuance of this act shall cease to be valid as against the creditors of the person making the same, or against subsequent purchasers or mortgagees in good faith, after the expiration of one year from the filing thereof, unless,' etc., means subsequent to the expiration of the year, that is, after the time of refiling has elapsed." The New York statute is like our own, so far as this question is concerned. In *Newman v. Tymeson*, 12 Wis. 448, the court says: "We think this was erroneous. The section referred to provides that a chattel mortgage, after being properly filed, shall cease to be valid as against the creditors of the mortgagor, or subsequent purchasers or mortgagees in good faith, unless, within 30 days next preceding the expiration of the year, the mortgagee shall make and annex to it an affidavit setting forth his interest, etc. The clear intent of this provision was that, in case of failure to make the affidavit, the mortgage should cease to be valid as against creditors who should thereafter seize it, (the property,) or purchasers who should thereafter purchase." "If property, covered by a chattel mortgage properly filed, is so taken and converted within the year after the filing as to give the mortgagee a good cause of action for such taking, it is not necessary in order to preserve his right to recover that the action should be commenced within the year from such filing, or that the mortgage should be renewed at the end of the year, as required by statute, to make it valid against subsequent purchasers or mortgagees." *Case v. Conroe*, 13 Wis. 31. Judge ORTON, delivering the opinion in *Lowe v. Wing*, 56 Wis. 33, 13 N. W. Rep. 892, says: "This court has followed the courts of New York in the construction of the above statute for the renewal of chattel mortgages, and has held that 'the clear intent of this provision was that, in case of failure to make the affidavit, the mortgage should cease to be valid as against creditors who should thereafter seize it, (the property,) or purchasers who should thereafter purchase it.'" The statute of Wisconsin is the same as ours, except that the limit is two years instead of one. In *Edson v. Newell*, 14 Minn. 228, (Gil. 167,) the court says: "In this case more than one year elapsed between the filing of this mortgage and the commencement of this action, and, no copy and statement having been filed as provided for in the statute quoted, the counsel for the defendant insists that the plaintiff cannot recover because the mortgage was not, as against the attaching

creditors, in life at the time of the commencement of this action; in other words, because the plaintiff had ceased to have any rights under the mortgage, as against such attaching creditors. But in our opinion this position cannot be sustained. The goods were taken and sold by the defendant before the expiration of one year from the filing of the mortgage. Whether since the conversion he has kept his mortgage on foot, by complying with the statute, is unimportant." Again, referring to *Corbin v. Kincaid*, 33 Kan. 652, 7 Pac. Rep. 145, Judge VALENTINE says: "And all this transpired within less than one year after the execution of the plaintiff's mortgage, and at a time when no one would claim or even pretend that any renewal affidavit was necessary. A cause of action in replevin or conversion then arose in favor of the plaintiff and against the defendant, and that cause of action was not satisfied, annulled, or barred by any failure on the part of the plaintiff to afterwards file a renewal affidavit." Finally, the Missouri court has construed our statute, and Judge HOUGH, in *Frank v. Playter*, 73 Mo. 672, says: "The law of Kansas, in regard to mortgages of personal property, provides that every such mortgage shall be void as against creditors of the person making the same, or against subsequent purchasers or mortgagees in good faith, after the expiration of one year after the filing thereof, unless within 30 days next preceding the expiration of the term of one year from such filing, and each year thereafter, the mortgagee, his agent or attorney, shall make an affidavit," etc. The object of the statute requiring this affidavit to be made, was to keep the public informed from time to time as to the condition of the title of incumbered personal property, and to furnish some reliable record evidence by which parties might be guided in dealing with such property. This statute, by its terms, can only be invoked by subsequent purchasers or mortgagees in good faith, that is, by those who become such after the period at which such affidavit should have been made; and creditors of the mortgagor manifestly cannot claim the benefit of its provisions when their claims are asserted before the expiration of the time prescribed. The plaintiff, however, is neither a subsequent purchaser or mortgagee nor is he a creditor. It is true he claims through those who were creditors of the mortgagor, but those creditors had asserted their claims, and he had purchased from those claiming under the proceedings instituted by them, while the mortgage was undoubtedly valid, and before any affidavit was required to be filed. The plaintiff having acquired his rights, and brought his suit, while the mortgage was a valid and subsisting incumbrance, against him and those under whom he claimed, his right to recover cannot be aided by the subsequent failure of the defendants to make the affidavit required by law. The rights of the parties had become fixed before the default occurred. Besides, the property had been reduced to possession by the defendants within the year, and that of itself dis-

pensed with the necessity of any affidavit. This view is supported by decisions in New York and Minnesota, where similar statutes are in force. *Meech v. Patchin*, 14 N. Y. 71; *Dillingham v. Bolt*, 37 N. Y. 198; *Ely v. Carnley*, 19 N. Y. 496; *Porter v. Parmley*, 52 N. Y. 185; *Edson v. Newell*, 14 Minn. 228 (Gil. 167.)

It will be remembered that the first mortgage of the plaintiff below was made December 1, 1884; that all the other mortgages were made during the first half of 1885, and the sheep were taken possession of by Howard and the Bank of Burron in the fall of 1885, and within a year from the execution and filing of the first mortgage of the plaintiff below. The right of action for the conversion of the sheep in favor of the plaintiff below, and against the defendant below, accrued during the year from the filing of the mortgage of December 1, 1884. It follows then that, under the law of Corbin v. Kincaid, 33 Kan. 649, 7 Pac. Rep. 145, the right of action could not be disturbed by a failure to file the renewal affidavit. The plaintiff claims that the mortgage given by Reeder to the Hutchinson Bank, December 1, 1884, was satisfied by the mortgage given June 29, 1885, the latter mortgage being given to secure the same debt, and complains of instruction No. 11, given by the court. We think instruction No. 11 is correct, and, taken with the thirteenth instruction, gives all the law on the subject. We do not think the taking of a second mortgage to secure the same debt secured by a first mortgage, upon a renewal of the note secured by the first mortgage, and upon the same property, operates as a satisfaction and release in law of the first mortgage. "The taking of a new note and mortgage on personal property to secure an indebtedness already evidenced by a note, and secured by a mortgage on the same property, does not, even when the first note and mortgage are canceled, operate to discharge the lien of such first mortgage." *Packard v. Kingman*, 11 Iowa, 219. "Nothing but payment in fact of the debt, or the release of the mortgage, will discharge a mortgage." *Crosby v. Chase*, 17 Me. 369; *Hadlock v. Bulfinch*, 31 Me. 246. In *Gregory v. Thomas*, 20 Wend. 19, the court says: "But it is said that the defendant's second mortgage extinguished the first; and consequently, being put to stand exclusively on the last, which was in 1835, the plaintiff's mortgage of the previous September is let in. The argument is against all the books, ancient and modern. Adjudications of several centuries upon such cases, of every variety of form, in England, in this state, and in neighboring states, settle the proposition that a subsequent security for a debt of equal degree with a former, for the same debt, will not, by operation of law, extinguish it." The plaintiff seems to think the defendant lost his rights by not proceeding upon his mortgage when the debt it secured became due. We do not think so. There is no limit to the life-time of the mortgage, except such as is put upon it by the statute; otherwise, it will remain until the debt is paid or barred. *Morse v. Clayton*, 13 Smedes & M. 381. We

are satisfied no reversible error exists in the record in this case, and therefore recommend that the judgment of the district court be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

#### STATE V. ESTEP.

(*Supreme Court of Kansas. June 7, 1890.*)

##### MURDER—EVIDENCE—INSTRUCTIONS.

1. The evidence examined, and the verdict of murder in the second degree held to be sustained by sufficient evidence.

2. The trial court is not required to give instructions upon an inferior degree of crime necessarily included in the one charged, unless the evidence warrants it. *State v. Mowry*, 37 Kan. 369, 15 Pac. Rep. 282.

3. Where the court properly instructs the jury, and omits some instructions which might properly have been given, but no request was made for such instructions, no reversible error is committed. *State v. Peterson*, 38 Kan. 204, 16 Pac. Rep. 263.

(*Syllabus by Green, C.*)

Commissioners' decision. Error from district court, Norton county; *LOUIS K. PRATT*, Judge.

*Hamilton & Cannon and E. A. Austin*, for appellant. *L. B. Kellogg*, Atty. Gen., and *L. H. Thompson*, for appellee.

GREEN, C. On the 9th day of May, 1889, an information was filed in the district court of Norton county against John Estep for murder in the first degree, charging him with having killed and murdered John Ruff, on the 29th day of January, 1889, in said county. The case was tried at the May term of the court following, and resulted in a verdict of guilty of murder in the second degree. A motion for a new trial was made and overruled, and exceptions taken, and the defendant was sentenced to imprisonment in the penitentiary for 20 years. From this judgment and sentence he appeals to this court. The record discloses the following facts: John Ruff and the defendant were playing cards for a dollar a game on the inside of a curtained room in the north-east corner of a billiard hall in Lenora, in said county, between 10 and 11 o'clock at night, on January 29, 1889. A witness by the name of Clark was watching the game. The defendant had been losing in the game, which had been in progress some time, and finally a dispute arose between Ruff and the defendant as to who won the last game. Both claimed it. Ruff offered to compromise, but the defendant demanded all the money, or none. Both became angry, and jumped up from their chairs. The defendant drew a revolver. Ruff then told the defendant he had better put that revolver away. The defendant then deliberately aimed the revolver at Ruff and fired. At the time the fatal shot was fired, Ruff and the defendant were six or eight feet apart. After the shooting, the witness ran out, and as he came near the door looked over his shoulder, and saw Ruff outside the curtain running towards the defendant with something in his hand. Thought it was a spittoon. The defendant stood on the outside of the curtain near or behind a

billiard table and near the wall, and, as the witness came to the door, he heard another shot fired, and saw the flash. He then ran out and gave the alarm. There was no light in the hall, except the one in the curtained room. The spittoons used in the hall were large wooden boxes, 16 inches by 16 inches, made of 6-inch lumber, and filled with sand and coal ashes. There were but two shots fired, the first being inside the curtained room. The body of the deceased was found near the east side of the billiard table. Another witness testified that he examined the billiard hall early the next morning, and found no bullet holes in the calico curtains surrounding the room, but found a bullet mark on the floor, making a long mark, a little behind the stove, and after striking the floor glanced and struck the wainscoting, where the ball was found by the witness. A mark was also found on the wainscoting behind the billiard table, indicating that something had struck the wainscoting, taking off the paint, and making a dent therein. This witness also found a wooden spittoon lying a little distance therefrom turned upside down, and the contents partly spilled out, and saw dirt on the floor near the stove, and on top of the pool and billiard tables, and scattered along to where the spittoon was found, and also saw some dirt on top of the wainscoting where the dent was made. A *post-mortem* examination was made of the body of John Ruff, disclosing the fact that a bullet had entered the body just at the top of the armpit in front of the left side near the heart, and cut off some of the branches of the pulmonary artery within one inch of the heart, passed through the end of the front lobe of the left lung, and struck the lower part of the fifth dorsal vertebra. The ball was located in the lower third of the fifth dorsal vertebra. The autopsy was conducted some 30 or 40 hours after the shooting. There was but one witness to the tragedy. The theory advanced by the appellant in this case is that the deceased could not have moved after receiving the fatal shot, and this theory may be supported in part by the expert testimony in this case. But the witness who was present, and saw the transaction between the deceased and the defendant, states positively that he saw the defendant shoot the deceased; that there were but two shots fired, and but one took effect. The court below held to the theory that the shot which killed Ruff was fired in the curtained room, and there is sufficient evidence to support this finding.

We have carefully examined the evidence in this case, and do not feel at liberty to reject the testimony of the witness who saw the transaction, and say that the theory of the appellant is correct, based upon the expert testimony. There was no motive for the witness, Clark, to misstate the facts. The jury and the trial court have passed upon the testimony, and we do not feel that we would be justified in setting aside the verdict on the claim made by the appellant that it is not supported by sufficient evidence. We are inclined to the opinion that there was suf-

ficient evidence to support the verdict of the jury rendered in this case.

A further objection is made to the instructions given by the court below that the court did not sufficiently charge the jury upon all the degrees of the crime of homicide, inferior to and included in the one charged in the information. The court instructed the jury upon murder in the first and second degrees, and also upon the law of manslaughter in the third degree, and also as to what constituted an assault. We think there was no testimony tending to show that the defendant was guilty of manslaughter in either the first or second degrees, or the fourth degree, and that therefore instructions were unnecessary, in those degrees of manslaughter. This court has repeatedly said that instructions should conform to the testimony of the case, and that no instructions should be given which would be inapplicable to the facts as disclosed in the evidence, as such instructions might mislead and confuse the jury. *State v. Rhea*, 25 Kan. 576; *State v. Hendricks*, 32 Kan. 559, 4 Pac. Rep. 1050; *State v. Mize*, 36 Kan. 187, 13 Pac. Rep. 1; *State v. Mowry*, 37 Kan. 369, 15 Pac. Rep. 282.

Another objection was made in the oral argument of this case that, in giving the degrees of murder, the court did not sufficiently define murder at the common law in connection with his instructions, but we do not think this position tenable. The court said: "By the statutes of the state of Kansas, we have two degrees of murder, the first and second, which I will hereafter define to you. At common law, there are no degrees of murder, and when you come to read the definition of murder in the first and second degrees in our statute, you will find it is important for you to know what constitutes murder at the common law, because you will observe that our statute uses the word 'murder' in its common-law sense, but provides that all murders committed deliberately and premeditatedly shall be of the first degree, and all other murders shall be of the second degree. Murder as defined by the common law is where a person of sound memory and discretion unlawfully and feloniously kills a human being against the peace and dignity of the state, with malice aforethought, either expressed or implied." Murder in the first degree is defined by the statutes of the state of Kansas as follows: "Every murder which shall be committed by the willful, deliberate, premeditated killing of a human being, of malice aforethought, without lawful excuse or justification, shall be deemed murder in the first degree." Murder in the second degree is defined by our statutes as follows: "Every murder which shall be committed purposely and maliciously, but without deliberation and premeditation, shall be deemed murder in the second degree." The court, in charging the jury, defined the degrees of murder in the language of the statute, and correctly instructed the jury as to what constituted murder at the common law. No further instructions were requested in behalf of the defendant on the trial. These instructions, we think, are correct, and were ap-



plicable to the facts as presented by the evidence in this case.

The point made by the defendant that the court did not instruct the jury as fully as should have been done, upon murder at the common law, is not good here, for the reason that no such instructions were asked by the defendant in the court below, and no error was committed by the trial court by its omission to give such instructions. *State v. Pfefferle*, 36 Kan. 96, 12 Pac. Rep. 406; *State v. Peterson*, 38 Kan. 211, 16 Pac. Rep. 263. Mr. Justice VALENTINE stated the rule in *State v. Peterson*, supra: "As a general rule where the court properly instructs the jury, except that it omits some matter which might properly be given, no available error is committed, unless the court has been properly requested to instruct with reference to such matters." We think the court gave the necessary instructions in this case, and, from an examination of the record as it has been presented to us, we see no ground for setting aside the judgment and sentence of the court below, and we therefore recommend an affirmance.

PER CURIAM. It is so ordered; all the justices concurring.

PEOPLE v. SMITH. (No. 20,709.)

(Supreme Court of California. Nov. 1, 1890.)

BURGLARY—INDICTMENT.

1. Under Pen Code Cal. § 459, making the entering of certain premises "with intent to commit grand or petit larceny, or any felony," burglary, as there is no other degree of larceny, it is not necessary that an information charge the degree of larceny with intent to commit which defendant entered the premises.

2. An information charging entrance with intent to commit larceny does not charge two offenses.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; JOHN F. FINN, Judge. *Alva E. Snow*, for appellant. *Geo. A. Johnson*, Atty. Gen., for the People.

FOOTE, C. The defendant was convicted of burglary, and appeals from the judgment rendered against him, and from an order refusing him a new trial. He demurred to the information on the grounds (1) that it did not conform substantially to the requirements of section 950, subd. 2; (2) that the facts stated do not constitute a public offense; (3) that more than one offense is charged. His demurrer was overruled. He then pleaded not guilty, and was convicted as charged. After verdict, he moved in arrest of judgment, on the same grounds as those contained in the demurrer. The motion was denied, as was also that for a new trial. As will be seen, according to the transcript, he did not state in which of the Codes "section 950, subd. 2," was contained, but presumably the court treated it as that in the Penal Code, or it may be that by clerical error it is omitted from the transcript.

The point most insisted upon by the defendant for a reversal of the judgment and order seems to be, as he claims, that the

information did not state the degree of larceny with intent to commit which he feloniously and burglariously entered the premises he is charged to have burglarized. His view of the law seems to be that the information should have stated whether he entered with intent to commit grand or petit larceny. He is charged to have feloniously entered, with intent to commit larceny. Larceny is a specific offense, (Pen. Code, § 484.) just as murder is, (Id. § 187;) but there are degrees of each under our statutes, (Id. §§ 189, 486-488.) Section 459 of the Penal Code makes the entering of certain premises as here involved, "with intent to commit grand or petit larceny, or any felony," burglary; that is to say, the entrance with intent to commit the specific crime of larceny is burglary, whether the degree of larceny be grand or petit. Grand and petit are the only degrees of larceny. Id. § 486. It could make no difference to the defendant whether the proof showed him guilty of the intent to commit grand or petit larceny. He would be just as guilty of burglary if he entered with intent to commit the one as the other. He would still have entered with the intent to commit the specific crime of larceny, the degree of the specific offense being immaterial. Therefore, it is plain that the defendant was fully and clearly informed of the nature of the charge against him, which is all that was necessary as to the matter under discussion; and we can perceive no respect in which the defendant's rights have been prejudiced, as claimed.

The case cited of *People v. Nelson*, 58 Cal. 104, is not in point. There the information did not state that the defendant had entered with intent to commit larceny. It stated that he had entered with intent to commit a felony, but not specifying what felony. Here he was notified that he was accused of entering with intent to commit the specific crime of larceny, it being immaterial to the commission of burglary which of the two his intent was to commit. If he intended to commit one of the degrees of larceny, either grand or petit.

In *People v. Henry*, 77 Cal. 445, 19 Pac. Rep. 830, it was held that an information charging the entrance with intent to commit the crime of larceny was not an allegation of the commission of two offenses, so that the point made here by the defendant upon that head is untenable. The evidence of the recent possession of the stolen property, together with the defendant's statements and the circumstances surrounding the transaction, were sufficient to warrant the jury in their verdict. *People v. Flynn*, 73 Cal. 511, 15 Pac. Rep. 102. There is no reason given in the defendant's points and authorities why the instructions were not correct, and we perceive no error therein, although such is alleged. Perceiving no prejudicial error, we advise that the judgment and orders be affirmed.

We concur: BELCHER, C. C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and orders are affirmed.

PARKER v. LARSEN. (No. 12,820.)

(Supreme Court of California. Oct. 30, 1890.)

WATERS AND WATER-COURSES—INJURY FROM IRRIGATION DITCH.

A land-owner who permits the water used in irrigating his fields to percolate through a ditch, and saturate his neighbor's land, is liable for the damages, and may be restrained from continuing the injury.

Department 2. Commissioners' decision. Appeal from superior court, Santa Clara county; D. BELDEN, Judge.

C. D. Wright, for appellant. T. H. Laine, for respondent.

BELCHER, C. C. This is an action for damages, and an injunction. The court below gave judgment for the plaintiff, and the defendant appeals on the judgment roll. The facts found are in substance as follows: The plaintiff and defendant own adjoining tracts of land in Santa Clara county; the plaintiff's tract lying north of defendant's. Both tracts are adapted to, and are used for, agricultural purposes. They are nearly level, but there is sufficient slope so that water will flow from the land of defendant to and upon the land of plaintiff. The defendant raises alfalfa on his tract, and, in order to do so, it is necessary that the ground be irrigated two or three times during the summer. He has two artesian wells upon the upper end of the tract, which are so capped that the water can be shut off, or permitted to flow, at his pleasure. He has also excavated along the north side of his land, and two or three feet from the plaintiff's south line, a shallow ditch, which is several hundred feet long, and has no outlet or drain from either end. In excavating this ditch the earth was thrown up on the north side thereof, that is, between the ditch and the plaintiff's line. When he wishes to irrigate his land, he removes the caps and lets the water flow over the surface for 10 days or 2 weeks, and when it is sufficiently irrigated the wells are again closed. The excess of water not absorbed and held by the soil flows into the ditch above mentioned, and forms a pool some two or three hundred feet in length, and some 6 or 10 inches in depth, and remains there for about a week, and until taken up by evaporation and percolation. Upon the west side of defendant's tract is a lane, and upon the side of it a ditch, much lower than his land, into which at a very small expense, and with little inconvenience, he could drain the water from his ditch, and probably, prevent any injury to plaintiff. During the last two or three years, and two or three times each summer, defendant has irrigated his land in the manner above described, and on each of these occasions the water has accumulated, as above stated, and has slowly percolated beneath the surface, and through the embankment into the plaintiff's land, and has saturated the soil to a considerable distance, and to the extent of three acres, which has thereby been made wholly useless for any purpose of ordinary husbandry. And during this period, upon one or more occasions, the water from these wells has flowed over the

top of the embankment, and thence upon the surface of the plaintiff's field. The damage and injury to plaintiff's land, from these percolations, is \$100. The defendant, in so running and using said water, and permitting it to accumulate upon the north line of his field, was not actuated by any malice or desire to injure plaintiff, but it was done for the purpose of fully utilizing the whole of his field in growing the crop of alfalfa. And, as conclusions of law, the court found that the plaintiff was entitled to a judgment for \$100 damages, and to an injunction restraining the defendant from permitting the water from his wells to flow to and accumulate in the ditch along the north line of his land. And judgment was so entered. From the foregoing statement of the facts, it is manifest that the plaintiff was entitled to the relief which he obtained. The water which did the injury to plaintiff was not a natural stream flowing across defendant's land, but was brought upon the land by artificial means. And the rule is general that, where one brings a foreign substance on his land, he must take care of it and not permit it to injure his neighbor. The law upon this subject is tersely expressed in the maxim, *sic utere tuo ut alienum non laedas*. We think the judgment should be affirmed, and so advise.

We concur VANCLIEF, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

ROSENTHAL *et al.* v. KAHN *et al.*

(Supreme Court of Oregon. Oct. 27, 1890.)

SALE—WHEN TITLE PASSES.

1. Ordinarily, where there is a sale of goods by number, weight, or measure, at so much a piece, a pound, a cord, or a bushel, it is necessary, in the absence of evidence showing a different intention, that the things should be counted, weighed, or measured before the price to be paid can be ascertained. Before this is done, the sale is not so consummate and perfect as absolutely to change the property, but the goods still remain at the risk of the vendor.

2. Where R. agreed in writing to furnish K. 2,900 cords, more or less, of good, sound, merchantable fir-wood, at the rate of \$1.90 per cord, on board cars, at or between Clarno or Fairview, said wood to be measured and received by the quartermaster at Walla Walla, W.T., held, that the title to the wood did not pass to K. until received and measured by the quartermaster at Walla Walla.

(Syllabus by the Court.)

Appeal from circuit court, Multnomah county; E. D. SHATTUCK, Judge.

On April 30, 1888, the parties to this action entered into the following contract in writing: "Portland, Oregon, April 30, 1888. Know all men by these presents that Messrs. Rosenthal Bros., parties of the first part, and J. Kahn, of Portland, Oregon, party of the second part, witnesseth: That the said party of the first part agrees to furnish the said party of the second part twenty-nine hundred (2,900) cords of good, sound, merchantable fir-wood, more or less, said wood to be four (4) feet in length, and each cord +

contain one hundred and twenty-eight (128) cubic feet, at the rate of one 90-100 (\$1.90) dollars per cord, on board cars, at or between Clarnie and Fairview, said wood to be received and measured by the quartermaster, U. S. A., at Walla Walla, W.T.; and the said party of the second part agreed to advance the said party of the first part one 25-100 (\$1.25) dollars per cord for all wood delivered at any side of slide track, on or before July 1st, 1888, and the balance to be paid for when measured and received by the quartermaster at Walla Walla, W.T.; all wood to be at the risk of the said party of the first part until delivered to O. R. & N. Co. on board cars. ROSENTHAL BROS. JACOB KAHN. Witness: EDW. P. PARKE. H. N. PATTED." This action is brought to recover the contract price for wood delivered under this contract; plaintiffs claiming and alleging that they delivered to defendants, as provided in said contract, 1,392½ cords of wood, for which they have received \$1,720, and no more, leaving a balance due them of \$924.80, for which they ask judgment. The defendants claim that plaintiffs only delivered to them 1,114 cords, and no more, and that the balance is the sum of \$396.66, which is more than offset by matters alleged in the answer by way of counter-claim. A trial was had in the court below, which resulted in a verdict and judgment in favor of plaintiffs for the sum of \$854.30, from which this appeal is taken.

*Dolph, Bellinger, Mallory & Simon*, for appellants. *C. J. McDougall*, for respondents.

BEAN, J., (after stating the facts as above.) The question presented on the record in this case for our consideration is whether, upon the delivery of the wood on board the cars at the place designated in the contract, the sale became absolute, and the title vested in defendants, or was the sale conditional until the wood was received and measured by the quartermaster at Walla Walla. Upon this question, the court below instructed the jury as follows: "Under the contract set out in the pleadings in this case, it was not the business of plaintiffs to procure any shipping receipt or other paper from the railroad company for the purpose of showing the amount of wood which they had placed upon the cars when loaded. It was defendant's business to see that shipping receipts were properly made out if they wanted them made out at all. That was something with which the plaintiffs had nothing to do. When they put the wood on the cars, they had nothing more to do with it. It was then delivered to the defendants. Under this contract, the wood was at the risk of defendants from the time it was put on the cars, so far as concerns any loss which might result from railroad accident, fire, or theft; and, after it was placed upon the cars, their liability ended. They had nothing more to do with it, or responsibility for it. The giving of each of these instructions is assigned as error. The contention of plaintiffs is that, as soon as they delivered the wood on board the cars of the Oregon Railway & Navigation Company, their duty was done,

and they were under no obligations to do anything further under the contract, and the property in the wood immediately vested in the defendants. The act of measuring the wood by the quartermaster, at Walla Walla, was only the means of ascertaining the quantity, in order that the amount defendants were to pay could be computed or determined, and was in no way essential to a change in the title. The defendants, on the other hand, claim that the receipt and measurement of the wood by the quartermaster was a prerequisite to the consummation of the sale, and until it was done, the title did not pass to them.

It may be stated as a general rule that when some act remains to be done, in relation to the property, which is the subject of the sale, and there is no evidence to show any intention of the parties to make an absolute and complete sale, the performance of such act is a prerequisite to a consummation of the contract, and, until it is performed, the title to the property does not pass to the vendee; as where there is a sale of the goods by number, weight, or measure, at so much apiece, cord, or bushel, it is necessary, in the absence of evidence showing a different intention, that the things should be counted, measured, or weighed before the price or consideration to be paid can be ascertained. Before this is done, the sale is not so consummate and perfect as absolutely to change the property, but the goods still remain at the risk of the vendor. *Riddle v. Varum*, 20 Pick. 289; *Wilkinson v. Holiday*, 33 Mich. 386; *Benj. Sales*, § 319; *Baker, Sales*, § 299; *Fuller v. Bean*, 34 N. H. 290; *Stone v. Peacock*, 35 Me. 388; *Graff v. Fitch*, 58 Ill. 373; *Gibbs v. Benjamin*, 45 Vt. 124. *Blackburn*, in his work on *Sales*, states the rule as follows: "When anything remains to be done to the goods, for the purpose of ascertaining the price, as by weighing or measuring, or testing the goods, when the price is to depend on the quantity or quality of the goods, the performance of these things, also, shall be a condition precedent to the transfer of the property, although the individual goods be ascertained, and they are in the state in which they ought to be accepted." *Blackb. Sales*, p. 151. To this Mr. Benjamin adds another, as follows: "When the buyer is by the contract bound to do anything as a condition, either precedent or concurrent, on which the passing of the property depends, the property will not pass until the conditions be fulfilled, even though the goods may have been actually delivered into the possession of the buyer." *Benj. Sales*, § 320. "The principle is well settled," says *REDFIELD, J.*, in the case of *Gibbs v. Benjamin*, *supra*, "and uniform in all the cases, that, when anything remains to be done by either or both of the parties precedent to the delivery, the title does not pass. And so inflexible is the rule that, when the property has been delivered, if anything remains to be done by the terms of the contract before the sale is complete, the property still remains in the vendor. The contract must be executed to effect a complete sale, and nothing further to be done to ascertain the quantity or quality or value of the property."

Where the question arises under the statute of frauds, or the rights of creditors do not intervene, the question whether a sale is complete or only executory must usually be determined on the intention of the parties, to be ascertained from the contract, the subject-matter, and the surrounding circumstances. The parties may settle the matter by the express words of the contract, but, if they fail to do so, we must determine, under the rules of law, what their intention was; and, when this is ascertained, it must govern and control. If the goods sued on are sufficiently designated, so that no question can arise as to the thing intended, it has been held not absolutely necessary that the goods should be in a deliverable condition, or that the quantity or quality, when the price depends upon either or both, should be determined. All these circumstances have an important bearing in arriving at the intention of the parties, but no one of them, or all combined, are conclusive. *Lingham v. Eggleston*, 27 Mich. 324; *Hatch v. Oil Co.*, 100 U. S. 131; *Callaghan v. Myers*, 89 Ill. 566; *Benj. Sales*, 239. It is not disputed that when there has been a complete delivery of the property, in accordance with the terms of the contract of sale, and nothing remains to be done by either of the parties in relation to the property to effect the transfer, the title passes, although there remains something to be done in order to ascertain the total value of the goods, at the value specified in the contract. *Burrows v. Whitaker*, 71 N. Y. 291; *Graff v. Fitch*, 58 Ill. 373.

There is also a line of authorities which hold that, although a large and unknown quantity of goods may be sold by the foot, pound, or yard, yet if the vendor is not bound to weigh or measure before delivery, but delivers the whole to the buyer, the mere fact that the precise quantity is not then known, and so the whole price ascertained, does not prevent the title from passing. These cases, however, proceed largely upon the ground that the particular contract did not require that the articles should be weighed or counted before the title should pass. It is simply a question of the intention of the parties. *Riddle v. Varnum*, 20 Pick. 280; *Benj. Sales*, 267. But when the goods are to be weighed or measured, in order to ascertain the quality or quantity, unless it appears that the intention of the parties was otherwise, the title will not ordinarily pass until such measuring or weighing is done. It is not important who is to do the weighing or measuring, whether the vendor or buyer, or some third party, except as that fact may indicate the intention of the parties as to the time the title shall pass. Thus in *Ward v. Shaw*, 7 Wend. 404, W. sold to C. a pair of cattle, which C. was to take into his possession, slaughter them, take the quarters to market, weigh them, and pay \$7.50 for each 100 weight. Immediately after C. took possession, his creditors attached the cattle as his, but the title was held not to pass before the slaughtering and weighing, things to be done by the vendee. Applying these rules to the contract in suit, we are clearly of the opinion that the title

to the wood did not pass to the defendants until it was received and measured by the quartermaster at Walla Walla. This agreement, being in writing, must be held to contain all the terms of the contract, and the court must so interpret it as to carry out the intention of the parties as nearly as such intention can be determined, in the light of the contract, the subject-matter, and the surrounding circumstances.

The pleadings admit that the wood was contracted for by defendants to be applied in fulfilling a contract which they had for supplying wood at the barracks at Walla Walla for the use of the United States; and that the plaintiff knew that such was the purpose for which defendants desired the wood at the time they entered into the contract, which explains the provisions of the contract, providing that the wood should be received and measured by the quartermaster at Walla Walla, he, no doubt, being the person whose duty it was to receive and measure the wood defendants were to deliver under their contract with the government. Under this contract, plaintiffs agreed to furnish the defendants 2,900 cords of good, sound, merchantable fir-wood, more or less, at the rate of \$1.90 per cord, on board the cars at or between Clarnie and Fairview, to be received and measured by the quartermaster at Walla Walla. Here the price is stipulated in the contract for each cord, but the quantity, more or less, agreed to be furnished as provided in the contract is to be ascertained by the quartermaster. He, by this contract, is the person agreed upon by the parties to measure and ascertain the quantity of wood. As already shown, a contract is not executed, and a complete sale effected, while anything remains to be done to ascertain the quality or quantity of the thing sold, when the sale is by weight or measurement, unless a different intention is clearly shown. The number of cords of wood stipulated to be furnished in the contract is to be ascertained and determined by measurement, so that, after the wood was put aboard of the cars, something yet remained to be done to complete the conditions of the sale. Some subsequent acts were to be done by the quartermaster, acting by force of this contract, in order to ascertain the quantity of wood sold, and the amount defendants were liable to pay therefor. The defendants made no purchase of the wood, as it was from time to time delivered aboard of the car; nor were they bound to take all the wood so delivered, but only such as fulfilled the terms of the contract. The wood was yet to be measured, in order to ascertain this fact; and, until so measured, the title did not vest in them. So inflexible is this principle that, unless it distinctly appears that it was the intention of the parties to treat the sale as complete before the ascertainment of the quantity, this is regarded as a condition precedent to the passing of the title. Several cases were cited by respondents' counsel to the effect that, when there is a valid contract of sale, a delivery to a common carrier, according to the terms of the contract, vests the title to the property in

the buyer. These were cases where goods had been purchased to be shipped by a common carrier, and nothing remained to be done by either of the parties in relation to the goods to effect a transfer of the title, and are not applicable to the case under consideration. It follows, therefore, that the judgment must be reversed, and the case remanded for a new trial.

HICKLIN v. MCCLEAR.

(*Supreme Court of Oregon. Oct. 27, 1890.*)

VACATING JUDGMENT—EXCUSABLE NEGLECT.

1. The neglect of a party or his attorneys, under the facts as presented by this record, to inform himself of the recitals in a deed of conveyance by which he claims title, and which he offers in evidence, is not such "excusable neglect" as would warrant the court, in the exercise of the discretion conferred on it, to open a judgment under section 102, Hill's Ann. Code.

2. To justify the interference in any such case an abuse of discretion must be shown.

(*Syllabus by the Court.*)

Appeal from circuit court, Multnomah county; E. D. SHATTUCK, Judge.

This is an appeal from an order of the circuit court refusing to relieve the defendant and appellant from a payment of a judgment recovered of him by the plaintiff and respondent, wherein respondent was adjudged to be the owner of certain real property in controversy in an action of ejectment brought by respondent against the appellant to recover certain town lots, etc. The cause was heard by the court by consent without a jury, and it thereafter made and filed findings of fact and conclusions of law, from which a judgment was rendered in favor of plaintiff, declaring him to be the owner of said property, and entitled to the possession of the same, and from which judgment the defendant then appealed to this court, where said judgment was affirmed. Thereafter, and within one year, the defendant filed a petition in the circuit court, asking to be relieved from said judgment, for the reason that the same was obtained through the mistake, inadvertence, surprise, and excusable neglect of the petitioner and his attorneys. The petition upon due notice given was heard by the court, considered and denied, and it thereupon made and filed the findings of fact and conclusions of law, upon which judgment was rendered thereon, and from which the defendant appeals to this court.

Henry Wagner and J. E. Stoddard, for appellant. John H. Hall, for respondent.

LORD, J., (*after stating the facts as above.*) The mistake or excusable neglect alleged was an omission on the part of counsel for the defendant to ask the lower court to pass upon an exception in a certain one of the deeds offered by them, and received in evidence, to establish the title of the defendant. It is claimed, by reason of this omission on their part, the defendant was deprived of the judgment in ejectment of his one-fourth interest in the lots, which otherwise would have been excluded from such judgment. The excuse for this omission is that the record of title in

involved in the action of ejectment was voluminous, and complicated, and the exception in the deed referred to overlooked by them, and hence included in the judgment for the whole title rendered in that action. Under the Code, the court may, in its discretion, and upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment or order, or other proceeding taken against him, through his mistake, inadvertence, surprise, or excusable neglect. Hill's Code, § 102. The court below found "that on the said trial the attorneys for the defendant did not claim or pretend that the plaintiff did not take by his deeds aforesaid (if he took any interest whatever) the whole estate, and every part thereof, in said lots, and did not claim, nor pretend to claim, that the chain of title which plaintiff, Hicklin, relied upon failed to convey the one-fourth interest referred to in the petition, if any interest was conveyed thereby;" and, further, "that the attorneys for Hicklin, in a written brief, briefly discussed the effect and operation of the exception in the above-mentioned deed, etc., but, inasmuch as the attorneys for the defendant did not specifically claim that the plaintiff could not take under the deeds which he introduced more than a three-fourths interest, the court did not consider the point suggested by the brief of the plaintiff Hicklin's attorney, and did not pretend to construe the said exception in the deed of April 13, 1860, and assumed that the recital of lots and blocks sold by Love & Tibbets prior to April 16, 1858, was true, and that block three was one of those so sold." And, as a conclusion of law, found that the matter and things alleged and found did not constitute such surprise, inadvertence, or excusable neglect on the part of the defendant, McClear, and his attorneys as would authorize the court to grant the prayer of the petitioner, —and dismissed the petition. It will be noted that the deeds of the record were open to the inspection and in the possession of the defendant and his attorneys, and that the matter involved in the action was of that character which required that they should examine, ascertain, and know the rights of the defendant in the premises under the deeds, and in the action. More; that the attorneys for the plaintiff, in a written brief, discussed the operation and effect of the exception in the deed referred to, presumably claiming then, as now, that such exception did not exclude the right of the plaintiff to the whole title including the one-fourth interest, thus specifically attracting the attention of the attorneys for the defendant to the exception and the construction and effect claimed by them to be given to it; yet, despite all this, no attention was paid to the exception by the attorneys for the petitioner, nor any claim whatever made that the plaintiff did not take the interest now involved and sought to be excepted from the operation of the judgment. It would seem then that the attorneys for the defendant not only neglected or omitted to examine and acquaint themselves with the contents of the deed offered in evidence by them, and in support of their

title, but also, when their attention was invited to a brief discussion of the exception, they either disregarded it or considered it of too little importance to require an answer, or to require the court to pass upon it. Under these circumstances it is difficult to plant this case upon any tenable ground within the purview of the section of the Code cited. While these statutes are to be regarded as "remedial in their character, and intended to furnish a simple, speedy, and efficient means of relief in a worthy class of cases," they are not intended "to allow a party once having an ample opportunity to present his defense, or cause of action, to re-present it at some future time with such other features as a more mature reflection should happen to suggest." *Freem. Judgm.* §§106, 111.

It is true that some few cases may be which seem to infringe the principle of the absolute verity of judgments, and open them for purposes of doubtful legal propriety. In *Levy v. Joyce*, 1 Bosw. 624, a judgment was opened so as to permit a defendant to make certain proof which, by mistake, he had neglected to offer,—a conclusion that the court could not forbear saying had not been reached "without some hesitation." But the case at bar goes further, and invokes a relaxation of the principle which demands the exercise of reasonable diligence and vigilance in the conduct of an action or defense. It asks us to say that the neglect of a defendant or his attorneys, under the circumstances indicated, to inform himself of the recitals in a deed by which he asserts or claims title, and which he offers in evidence, is such neglect as is "excusable" within the purview of the statute; and that the refusal of the court thus to consider it was a gross abuse of the discretion confided to it. To avoid further comment, it is enough to say that we have been unable to find a case, nor have we been referred to any, which would warrant the lower court in the exercise of the discretion conferred upon it to vacate a judgment upon the facts as found and presented by this record, much less to justify us in interfering with its discretion when exercised, except a strong case of abuse is shown. The judgment must be affirmed.

WEST COAST LUMBER CO. v. APFIELD *et al.* (No. 13,788.)

(*Supreme Court of California*, Nov. 7, 1890.)

MECHANICS' LIENS—LEASED PREMISES—EVIDENCE—PARTIES.

1. Where a lease of land contains nothing to put third persons on notice that buildings to be erected thereon by the tenants will not inure to the landlord's benefit, and become a part of the realty, the landlord, who has stood by and seen the tenants erect a large and costly building on the land, without giving any notice under Code Civil Proc. Cal. § 1192, that he will not be responsible for the same, cannot be heard to say that the tenants have the right to remove the building at the expiration of their term, and thereby deprive material-men of their lien on his land for material furnished for the building.

2. In an action to foreclose a material-man's lien on both the land and the building, evidence of an intention by the tenants to remove the building at the expiration of their term is properly excluded as against the material-men, who

furnished the material without any notice of such intention.

3. Where the building was erected by the tenants as copartners, the executor of one of them, since deceased, is not a necessary defendant in an action to foreclose a material-man's lien, as the surviving partner is fully authorized to alone defend the partnership interest.

Department 1. Appeal from superior court, San Diego county; W. L. PIERCE, Judge.

*Geo. W. Hardacre and D. L. Withington*, for appellant. *Trippet & Neale, Huusaker & Britt*, and *C. F. Holland*, for respondents.

Fox, J. 1. Appellant is the owner in fee of Lot L, block 734, New San Diego. He leased the same for the term of five years to the defendant Apfield, who took one Newkirk into partnership with him, and they proceeded to erect a four-story building upon the lot, upon which divers liens were filed, for labor and materials, upon which suits were brought, four of which suits were consolidated and tried together, resulting in judgments in favor of the claimants, from which judgments the defendant Low appeals, also from an order denying his motion for new trial. The lease contains the following provision: "No buildings or improvements shall be removed until the taxes shall be fully paid, and until all rents and indebtedness has been paid. And, at the expiration of said term, the said party of the second part will quit and surrender the said premises in as good state and condition as reasonable use and wear thereof will permit, (damage by the elements alone excepted.)" The demised premises are described as being "all that real property," etc., "with the appurtenances," etc. There is no clause in the lease either reserving or granting to the lessee the right to remove any buildings or improvements which have been or may be erected upon the premises. But, from the first sentence of the clause above quoted, the appellant argues that the building erected by the lessee upon said lot is not an improvement to or upon the same, and that laborers and material-men, who furnish labor and material therefor, cannot, by reason thereof, acquire a lien upon his interest (the fee) in said land, the lease being a matter of public record in the office of the county recorder. To this the respondent makes the pertinent suggestion that it is this very improvement to his realty that enables him to realize \$100 per month rent therefor, for the term of the lease,—an amount which it could not command if the lot remained vacant. But assuming that the inference which appellant draws—that the building is subject to removal at the expiration of the lease—be true in fact, he is still protected by the terms of his lease, for it cannot be removed until all taxes, rents, and debts are paid. If, therefore, in order to protect his realty, he has to pay off these liens, the building, even under his theory of the case, cannot be removed until the money is repaid. But there is more than this of this lease. By its terms, he has demised all that there is of the "real property," with its appurtenances. That includes not only the land, but everything

that is affixed, incidental, or appurtenant to the land. Civil Code, § 658. That which is affixed includes that which is "imbedded into it, as in the case of walls; or permanently resting upon it, as in the case of buildings." Id. § 660. And that is deemed incidental or appurtenant to land which is by right used with the land for its benefit. Id. § 662. It is apparent that it was the erection of this building which gave to the otherwise vacant lot a rental value of more than a nominal amount. It was a large and substantial structure, not only apparently "permanently resting upon" the lot, but the proof shows that it was resting upon mud-sills "imbedded in it," and also that when completed it was "used with the land." To all appearance the lot and building was a single entity of "real property." Again, as we have before said, there was neither a reservation of right, nor a grant of right, to remove any buildings; but, on the contrary, there was an express covenant to surrender at the expiration of the term "in as good state and condition as reasonable use and wear thereof will permit, damage by the elements alone excepted." This at least was an express provision negating the right to remove. "A tenant for years, or at will, has no other rights to the property than such as are given to him by the agreement or instrument by which his tenancy is acquired, or by the last section." Id. § 820. The preceding section, being the one referred to as "the last section," gives him the right to "occupy the buildings, take the annual products of the soil, work mines and quarries open at the commencement of his tenancy." Nowhere does the Code give the right to remove buildings, unless that right is expressly granted or reserved in the instrument creating the tenancy, or the buildings are such, or so erected, as not to partake of the realty. "When a person affixes his property to the land of another, without an agreement permitting him to remove it, the thing affixed, except as provided in section ten hundred and nineteen, belongs to the owner of the land, unless he chooses to require the former to remove it." Id. § 1013. "A tenant may remove from the demised premises, any time during the continuance of his term, anything affixed thereto for purposes of trade, manufacture, or domestic use, if the removal can be affected without injury to the premises, unless the thing has, by the manner in which it is affixed, become an integral part of the premises." Id. § 1019. This would hardly authorize the removal of a four-story building erected to be used for stores, and as a lodging and boarding-house. It may be that the parties have not expressed in this lease what they had agreed upon beforehand, and understood and intended at the time, but, having reduced the same to writing, and executed the same, it supercedes all oral negotiations or stipulations concerning the subject-matter, which preceded or accompanied the execution of the instrument. Id. § 1625. If by mistake the parties have failed to express the intention in the making of the instrument, the appellant, upon proper showing of the fact, may have it revised and reformed;

but that he has not sought to do here, and he could not have it so done as to prejudice the rights of third persons, acquired in good faith and for value. Id. § 3399. Here, with the record showing that he was the owner in fee, with nothing to show, or to put third parties upon notice, that buildings erected thereon would not inure to his benefit, and become a part of the realty, with actual knowledge of the construction of the building, and without giving any notice, under section 1192, Code Civil Proc., that he would not be responsible for the same, the appellant has stood by and seen his tenants erect a large and costly building upon his lot. He cannot now be heard to say that the men who performed labor upon and furnished material for such building have no lien upon his lot therefor, because the building has not become a part of the realty, and is not an improvement upon his property. Possibly he would have been entitled to have the decree foreclosing the lien so framed as to have the leasehold interest of the tenant first sold, and his fee held liable only for deficiency, if there was any, but he asked for no such relief in the court below, and it is too late now to assign the failure to grant that relief as error upon which to reverse the judgment.

2. Appellant claims that it was error to exclude the evidence of the defendant Apfeld as to his intention in reference to a future removal of the building. While it is true that, as between the appellant and his lessee, the question of whether a building about to be erected would become a part of the realty or not would depend largely upon the intention of the parties, it is equally true that it would not depend upon the intention of one of the parties; nor would a secret intention on the part of both defeat the rights of third parties who acted without notice of such intention, and upon the faith of the rule established by law where no such intention existed. It was not, therefore, error to reject this evidence.

3. There was no error in refusing to continue the case and make Newkirk's executor a party. It was a partnership of Newkirk & Apfeld that erected this building. No judgment was sought against the estate of Newkirk, and the surviving partner alone was fully authorized to defend for the partnership interest. Besides, Newkirk's interest had already been assigned before his death, and his assignee was also a party to the action.

4. The objection to the lien of the West Coast Lumber Company, filed May 26th, is not well taken. It shows upon its face that the original charge was made against Newkirk alone, because the claimant did not know at that time that Apfeld was interested in the building, or a partner of Newkirk's, but that, before the claim of lien was filed, the company learned the fact, and the claim was filed against the firm. Defendant was not misled or prejudiced by reason of the claimant stating the whole fact in its notice of lien. The remaining objections to the claims of liens all go to the question of the time of filing, — whether the same were filed at the prop-



er time or not. The record is not very clear as to when this building was finally and fully completed. As we read it, the last of the liens was filed within the time required by law after the last work was done on the building.

On the other hand, some of them would seem to have been filed before all work had ceased, but not until the building was so nearly completed as that only "trivial imperfections" remained in the work. Under these circumstances, and in view of section 1187, Code Civil Proc., (as amended March 15, 1887,) we are not disposed to disturb the findings of the court on this point.

5. It is claimed that the court erred in finding that the building was constructed with the knowledge and consent of the appellant. The finding of consent was unnecessary, and may be treated as surplusage. The finding that it was done with his knowledge is in accordance with the admissions of the pleadings. Judgment and order affirmed.

WE CONCUR: PATERSON, J.; SHARPSTEIN, J.

35 Cal. 600

LOWREY v. HOGUE. (No. 13,779.)

(Supreme Court of California. Sept. 10, 1890.)

CRIMINAL LAW—CHANGE OF VENUE—SENTENCE.

1. Under Pen. Code Cal. § 1431, providing that "if the action or proceeding is in a justice's court a change of the place of trial may be had at any time before the trial commences: \* \* \*

(2) When it appears from affidavits that the defendant cannot have a fair and impartial trial, by reason of the prejudice of the citizens of the township, the cause must be transferred to a justice of a township where the same prejudice does not exist,"—the mere filing of an affidavit of prejudice does not make it the imperative duty of the justice to transfer the case, but it is for him to determine whether the facts set out in the affidavit show that a fair trial cannot be had by reason of prejudice.

2. Where a judgment provides that defendant be imprisoned for a certain time, and that he also be fined a certain amount, and that in default of payment of the fine he be imprisoned a certain additional period, the fact that the latter provision is void does not render the rest of the judgment void.

In bank. Writ of review to justice's court, city and county of San Francisco; S. L. HOGUE, Judge.

Justin Jacobs, for petitioner. W. D. Tupper, for respondent.

PATERSON, J. A complaint was filed in one of the justice's courts of the county of Fresno, charging the plaintiff with having committed the crime of battery. Prior to the time the case was set for trial, the plaintiff filed an affidavit in which he set forth that he could not have a fair and impartial trial by reason of the prejudice of the citizens of that township. The cause of such prejudice he alleged to be certain publications in the newspapers of the township with reference to the facts or purported facts of the case. A copy of the articles referred to was set forth in the affidavit. The justice denied the motion for a change of venue, the jury was impaneled, the defendant was convicted,

and a judgment was entered against him that he be confined in the county jail for the period of 30 days. The judgment imposed a further penalty of \$200 fine, with the usual alternative of imprisonment in the county jail until the fine be paid at the rate of one day for every dollar thereof. This is a proceeding to annul and set aside the judgment. It is claimed that the judgment is void for two reasons: *First*, because the affidavit filed on motion for a change of venue ousted the justice's court of jurisdiction,—that it was the imperative duty of the court to transfer the case to another township for trial; *second*, because the court had no authority to add to the fixed period of imprisonment the alternative of imprisonment for non-payment of the fine imposed. Section 1431 of the Penal Code provides that "if the action or proceeding is in a justice's court, a change of the place of trial may be had at any time before the trial commences: \* \* \* (2) When it appears from affidavits that the defendant cannot have a fair and impartial trial, by reason of the prejudice of the citizens of the township, the cause must be transferred to a justice of a township where the same prejudice does not exist." Under this provision we do not think it was the imperative duty of the justice to transfer the case. In civil cases in justices' courts the legislature has provided that the place of trial may be changed "when either party makes and files an affidavit that he cannot have a fair and impartial trial on account of the bias or prejudice of the citizens of the township or city against him;" but in criminal cases the opinion of the defendant that he cannot have a fair and impartial trial is not sufficient. He must state the facts upon which he bases that opinion, and the court is then called upon to determine whether the reasons given support the conclusion. The justice is called upon to exercise his discretion. For any abuse of discretion, the defendant has a speedy and adequate remedy by appeal to the superior court. If the justice has erred in this case, we presume that the error will be corrected by the superior court. It is not a case of want of jurisdiction.

That portion of the judgment providing for a collection of the \$200 fine by imprisonment in case the money be not paid is void. *Ex parte Rosenheim*, 83 Cal. 388, 23 Pac. Rep. 372. But the whole of the judgment is not void because of this defect.

It is ordered that there be stricken from the judgment that portion thereof which provides that "in case said fine be not paid within one hour from this time of rendering judgment that you, the said George Lowrey, defendant, be imprisoned in the county jail of the county of Fresno, state of California, until the fine be duly satisfied in the proportion of one day's imprisonment for every dollar of the fine, or until lawful payment shall have been made of such proportion of said fine as shall not have been satisfied by imprisonment at the rate above prescribed."

WE CONCUR: SHARPSTEIN, J.; WORKS, J.; FOX, J.; MCFARLAND, J.

86 Cal. 210

**FAEKLER v. WRIGHT.** (No. 13,644.)

(Supreme Court of California. Oct. 23, 1890.)

JUDICIAL NOTICE—POLITICAL DIVISIONS OF THE STATE.

Under Code Civil Proc. Cal. § 1875, subds. 3, 8, providing that the courts shall take judicial notice of the acts of the legislative, executive, and judicial departments of the state, and of the geographical divisions and political history of the world, the court will take judicial notice of the fact that the land described in a mortgage by section, range, and township, according to government survey, has been detached from the county of which it was a part at the time the mortgage was executed, and added to a new county, in which latter the foreclosure suit was brought.

Department 1. Appeal from superior court, Orange county; J. W. TOWNER, Judge.

*Victor Montgomery*, for appellant. *Ray Billingsly*, for respondent.

**PATERSON, J.** The only question raised by appellant, which is worthy of consideration, is whether the court below had jurisdiction of the subject-matter. The complaint refers to the copy of the mortgage attached thereto for a description of the property. It is described therein as follows: "The real property situate in the Rancho Santiago de Santa Anna, county of Los Angeles, state of California, and described as follows, to-wit: The north-west quarter of lot number three, of block 'C,' containing ten acres of land in the A. B. Chapman tract, according to the survey thereof made by Frank Lecouvrier in the year 1870, being a portion of the north-west quarter of section 33, township 4 south, range 9 west, of S. B. B. and M." There is no allegation that the property described in the mortgage is a portion of the territory which has, since the execution of the mortgage, been taken from the county of Los Angeles, to create the county of Orange; but, as a matter of fact, township 4 south, range 9 west, of S. B. B. and M., is a part of that territory, and it is a fact of which the court takes judicial notice. Section 1875, Code Civil Proc. subds. 3, 8. Judgment affirmed.

We concur: **WORKS, J.; FOX, J.**

86 Cal. 219

**WHITE v. WHITE.** (No. 13,331.)

(Supreme Court of California. Oct. 23, 1890.)

DIVORCE—CROSS-COMPLAINT—FINDINGS.

1. Civil Code Cal. § 130, provides that no divorce can be granted upon the uncorroborated statement, admission, or testimony of the parties. A husband sought divorce for adultery and desertion, and the wife, by cross-complaint, sought it for adultery and extreme cruelty. The court found the wife innocent of both charges, and granted her a divorce for the adultery of her husband; but also found that the specific acts of extreme cruelty were mainly sustained by the wife's evidence, which was contradicted by the husband, and the corroborating circumstances were insufficient to establish them. *Held* that, while the court was restrained by the statute from finding cruelty as a ground of divorce, it was at liberty to find it as a justification for the desertion, and there was no conflict in the findings.

2. It was proper for the court to award all the community property to the wife, although it also found that it was impossible for it to deter-

mine what part of the property claimed by the husband was community property, and appointed a referee to determine that question, and report for final action thereon.

3. When there is no bill of exceptions, it will be presumed that there were no objections to evidence below, and the reviewing court will refuse to consider questions arising thereon.

In bank. Appeal from superior court, city and county of San Francisco; T. K. WILSON, Judge.

*E. D. Wheeler and Barclay Henley*, for appellant. *H. E. Highton, H. C. McPike, and J. A. Cooper*, for respondent.

**McFARLAND, J.** 1. This is an action for a divorce upon the alleged grounds of adultery and willful desertion, brought by the husband against the wife. The defendant filed an answer and cross-complaint, in which she denied the charges made against her in the complaint, and, alleging adultery, willful neglect, willful desertion, and extreme cruelty against plaintiff, prayed that she be granted a decree of divorce for those causes. The trial court found against plaintiff as to his averments of defendant's adultery and desertion, in favor of defendant as to her averments of plaintiff's adultery, neglect, and desertion, and against her as to her averment of plaintiff's extreme cruelty. Judgment was rendered denying the prayer of the complaint, and decreeing a divorce according to the prayer of the cross-complaint. Plaintiff appeals from the judgment upon the judgment roll alone. (There are also questions about community property, which will be noticed hereafter.)

As there is no evidence before us, that part of the judgment which decrees a divorce must be affirmed, unless its invalidity appears upon the face of the judgment roll. The point which appellant makes against the validity of the decree of divorce, stated briefly, is this: Appellant, in his answer to respondent's cross-complaint, pleaded her desertion by way of recrimination. The court found that respondent did leave the appellant on October 26, 1884, and did not return; and, as the court also found that appellant was not guilty of extreme cruelty, therefore respondent must have been guilty of desertion. But as to respondent's averment of appellant's cruelty, the court finds as follows: "There is testimony tending to prove the allegations of the extreme cruelty contained in the fourth cross-complaint of the defendant, but as to the specific acts therein alleged they are mainly sustained by the evidence (testimony) of the defendant herself, which is contradicted by the plaintiff, and the corroborating circumstances are insufficient to establish the said specific acts, or the said charge of extreme cruelty." The court was here dealing with the respondent's affirmative averment of extreme cruelty as a distinct cause for granting her a divorce, and was acting under the restraint of section 130 of the Civil Code, which provides that "no divorce can be granted upon the default of the defendant, or upon the uncorroborated statement, admission, or testimony of the parties." But the court was not under that restraint when considering appellant's affirmative averment of respondent's

ent's desertion as a distinct cause of divorce on his part, she claiming that his treatment justified her in leaving. And, if upon that issue the only evidence was the testimony of the parties, there is no rule which prevented the court from believing the one, or disbelieving the other. We therefore see no reason for disturbing the judgment, so far as it decrees a divorce.

2. Respondent, in her cross-complaint, averred that appellant was the owner of a large amount of property, and that certain parts of it were community property; and the court decreed that the whole of the community property be awarded to respondent. And appellant contends that in this part of the decree the court "acted improperly and erroneously, and not intelligently, and without knowledge of all the facts of the case, or the condition of the parties." This contention is founded upon the latter part of finding 14, which is as follows: "It is impossible upon the testimony, so far as available and produced, to determine what the property, real and personal, the resources, the income, and the interests of the plaintiff really are, or were at the commencement of this action, or what proportion community property; and to obtain this information, and to enable the court to act intelligently and finally upon these questions, a strict, accurate, and full inquiry, investigation, and account is indispensable, which, from its nature, cannot originally be taken by the court itself, but must in the first instance be had and conducted by a competent referee." But the previous part of said finding recites the fact that evidence had been taken on the subject of property; and it may well be assumed that sufficient evidence had been introduced to inform the court generally on that subject, so that it could know the limits within which the value of the community property would lie, and thus intelligently exercise its discretion in awarding all such property to respondent. The decree contained a clause appointing a referee to take, and report to the court for its final action, a full and accurate account of the property. In all this we see no error; and the point here made by appellant is, in our opinion, not tenable.

3. Appellant, in his answer to the cross-complaint, denied that there was any community property, and also averred that immediately preceding the marriage the parties entered into a written contract, properly executed and acknowledged, by which it was agreed that all property acquired by plaintiff after the marriage should be his separate property, and should in no event become community property. The court found that this contract, owing to circumstances under which appellant procured respondent to make it, was invalid; and decreed it to be set aside and annulled. Appellant contends that this was error, because that result could have been legally reached only in an action brought by respondent for the direct purpose of annulling said contract, and in which pleadings on that issue could have been properly framed. But in

the case at bar the real issue here involved was as to the existence of community property, which was affirmed by respondent, and denied by appellant; and if on that issue the latter chose to introduce the said contract in evidence, it is difficult to see why respondent could not attack its validity for any cause. The fact that appellant pleaded the contract in his answer made no difference, for, under our system, it stood as denied. But, waiving the question whether there would be any merit in the point if properly presented, it is sufficient to say that in the case at bar, there being no bill of exceptions, it must be assumed in support of the judgment that appellant made no objection to the introduction of evidence attacking the validity of the contract. The parties, therefore, must be treated, according to numerous decisions of this court, as having waived all objection, and as having tried the issue upon its merits. It is too late to make the objection here for the first time. *King v. Davis*, 34 Cal. 106; *Hutchings v. Castle*, 48 Cal. 155. It was perhaps going further than was necessary for the court to decree the contract a nullity; but that would be, at worst, only surplusage.

We think that the facts found by the court were sufficient to warrant the conclusion that the contract was invalid because improperly procured. Judgment affirmed.

We concur: BEATTY, C. J.; FOX, J.; THORNTON, J.; WORKS, J.

PATERSON, J., (*concurring*.) I concur in the views expressed by Mr Justice McFARLAND, but would decide the first contention on the broad ground that the cruelty referred to in section 98 of the Civil Code, and which makes the offending party the deserter, is not necessarily of the same character or grade as the "extreme cruelty" defined in section 94 as one of the grounds of divorce. Section 98 reads as follows: "Departure or absence of one party from the family dwelling-place, caused by cruelty or threats of bodily harm, from which danger would be reasonably apprehended from the other, is not desertion by the absent party, but it is desertion by the other party." This section, say the code commissioners, was "intended to settle a question discussed as doubtful in 1 Bish. Mar. & Div. §§ 787, 791, 794. If a wife quits her husband's house under probable cause to apprehend personal violence from him, or if he, by reason of acts of cruelty, drives her from the home, it is the same as if he had thrown her out of doors. If the acts of cruelty show an intention on his part to drive her from him, he is held responsible for the natural and probable consequences of such acts, and it is as much desertion on his part as if he had without cause left her, intending to desert her. Unless section 98 provides for a grade of cruelty other than that defined in section 94, it is entirely superfluous. The two sections would provide for one cause of action only, under two different names.

86 Cal. 225

PEOPLE v. TARM POI. (No. 20,648.)  
(Supreme Court of California. Oct. 23, 1890.)  
MURDER—INSTRUCTIONS—ALIBI—MISCONDUCT OF JURY.

1. Upon a trial for murder it is not error to give the following charge, which is taken *verbatim* from Pen. Code Cal. § 1105: "Upon trial for murder, the commission of the homicide by the defendant being proven to the satisfaction of the jury, or admitted, the burden of proving circumstances of mitigation, or that justify or excuse him, devolves upon the defendant, unless the proof on the part of the prosecution tends to show that the crime committed only amounted to manslaughter, or that the defendant was justifiable or excusable."

2. Where the accused totally denies the killing, introduces testimony that it was done by others and that he was at another place at the time, a charge upon the doctrine of self-defense cannot be prejudicial to him.

3. Where there is testimony tending to prove an *alibi*, it is not error to charge that the accused "may establish any fact essential to his defense by merely a preponderance of evidence," when accompanied by a further charge that "if, from the whole case, and a consideration of all the testimony, the evidence [as to *alibi*] be sufficient to create a reasonable doubt as to whether defendant was present at the time and place of the murder, he should be acquitted."

4. Where the accused asks for a view of the *locus*, he cannot complain of the momentary separation of a juror from the others during the view, without showing that he was injured thereby.

In bank. Appeal from superior court, city and county of San Francisco; F. W. VAN REYNEGOM, Judge.

D. M. Delmas, for appellant. Frank M. Stone and Atty. Gen. Geo. A. Johnson, for respondent.

McFARLAND, J. The appellant was convicted of murder, and he appeals from the judgment, and from an order denying a new trial. He makes three points on the appeal, viz.: (1) That the trial court erred in instructing the jury; (2) misconduct on the part of the jury; and (3) insufficiency of the evidence to support the verdict.

1. The objection urged against the instructions is that they require a preponderance of evidence on the part of a defendant in a criminal case, contrary to the rule laid down in *People v. Bushton*, 80 Cal. 160, 22 Pac. Rep. 127, 549, and *People v. Elliott*, 80 Cal. 296, 22 Pac. Rep. 207. The instructions objected to, and which for convenience we will number 1, 2, and 3, are as follows: "(1) Upon trial for murder, the commission of the homicide by the defendant being proven to the satisfaction of the jury, or admitted, the burden of proving circumstances of mitigation, or that justify or excuse him, devolves upon the defendant, unless the proof on the part of the prosecution tends to show that the crime committed only amounted to manslaughter, or that the defendant was justifiable or excusable. (2) If, from all the evidence, the jury should be satisfied by a preponderance of testimony that the circumstances were such as to excite the fears of a reasonable man, and that the defendant acted under the influence of those fears alone, or if he killed the aggressor to prevent the commission of a felony, he would not be criminally responsible for his death, although the cir-

cumstances might not be sufficient to prove by a preponderance of evidence that the aggressor was actually about to commit a felony. (3) In the determination of this case you are further instructed that, while the law requires the guilt of the defendant to be shown to your satisfaction beyond a reasonable doubt before you can convict, he may establish any fact essential to his defense by merely a preponderance of evidence." The first instruction above quoted is taken *verbatim* from section 1105 of the Penal Code, and, of course, is not erroneous, although it should, in justice, be accompanied, as it was in the case at bar, by what the same Code contains on the subject of reasonable doubt. The second instruction is somewhat confused by the use of the word "if;" but it might, perhaps, be fatally erroneous if in this case, as in *People v. Bushton*, and kindred cases, the defendant had admitted the killing, and the question had been about "circumstances of mitigation, or that justify or excuse him." In the *Bushton* Case the killing was admitted, but defendant claimed that it was done accidentally; and section 1105, Pen. Code, was therefore applicable to the case. But the trial court in that case, in its charge to the jury, in addition to giving said section of the Code, used strong and repeated expressions to the effect that "it devolves upon the defendant" to prove circumstances of mitigation, excuse, or justification "by a preponderance of evidence on his part," by "some stronger proof," etc. This language was held to be beyond the meaning of the Code, and to be inconsistent with the rule that if the jury have a reasonable doubt of a defendant's guilt they should acquit. *People v. Elliott* was a similar case; that is, defendant admitted the killing, but claimed that it was justifiable. Now, in the case at bar, there were no facts which made section 1105, Pen. Code, or the doctrine of the *Bushton* and *Elliott* Cases applicable. In this case the defendant did not set up any circumstances of mitigation, or excuse, or justification. He totally denied that he had anything to do with the killing of the deceased. He introduced witnesses who testified that they were present and saw the killing; that it was done by persons other than defendant; and that he was not present when the killing took place. He also testified himself, and introduced other witnesses who testified that, at the time of the killing, he was at another place in bed. It is clear, therefore, that the second instruction,—about "fears of a reasonable man,"—whether correct or not, could not have injured the defendant. The part of the third instruction which is objected to is this: "He may establish any fact essential to his defense by merely a preponderance of evidence." Of course this proposition in itself is true; it does not upon its face declare anything that is erroneous. It is apparently intended for the benefit of the defendant. But the objection made to it is that the jury might infer from it the other proposition that no evidence on the part of the defendant of a fact would be sufficient to raise a reasonable doubt of his guilt, un-

less he actually proved the fact by a preponderance of evidence. It is possible that the language objected to might have the alleged effect on a jury in some cases when not accompanied by other qualifying instructions; and for this reason it had better be left out of charges to juries in criminal cases. In the case at bar, however, the only effect that the instruction could have had was in relation to the fact of an *alibi* which defendant attempted to prove. But, with respect to that fact, the court instructed the jury as follows: "Where evidence has been offered by the defendant for the purpose of proving an *alibi*,—that is to say, that the defendant was in another place at the time of the alleged act of murder, and was distant from the scene of the killing charged, at the time, and therefore could not have participated in it,—if, from the whole case, and a consideration of all the testimony, the evidence in this behalf produced be sufficient to create a reasonable doubt as to whether the defendant was present at the time and place of the murder, he should be acquitted." This was certainly putting the law as favorably for defendant as he could reasonably demand, and taking the instruction last above quoted, and the one objected to, together, there was no danger of the jury being misled.

2. Alleged misconduct of the jury. The deceased was killed on the street, near the corner of Jackson and Dupont streets, in the city of San Francisco, and in the taking of the testimony in chief of the prosecution a great many different localities, houses, etc., were mentioned. When the evidence for the prosecution in chief was closed the prosecution and defense joined in a request to the court that the jury be allowed to visit and view the various places mentioned in the testimony, whereupon the court made an order for the viewing of about a dozen enumerated places. The deceased was attacked and killed about 10 o'clock on the night of June 23, 1889, by two or three persons who used hatchets, and perhaps other weapons; and a witness had testified that he saw the assault, that defendant was one of the assailants, and that immediately after the assault the defendant went up the stairway of a certain house designated as "No. 924 Dupont street." The defendant was arrested about three hours afterwards, in a house on another street in that vicinity, called "Washington alley," the house being designated as "No. 10 Washington Alley." And a witness (Wittman) had also sworn that he (the witness) had afterwards gone up the stairway of No. 924 Dupont, and, passing through a window, had gone on the roofs of the intervening houses and down into the house No. 10 Washington alley. Now, the order above mentioned for viewing premises, made at the joint request of the parties, included "the premises No. 10 Washington alley," and "also to ascend the stairway at No. 924 Dupont street, and look out of the window at the head of the stairs, look at the alley, and pass over the roof, if desired, to the place alleged to have been reached by Sergeant Wittman." When the order was made, one of the jurors, Mr.

James Means, in open court, and before the jury started, asked permission to pass over the roofs from No. 924 Dupont to No. 10 Washington alley. Counsel for the people said he "would not object;" and counsel for defendant stated that "he would be glad to have affiant [Means] or any other, or all, of the jury, pass over the roofs if they wished to attempt the passage, and expressly stated that on behalf of defendant he had no objection to affiant passing over the roofs, if he could." "The remainder of the jury, in open court, stated that no other members of the jury desired to attempt said passage on said roofs." Means says in his affidavit further as follows: "That upon reaching said 924 Dupont street, in conformity with said permission, affiant passed out of said window and over said roofs onto the roof of the building No. 10 Washington alley; that the other jurors passed to No. 10 Washington alley by way of the street, and met affiant where he had remained on the roof said building No. 10 Washington alley; that affiant was in full view of the balance of the jury, and of the judge of said court, while passing over said roofs; that he neither spoke to any one nor did any one speak to affiant, from the moment he left the balance of said jury, until he was again joined by the balance of the jury. That both defendant and his counsel, Mr. Lyman I. Mowry, were present during all the foregoing proceedings, and offered no objection to the said act of affiant." And the passage of said juror, Means, over said roofs, under the circumstances as above stated, is relied on by appellant as misconduct for which the judgment should be reversed. The only substantial difference between the affidavit of Means and that of appellant, upon which alone he rests this part of his case, is that appellant says that during a part of the time when Means was on the roof he could not be seen by the other jurors. There is always necessarily some difficulty in keeping jurors closely together when viewing premises; and when a party requests that there be such a viewing he should not be heard afterwards to object, unless he can show that without his consent or knowledge there has been some misconduct in the proceeding which has caused him substantial injury. He should not be allowed to use it voluntarily as a means of entrapping the opposite party into mere abstract errors. It is not necessary to determine whether the act of Means, had it been done against appellant's consent, would have constituted in law a "separation" of the jury. Neither does it appear that appellant was injured by the act. Appellant took the chances of injury or benefit. The juror might, as appellant may have expected, have become lost in the labyrinth of Chinese roofs. If appellant had not desired to have the juror make the attempt, he should have objected when the proposition was made before the court left the court-room, or afterwards, before the juror commenced the passage. Instead of doing so, he not only consented, but requested that the juror make the attempt. After the result was known, it was too late to make the objection. We do not

see that the question of a defendant's power to waive a constitutional right is involved. The thing complained of here is, at worst, only an irregularity which should have been objected to when the opportunity was offered. The point as to jurors examining the box in which appellant's hat was said to have been kept over night, we do not understand to be urged. The statement about it was made merely "on information and belief," and was insufficient. *People v. Williams*, 24 Cal. 38.

3. As to the point of the insufficiency of the evidence to support the verdict, it is enough to say that the mass of evidence, both direct and circumstantial, against appellant, is too great to afford any warrant for the court to disturb the finding of the jury. Judgment and order affirmed.

We concur: BEATTY, C. J.; PATERSON, J.; WORKS, J.; FOX, J.

THORNTON, J., (*concurring*.) In my opinion the instructions are without error. I find no error in the record. I wish to add that I do not intend by what is said herein to approve the ruling in *People v. Bushon*. I concur in affirming the judgment and order.

86 Cal. 158

FISHER V. POLICE COURT OF THE CITY OF SAN DIEGO *et al.* (No. 13,781.)

(*Supreme Court of California*. Oct. 15, 1890.)

MUNICIPAL CORPORATIONS—BOUNDARIES—CONSTRUCTION OF STATUTES.

The city of San Diego is built around three sides of a bay, shaped like a horseshoe, and was originally a pueblo, whose water-line was the bay. A peninsula, beginning near the mouth, and at one side of the bay, runs nearly in the center, and more than half way up the bay, around which the water for an indefinite distance is called the "Ship's Channel." Acts Cal. 1875-76, p. 806, reincorporated the city, with the same limits on the land side as before, but provided that the "water front line should be the ship's channel," and gave the city jurisdiction of the bay and of the sea for one league from shore. Another section divided the peninsula into wards for voting purposes, and drew the boundary line of one ward from one point to another across the mouth of the bay; thus including, practically, the whole peninsula. Other sections restricted the elective franchise to residents of the city, and authorized the city to acquire land outside of its boundaries for municipal purposes only. *Held*, that the act included the peninsula within the city limits.

In bank. Application for writ of prohibition.

*Hunsaker & Britt*, for appellant. *Capps & Montgomery*, for respondents.

PER CURIAM. Appellant applied to the superior court for a writ of prohibition to prohibit the police court of the city of San Diego from further proceeding in a certain criminal action in which petitioner was charged with violating a certain ordinance of said city. The superior court denied the writ, and petitioner appeals to this court. The only question involved is whether a certain territory, known generally as "Coronado Beach," is within the limits of the municipal jurisdiction of the city of San Diego. This question was directly presented, and elaborately consid-

ered by this court, in *City of San Diego v. Granniss*, 77 Cal. 511, 19 Pac. Rep. 875, and it was there held, all the justices who were present and participating in the decision concurring, that said territory was within said limits. Upon a petition for rehearing, that case was again thoroughly considered, and the rehearing was denied. The record on the present appeal presents the point in substantially the same way in which it was presented in said case of *City of San Diego v. Granniss*, and, upon the authority of the latter case, the position of appellant that, at the time said case was decided, Coronado beach was not a part of the city of San Diego is held to be untenable. Appellant also relies upon an act of the legislature approved March 16, 1889, which he says changed the boundaries of the city of San Diego by taking away from it the said Coronado beach. But in the recent case of *People v. Common Council*, ante, 727, (No. 13,874, filed Aug. 18, 1890,) this court held said act to be unconstitutional and void "so far as it undertakes to exclude or take away any part of the territory under the municipal jurisdiction of San Diego." There are no other points necessary to be noticed. The order appealed from is affirmed.

86 Cal. 197

CAMPBELL V. WEST *et al.* (No. 13,750.)

(*Supreme Court of California*. Oct. 23, 1890.)

MORTGAGES—FORECLOSURE—EVIDENCE—JUDICIAL NOTICE.

1. The court will take judicial notice that the county clerk is *ex officio* clerk of the superior court, so that, though he indorses a complaint filed in the superior court as "county clerk," it will be deemed to have been filed with the proper officer.

2. Judicial notice will not be taken of the fact that land described in a mortgage by reference to private and not government surveys, and as situated in a certain county, has, since the execution of the mortgage, been taken from that county, and attached to the county in which the foreclosure suit is brought.

3. Where a petition in foreclosure fails to allege that the land described in the mortgage is situated in the county in which the suit is brought, and the description shows that it is situated in another county, the court acquires no jurisdiction of the case, under Code Civil Proc. Cal. § 392, and Const. art. 6, § 5, requiring the action to be brought in the county where the land is situated.

4. Where a mortgage note provides that the interest shall be paid semi-annually, and if not so paid that it shall be compounded semi-annually, or the whole sum, principal and interest, shall become immediately due at the option of the holder of the note, the holder of the note may exercise his option promptly upon a default in the payment of any installment of interest, and the fact that he has compounded the interest on prior installments does not affect his right.

Department 1. Appeal from superior court, Orange county; J. W. TOWNER, Judge.

*Victor Montgomery*, for appellants. *Ray Billingsley*, for respondent.

FOX, J. This is an action to foreclose a mortgage. Judgment and decree in favor of plaintiff, from which defendants appeal, the case coming up on the judgment roll.

1. The first point made is that the court never acquired jurisdiction of the case, for the reason that the complaint was never

filed in the court,—the indorsement thereon showing that the same was filed with the county clerk. This point is not well taken. The court will take judicial notice of the fact that the county clerk is *ex officio* clerk of the superior court. The complaint is entitled and indorsed in the superior court of the county of Orange, and is also indorsed, "Filed October 19, 1889. R. Q. WICKHAM, County Clerk." If the indorsement had been signed simply "R. Q. Wickham, Clerk," it would have been sufficient. The placing of the word "county" before the word "clerk" was mere surplusage, and will not defeat the effect of the indorsement, inasmuch as it is a designation consistent with that of the *ex officio* office of clerk of the court.

2. It is claimed that the complaint contained no description or allegation showing that the property against which foreclosure is sought was situate within the jurisdiction of the court. The action must be brought in the county in which the land is situate. Const. art. 6, § 5; Code Civil Proc. § 392. The complaint in this case contains no description of the property, except as it is found in the copy of the mortgage attached as an exhibit, and that describes it as being situate in the county of Los Angeles. The court finds and recites in its decree that the land is situate in the county of Orange, and that the same was formerly a part of the county of Los Angeles. This finding and recital would be sufficient, if there was anything in the complaint to support it, but there is not. The court will take judicial notice of the boundaries of the county, and of the location of lands described by government subdivisions, as by township, range, and section, and the legal subdivisions thereof; but it cannot take judicial notice of the location of lands designated simply by name, or reference to a private survey, as in this case. The only description given in the complaint or mortgage attached is that it is "situate in the county of Los Angeles, state of California, and described as follows, to-wit: In Rancho Santiago de Santa Ana, the whole of block 'N,' (except thirteen acres on the east side thereof heretofore sold to Mrs. Gearhart,) the same being and lying in the Gray tract, as surveyed and subdivided by Geo. Knox in February, 1881, a plat of which tract is duly recorded in the office of the recorder of deeds in and for said county of Los Angeles," etc. There is not a word here indicating a fact of which the court can take judicial notice, and every fact which is indicated by this description tends to show that the land was so situate that the court did not have jurisdiction to foreclose this lien. It was necessary, to give the court jurisdiction to enter this decree of foreclosure, that the plaintiffs should prove that the land was situate in the county of Orange; and in the absence of an allegation of the fact in his complaint he was not entitled to prove it.

3. It is claimed that the default of defendants was unauthorized by law. In this counsel is mistaken. The demurrer of defendants was filed November 4, 1889. It was overruled November 16, 1889, and

defendants given 10 days to answer. They failed to do so. An extension of time was given them, and they still failed to answer; and on the 14th of December, 1889, after the expiration of the extended time, their default was regularly entered.

4. It is claimed that the demurrers should have been sustained, for that it appeared upon the face of the complaint that the demand was not due. This point is not well taken. The note was dated March 28, 1888, due two years after date, with interest at 12 per cent. per annum, payable semi-annually, "and if not so paid to be compounded semi-annually, and bear the same rate of interest as the principal; and, should the interest not be paid when due, then the whole sum of principal and interest shall become immediately due and payable, at the option of the holder of this note." The first installment of interest fell due September 28, 1888, and on the 2d of November, following, a little more than half of that installment was paid. No more was ever paid on account of either interest or principal. A second installment fell due March 28, 1889, and a third installment, September 28, 1889. Conceding that it was the duty of the holder of the note to exercise his option promptly upon the maturity and non-payment of an installment of interest, or in default thereof he would be deemed to have elected to waive immediate payment, and accept the compounding of interest as provided for, it does not follow that, having failed to exercise the option upon the first default, he was bound to waive its exercise at all subsequent defaults, and let the interest accumulate and compound until the note itself matured according to its face. Such a rule would forbid his allowing his debt or any grace whatever, except at the peril of ultimately finding his security insufficient to meet the accumulated obligation. The true and just rule is that while he exercises his option promptly he may do it at the maturity, and upon default, of any installment of the interest. The third installment of interest in this case fell due on the 28th of September, 1889. Defendants had all that day in which to pay it. The court will take judicial notice of the days of the week, and of the month, and so of the fact that the maturity of this installment fell on a Saturday. The 29th was Sunday. Promptly on Monday, the 30th, the first business day after default, plaintiff notified defendants of his option, declaring the whole amount of principal and interest due, and demanding prompt payment thereof. This he clearly had the right to do. Default being made in the payment, this action was commenced October 19th, following.

5. There was no error in the allowance made for counsel fee, under the provisions of the mortgage and of the law and the allegations and prayer of the complaint.

For the error discussed in the second point herein stated, the judgment must be reversed, and the case remanded for such further proceedings as the parties may be advised. So ordered.

We concur: WORKS, J.; PATERSON, J.



86 Cal. 255

**MENDOCINO COUNTY v. BANK OF MENDOCINO.** (No. 12,975.)

(Supreme Court of California. Nov. 3, 1890.)

**COLLECTION OF LICENSE—BANKS.**

1. The county government act, (St. Cal. 1883, p. 299,) giving the county boards of supervisors power to license all kinds of business carried on in the counties, and to provide for the collection of the licenses, repeals Act March 13, 1883, (St. 1883, p. 297; Pol. Code Cal. § 4045,) added to the Code the day before the former act was passed, and providing that the licenses should be collected as directed by Pol. Code, § 3360, which declared that the collection should be by suit in the name of the people, and an ordinance passed by the supervisors under the county government act, providing that the licenses shall be collected by suit in the name of the county, is valid.

2. Though one carrying on a business which requires a license refuses to take it out at all, yet, under the ordinance and the statute (St. 1883, p. 299) authorizing it, *assumpsit* will lie to recover the amount of the tax.

3. The fact that a bank of which the payment of a license tax is required by the ordinance of the board of supervisors has paid a state license to the board of bank commissioners, created by a prior statute, (St. 1877-78, p. 740,) does not exempt it from the payment of the license required by the supervisors acting under the county government act.

Commissioners' decision. Department 2. Appeal from superior court, Mendocino county; R. McGARVEY, Judge.

T. L. Carothers, for appellant. J. M. Mannon and Dist. Atty. J. Q. White, for respondent.

BELCHER, C. C. In October, 1887, the board of supervisors of Mendocino county passed an ordinance providing for the payment of licenses by persons, firms, and corporations carrying on various kinds of business in that county, and, among others, the business of banking and loaning money at interest, and also providing that the district attorney should commence suit, in the name of the county, to recover the license tax, against any one required, but refusing, to pay the same, and that in case of recovery by the plaintiff \$25 damages should be added to the judgment, to be collected from the defendant. At the time the ordinance was passed, and thereafter, the defendant was engaged in the business of banking and loaning money at interest in the county, but refused to pay the license tax required in such case, and thereupon this action was commenced in a justice's court to recover the same with the penalty. The defendant interposed a general demurrer to the complaint, which was overruled, and then answered. By its answer, which was verified, it alleged that the board of supervisors had no right or power to levy, assess, or collect a license from defendant for transacting its business, and that the license tax claimed was illegal, and not warranted in law. An order was thereupon made transferring the case to the superior court of the county for trial; and in that court it was subsequently tried, and judgment given for plaintiff for the amount sued for. From the judgment so rendered the defendant appeals.

The principal ground urged for a reversal of the judgment is that the power to pass an ordinance, fixing licenses for

the transaction of business, was given to boards of supervisors by section 4045, which was added to the Political Code by an act of the legislature passed March 13, 1883, (St. 1883, p. 297;) that by this section it is provided that "the licenses herein provided for shall be collected as now provided for by the provisions of chapter fifteen, title seven, part three, of the Political Code of the state of California;" and that by section 3360, found in the chapter (15) referred to, it is provided that, "against any person required to take out a license who fails, neglects, or refuses to take out such license, or who carries on or attempts to carry on business without such license, the collector may direct suit in the name of the people of the state of California, as plaintiff, to be brought for the recovery of the license tax," etc. The argument is that under these sections the board of supervisors had no power to provide, as it did, that suit to collect the license tax should be brought in the "name of the county of Mendocino," and that the ordinance was to that extent void, and consequently the action in the name of the county was not authorized, and could not be maintained. Citing County of Monterey v. Abbott, 77 Cal. 541, 18 Pac. Rep. 113, and 20 Pac. Rep. 73. The argument is faulty in two important respects: *First*. It is not supported by the case cited. In that case, the ordinance involved provided that actions to collect license taxes should be commenced in the name of the people, and the action was commenced in the name of the county. It was held that where a right is given, and a remedy provided by statute or valid ordinance, the remedy so provided must be pursued, and hence that the action could not be maintained. *Second*. It wholly ignores the fact that, on the next day after section 4045 was added to the Code, another act was passed by the legislature, commonly called the "County Government Act," (St. 1883, p. 299,) which operated to supersede and repeal the said section, as has been held by this court in two well-considered cases,—*Ex parte Benjamin*, 65 Cal. 310, 4 Pac. Rep. 23, and *County of Santa Clara v. Railroad Co.*, 66 Cal. 642, 6 Pac. Rep. 744. By this last act, boards of supervisors in their respective counties are given jurisdiction and power, under such limitations and restrictions as are prescribed by law, "to license, for purposes of regulation and revenue, all and every kind of business not prohibited by law, and transacted or carried on in such county, and all shows, exhibitions, and lawful games carried on therein, to fix the rates of license tax upon the same, and to provide for the collection of the same, by suit or otherwise." Section 25, subd. 27. It was, then, under the authority conferred by the county government act, and not under section 4045 of the Political Code, that the ordinance in question was passed, and the contention of appellant upon this point is therefore wholly without support. Of course provision might have been made in the ordinance that actions should be commenced in the name of the people, as was done in the ordinance under review in *Ex parte Mirande*, 73 Cal. 365, 14 Pac. Rep. 888. But this was not necessary, as there was

equal authority to provide that the actions should be commenced in the name of the county. See *County of Santa Clara v. Railroad Co.*, supra; *County of Amador v. Kennedy*, 70 Cal. 458, 11 Pac. Rep. 757; *County of San Luis Obispo v. Hendricks*, 71 Cal. 242, 11 Pac. Rep. 682. In the last-named case, it is true, the judgment for the plaintiff was reversed, but it was for reasons which do not affect this case. It is also claimed that the demurrer to the complaint should have been sustained, because it appeared therefrom that the defendant had not taken out the license required by the ordinance, and, in such case, it is said *assumpsit* will not lie to collect the license tax. This point is rested on the authority of *City of Santa Cruz v. Railroad Co.*, 56 Cal. 143, and *County of Monterey v. Abbott*, 77 Cal. 541, 18 Pac. Rep. 113, and 20 Pac. Rep. 73. But in the *Santa Cruz Case*, as was said in *City of Los Angeles v. Railroad Co.*, 61 Cal. 64, "it did not appear that the city of Santa Cruz had provided by ordinance for the collection of licenses by an ordinary action, or that the city charter in terms authorized an ordinance providing for the collection of licenses by such action." And in the *Monterey Case* it was held that, where a county ordinance imposing license taxes provides that actions to collect the same shall be in the name of the people, "the failure to take out a license did not, of itself, make the defendant a debtor of the county in such sense that an ordinary action, in the nature of an action for debt, could be maintained by the county, as 'the real party in interest.'" Evidently these cases do not support the claim of appellant; for, as we have seen, the ordinance here involved did expressly provide that the actions should be commenced in the name of the county, and this provision was fully authorized by the statute.

As a last ground for reversal, it is urged that the defendant, on payment of a valuable consideration therefor, obtained a license to transact its business under an act of the legislature, passed in 1878, entitled "An act creating a board of bank commissioners, and prescribing their duties and powers," (St. 1877-78, p. 740.) and therefore that the county of Mendocino, which derived its authority and power from the state, could not interfere with this privilege, or restrict it by exacting another license tax for transacting the same business. Upon this point the learned counsel admits that he has been unable to find any authority either *pro* or *con*. In our opinion, no authority other than the statute is necessary to justify the action of the court below. The county government act authorized the board of supervisors to require license taxes to be paid for the privilege of carrying on in the county "all and every kind of business not prohibited by law." This statute fully covers the case, and there is, and can be, no pretense that it is unconstitutional. We advise that the judgment be affirmed.

We concur: HAYNE, C.; FOOTE, C.

PER CURIAM. For reasons given in the foregoing opinion, the judgment is affirmed.

McCORMICK *et al.* v. ORIENT INS. CO. (No. 12,836.)

(Supreme Court of California. Nov. 3, 1890.)

REFORMATION OF INSURANCE POLICY—WAIVER OF CONDITIONS.

1. In an action to reform a fire policy which stipulates that, if the title of the assured is less than absolute, it shall be specifically represented to the company, plaintiffs are not entitled to relief when it appears that they were not misled by any acts or representations of the company or its agents, though they may not have actually known of the existence of the clause in question when they accepted the policy on property described in the application as their own, when in fact their only interest in it was that of commission merchants.

2. The company does not waive its right to insist on the forfeiture of the policy because of such misrepresentation by requesting the assured to produce their books, together with the uninjured property, after the fire, as provided by the policy, and after it is aware that the assured are not the absolute owners.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; J. F. SULLIVAN, Judge.

John H. Dickinson, for appellants. William M. Pierson, for respondent.

HAYNE, C. The original complaint in this case was to recover \$2,000 on a policy of insurance. After several years of litigation, the plaintiffs amended their complaint so as to seek a reformation of the policy, on the ground of fraud and mistake, and for a decree upon it as reformed. The trial court gave judgment for the defendant, and the plaintiffs appeal upon the judgment roll, without any bill of exceptions or statement. The policy contained the following provision: "Any interest in property insured not absolute, or that is less than a perfect title, must be specifically represented to the company, and expressed in this policy in writing." There was no indication in the policy that the plaintiff's interest was not an absolute interest. On the contrary, it stated that the plaintiffs were insured "on their stock of manufactured manilla paper," etc., and the application (which, in our opinion, was made by the agent of the plaintiffs) stated the same thing. As a matter of fact the plaintiffs were not the owners. They merely had the property for sale on commission, and the defendant did not "have any knowledge of the same, except in so far as the same was disclosed and stated in the said application for insurance and policy." Upon these facts it is plain that the plaintiffs could not recover in an action at law upon the policy; and it was so held on appeal in a companion case, the decision in which was, by stipulation, to control this case. *McCormick v. Insurance Co.*, 66 Cal. 362, 5 Pac. Rep. 617. After that decision, the plaintiffs here amended their complaint so as to make the suit for a reformation of the policy by the elimination of the clause as to ownership. The grounds upon which such reformation was sought were, in substance, that the plaintiffs did not know that the policy contained the provision as to ownership; that the defendant represented to them that the insurance was upon their interest as com-

mission merchants, and prepared the policy in such a way as to mislead, and with the intention of misleading; and that plaintiffs did not read the policy, because of their reliance upon the good faith of the defendant and its agents. With the exception, however, of the plaintiffs' actual knowledge, which is immaterial when taken by itself, the truth of these allegations is completely negatived by the findings, which, as already stated, have not been attacked. It is plain, therefore, that the plaintiffs made no case for a reformation of the policy. They contend, however, that the defendant, by its conduct after the fire, waived the defense in question, and is estopped from refusing to pay their claim; in other words, that no reformation of the policy was necessary. We hardly think that a party should be allowed to shift his ground so much. See *Washburn v. Insurance Co.*, 114 Mass. 175; *Tredegar v. Windus*, L. R. 19 Eq. 607. But disregarding this we proceed to inquire whether there was any waiver or estoppel. In strictness, the term "waiver" is used to designate the act, or the consequences of the act, of one side only, while the term "estoppel" (*in pais*) is applicable where the conduct of one side has induced the other to take such a position that he will be injured if the first be permitted to repudiate his acts; but in the law of insurance the terms are ordinarily used indiscriminately. See *May, Ins.* § 505. In this case we see nothing which would amount to a waiver as distinguished from an estoppel. The conduct claimed to constitute an estoppel was as follows: After the fire, the agents of the defendant, who then knew of the facts concerning the ownership of the property, requested the plaintiffs to produce their books, together with that portion of the property which had escaped damage, whereupon the plaintiffs, "at considerable inconvenience and labor," produced their books, and, at "considerable expense and labor," produced that portion of the property which had escaped damage, and had the same sorted and weighed. The defendant then offered to pay \$1,154.54, which it contended was all the damage covered by the policy, which offer was refused. It is admitted that "both parties acted in good faith up to the commencement of the suit." It is to be observed that there is no question of any conduct of the defendant which induced the plaintiffs to omit anything essential, or to do anything prejudicial, to the validity of the policy, either before or after the loss. There was simply a request to be shown the books, and a request to produce the property not damaged, a compliance with these requests, and an offer to pay a part of the claim. So far as the request for the books, and the production of them, are concerned, we do not think that the act is of such a nature that it ought to estop the defendant from relying upon a valid defense. It is not more arduous in character than the making of an affidavit as to the circumstances of the loss; and, upon the former appeal, in the companion case, it was held that the making of such an affidavit, followed by the offer to pay a part of the claim, did not

operate as an estoppel. 66 Cal. 364, 365, 5 Pac. Rep. 619. That case is not overruled by *Wheaton v. Insurance Co.*, 76 Cal. 432, 433, 18 Pac. Rep. 758, as supposed by the counsel for the plaintiffs. What is said in the latter case concerning the former in this connection relates simply to the power of a general agent to make a waiver under certain conditions, and was put in merely by way of guarding against an unwarranted implication. Now the only thing in which the case before us can be argued to be materially different from the case on the other appeal is that it now appears that the plaintiffs, at "considerable expense and labor," produced that portion of the property which had escaped damage, and had the same sorted and weighed. But we do not think that this worked an estoppel. An essential element of estoppel of this character is that one party should have relied upon the conduct of the other, and been induced by it to put himself in such a position that he would be injured if the other should be allowed to repudiate his action. *Boggs v. Mining Co.*, 14 Cal. 367, 368. This essential element does not appear from the findings. It is found that the request was made, and that the plaintiffs subsequently did the things requested. But it is not found that the acts were induced by the request. As a matter of evidence, one might possibly be inferred from the other; but mere inference of that character does not supply the place of a finding. And in this case it appears from other parts of the record that no such inference could be drawn, and that the element in question did not exist, for the things which were done by the plaintiffs were required by the contract to be done. The plaintiffs were simply complying with their contract; and, as their position was that the defendant was liable in an action at law for the full amount of the claim, it is manifest that they would have done the things anyway. In view of this, it seems idle to say that they were induced by the conduct of the defendant to incur expense in producing the goods, and having them sorted and weighed. This precise point was decided by the case of *Wheaton v. Insurance Co.*, supra. That case went further than is required here, because there the time to make preliminary proofs had expired, and it was afterwards that the request to make them was made, and the jury found that the insured was put to trouble and expense in complying with the request, and that except for it he would have abandoned the claim. But it was held that this finding was not justified by the evidence, from which nothing appeared except the request, and the subsequent performance of the acts requested; and the court, per *McKINSTRY, J.*, said: "His action is to be referred to the contract; his motive to the necessity of making the proofs as a preliminary to securing the insurance. After he was requested to make the proofs he had agreed to make, he made them; but the statement that he was induced to make them by the request is only a *post hoc ergo propter hoc*." Upon the record before us, we do not see anything to estop the defendant from relying upon the defense

referred to, which, as we have seen, was clearly made out. We, therefore, advise that the judgment be affirmed.

WE CONCUR: BELCHER, C. C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

McCORMICK *et al.* v. UNION INS. CO. (No. 12,887.)  
(*Supreme Court of California*. Nov. 3, 1890.)

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; J. F. SULLIVAN, Judge.

John H. Dickinson, for appellants. William M. Pierson, for respondent.

HAYNE, C. The judgment in this case should be affirmed on the authority of *McCormick v. Insurance Co.*, ante, 1008, (just decided.) It is contended that that case is unlike this in two particulars, viz., the provision as to ownership, and a provision as to the indorsement of a waiver on the policy; but, so far as the case before us is concerned, we do not think that the provision as to ownership is different in effect, and we did not rest our opinion in the other case upon the provision as to waiver, above referred to. We, therefore, advise that the judgment be affirmed.

WE CONCUR: BELCHER, C. C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

McCORMICK *et al.* v. SPRINGFIELD INS. CO. (No. 12,898.)

(*Supreme Court of California*. Nov. 3, 1890.)

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; J. F. SULLIVAN, Judge.

John H. Dickinson, for appellants. William M. Pierson, for respondent.

HAYNE, C. This case is not materially different from *McCormick v. Insurance Co.*, ante, 1008, (just decided;) and upon the authority of that case we advise that the judgment should be affirmed.

WE CONCUR: BELCHER, C. C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

36 Cal. 124

JAMES V. YAEGER. (No. 13,940.)

(*Supreme Court of California*. Oct. 21, 1890.)

NEGOTIABLE INSTRUMENTS—BONA FIDE PURCHASER.

1. One who buys a note after maturity, from one of the makers thereof, is presumed to take it with knowledge of all the facts, and, where it has been paid, he cannot sue thereon.

2. Civil Code Cal. § 1774, which provides that "one who sells or agrees to sell an instrument purporting to bind any one to the performance of an act, thereby warrants that he has no knowledge of any facts which tend to prove it worthless," applies only to the transfer of paper, in due course, and to an innocent holder.

Department 1. Appeal from superior court, Orange county; J. W. TOWNER, Judge.

Charles S. McKelvey, for appellant. Richard Melrose and E. A. Meserve, for respondent.

WORKS, J. This action was brought by the respondent, as indorsee, against the

appellant and two others, on a non-negotiable, joint and several promissory note. The other makers of the note denied the assignment to the respondent, and set up affirmatively that the note had been fully paid by the appellant. The appellant answered, admitting the execution of the note by himself and the other defendants, but denied that the payee of the note had ever assigned or delivered the same to the respondent, and alleged that he had fully paid the note to the payee, and taken it up; that he thereby became entitled to contribution from his co-makers; that he was only a surety on the note for the other makers, which was known to the plaintiff; and that he sold his right to contribution to the plaintiff, and nothing more, and assigned and delivered the note to him for the purpose of securing the same. At the trial, it appearing that the appellant had in fact fully paid the note to the payee upon its maturity, and taken it up, the court granted a nonsuit as to the other defendants, who were the principals on the note, and the plaintiff amended his complaint by adding thereto the following allegations: "(2) That on or about the 20th day of November, 1889, the said defendant, C. Gomber, paid the principal sum of said promissory note, and the interest due thereon, to the said H. Werder, and that thereupon the said Werder delivered the said promissory note to the defendant, C. Gomber; and afterwards, to wit, on or about the 4th day of December, 1889, the said defendant, Gomber, sold and delivered said note for a valuable consideration to the said plaintiff. (3) That since the said 4th day of December, 1889, no part of the said principal sum of said promissory note, nor of the interest due thereon, has been paid by said defendant, Gomber, or at all." Upon the issues thus formed the court below tried the cause, and found the execution of the note, as alleged, the payment of it to the payee by the appellant, and its delivery to him; that he afterwards sold the note to the plaintiff, and has not since paid it the second time; and upon these findings rendered judgment against the appellant for the amount of the note and interest.

It is contended by the appellant that the findings of the court do not sustain the judgment. In this contention we fully agree with counsel for appellant. By the payment to the payee the note became extinct, and ceased to be a binding obligation. Code Civil Proc. § 1473; *Wright v. Mix*, 76 Cal. 465, 18 Pac. Rep. 645. And a purchaser of the note after maturity—or in this instance, the note being non-negotiable, whether the purchase was before or after maturity—took it subject to the defense of payment. *Elgin v. Hill*, 27 Cal. 373. Having been paid it became *functus officio*, and no action could be maintained upon it. *Gordon v. Wansey*, 21 Cal. 79. If the respondent had been an innocent purchaser, it would have been different. But here, not only was the note non-negotiable and the purchase by the respondent after maturity, but his purchase was from one of the makers of the note. This was sufficient to put him upon inquiry. But it must be presumed, in this case, that the

respondent took the note with full knowledge of all the facts. In his amended complaint he alleges the facts, but does not allege that he had no knowledge thereof at the time the note came into his hands. And, as we have said, the mere fact that the note was in the hands of one of the makers, after maturity, was sufficient notice to him that it had been paid and taken up. We do not overlook the fact contended for by the respondent, that a negotiable note may, under certain circumstances, be enforced against certain parties to it after payment. But this is not one of the cases. The purchaser of a note from the maker, after maturity, cannot claim to be an innocent holder, nor can he claim, as against the maker or any one else, that the note has not been extinguished, if it has in fact been paid.

But it is contended that the maker who again puts out the note is estopped to deny its genuineness, or to set up the defense of its extinguishment by payment. We do not think so under the circumstances of this case. There is no allegation or finding that the respondent was ignorant of any of the facts, or that he was misled by any representations of the appellant, or otherwise. This being so, there is no element of estoppel in the case. Counsel for respondent rely upon section 1774, Civil Code, which provides: "One who sells or agrees to sell an instrument purporting to bind any one to the performance of an act thereby warrants that he has no knowledge of any facts which tend to prove it worthless, such as the insolvency of any of the parties thereto, where that is material, the extinction of its obligations, or its invalidity for any cause." But this section only applies to the transfer of paper, in due course, and to an innocent taker. This must be so necessarily, else all the legislation for the protection of an innocent holder of commercial paper, as between him and his assignor, would be unnecessary, and an indorsee with knowledge would be protected equally with a purchaser for value, and without notice. Judgment reversed, and cause remanded for a new trial.

We concur: FOX, J.; PATERSON, J.

85 Cal. 421

PEOPLE v. NELSON. (No. 20,628.)

(Supreme Court of California. Sept. 1, 1890.)

CRIMINAL LAW—ROBBERY—EVIDENCE.

1. On trial for robbery, where it appears that the crime was committed on the prosecuting witness and another, who met in town, and then drove out to the ranch of the witness, and that during the drive the robbery occurred, the witness, after stating where and when he met his companion, can testify that they took a journey on that day, such statement being preliminary to the ensuing examination.

2. Such witness can testify that after robbing him defendant proceeded to rob his companion, as such evidence is part of the *res gestæ*, and does not tend to establish another and distinct offense.

3. An exception to testimony cannot be taken for the first time by a motion to strike out.

4. Where a non-resident witness for the prosecution, who gave his testimony at the preliminary examination, told the prosecuting attorney that he did not expect to remain in the state more than 10 days longer, but that, if he did, he

would notify him, and he has not been heard of since, his deposition, correctly taken at the preliminary examination, is admissible under Pen. Code Cal. § 686, providing that the testimony of a witness taken at the preliminary examination may be read at the trial, when it is shown that he cannot, with due diligence, be found within the state.

5. The grounds of an objection to the admission of evidence must be specified, otherwise an exception to its admission will not be regarded on appeal.

6. The erroneous admission of evidence is not ground for reversal when it is not prejudicial to defendant.

7. Evidence of defendant's absence from the place where the crime was committed is not a defense, but it is admissible to establish a defense; and, if a reasonable doubt is created by the evidence, defendant should be acquitted.

8. In order to convict on circumstantial evidence alone, the circumstances proved "must concur" to show that he committed the crime, and "must be inconsistent" with any other rational conclusion.

9. A new trial on the ground of newly-discovered evidence is properly refused when it is not shown why the evidence was not produced at the first trial.

Commissioners' decision. In bank. Appeal from superior court, Sacramento county; JOHN W. ARMSTRONG, Judge.

W. A. Anderson and J. C. Tubbs, for appellant. George A. Johnson, Atty. Gen., for the People.

BELCHER, C. C. The defendant was convicted of the crime of robbery, and he appeals from the judgment and an order denying him a new trial. Numerous errors in the admission of evidence, and in the refusal to give certain instructions, as asked by defendant, are assigned, and, in order to make clear the points presented, a brief statement of the facts should be made. The offense charged was committed by stopping one Thomas Davis on the highway, and taking from him his watch and chain, and a small amount of money. Davis was the foreman of a ranch, situated on the north side of the American river, in Sacramento county, and on the 3d day of July, 1889, was in the city of Sacramento to obtain supplies for the ranch. He met there one John Cownle, who had recently come to this state from Iowa, and took him into his buggy, and then drove across the river towards the ranch. Shortly after passing the river, and at about 2 o'clock in the afternoon, or a little later, he was stopped on the road by a man who came out of the brush, and, presenting a revolver, told him to halt, and to strip his pockets, and throw out his watch, quick. Davis threw his watch and money on the ground, and the robber then turned his pistol on Cownle, and told him to deliver up his money. Cownle threw out his purse, and was then told to give up his watch, and be quick about it, or he would shoot, and Cownle threw down his watch and chain. The robber then told Davis to go on, and he drove rapidly to the ranch, about three miles away. On arriving there, he had one Phil Johnson telephone to the sheriff in Sacramento that he had been robbed across the American river, and to come out. The sheriff telephoned back to Davis to meet him, and Davis, Johnson, and Cownle at once went

back and met the sheriff and two deputies near the place of the robbery. Davis then told the sheriff who he thought had robbed him, and the officer went to a milk ranch, nor far away, and there found and arrested the defendant. At the trial, Davis was called as a witness for the prosecution, and, after telling where and when he met Cownie, he was asked: "State whether you and he took any journey on that day." Counsel for defendant objected to the question as irrelevant, immaterial, and incompetent, and the objection was overruled. This ruling is assigned as error, but we think it proper. The question was merely preliminary to the further examination. The same witness, after stating how he was made to give up his watch and money, was asked: "What occurred after you had given all the property that you had?" The answer was: "Well, he turned his attention then to Mr. Cownie, and he pointed his gun at him. Question. What kind of a gun was it? Answer. It was a pistol." This testimony was objected to on the ground that it was irrelevant and incompetent, because it tended to show the commission of another distinct offense. The objection was overruled, and an exception reserved. We see no error in this ruling. The robbery of both parties was practically one act, and the testimony was admissible as part of the *res gestæ*. Further along, after the witness had stated that he had Phil Johnson telephone to the sheriff, he was asked the following questions: "Did you tell him what occurred before you telephoned?" "What did you tell him to telephone?" "Did you tell him who to look for?" Each of these questions was objected to as irrelevant and immaterial, and the objections were overruled. It is claimed that these rulings were erroneous, but, as shown by the record, no answers were given to the first and third questions, and the answer to the second was only: "I told him to telephone to the sheriff that I was robbed. Q. What else, anything? A. And across the American river, and for him to come out." We are unable to see that the defendant was in any way prejudiced by the rulings. The witness was also asked: "Q. Didn't you know the man then that had robbed you? A. Yes, I had recognized him. Yes, sir. Q. Did you tell anything to that effect to the sheriff? A. No; and he telephoned back to me to meet him, and me and Phil Johnson and Mr. Cownie turned around after they said they were going out." The defendant moved to strike out this testimony as irrelevant and incompetent and hearsay. The motion was denied, and an exception taken. The answer to this point is that an objection to testimony cannot be taken for the first time by a motion to strike it out. *People v. Long*, 43 Cal. 444; *People v. Rolfe*, 61 Cal. 540.

At the preliminary examination of the defendant, John Cownie was a witness for the prosecution, and his testimony was correctly taken down by a reporter. At the trial, the district attorney proposed to read this testimony, and counsel for defendant objected to his doing so on the ground that it was incompetent, no rea-

son having been given why the witness himself was not present. The district attorney was then sworn, and testified: "Mr. Cownie informed me that it was his intention to leave the state in about two weeks. If he didn't leave he would notify me as to his whereabouts. I received no notification from him, and it is my best belief that he has returned to Iowa. The Court. When this testimony was taken, where did the witness go, or did he state where he was going? Answer. He said he did not know where he would go. He said it was probable he might go up the Sacramento road, and from there go on to Oregon. He said he might go to San Francisco, and he hadn't yet made up his mind. He might take the steamer back, or he might go back by the Southern road, but he hadn't made up his mind, but it was his intention not to stay in the state more than ten days or two weeks. I said, 'The case might be set for trial at any time, and your presence desired, if you are in the state.' He said: 'If I remain here more than two weeks, I will let you have notice of my whereabouts.' I have no knowledge of where the man is to-day, unless he is at home, at Des Moines, Iowa. I could not issue a subpoena, because I had no idea where to send it, and could have no idea. I will further state that Mr. Cownie told me it was his intention not to return to the state of California." The objection was then overruled, and an exception reserved. The Penal Code, § 686, provides that in a criminal action the defendant is entitled "to be confronted with the witnesses against him, in the presence of the court, except that where the charge has been preliminarily examined before a committing magistrate, and the testimony taken down by question and answer in the presence of the defendant, who has, either in person or by counsel, cross-examined, or had an opportunity to cross-examine, the witness, \* \* \* the deposition of such witness may be read, upon its being satisfactorily shown to the court that he is dead or insane, or cannot, with due diligence, be found within the state." It is claimed that this ruling was erroneous, because it did not appear that any effort had been made to ascertain whether the witness was still in this state, or had returned to his home in Iowa; but we think the sworn statements of the district attorney, in the absence of anything to the contrary, were sufficient to justify the court in concluding that the witness had left the state, and could not by any diligence have been produced at the trial.

In the testimony of the witness Cownie, the following occurs: "Question. I will ask you this: Did he mention to you, did he state as a fact to you, any time after that, that he recognized the man? Answer. We had not driven forty rods until Mr. Davis said: 'I know that man. I know that voice. I know who robbed us. Just let me think,—let me think.' I was letting him do as much thinking as he pleased, for I was doing considerable myself, and was not speaking. He said, 'Let me think.' I had not spoken yet. I was thinking, too. Q. When did he, if any

time, state that he knew who it was? A. He spoke before we were at the end of the trestle. He said, 'I know that man.' Q. Where did he fix the man? A. He said he was a painter. He said: 'I know that voice. That is the voice of the man that done some painting for us.' He said: 'He painted this buggy we are riding in.' At the conclusion of the testimony of the witness, the following objections, motions, and exceptions are shown by the record: "Counsel for the defendant objected to the question asked in the deposition as to whether Davis recognized the man. The objection was overruled, and counsel for defendant excepted. Counsel for the defendant moved to strike out the answer to that question after the answer was made. Motion denied. Counsel for the defendant excepted. Counsel for the defendant moved at the time of reading to strike out the answer, 'I know that man.' Motion denied. Defendant excepted. Counsel for defendant moved to strike out the expression of the witness, 'That is the voice of the man that done some painting for us. He painted this buggy we are riding in.' Motion denied. Defendant excepted." It is claimed that the conversation between Davis and Cownie was inadmissible, and that the court erred in its rulings to the prejudice of defendant. The answer to this point is that no ground of objection to the first question was stated, and the well-settled rule is that a general objection to the admission of evidence is insufficient. "A party objecting to evidence must specify the ground of his objection. *People v. Manning*, 48 Cal. 835. If he does not, there is no error in overruling his objection, and an exception taken to the ruling is not revisable on appeal. *Winans v. Hassey*, 48 Cal. 635." *People v. Chee Kee*, 61 Cal. 404. And as to the motions to strike out, it does not appear from the record that any objection to the testimony was taken at the preliminary examination, or at the trial, and, in such case, as we have seen, a motion to strike out will not be entertained. Besides, no grounds for the motions were stated.

John Morrison was called as a witness for the prosecution, and testified that he kept a saloon on the north side of the American river, and that the defendant came to his saloon at about 12 o'clock on the 3d of July, that he did not notice how defendant was dressed; and that he testified in the justice's court. He was then asked: "Recall to your memory whether you didn't testify there as to the clothes that he had on." Counsel for defendant "objected to the attorney calling the attention of the witness to that testimony, or to any testimony." The objection was overruled, and an exception taken. The answer was: "I remember testifying. I testified that I didn't know what clothes he had on when he went on, but I noticed the clothes after he was arrested." The witness went on to state that he saw Mr. Davis drive past at a pretty good gait, going north, and that he remembered when he came back. He was then asked: "Did Mr. Davis communicate to you the fact that a robbery had been committed?" This question was objected to as irrele-

vant and immaterial, and the objection was overruled. The answer was, "Yes, sir." It is claimed that these two rulings were erroneous; but conceding them to be so, we are unable to see that the defendant was, or could have been, in any way, prejudiced by them. They are therefore not cause for a reversal of the judgment.

It is further contended that the verdict of the jury was contrary to the evidence, and that the jurors must have been controlled by prejudice or passion. But there was direct and positive testimony that the offense charged was committed, and that the defendant was the party who committed it. There was also circumstantial evidence tending strongly to the same end. Whether the defendant was guilty or not was therefore a question for the jury, and the verdict cannot be disturbed on the ground that it was not justified by the evidence. It should be added that we see nothing in the record tending to show that the jury was at all influenced by passion or prejudice.

Counsel for defendant requested the court to give to the jury the following instructions: "When a criminal charge is sought to be proved by circumstantial evidence, the proof must be consistent with defendant's guilt, and inconsistent with every other rational conclusion. Each rational fact going to make up the chain of circumstances must be proved to a moral certainty, and beyond all reasonable doubt. The evidence must be such as to exclude the probability of any other hypothesis being true, and, if the evidence does not establish this absolutely to moral certainty, then the jury must acquit." "The identity of the accused must be established to an absolute moral certainty, and every fact and circumstance must be established to the same degree of certainty as the main fact, which these independent circumstances, taken together, tend to establish. If this certainty is not proven, then the jury must acquit the defendant." The court struck out the word "absolute" in the first of these instructions, and, as thus amended, gave it to the jury; and it refused to give the second. There was no error in this. In *People v. Davis*, 64 Cal. 440, 1 Pac. Rep. 889, an instruction was asked by the defendant in regard to circumstantial evidence, which stated that "the hypothesis contended for by the prosecution must be established to an absolute moral certainty, to the entire exclusion of any rational probability of any other hypothesis being true, or the jury must find the defendant not guilty." The instruction was refused, and in this court it was said: "A philologist may be able to say that the word 'absolute,' in the instruction requested and rejected, adds no force to the words 'moral certainty.' But the word suggests a degree of certainty greater than that moral certainty which can be reached upon such evidence as is securable in courts of justice. If the learned judge of the court below had stricken out the word 'absolute,' we certainly could not have held that it was error on his part. It follows that it was not error to decline to give the instruction as it was presented."



The defendant also asked the court to give to the jury instructions reading as follows: "The commission of a crime implies the presence of the defendant at the necessary time and place, and evidence of the absence of defendant is always a defense, and, if a reasonable doubt is created by this evidence, it is the duty of the jury to acquit the defendant." "In order to convict the defendant of a crime upon circumstantial evidence alone, the circumstances proved must all concur to show that he committed the crime, and must all be inconsistent with any other rational conclusion, and must exclude, to a moral certainty, every other hypothesis but the single one of guilt." The court amended the first of these instructions by inserting after the word "always" the words "admitted to establish," and the second by striking out the word "all." As thus amended both instructions were given. We think the instructions as given stated the law correctly, and that the amendments complained of were therefore properly made.

The last point made is that a new trial should have been granted on the ground of newly-discovered evidence. A sufficient answer to this is—*First*, that no reason is shown why the evidence was not produced at the trial; and *second*, that it simply tells how another robbery was attempted by some unknown person, near the same place, and under similar circumstances, about 20 days after the offense here charged was committed. We advise that the judgment and orders be affirmed.

We concur: FOOTE, C.; GIBSON, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and orders are affirmed.

86 Cal. 203

TATUM *et al.* v. THOMPSON. (No. 12,701.)  
(Supreme Court of California. Oct. 28, 1890.)

LANDLORD AND TENANT—REPAIRS—EVIDENCE.

1. Under a lease stipulating that if the premises become untenable by reason of fire, no rent shall be charged until they are made tenable by the lessor, the lessees who remain in possession after a fire, and continue to pay rent, without protest, elect to treat the premises as tenable, and cannot recover for damages to their property occasioned by rain coming through the roof, which was injured by the fire, and which had not been wholly repaired when the rain occurred.

2. Where the lessees continue in possession after the fire, without notifying the lessor that the premises are untenable, there is no duty on his part to repair under Civil Code Cal. §§ 1941, 1942, providing that the lessor shall repair within a reasonable time after notice from the lessee.

3. In such case, evidence by plaintiffs as to why they remained in the premises after the fire is inadmissible.

Department 1. Appeal from superior court, city and county of San Francisco; T. H. REARDEN, Judge.

Langhorne & Miller, for appellants.  
Mesick, Maxwell & Phelan, for respondent.

Fox, J. Appellants were tenants of respondent, occupying the first floor and basement of the building Nos. 25 to 31 Main

street, San Francisco, under a written lease, paying a monthly rent of \$450 per month, monthly in advance. The rent fell due on the 5th of each month. On the 5th of August, 1884, the rent for the next succeeding month was demanded and paid in advance, in due and regular course of business. The lease contained the following clause: "It is mutually agreed that if, by reason of fire, the premises herein leased shall become untenable, no rent shall be charged or paid until they are made tenable by the party of the first part. [the lessor.]" On the 5th of August, and after the rent falling due on that day had been paid, a fire consumed the roof of the building, and the two stories above the premises leased to the plaintiffs. It did not reach plaintiffs' premises, except to burn out in several places the flooring of the premises immediately over them, thus rendering them subject to the falling in upon them of *débris* and clinders from the floor above. They were, however, liable to become further untenable by reason of rains likely to occur, and the first of which did occur on the 12th October following. On the 18th of September, defendant commenced the repair of the building, and put a ceiling in plaintiffs' premises to protect them from the falling *débris*, and the floor immediately above was tongued and grooved, and the joints laid in white lead, with the idea that it would, "in some measure," protect plaintiffs' premises from any rain that might intervene before the roof was completed. Plaintiffs did not elect to treat the place as untenable for their use, or either move out, or refuse to pay rent, but remained there, without any indication of intention to move; and regularly, on the 5th of each month, the collector called as usual for the rent, and they as regularly paid it. They allege in their complaint: "That immediately after said fire, the defendant informed and promised plaintiffs that he would at once commence and set about repairing said building, and would thoroughly repair the same, and put it in a good, safe, and tenable condition; that these plaintiffs, relying upon the defendant's duty as well as also upon his promise to repair said building, and put it in good, safe, and tenable condition, remained in and continued to occupy said demised premises with their goods, wares, and merchandise, as aforesaid, and paid the rent as provided in said indenture of lease, up to the commencement of this action." The evidence does not support this averment. On it the court found against the plaintiffs; and the testimony, even that given by the plaintiffs and their manager, justifies the finding. There was no duty devolving upon the defendant, by reason of the clause in the lease above quoted, to repair promptly, or at all. Whatever duty there was resting upon the defendant to repair, (assuming that the premises had become unfit for the occupation for which they were demised,) was that growing out of the provisions of the statute. Civil Code, §§ 1941, 1942. Under these provisions, if the premises had become unfit for the occupation for which they were demised, from a cause not occasioned by the ordinary negligence of the

lessee, it was the duty of the lessor to repair, within a reasonable time after notice from the lessee; and, if he failed to do so, the lessee had the right to vacate the premises, and would thereupon be discharged from further payment of rent; or he might at his option, after such notice and failure to repair within a reasonable time, himself make the repairs, if they did not require an expenditure greater than one month's rent, and deduct the amount of such expenditure from the rent. *Van Every v. Ogg*, 59 Cal. 563. The evident purpose of the clause of the lease which we have quoted was to change in some measure the rights of the parties under this statute; but it did not change the duty of the lessor in the premises, so far as relates to the making of repairs. It certainly suspended his right to collect, or the duty of the lessees to pay, rent, pending repairs. In our judgment, it gave the lessees the right either to remain in the possession of the premises, making such use of them as they could, pending repairs, without the payment of rent for such period as the premises remained out of repair, or at their option they could move out and remain until the repairs were completed, and then return and continue to occupy the premises at the stipulated rental for the balance of the term of the demise. They did not do either, but continued to occupy the premises, and regularly to pay the rent, as if no repairs were required. They did not even notify the defendant to repair, and therefore never put him in default under the statute. They had some talk with the defendant about the repairs, in which he told them that he was in no hurry about the matter, that he did not wish to commence until the loss was adjusted with the insurers, and in which they requested that in making repairs some things should be done which he was not required to do,—putting the premises in better condition than they were before,—of which the ceiling was one. These were made as requested. But the repairs did not commence until about the 18th of September, and on the 12th of October, the roof not yet being on, a rain came, and plaintiffs were damaged by water. This action is to recover for the damages thus sustained. Judgment went for defendant, and from this, and an order denying plaintiffs' motion for new trial, this appeal is taken.

1. Three errors are assigned on the rulings of the court in rejecting certain testimony offered by plaintiffs: (1) That the court erred in not permitting the plaintiffs to testify as to why they remained in the demised premises after the fire; (2) that the court erred in not permitting plaintiffs to testify as to whether or not defendant had said or had done anything that induced them to believe that he would make the premises tenantable; (3) that the court erred in not permitting plaintiffs to testify as to whether or not they remained in the premises after the fire until the time of the rain by reason of any promise made by defendant in regard to repairing the building. The court admitted and received all the testimony that was offered by either party as to all that was said and all that

was done by any and every of the parties, or their agents or representatives, touching the subject-matter of repairs. This being done, the evidence as to what the effect of these things so said and done was upon the minds of plaintiffs was wholly incompetent and inadmissible, and it was not error to reject it. Cases are triable by the proof of facts, not of the thoughts of men.

2. Appellants claim that "the finding of the court that at all times after August 5, 1884, the plaintiffs, by their acts and conduct, and by the payment of rent, elected to consider the premises not untenable, \* \* \* and that the premises by the fire of August 5, 1884, were not untenable as to plaintiffs, is not supported by the evidence." We think the evidence fully supports this finding. The plaintiffs continued to occupy and conduct their business as if there had been no fire. There is nothing to show that they ever claimed that the premises were untenable, or notified the defendant to repair, or took any steps to put him in default for not repairing. If the premises had been rendered untenable, then, by the express covenant of the lease, they were under no obligation to pay rent until repaired; but they paid promptly and regularly, without diminution or protest.

3. Appellants claim that "the evidence does not support the findings that from August 5 to October 12, 1884, was not ample or reasonable time for putting the premises in a safe or tenantable condition, and that there was no failure or neglect on the part of defendant in putting the demised premises in a safe or tenantable condition." The argument in support of this proposition is based upon the idea that the demand for rent after the fire operated as an implied warranty that the premises were not untenable, and cites the case of *Roussinet v. Rebout*, 18 Pac. Rep. 423, in support thereof. That case is hardly in point. There certain premises were leased for the purposes of a nursery for plants. On the premises were 15 orange trees, the care and product of which were reserved by the lessor, who covenanted that "the care given to the orange trees must not cause any harm to the plants raised by the tenant." It was shown that, by means of the care given to the orange trees, the plants of the lessee were destroyed, and the lessor was held liable therefor. This liability was for damages resulting from the direct act of the lessor, done in violation of his covenant, not for injuries resulting from causes over which he had no control, and against which he was not bound to protect the lessee. As already stated, this special provision of the lease did not bind the lessor to repair at all. Under the statute, he was bound to repair only upon notice from the tenant, and, if he then failed to do it, the limit of his liability was the right of the lessee to terminate the lease, or, at his option, to make the repairs to the extent of one month's rent, and deduct the cost thereof from the rent. *Van Every v. Ogg*, supra. Neither did the covenant in the lease amount to a warranty of anything except that, if the premises were untenable, the lessee should not be required to pay

rent. In regular course of business, the collector called for the rent. If the plaintiffs deemed the premises untenable, it was their duty to say so, and refuse to pay the rent. But instead of that they promptly paid, without objection or protest, thus, in the most emphatic terms, assenting to the proposition that they had not become unfit for the purpose for which they were rented. Neither did they take any measures to assert their rights under the statute, but they remained in possession, and gave no notice to repair, or of intention themselves to make repairs. The other cases cited by appellants are even less in point. They are generally cases where the landlord had undertaken permanent repairs on his own account, where no rights were reserved to the tenant by reason thereof, and where the repairs were conducted in such a manner as that injury to the tenant resulted therefrom. The court found in the same connection with this point that the time from the date of the fire to the 12th of October was not ample or reasonable for the repair, refitting, and reconstruction of the building. On this point, and almost on this point alone, there was some conflict of testimony, but there was evidence to support the finding, and it cannot therefore be disturbed. There is evidence to support all the findings, and they support the judgment. No errors of law are assigned in the argument except such as we have here considered. We think, with the court below, that the plaintiffs elected to treat the premises as not untenable, and governed themselves accordingly, and that they cannot recover in this action.

Judgment and order affirmed.

We concur: WORKS, J.; PATERSON, J.

86 Cal. 274

CORTEZ v. SUPERIOR COURT. (No. 13,885.)

(*Supreme Court of California.* Nov. 3, 1890.)

JUDGMENT—PARTITION PROCEEDINGS—ALLOWANCE OF COMMISSIONERS' FEES.

1. A decree allowing a certain sum to a commissioner in partition, for services and expenses, is a money judgment, within the meaning of Code Civil Proc. Cal. § 685, providing that "in all cases other than for the recovery of money, the judgment may be enforced or carried into execution after the lapse of five years from the date of its entry, by leave of the court, upon motion or by judgment for that purpose," and cannot be enforced by execution after five years.

2. The commissioner was a "party in whose favor judgment is given," within the meaning of section 681, providing that such party may have execution to enforce a judgment, within five years from its entry.

In bank. Writ of review to superior court, city and county of San Francisco; J. F. SULLIVAN, Judge.

Code Civil Proc. Cal. § 681, provides: "The party in whose favor judgment is given, may, at any time within five years from the entry thereof, have a writ of execution issued for its enforcement." Section 685 reads: "In all cases other than for the recovery of money the judgment may be enforced or carried into execution after five years from the date of its entry, by leave of the court, upon motion, or by

judgment for that purpose founded upon supplemental pleadings."

Garber, Boalt & Bishop, (J. P. Phelan, of counsel,) for petitioner. T. Z. Blake-man, for respondent.

PATERSON, J. Review. On August 3, 1883, a decree of partition of certain real estate was entered in the superior court, probate department, of the city and county of San Francisco. One Wackenreuder, who performed the duty of commissioner in making the partition, was by the decree allowed a fee of \$480 for his services and expenses incurred. It was provided in the decree that the sums so allowed to Wackenreuder, and "amounting to \$480, be, and the same are hereby, charged and made a lien upon the land and premises partitioned." In July, 1888, the executors of Wackenreuder procured from the court an order of sale to satisfy the claim with interest thereon from the date of the decree. On August 20, 1889, the court made an order requiring the executors of Wackenreuder to show cause why the order of sale should not be set aside, and an order was entered staying all proceedings. On May 15, 1890, the order under review herein granting an execution was made. It vacates the order to show cause, and the stay order, procured by the distributees of Ramirez's estate, August 20, 1889, finds the amount which had been paid on account of fees and expenses, the amount still unpaid, and directs execution therefor against the respective shares partitioned to the several parties, and made liable by the provisions of the decree. That portion of the decree which provides for the payment to Wackenreuder of \$480 is, in effect, a judgment in his favor for that sum. It is a money judgment, and, if valid, one upon which he would have been entitled to an execution, if the probate court had the power to issue one at all, which is doubtful.

The judgment, being one "for the recovery of money," so far as Wackenreuder was interested in it, could not be enforced by execution after the lapse of five years from the entry thereof. Sections 681, 685, Code Civil Proc.; Dorland v. Hanson, 81 Cal. 202, 22 Pac. Rep. 552. We think that Wackenreuder was "the party in whose favor judgment was given," within the meaning of the word "party," as used in section 681, supra. The order staying proceedings did not operate to suspend the running of the statute. Solomon v. Maguire, 29 Cal. 237; Dorland v. Hanson, supra. We think that the order under review was in excess of the jurisdiction of the court. The court had no power to enforce the same after the lapse of five years. It had ceased to be operative, (*White v. Clark*, 8 Cal. 513,) assuming that the probate court had the power to declare a lien, and to award an execution in satisfaction thereof,—a question we deem it unnecessary to determine, in view of what has been said on the other point raised.

The order is annulled.

We concur: SHARPSTEIN, J.; FOX, J.; McFARLAND, J.

86 Cal. 286

**FLOURNOY V. FLOURNOY.** (No. 13,732.)

(Supreme Court of California. Nov. 5, 1890.)

**HUSBAND AND WIFE—SEPARATE ESTATE—COMMUNITY PROPERTY.**

1. Where real estate is conveyed to a wife, with the understanding between her and her husband that it is to be her separate estate, and is to be paid for out of the separate property which she already owns, the fact that the husband loans her money to make a partial payment thereon gives him no interest in the land, as between himself and her.

2. Where a wife who had made large payments on lands conveyed to her for her separate estate, joined with her husband in executing a mortgage thereon, to raise money partly for her own benefit, and partly to discharge a prior mortgage on the land, the amount used in discharging the prior mortgage was, as between herself and husband, an investment for her separate estate.

3. Where a wife purchases lands for her separate estate, and the deed is deposited in escrow, to be delivered upon payment of the balance of the purchase money, the husband cannot gain an interest in the lands, as between himself and her, by paying the money and receiving the deed, without the wife's knowledge.

Department 1. Appeal from superior court, San Diego county; **GEORGE PUTERBAUGH**, Judge.

**L. L. Boone and Hunsaker & Britt**, for appellant. **Capps & Montgomery**, for respondent.

**WORKS, J.** This is an action brought by a wife against her husband, to recover upon a promissory note, and for money had and received. The defendant set up a counter-claim for money loaned. The court below found in favor of the plaintiff on the note, and for a part of the amount claimed by her for money had and received, and allowed the defendant a part of his counter-claim. The plaintiff appeals on the judgment roll. There is no controversy as to the correctness of the finding, and judgment upon the note and the counterclaim. The contest is as to the amount allowed the plaintiff for money had and received. The real matter of controversy is as to the character of certain moneys claimed by the wife, whether the same was her separate estate or community property. The facts, as disclosed by the findings, are these, in substance: That certain real estate was sold to the plaintiff for \$4,750, and a deed therefor executed to her; that it was the intention and expectation of the parties that the consideration therefor should be paid by the plaintiff, out of her separate estate, and that thereupon the property should be her separate property; that, on the day said real estate was purchased, the defendant loaned the plaintiff \$600, which sum was by the defendant, at the instance of the plaintiff, paid to the party who conveyed said property to the plaintiff, and, as a part of the consideration therefor, that the plaintiff promised to repay said sum to defendant, and defendant expected the same to be paid out of her separate property; that the plaintiff at that time had separate property of the value of between \$7,200 and \$9,200; that, upon the payment of said \$600, a deed for the property was delivered in escrow till the balance of the purchase price should be paid; that after-

wards the plaintiff paid upon the property, of her separate funds, \$2,000; that said deed contained a covenant on the part of the plaintiff to pay off a mortgage standing against said property for \$1,000; that plaintiff and defendant borrowed \$3,000, and gave their joint note therefor, and joined in a mortgage on said property to secure the payment thereof; that \$2,000 of said sum was paid to the plaintiff, and \$1,000 thereof applied to the payment of the mortgage for that amount, which she had covenanted to pay; that the balance of the consideration for the property purchased by the plaintiff, \$1,150, was paid by the defendant out of his own separate estate, without the request or knowledge of the plaintiff, and thereupon the deed was taken out of escrow and recorded; that afterwards said property was sold for \$6,500. The purchaser assumed the \$3,000, and paid the balance in cash at divers times to the defendant, no part of which has been paid to the plaintiff.

The question presented under these findings, is, how much of the money thus received, and not paid over to the plaintiff, was her separate estate, and how much of it, if any, was community property? The court below held, as a conclusion of law, that the plaintiff was entitled to recover of the defendant, on account of the moneys thus received, and not paid over, \$933.33, and as against this sum allowed the defendant an offset of \$160 on an account stated, and the sum of \$594.40 for money loaned. By what rule of law or what process of reasoning the court found that for \$3,500, collected and appropriated by the defendant, he was only bound to pay less than one-third of that sum, we are not informed by the findings and conclusions of law. We suppose, however, that the court came to the conclusion that all of the money realized by the defendant from the land purchased by the plaintiff was community property, except what was actually paid by her therefor out of her separate property, and the proportionate increase in the value of the land at the time it was sold by her. The position taken by the respondent in this court is that, as to the \$600 loaned to the plaintiff by the defendant, to make the first payment, they were dealing with each other in a fiduciary capacity, and, as she gave no mortgage on the property to secure its repayment, it was in effect a payment made by the defendant on the land, and gave him an interest therein to that extent. But it must be remembered that this is a question wholly between the husband and wife; that the court finds that he loaned her the money to be repaid out of her separate estate; and that such was the intention of the parties. The effect of the respondent's position is to convert this loan of money by the defendant into an investment, on his individual account, in real estate, against the express understanding and intention of the parties. It is, in effect, to say that by loaning to the wife he could hold her liable to him on her contract to repay him the money loaned, and yet hold an interest in the land to the extent of such loan, with the right to sell the same without her con-

sent; or, putting it differently, the loan of the defendant to his wife was a loan to himself, in spite of their agreement to the contrary, and he could recover from her the amount loaned, for that was their contract, and yet hold an interest in the land to the same extent, because, according to the respondent's contention, that was the legal effect of his making the payment, without taking a mortgage on the land to secure its repayment. Such a construction of the law would certainly not offer great inducements for a married woman to call upon her husband for aid where her separate property was in danger. The case of *Schuyler v. Broughton*, 70 Cal. 282, 11 Pac. Rep. 719, gives some countenance to the respondent's claim, to the extent that it is there held that money borrowed by a married woman to invest in real estate, during her marriage, is community property, unless it be borrowed by her upon the faith of her existing separate property, *which she mortgages or pledges as security for its payment, or against which her contract may be enforced*. That part of the doctrine announced in the case cited which appears in italics may well be doubted, but, in any event, we are not inclined to apply it to a case of this kind, where the question arises between the husband, who made the loan, and the wife, who received it, and where such a construction of the contract between them would defeat the intention of the only persons who were parties to the transaction, and who alone can be affected by a decision of the question. The parties dealt with each other as if they were unmarried. There was no intention that the husband should, by virtue of the payment made by him, become a part owner in the land. The intention was that it should be her separate property, and so it must be held to be. *Schuler v. Society*, 64 Cal. 397, 1 Pac. Rep. 479; *Taylor v. Opperman*, 79 Cal. 468, 21 Pac. Rep. 869.

As to the \$2,000 paid by the wife out of her separate estate, there can be no question as to her having a separate estate in the land to that extent. Up to the time, therefore, that the \$3,000 was borrowed the money invested in the property was her separate estate, and the defendant had no interest in it. This being so, the money borrowed was borrowed "on the faith of her existing separate property, and secured by mortgage," and, even under the strict rule laid down in *Schuyler v. Broughton*, *supra*, the money thus realized became her separate property, and the \$1,000 used to pay off and satisfy the mortgage standing against the property gave her a further separate estate therein to that extent. The fact that the defendant joined in the note and mortgage given to secure the repayment of the money borrowed, does not affect the question. The real security was her separate property; the \$1,000 was invested in the property, and the balance of the money went to her, and was legally hers. *Martin v. Martin*, 52 Cal. 235; *Beaudry v. Felch*, 47 Cal. 183. It is equally clear to us that the amount of \$1,150 paid by the defendant, as the balance due on the property out of his own separate funds, accrued to the in-

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terest of the plaintiff in the land. Up to that time the land was wholly her separate estate. It was the intention and understanding of the parties that she should pay for the property out of her separate estate. The husband could not, by voluntarily paying the balance due on the property, convert it into community property to that extent. His payment, being voluntary, and without her knowledge or consent, could give him no right or interest in the property, or change it from separate to community property. *Morgan v. Lones*, 80 Cal. 317, 22 Pac. Rep. 253. To give it such an effect would be to violate the express understanding and intention of the parties, and hold the plaintiff liable for an obligation which she never incurred. This we cannot do. *Moulton v. Loux*, 52 Cal. 83; *Curtis v. Parks*, 55 Cal. 106. It must rather be presumed that it was the intention of the husband to advance the money paid for the benefit of the wife's separate estate, and that it was intended to accrue to her benefit. *Peck v. Brummagin*, 31 Cal. 441; *Swain v. Duane*, 48 Cal. 358. In dealings of this kind the intention of the parties is of paramount importance, where the question as to the effect of a conveyance of real estate arises as between themselves; and where it appears that a conveyance to the wife was intended, as between the husband and wife, to vest the title to the property in her as her separate estate, the courts will respect the intention of the parties, and, as between themselves; uphold her title to the property, although the legal effect of the purchase and conveyance would, independent of such intention, vest the title in the community. *Woods v. Whitney*, 42 Cal. 358; *Peck v. Brummagin*, 31 Cal. 441; *Higgins v. Higgins*, 46 Cal. 263; 2 Devl. Deeds, §§ 1168, 1169. For these reasons we are constrained to hold that the whole of this property was the separate estate of the plaintiff, that the whole of the purchase money realized from its sale belonged to her, and that she was entitled to recover the full amount thereof collected by the defendant, and converted to his own use. Judgment reversed, with instructions to the court below to modify its conclusions of law in conformity to this opinion, and render judgment in favor of the plaintiff accordingly.

We concur: FOX J.; PATERSON, J.

86 Cal. 241

SILVA v. SERPA *et al.* (No. 12,636.)

(Supreme Court of California. Nov. 1, 1890.)

NOTICE OF APPEAL—FORECLOSURE OF MORTGAGE.

1. Where defendant appeared in person in the court below, and had no attorney, and it appeared that when the appeal was taken he was absent from the state, it was sufficient to serve the notice of appeal upon the clerk, for him, as provided in Code Civil Proc. Cal. § 1015.

2. On suit in foreclosure, it is error to admit evidence of the mortgagor's declarations, made after the execution of the mortgage, that it was given without consideration, and only for the purpose of putting the property beyond the reach of his wife, with whom he was having difficulty.

Commissioners' decision. In bank. Appeal from superior court, San Benito county; JAMES F. BREEN, Judge.

*John L. Hudner and M. T. Dooling, (J. H. Campbell, of counsel,) for appellant. N. C. Briggs, for respondent.*

VANCLIEF, C. The action was to foreclose two mortgages executed to the plaintiff by the defendant Joaquin S. Serpa, to secure payment of his promissory notes, the first mortgage dated June 2, 1885, to secure \$1,500 with interest, and the second, dated September 14, 1885, to secure \$600. The respondent Maria L. Serpa was made defendant on the alleged ground that she had, or claimed to have, some interest in, or lien upon, the mortgaged property subject to the mortgage. The mortgagor, Joaquin S. Serpa, in person, without an attorney, demurred generally to the complaint, and his demurrer being overruled, failed to answer, and his default was duly entered. The defendant Maria answered to the effect that, after the execution of the mortgages in July, 1886, she married the defendant Joaquin; that in January, 1887, by a decree of the superior court in which this action was brought, she obtained a divorce from said Joaquin on the ground of extreme cruelty, and also a judgment against him for \$290 and for \$40 per month as permanent alimony; which judgment was duly docketed immediately after it was entered; and that said judgment remains in full force, and is a lien upon the mortgaged property. She further alleged, in substance, that there never was any consideration for said notes or mortgages to plaintiff, and that nothing was ever due or owing thereon from defendant Joaquin to the plaintiff; but that they were executed for the sole purpose of defrauding Joaquin's creditors, and that the purpose of the attempt to enforce and foreclose them in this action is to cheat and defraud her out of the money due, and to become due, her on said judgment. As between the plaintiff and the defendant Maria, the court found in her favor on all the issues. As between the plaintiff and the mortgagor, (Joaquin,) the court, upon the default of the latter, ordered the mortgaged property to be sold to satisfy the mortgages, but subject to the lien of the judgment in favor of the defendant Maria. The plaintiff appeals from that part of the judgment in favor of the defendant Maria, upon the judgment roll containing a bill of exceptions.

1. Respondent has moved to dismiss the appeal on the alleged ground that the notice of appeal was not served on the defendant Joaquin. It appears, however, by affidavit filed in the court below and properly certified to this court, (Moore v. Besse, 35 Cal. 184.) that, at the time the appeal was taken and the notice thereof served, the defendant Joaquin resided out of this state; and the record shows that the notice of appeal was served on the clerk for him. As he had appeared in person, and had no attorney, this was proper service. Code Civil Proc. § 1015.

2. The bill of exceptions shows that on the trial, the defendant Maria, and other witnesses on her behalf, were permitted by the court, against proper objections by plaintiff's counsel, to testify to state-

ments and admissions of the defendant Joaquin, in regard to the notes and mortgages in suit, the purpose for which they were executed, and as to the consideration therefor, made ten months and a year after their execution. Frank Pendro was thus permitted to testify that, in August, 1886, the defendant Joaquin told witness that "the only reason he had mortgaged was on account of a difficulty with his former wife; that he put mortgage not to borrow money, but to avoid paying; that he did not owe John Silva anything; that he had trusted Silva and had given mortgage, but could get it back at any time; and that, if I would buy, we would go and see Silva, and I could get a good title." The defendant Maria was thus permitted to testify that, in November or December, 1886, Joaquin told her about the mortgages, and said: "They were put on, on account of trouble he had with the Portuguese society, but that he never received any money for them; that they went before a justice of the peace when mortgage was made, and Silva gave him \$300, but that he gave it back to him in half an hour after." That the admission of this testimony, against the objection of plaintiff's counsel, was error presumably prejudicial to plaintiff, is too plain to require argument or the citation of authority. The rights of the mortgagee could not have been prejudicially affected by the *ex parte* statements or admissions of the mortgagor made after the execution of the mortgages. I think the motion to dismiss the appeal should be denied, and that part of the judgment appealed from should be reversed, and the cause remanded for a new trial between the plaintiff and the defendant Maria L. Serpa only.

We concur: BELCHER, C. C.: FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the motion to dismiss the appeal is denied, and that part of the judgment appealed from is reversed, and the cause remanded for a new trial between the plaintiff and the defendant Maria L. Serpa only.

35 Cal. 295

PEOPLE V. EUBANKS. (No. 20,679.)

(Supreme Court of California. Nov. 5, 1890.)

MURDER—INSANITY AS A DEFENSE.

In a murder case, where the only claim of the defense was that defendant had inherited such an impaired mind, and this had been so further weakened by liquor, that he was incapable of the malice requisite for murder in the first degree, or that at least the jury should in their discretion make his punishment a life sentence instead of death, there being no claim of insanity, there was no prejudicial error in charging that the burden of proving insanity was on defendant, the jury being clearly charged that as to all other matters, including defendant's said claim, they must give him the benefit of every reasonable doubt, and that as to such matters the burden of proof was not on him.

Commissioners' decision. Department 2. Appeal from superior court, Santa Clara county; F. E. SPENCER, Judge.

H. D. Morehouse and H. D. Tuttle, for appellant. Atty. Gen. Geo. A. Johnson, for the People.

FOOTE, C. The defendant was convicted of murder in the first degree, and is under sentence of death. He appeals from the judgment therein rendered, and from the order denying a new trial. The main ground upon which he bases his contention for a reversal of the judgment and order is that the court gave in its charge to the jury, of its own motion, among other things, this instruction: "Upon the issue of insanity, the evidence must be such in amount that if the single issue of the sanity or insanity of the defendant should be submitted to you in a civil case you should find that he was insane. In all other matters, except that of insanity, the defendant is entitled to the benefit of every reasonable doubt." The claim of the defendant is, to quote the language of his closing brief: "The appellant does not claim that he is innocent. He does not claim that he ought not to be punished. But he does claim that the facts in this case do not warrant a punishment of death; that he is only guilty of murder in the second degree, and, if guilty of murder in the first degree, the death penalty should not be affixed. He bases this contention upon the proposition that, from the long and excessive use of intoxicating liquors, and from inheritance from his mother, he was, at the time of the homicide, and for a long time prior thereto, of a weak and enfeebled mind, and incapable, by reason of this mental infirmity, of conceiving that malice requisite to constitute murder in the first degree." His defense on the trial, as stated by his counsel, in the presence of the court and to the jury, was: "That the defense in this case stands in the remarkable attitude from beginning to end that the defendant was guilty of the crime of murder, but they would endeavor to establish that the defendant inherited from an insane mother an impaired mentality; that at the time of the homicide the defendant's mind had been further weakened by a long and continuous use of alcoholic liquors, and that his mental condition was such at the time of the homicide that he should not be adjudged guilty of murder in the first degree, or, at least, he should not be subjected to the death penalty; that, as the law divided murder into first and the second degrees, the defense would offer testimony showing the impaired mental condition of the defendant's mind for the purpose of rebutting malice, and for the purpose of reducing the degree of crime from the first to the second degree, or, if they failed in that, still the law permitted the jury to affix imprisonment for life as the penalty for the crime, and the defense would therefore attempt to show that the mind of the defendant was so weakened that the death penalty should not be affixed." The evidence offered on this head was admitted. The uncontradicted evidence showed that the defendant had shot his own child, a girl just verging upon womanhood, through the heart with a shot-gun, without any provocation or excuse. Self-defense was not set up; to prove an *alibi* was not attempted; insanity, as we have seen, was not pretended, because, if it was present at the time of the killing, the defendant could not be guilty

of murder, or any other crime, and must have been acquitted, and he admits he was guilty of murder. But it was hoped to raise in the minds of the jury a reasonable doubt whether, from the somewhat weakened mental condition of the defendant, it being contended that such weakness existed, he could have entertained malice in the shooting, or, from the fact that such a defense as was set up had some shadow of evidence to support it, that the jury might be induced not to inflict the death penalty upon him. It is plain, then, that the defendant did not pretend, either in his defense or in the evidence to support it, that he was insane at the time of the killing. So that the instruction (assuming it to be wrong under the decision of the *Bushon Case*, 80 Cal. 160, 22 Pac. Rep. 127, 549) that the burden was upon him to prove that defense by a preponderance of evidence could not have misled the jury. They could not but plainly see that he was not relying upon the defense of insanity; that he made no pretense of being entitled to an acquittal on that account. Hence, they were clearly told in the charge that as to all other matters, including his peculiar defenses, as above indicated, they must give him the benefit of every reasonable doubt, and that, as to such matters, he was not required to prove them by a preponderance of evidence. And it further appears that, as to all those things upon which he based his defense, the court gave full and complete instructions, giving him the benefit of all that he claimed or asked for at the hands of the jury, and as to all other questions upon which the jury needed instruction they were fully and clearly charged by the court. Perceiving no prejudicial error in the record, we advise that the judgment and order be affirmed.

I concur: BELCHER, C. C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

86 Cal. 298

Dwyer v. Carroll. (No. 12,770.)

(*Supreme Court of California*. Nov. 6, 1890.)

LANDLORD AND TENANT — EVICTION OF TENANT — REPAIRS — DAMAGES.

1. In an action by a tenant for the unauthorized interruption of his quiet and peaceable possession by his landlord, it appeared that the tenant had informed the landlord that the floor on the first story of the building, which was an hotel, had settled and needed repair; that it was agreed that the work of repairing should commence in a few days; that thereafter, and a few days before the commencement of the work, plaintiff paid his rent for a month in advance. Plaintiff's testimony was that defendant said he was only going to put in a new floor on the first story; that it would not take more than 10 or 12 days; that it would not require the building to be vacated; that with this understanding he made no objection; but that, instead of merely putting in a new floor, the house was raised 14 feet, a cellar dug, and a new story placed between the old building and the cellar, the changes occupying over two months; that on account of the raising of the building, plaintiff and his family and boarders had to leave, and he was unable to get his furniture from the building for over three months. Defendant testified that plaintiff was fully advised of the unsafe condition of the build-



ing, and that a new floor and foundation would have to be put in, requiring from 30 to 60 days; that plaintiff consented to this, and, on finding that the building could not be safely occupied during the repairs, voluntarily vacated it and gave up possession. *Held*, that the jury, by finding a sum certain for plaintiff, in effect found that plaintiff did not consent to the re-entry.

2. The authority given by Civil Code Cal. § 1941, to the lessor of a building to enter and make repairs necessary to make it tenantable, does not give the lessor the right to re-enter for the purpose of making extensive alterations.

3. Plaintiff having pleaded specially the loss of his business, it was properly considered in estimating his damages.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; JOHN F. FINN, Judge. *Smith & Murasky*, for appellant. *T. J. Crowley*, (*E. P. Cole*, of counsel,) for respondent.

GIBSON, C. This appeal is brought by the defendant from a judgment entered upon a verdict for \$500, rendered against him in an action of trespass prosecuted by plaintiff; also from an order, made therein, denying him a new trial. The plaintiff, in his complaint, alleged that by virtue of a lease from the defendant he was the tenant, and, as such, was in the possession, of certain premises on Mission street in San Francisco, known as the "Union Hotel," which he used in carrying on the business of keeping an hotel, from the 1st day of February, 1886, until the 10th day of November, 1886, when the defendant forcibly and unlawfully invaded the said premises, and ejected the plaintiff therefrom, and tore down and destroyed the building thereon, and removed and destroyed a large portion of the furniture in said building, and withheld the possession of the premises from the plaintiff; that at the time of such ejection the plaintiff was earning a net profit of over \$200 per month in his said business of hotel keeping; and that, by the trespass of the plaintiff, the defendant's peaceable possession of the premises was destroyed, and his said business ruined, to his damage in the sum of \$5,000. Defendant, in his answer, admitted the relation of landlord and tenant as alleged by plaintiff, but denied that he committed the trespass, or withheld the possession of the premises, or that the plaintiff was earning \$200, or any other sum, per month as a net profit on his business of hotel keeping, or that he sustained or suffered any damage whatever. It thus appears that the gist of the action is the unauthorized interruption by the landlord of the quiet and peaceable possession of his tenant. The main question then is, did the tenant suffer such an interruption? It appears from the evidence that early in October, 1886, the tenant, who was holding from month to month at the monthly rental of \$60 payable in advance, brought to the notice of one McGrath, the agent of the landlord, the fact that the Union Hotel building was in a dilapidated state, particularly the floor of the first story, which had settled several inches in places, and also a back stairway. This in turn was communicated to the landlord, who a few days afterwards caused

the building to be examined, and, upon learning that it was in a dangerous state for habitation, the foundation having decayed and given way, he with the carpenter who made the examination and subsequently undertook the work upon it, went together to the building about the 7th of October, and informed the tenant of the condition of the building, and that it could not be repaired unless it was vacated. The tenant said he did not want to have his occupancy disturbed until after the election which was to be held on the 2d day of the following month of November, as he had rented a portion of the first story to the election commissioners for a polling place. The landlord then said to the tenant that he would defer the repairs until after the election, but that he (the tenant) would have to occupy the building at his own risk. These conditions, it seems, the tenant assented to, and he continued to occupy the building until after the election and the canvassing of the votes cast at the polls in the building, which canvassing was not completed until about the 9th of November. In the mean time, that is to say, on the 7th of the same month, the tenant's rent to the 7th of December fell due, and on the 9th of November he paid it. On the 10th of November, the carpenter above mentioned, Mr. Worden, with his men, went to the place and commenced the work upon the building. To this the tenant made no objection, but began to move his effects on the first floor out of the way of the workmen. Regarding this entry, the evidence on behalf of the tenant tended to show that the latter was informed by his landlord that he, the landlord, only intended to have a new floor put in the first story, and that it would not take more than 10 or 12 days to do it, and that the inconvenience resulting therefrom would only be temporary, and would not require the building to be vacated; that with this understanding he (the tenant) made no objection, but, instead of merely putting in a new floor, the house was raised about 14 feet, a cellar dug underneath it about 9 feet deep, and a new story placed between the cellar and the old building, which changes occupied over two months; that, on account of the house being thus raised, the tenant with his family and a number of boarders were compelled to vacate the building, and he (the tenant) was prevented from obtaining his furniture in the upper story of the building for nearly three months. In contradiction of this, the evidence of the defendant tended to show that the tenant was fully advised of the unsafe condition of the building, and that a new foundation and floor would have to be put in, which would probably require from 30 to 60 days. As to the necessity of the tenants moving out at the time the alterations of the building were commenced, the landlord testified: "I might have talked to Mrs. Dwyer [wife of his tenant] that it was a dangerous place for her to keep her children. The best thing she could do was to move out. It was before the commencement of the repairs. I did not, after the repairs began, tell her to get out. I would not do such

a thing. He kept the furniture up-stairs and intended to have the place when it would be fixed, but he left and rented a place before it was done. That was in February, 1887, I guess. I was not notified that he intended to move. I saw him moving his furniture. I asked him, was he going to move, and he said: 'Yes, I have rented that place at the opposite side.' That is the only time, after the repairs were begun, I had a conversation with him. One time he asked me what the rent would be. I told him I could not tell him what the rent would be, for I didn't know what the building was going to cost. This conversation took place some time during the improvement on the building." This makes it apparent that the plaintiff on his part endeavored to show that he consented to the entry of his landlord during the month of November for which he had paid rent for the purpose of repairing the floor in the first story, with the understanding, however, that he (the tenant) would not have to vacate the building, and, at most, would not be inconvenienced in his possession more than 12 days, and not otherwise; and that the defendant in like manner tried to prove that his tenant understood that the foundation of the house would have to be repaired as well as the floor, and so understanding it, he assented to the entry for such purposes, and, on finding that the building could not be safely occupied while the repairs were being made, he (the tenant) voluntarily vacated it, and yielded up the possession of the premises. It is well established that, if one consents to an act, he is not injured by it, but, in order to constitute a consent, the minds of the parties must meet upon the same thing in the same sense. Now if, in this case, the plaintiff's position be the true one, it is evident that the minds of the parties did not meet in the above sense. The evidence shows that instead of the landlord's entering to repair the building, that is, to restore such portions of it as were decayed or worn out, he entered for the purpose of making extensive alterations in the building, that is, to make a different building of it; and that, during the progress of the alterations, the building became uninhabitable, in consequence of which the tenant was compelled to vacate it. It does not seem probable that the tenant paid rent for a month in advance, a few days before the work was commenced, knowing that in a few days thereafter the house would be raised about 14 feet and an excavation of 9 feet made under it, so as to cut off all communication with the upper story, and thereby render his use and enjoyment of the building impracticable, if not impossible. There is, in fact, nothing in the evidence tending to show that anything was said, or intimation given, to the tenant regarding the putting in of a new story or the digging of a cellar. Nor is there anything tending to show that the tenant contemplated such changes being made. And as the jury, who were the exclusive judges of the value and effect of the evidence which, as is above shown, was conflicting regarding the consent of the tenant to the entry,

found a verdict for a sum certain in favor of the plaintiff, they in effect found for him upon all the issues. *Mendelsohn v. Lighter Co.*, 40 Cal. 657. We must, therefore, hold in accordance with their verdict that the tenant did not consent to the re-entry made by the landlord. This being so, the first contention of the appellant that the tenant assented to the landlord's re-entry cannot be sustained.

The appellant, however, further contends that, even if the tenant did not consent to the re-entry, the landlord had the right to re-enter upon the premises for the purpose of making all necessary repairs, by virtue of section 1941 of the Civil Code, which reads as follows: "The lessor of a building intended for the occupation of human beings, must in the absence of an agreement to the contrary, put it into a condition fit for such occupation, and repair all subsequent dilapidation thereof which render it untenable, except such as are mentioned in section nineteen hundred and twenty-nine." And the section referred to as the exception declares: "The hirer of a thing must repair all deteriorations or injuries thereto occasioned by his ordinary negligence." Under those sections it is clear that, in the absence of an agreement to the contrary, the landlord, after the delivery of possession to his tenant, has the right, and it is made his duty, to re-enter for the purpose of repairing any dilapidations not occasioned by the ordinary negligence of the tenant which renders the leased building untenable and which occurs after the beginning of the term. But while this is so, the facts of this case do not come within the rule so established, because, as we have already seen, the re-entry was made not for the purpose of making necessary repairs, but, on the contrary, to make extensive alterations. A re-entry cannot be made for such a purpose unless the right is expressly reserved in the lease. Civil Code, § 1927. And a right of entry for one purpose will not justify the performance of acts for another purpose. *Shiffer v. Broadhead*, 136 Pa. St. 260, 17 Atl. Rep. 592. In that case the defendants had the right to enter upon certain woodland to cut trees of a certain size, but they were held liable in trespass for cutting trees of a different size. So, in the present case, the landlord had a right, as already shown, to re-enter to make necessary repairs, but having made unauthorized alterations instead of repairs he thereby committed a trespass. Therefore this second contention of appellant must also be resolved against him.

The remaining point urged by the appellant is that the damages found are excessive. The evidence shows that the tenant was deprived of a large portion of his furniture for several months, and that some of it was broken, but there is no estimate as to what loss such deprivation and breakage caused. But it is undisputed that the landlord accepted rent from the tenant, and the jury impliedly found that, on account of the unauthorized alterations begun by the landlord, the tenant was compelled to vacate the building within three days after the beginning of the month for which the rent had been

paid; and at the time of his ejection the tenant was carrying on a business in the building that yielded him \$200 net profit per month. This is not contradicted. It is true, however, that it appears the tenant moved across the same street and there continued in the same business, but whether at a profit or a loss is not shown. In view of this state of the evidence, we cannot say that the damages are excessive. Appellant suggests that the loss of plaintiff's business, which he pleaded specially, is not a proper element of damages. But we think the destruction of his business was a proximate result of his ejection from the leased premises, and as such was, under his special allegation respecting the same, properly considered in estimating the damages sustained. The case of *Dexter v. Manley*, 4 Cush. 14, sustains this view. There, as here, the lessee was deprived of the use of the property leased, and it was held that the rule of damages was the value of the lease, and that the amount of business and profits, which were also specially pleaded, in connection with the rent reserved, were competent to show such value. The same principle is recognized in *Lambert v. Haskell*, 80 Cal. 611, 22 Pac. Rep. 327. We therefore advise that the judgment and order be affirmed.

We concur: HAYNE, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

80 Cal. 248

JOSHUA HENDY MACHINE-WORKS v. AMERICAN STEAM-BOILER INS. CO. OF NEW YORK. (No. 12,769.)

(Supreme Court of California. Nov. 1, 1890.)

FIRE INSURANCE—CANCELLATION OF POLICY—RETURN OF PREMIUM.

Under Civil Code Cal. § 2617, providing that the assured shall have a return of his entire premium when his property has not been exposed to any of the perils insured against, and that, when the insurance is for a definite time and he surrenders his policy, a proportionate part of the premium shall be returned, a person who has taken insurance for a certain period cannot surrender his policy and reclaim a ratable proportion of the premium, unless the policy is canceled for some of the reasons mentioned in sections 2610, 2619, or under a right to do so reserved in the policy.

In bank. Appeal from superior court, city and county of San Francisco; T. H. REARDEN, Judge.

*F. V. Bell* and *T. C. Van Ness*, for appellant. *J. N. E. Wilson* and *James M. Trout*, for respondent.

WORKS, J. This action was brought to cancel a policy of insurance and to recover \$194.46 as the ratable proportion of a premium paid thereon. Defendant's demurrer, on the ground of insufficiency of the facts stated in the complaint, was overruled, with leave to answer, which it failed to do. Judgment for plaintiff was thereupon entered, from which the defendant appeals. The defendant on June 2, 1887, in consideration of a \$300 premium paid by plaintiff, issued to the latter its policy of insurance, duly countersigned

by its agents at San Francisco, whereby it insured plaintiff to the amount of \$20,000, for a period of three years from June, 1, 1887, against loss or damage to property, whether owned by plaintiff or not, or for which plaintiff might be liable in case of loss or damage resulting from the explosion of either or both of two steam-boilers situate on certain premises in San Francisco; and, also, against loss of human life, or injury to person, resulting from the explosion of either or both of said boilers, for which plaintiff might be liable. Subsequently, on August 22, 1887, and prior to any loss or damage of any kind covered by the policy, plaintiff presented it to the defendant for surrender and cancellation, and requested defendant to accept the surrender of and cancel it. At the same time, plaintiff demanded the return of such proportion of the premium as corresponded with the unexpired term of the policy after deducting 30 per cent. The defendant refused to accept the surrender of the policy upon any terms, or to return any proportion of the premium. Among other provisions in the policy is the following: "This policy shall be canceled at any time at the request of this company, on giving notice to that effect, first deducting thirty per cent. for the charges of inspection, and refunding to the assured a ratable proportion of the balance of the premium for the unexpired term of the policy."

The defendant contends that, as this provision reserves the right to cancel the policy to the insurance company only, the plaintiff is not entitled to a cancellation of it, unless such right exists, independently of the contract of insurance, in some one or more of the cases provided for in sections 1689, 2580, 2610, 2619, of the Civil Code; and that, as the complaint does not present a case within any of those sections, the demurrer thereto should have been sustained. The policy reserves to the insurer the right to cancel the policy under certain conditions and on certain terms, but no such right is given to the insured. Therefore, the only question for us to determine is whether the insured had the right to a cancellation of its policy as a matter of law, independent of any stipulation to that effect in the instrument itself. The Code gives the right to rescind or cancel contracts, generally, for certain specified reasons. Civil Code, §§ 1689, 2580, 3406, 3414. And the right is given to rescind contracts of insurance for certain reasons. Civil Code, §§ 2610, 2619. It is not alleged in the complaint that any of the reasons above mentioned existed, but it is contended that section 2617 of the Civil Code gave the respondent the right to have the policy canceled without cause and upon his mere request. We do not so construe the section referred to. If this is its effect, the other sections of the Code above referred to are wholly unnecessary. If an insured has the right to rescind his contract at his pleasure, and without giving any reason therefor, it was hardly necessary for the legislature to provide, specifically, the grounds upon which such a right might be exercised. The Code provides that "an insurer is entitled to pay-

ment of the premium as soon as the thing insured is exposed to the peril insured against." Civil Code, § 2616. And when the peril insured against has existed, and the insurer has become liable for any period, however short, the insured is not entitled to cancel the policy, or to a return of any part of the premium, unless the right is given by the sections of the Code above referred to. May, Ins. § 67; *Rothchild v. Insurance Co.*, 11 Ins. Law J. 282. Section 2617 does not provide when a policy of insurance may be canceled by the insured, or profess to do so. It relates exclusively to the matter of a return of premium, and provides how much of the premium shall be returned to him. Two cases are mentioned, viz., where his interest in the property has not been exposed to any of the perils insured against, and where the insurance is made for a definite time and the insured surrenders his policy. In the first case, he is entitled to the return of the whole of his premium, and in the latter, to a certain proportion of it. The section is intended to provide how much of the premium shall be returned to the insured in the two cases mentioned, and nothing more. In any of the cases in which either party may cancel the policy as provided in the other sections of the Code, mentioned above, or as stipulated by the policy, this section steps in and protects the rights of the insured by preserving to him either the whole or a part of the premium paid by him, as the case may be. This view of the effect of these Code provisions, or others like them, was taken in the case of *Insurance Co. v. Coleman*, (Dak.) 43 N. W. Rep. 693, in which it is said: "But the defendant further claims that he is entitled to a reduction of the amount recoverable by the terms of the note, by the principles which apply to the return of premiums, claiming that 'risk and premium go hand in hand, and, once ceasing, the other also ceases.' This is not by any means true. If the premium had been paid, and the risk incurred, for any period, no matter how short, no breach of a subsequent condition for which the insured was responsible would entitle him to a return of any of the premium, although the company thereby ceased to be liable. The law relating to the return of premiums is clearly laid down in our Civil Code, §§ 1542-1544, and we are not aware that it differs materially from the general law of insurance elsewhere. Section 1542: 'A person insured is entitled to a return of premium as follows: (1) To the whole premium if no part of his interest in the thing insured be exposed to any of the perils insured against; (2) where the insurance is made for a definite period of time, and the insured surrenders his policy, to such proportion of the premium as corresponds to the unexpired time, after deducting from the whole premium any claim for loss or damage under the policy which has previously accrued.' Section 1543: 'A person insured is entitled to a return of the premium when the contract is voidable on account of the fraud or misrepresentation of the insured, or on account of facts of the existence of which the insured was ignorant without his fault, or when, by any fault

of the insured other than actual fraud, the insurer never incurred any liability under the policy.' Section 1544: 'If a peril insured against has existed, and the insurer has been liable for any period, however short, the insured is not entitled to return of premiums, so far as that particular risk is concerned.' We cannot see how section 1544, which is particularly referred to by defendant's counsel, in any way sustains his position. The words, 'so far as that particular risk is concerned,' do not refer to the time in which the subject is exposed to the peril; but where a premium is applicable to risks on two or more distinct subjects of insurance, and no risk has ever been incurred upon one subject, the proportionate premium may be recovered. This is evident not only from the reading of the previous sections, but from the history of the legislation which led to the adoption in the Code states of section 1542. This section, as originally adopted in California, read: 'A person insured is entitled to a return of premium paid, or a ratable proportion thereof, if no part of his interest in the thing insured is exposed to any of the perils insured against, or, where the insurance is made for a definite period of time, if it is not exposed to such peril for the whole period of that time.' In proposing as an amendment the language of section 1542, the Code examiners said: 'The present section does not conform to the general rule and the law elsewhere, and is manifestly unjust. Under it the insured, meeting with a loss in the first month of a policy for a year, could recover not only the loss, but eleven-twelfths of the premium, thus depriving the insurer of that proportion of the consideration for which he assumed the risk.' If the defendant had sustained a loss during the first year the premium for which had been paid in cash, he would have been liable on his note, because the peril had existed, the insurer had been liable, and the event insured against, in consideration of the entire premium, had happened. This being an insurance for five years, and the risk having attached, the insured is not entitled to any reduction on his note." The judgment is reversed, with instructions to the court below to sustain the demurrer to the complaint.

We concur: BEATTY, C. J.; FOX, J.; PATERSON, J.; MCFARLAND, J.; THORNTON, J.; SHARPSTEIN, J.

86 Cal. 323

**BANK OF SONOMA COUNTY v. CHARLES.**  
(No. 13,573.)

(*Supreme Court of California.* Nov. 6, 1890.)

EXECUTORS AND ADMINISTRATORS—PRESENTATION OF CLAIM—MORTGAGES.

1. Code Civil Proc. Cal. § 1500, provides that the holder of a mortgage may, without presentation thereof to the administrator, maintain an action to enforce the mortgage against the particular property subject thereto, "when all recourse against any other property of the estate is expressly waived in the complaint; but no counsel fees shall be recovered in such action, unless such claim be so presented." Plaintiff, without any presentation of the mortgage, and without recourse against the other property being "expressly waived in complaint," proceeded to fore-

close as if the mortgage had been presented, and although there was no deficiency judgment the decree provided for an attorney's fee. *Held*, that the decree could not be modified by striking out the provision for attorney's fee and then allowed to stand as if the proceeding had been under said section.

2. Where one presents to an administrator, and has allowed a note against an estate secured by a mortgage, but, by mistake, does not present the mortgage, supposing that the presentation of the note constituted a presentation of the mortgage also, he does not thereby waive his rights under his mortgage.

3. The approval of a note by an administrator does not constitute a waiver of the presentation of the mortgage by which the note is secured.

4. Error cannot be predicated of a decree in a foreclosure suit for following the provision of the mortgage, that the lands therein embraced be sold in one large parcel, and several other smaller parcels.

Department 2. Appeal from superior court, Humboldt county; G. W. HUNTER, Judge.

*Horace L. Smith and Thomas Ruthledge*, for appellant. *J. N. Gillett and J. F. Coogan*, for respondent.

MCFARLAND, J. This is an appeal by the defendant, Vernetta Charles, administratrix of G. W. Charles, deceased, from a judgment in favor of plaintiff foreclosing a certain mortgage. In his life-time the said G. W. Charles, and J. M. Charles, made their promissory note to plaintiff for \$42,250, and interest, and, to secure the same, executed a mortgage to plaintiff which covered a large quantity of land, and was duly recorded. After the death of said G. W. Charles, the plaintiff presented the following creditor's claim to the administrator and administratrix, viz.: "The undersigned, a creditor of George W. Charles, deceased, presents its claim against the estate of said deceased, with the necessary vouchers for approval, as follows, viz.: Estate of George W. Charles, deceased, to Bank of Sonoma County, Dr. 1889, February 16. To principal of promissory note, dated December 11, 1886, (copy here attached,) \$38,069.58. Interest thereon from December 11, 1886, \$5,979.07. This note is secured by mortgage of even date herewith." Then follows a copy of the note, and a proper verification of the claim. No other presentation of the claim or of the mortgage was ever made, or attempted to be made. The claim as presented was allowed by the administrator and administratrix and by the probate judge. The complaint is in the form commonly used in an action to foreclose a mortgage. It does not waive recourse against the property of the estate other than the mortgaged premises, but prays for a deficiency judgment against the estate, and counsel fees. The complaint shows upon its face that the only presentation of the claim was as above stated, and makes the presentation a part of the complaint as an exhibit. The defendant demurred to the complaint upon the general ground, and also upon the ground that it was ambiguous, uncertain, etc., because it cannot be ascertained therefrom whether the mortgage was ever presented. The demurrer was overruled, and defend-

ant answered, averring, among other things, that the mortgage was never presented, and that the only presentation of the claim was the one set forth in the complaint, and the court so found. The court rendered judgment foreclosing the mortgage, and allowing an attorney's fee of \$500, but not awarding any deficiency judgment against said estate. It is quite clear that there was no presentation of the mortgage. The general provision of the Code, as to the presentation of a claim founded upon a written instrument, is that "a copy of such instrument must accompany the claim, and the original instrument must be exhibited, if demanded, unless it be lost or destroyed;" in which event there must be an affidavit containing a copy, "or particular description of such instrument." Code Civil Proc. § 1497. Of course, in the case at bar, there was no attempted compliance with this general provision. There is, however, in the same section, a provision which relieves the holder of a mortgage from presenting either the original or a copy of the mortgage. It is as follows: "If the claim, or any part thereof, be secured by a mortgage, or other lien, which has been recorded in the office of the recorder of the county in which the land affected by it lies, it shall be sufficient to describe the mortgage or lien, and refer to the date, volume, and page of its record." But this, plaintiff did not do. It neither complied with the general provision, nor with the special one which was intended for the convenience of persons in its situation. The mortgage was, therefore, not presented at all.

But the complaint is drawn upon the theory that the mortgage had been presented; and the judgment rendered upon that complaint cannot be maintained, and the demurrer should have been sustained. Respondent contends that, as the court did not in fact order any deficiency judgment, the decree might be modified by striking out the attorney's fee, and then be allowed to stand as though plaintiff had proceeded under section 1500, *Id.* That section provides that the holder of a mortgage may, without presentation thereof to the administrator, maintain an action to enforce the mortgage against the particular property subject thereto, "when all recourse against any other property of the estate it expressly waived in the complaint; but no counsel fees shall be recovered in such action unless such claim be so presented." But to take advantage of that section there must be an express waiver in the complaint, and the complaint here contains no such waiver, and such a plain, statutory provision cannot be disregarded or explained away.

Appellant contends that plaintiff, by presenting the note and having it allowed, waived his mortgage, and all rights under it; but we do not think that the consequences of plaintiff's carelessness are so ruinous as to utterly preclude it from the benefit of the mortgage lien. Its property therein should not be held to be lost, unless such holding be an inevitable legal conclusion. Plaintiff certainly did not intend to waive or abandon its mortgage.

It evidently supposed that the presentation of the note was a presentation of the mortgage also, and it has proceeded on that theory ever since, and it would be unjust and inequitable not to allow plaintiff to correct the error into which it fell while it is not too late to do so, and when no injury will be done to other parties, and we see no legal obstruction in the way. The fact that the note was presented and allowed, as above stated, presents no great difficulty. Plaintiff should amend its complaint, so as to clearly waive all claim upon the mortgage and note against any of the property of the estate other than the mortgaged premises; and we see nothing in the point made by respondent that the appellant, by approving the note, waived presentation of the mortgage, even supposing that an administratrix could bind the estate by such a waiver. We think, therefore, that the judgment should be reversed, with leave to plaintiff to amend its complaint so as to expressly waive all recovery against any of the property of the deceased other than the mortgaged premises; and that, under the complaint so amended, a judgment foreclosing the mortgage, all the necessary facts being proven, can be maintained. But of course no counsel fees could be allowed.

The decree provided that the lands embraced in the mortgage should be sold in one large parcel, and in several other smaller parcels; and appellant contends that the provision for the sale of the one large parcel was erroneous. But there is an express provision in the mortgage that, in case a foreclosure should be necessary, the land should be sold in a certain manner, and the court in its decree followed that provision. In this we think there was no error. The parties had as full power to contract about the subdivisions or parcels by which the property should be sold as about any other matter, and it was proper for the court to enforce that part of the contract. It was not against the right of redemption. Section 694, Code Civil Proc., relates to sales under executions in cases where there have been no contracts between parties as to the manner of the sale. In *Hopkins v. Ward*, 72 Cal. 259, 13 Pac. Rep. 687, it was held, generally, that in a foreclosure suit the court has jurisdiction to provide in the decree in what parcel or parcels the mortgaged premises shall be sold; and we have been referred to no case in which it has been held erroneous for the court to order the premises sold in parcels, as provided by the parties in the mortgage itself. The only case cited which approaches the point under discussion is *Mickle v. Maxfield*, 42 Mich. 304, 3 N. W. Rep. 961, and in that case, while compliance with the contract was demanded by the mortgagor, a contract in a mortgage similar to the one in the case at bar was held valid; and it was further held that subsequent incumbrancers or purchasers took "subject to this provision as part of the contract," and that the right sought to be enforced "did not depend on implied equities, but upon express agreement, and it could not, under such circumstances, be important

to know what considerations brought it about." The judgment is reversed, and the superior court is directed to sustain the demurrer to the complaint, with leave to plaintiff to amend its complaint, as intimated in this opinion.

WE CONCUR: THORNTON, J.; SHARPSTEIN, J.

86 Cal. 329

PEOPLE v. CHUN HEONG. (No. 20,658.)

(Supreme Court of California. Nov. 6, 1890.)

MURDER—ALIBI—REASONABLE DOUBT—INSTRUCTIONS—EVIDENCE.

1. Upon a conviction of murder in the first degree a refusal to grant a new trial will not be overruled, although it appears that a preponderance of the evidence was in favor of an *alibi*, as it will be presumed that the jury had good reason to discredit the testimony of the witnesses upon that point.

2. Newspaper accounts of a murder, and of the arrest of the accused, are not competent evidence.

3. Where the commission of a murder was conceded, and the only real question was as to the identity of the murderer, it was not prejudicial error to charge upon the law of manslaughter and excusable and justifiable homicide.

4. A charge that defendant is entitled to acquittal if there is a reasonable doubt, but that "mere possible doubts, however reasonable, which beset some minds on all occasions," should not prevent conviction, is meaningless and confusing; but where the whole charge contained a sufficiently clear definition of reasonable doubt, the judgment will not be reversed.

5. Where the defense is an *alibi*, a charge that while defendant's guilt must be proved beyond a reasonable doubt, he can establish any fact essential to his defense by a preponderance of evidence, if erroneous, is cured by a charge that he must be acquitted if there is a reasonable doubt of his presence at the commission of the crime.

6. It is not error to charge that "a case might arise wherein a jury would be justified in finding a verdict for the defendant upon the testimony of one witness against the testimony of any greater number."

7. In charging upon *alibi* the court spoke of the "place of the alleged murder," and immediately afterwards of the "time and place of the murder." *Held*, the jury could not have considered the last phrase as an assumption that the crime had been proved.

8. The court charged that, "if you sustain a reasonable doubt as to whether the defendant is guilty of murder in the first degree, then you should not find him guilty of murder in the first degree, but you should proceed to inquire whether he is guilty of murder in the second degree," and immediately added: "If you believe from the evidence in the case beyond a reasonable doubt that the defendant is not guilty of murder in the first degree, but that the defendant with malice, [stating elements of murder in second degree,] then you should find him guilty of murder in the second degree." *Held*, this did not tell the jury not to consider murder in the second degree, unless satisfied beyond a reasonable doubt that he was not guilty of the higher offense, and was not erroneous.

Department 2. Appeal from superior court, city and county of San Francisco; F. W. VAN REYNEMOM, Judge.

Lyman I. Mowry, for appellant. Atty. Gen. Geo. A. Johnson, for respondent.

BEATTY, C. J. This is an appeal by the defendant from a judgment of life imprisonment upon a conviction of murder in the first degree. Numerous errors are assigned.

1. We cannot say that the superior court erred in overruling defendant's motion for a new trial for the reason that the verdict is contrary to the evidence. Although there is a serious conflict in the evidence, and, as it appears from the bill of exceptions, even a preponderance in favor of the defendant upon his defense of *alibi*, still, as there is sufficient evidence to support the verdict, it must be assumed that the jury, who saw and heard the witnesses for the defense, had good reason for discrediting their statements.

2. The superior court did not err in excluding from evidence the newspaper accounts of the killing and of the arrest of the defendant. They were not competent evidence of any material fact in the case, and were not rendered admissible by reason of the fact that they might have tended to corroborate the statements of one of defendant's witnesses upon purely collateral matters called out upon cross-examination. There had been no attempt to impeach the witness upon these points, nor any question made as to the truth of his statements.

3. As all the evidence in the case went to prove a deliberate murder, leaving no question for the jury except that of the identity of the murderer, it may have been unnecessary, but it was not error, certainly not prejudicial error, to charge the jury as to the law of manslaughter, and excusable and justifiable homicide. Such instructions could not by any possibility have harmed the defendant.

4. In attempting to define "reasonable doubt" the judge of the superior court gave an instruction containing an expression which has been repeatedly condemned by this court as meaningless, if not confusing. To tell the jury that the defendant is entitled to be acquitted if there remains a reasonable doubt of his guilt, and then in the next breath to tell them that "mere possible doubts, however reasonable, which beset some minds on all occasions," should not prevent a verdict of guilty, would seem to tend only to confusion. But in two cases, (*People v. Kernaughan*, 72 Cal. 609, 14 Pac. Rep. 566, and *People v. Lee Sare Bo*, 72 Cal. 623, 14 Pac. Rep. 310,) this court, while severely and justly condemning similar if not identical language to that above quoted, held, nevertheless, that taking the whole charge together there was a sufficiently accurate definition of what the law terms "a reasonable doubt," and that the instruction was not invalidated by this meaningless expression. Upon the same reasoning it may be held that its use in this instance was not prejudicial error. We cannot, however, abstain from again expressing the hope that the trial judges who have made use of this form of instruction will eventually see the propriety of returning to the approved definition which, since the time of Chief Justice SHAW, has never been improved upon.

5. The jury were instructed that, while it was necessary to prove the guilt of the defendant beyond a reasonable doubt, he could establish any fact essential to his defense by a mere preponderance of evidence. It is claimed that this was in effect, and by implication, an instruction that

it was necessary for the defendant to prove the *alibi*, upon which alone he relied as a defense, by a preponderance of evidence. But it is not a necessary implication from the language of the instruction that the defendant must prove any fact relied on by him by a preponderance of evidence, and, as to the *alibi* upon which he relied, the jury were correctly and explicitly charged that the defendant must be acquitted in case of a reasonable doubt that he was present at the time and place of the murder. This was sufficient to cure any apparent error in the instruction objected to.

6. There was no error in charging the jury that "a case might arise wherein a jury would be justified in finding a verdict for the defendant upon the testimony of one witness against the testimony of any greater number of witnesses." This is certainly true as a legal proposition, and it is not perceived how its statement in this case can possibly have prejudiced the defendant.

7. In instructing the jury upon the question of *alibi*, the trial judge made use of the expression, "place of the alleged murder," and immediately following in the same connection used the words, "time and place of the murder." It is claimed that this was an assumption that the crime of murder had been proved, and was equivalent to an instruction to that effect. We do not so regard it. The instruction has regard to the crime of murder "alleged" in the information, and so the jury must have understood it.

8. The court correctly instructed the jury as follows: "If you entertain a reasonable doubt as to whether the defendant is guilty of murder in the first degree, then you should not find him guilty of murder in the first degree, but you should proceed to inquire whether he is guilty of murder in the second degree." But immediately following this language the court added: "And if you believe from the evidence in the case beyond a reasonable doubt that the defendant is not guilty of murder in the first degree, but that the defendant with malice, [stating elements of murder in the second degree,] then you should find him guilty of murder in the second degree." It is contended that the court here charged the jury not to consider murder in the second degree, unless they were satisfied beyond a reasonable doubt that defendant was not guilty of the higher offense, thus reversing the merciful rule prescribed by the legislature. But it is plain to us that the expression, "beyond a reasonable doubt," as here used, applies to and qualifies that part of the instruction following, which defines murder in the second degree, and so we are bound to presume the jury must have understood it. By itself it bears this meaning, and immediately following this language is added: "If you entertain a reasonable doubt as to whether the defendant is guilty of murder in either the first or second degree, you should not find him guilty of murder, but you should proceed to inquire whether or not he is guilty of manslaughter," etc. This makes the meaning of the whole instruction plain, or at least it leaves noth-



ing in the literal terms of the instruction of which the defendant can complain, for, if the jury can be supposed to have taken it literally as construed by the defendant, they must have understood (1) that they could not convict of murder in the first degree if there was a reasonable doubt of guilt in that degree, and (2) that they could not convict of murder in the second degree, unless it was proved beyond a reasonable doubt that defendant was not guilty of murder in the first degree. In other words, following the instruction as construed by defendant, the jury could not have convicted him improperly of murder in the first degree, but might have been compelled to acquit him improperly of murder in the second degree. This was not an error of which he could complain.

We have thus reviewed all of the assignments of error. We find that the court used language in its charge tending to confusion upon some points, but that the entire charge construed together is sufficiently accurate and free from substantial error, at least of error prejudicial to the defendant, and conclude that the judgment must be affirmed. It is so ordered.

**WE CONCUR:** MCFARLAND, J.; SHARPSTEIN, J.

3 Cal. Unrep. 302

**BARRY v. GOAD et al.** (No. 12,984.)<sup>1</sup>

(*Supreme Court of California.* Nov. 6, 1890.)

**SCHOOLS—BOARD OF EDUCATION—EMPLOYMENT OF TEACHERS.**

The employment, by the board of education of the city and county of San Francisco, of inspecting teachers, whose duty it is to visit the schools and ascertain, by frequent oral examinations, the condition of the classes, and to give advice to teachers and principals when necessary, is within the power to "employ teachers" conferred on the board by Worley, Consol. Act, p. 171, § 1, subd. 3, (St. Cal. 1871-72.)

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; N. HAMILTON, Judge.

*Otto Tum Suden and Horace W. Philbrook*, for appellant. *Jos. Rothschild*, for respondents.

**FOOTE, C.** This action was brought by the plaintiff, a resident citizen of California, of the city and county of San Francisco, and a tax-payer, for the purpose of restraining the defendants, the board of education of the city and county of San Francisco, from drawing any drafts upon the school fund of the said city and county in favor of Laura T. Fowler and J. G. Kennedy, as compensation for their services as teachers in the public schools of said city and county. The cause was tried before the court, without a jury, and there is no bill of exceptions or statement on motion for a new trial. Upon the complaint and answer, apparently, the court found—*First*, that the allegations of the complaint were not sufficient in law to entitle the plaintiff to any relief or judgment; *second*, that all the affirmative allegations in defendants' answer were true. Judgment passed for the defendants, from which this appeal is taken. The whole matter turns upon the question as to whether the board of education had the power to appoint,

and order paid out of the school fund, Fowler and Kennedy, as inspecting teachers, and this depends upon the language of the statute, which is the measure of their power to appoint teachers; and whether the duties assigned to the teachers above mentioned, under their employment by the board, are those which appertain to teachers such as that board could appoint. The answer sets up, in an affirmative defense, the resolution of the board defining the duties of the teachers, who, it is claimed by appellant, are inspectors merely, and not teachers. He insists that such persons were not employed to perform the functions of teachers in the public schools at all, but were to be mere inspectors of schools, and to perform the duties that pertained to members of the board of education, which could not be delegated to anyone. That being so, such appointments or employments were without authority of law, and the appointees could not be paid from the school fund. The power of employing teachers given to this board is to be found in the Statutes of 1871-72, (see Worley, Consol. Act, p. 171,) as follows: Section 1, subd. 3. "To employ and dismiss teachers, janitors, and school census marshals, and to fix, alter, allow, and order paid their salaries or compensation," etc. The resolution of the board of education, under which Laura T. Fowler was employed as inspecting teacher, paid, and her duties defined, provides, specially, that her duty shall be to visit schools and ascertain by frequent oral examinations the condition of the classes; to observe carefully the methods of teaching and discipline by the teachers; to give advice and assistance to teachers and principals, when necessary; and, in the presence and before their classes, exemplify the best methods of teaching. It is alleged in the answer, and not denied, that J. G. Kennedy was appointed by the board as head inspecting teacher of the public schools of San Francisco. It is plain, we think, that unless the duties to be performed by them are such as are compatible with those of teachers in the public schools, the statutes do not authorize their employment or payment out of the school fund. Whether such appointments of teachers are, or not, in consonance with good policy in connection with the public schools is not a matter which comes within the purview of the appellate court to consider. The only thing left for determination is whether these persons, thus appointed, are teachers in the sense as expressed in the statute above quoted. That statute does not declare what kind of teachers the board is to employ. It says they may "employ and dismiss teachers." This means of course teachers for the public schools, such as the course of study in such schools, as prescribed by law and the regulations of the board, may demand. We cannot see what duty is assigned to these so-called "inspecting teachers," which may be said to make them anything but teachers, instructors, or tutors. They seem to be a higher order of teachers than those immediately over the pupils; but they are nevertheless teachers. They examine the

<sup>1</sup> Reversed in banc. See 26 Pac. 785, 89 Cal. 215.

school children orally, and thereby ascertain the condition of their classes. They observe the methods of teaching and discipline pursued by the other teachers. They give advice and assistance to other teachers, and, in their presence and before their classes, exemplify the best methods of teaching; and all these matters come within the province of a teacher or instructor, and tend to educate the public school children. We cannot say, therefore, that the board of education exceeded its powers in employing this kind of teachers; and we advise that the judgment be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

86 Cal. 348

PERKINS *et al.* v. ONYETT *et al.* (No. 13,348.)

(Supreme Court of California. Nov. 7, 1890.)

EXECUTORS AND ADMINISTRATORS—PRESENTATION OF CLAIMS—MORTGAGES—HOMESTEAD.

1. Under Code Civil Proc. Cal. § 1475, providing that a mortgage on a homestead must be presented like other claims against an estate, a judgment of foreclosure cannot be sustained where the only presentation was of the note, secured by the mortgage.

2. Section 1494, providing that every claim presented to the executor or administrator "must be supported by the affidavit of the claimant, or some one in his behalf," further provides that, "when the affidavit is made by a person other than the claimant, he must set forth in the affidavit the reason why it is not made by the claimant," also that the affidavit must state that there are no credits, offsets, etc., "to the knowledge of affiant." *Held*, that where an affidavit was made by an agent, and he gave no reason therefor, and further stated that there were no credits, etc., "to the knowledge of claimant," the claim having been rejected, an action could not be maintained thereon. *Estate of Swain*, 67 Cal. 637, 8 Pac. Rep. 497, distinguished.

In bank. Appeal from superior court, Butte county; PHILIP W. KEYSER, Judge.

*John Gale*, for appellants. *Gray & Sexton*, for respondents.

PER CURIAM. This action was brought upon a promissory note made in his lifetime by John Onyett, deceased, and upon a mortgage to secure it, executed by said John and his wife, Amy Onyett, on premises which constituted their homestead, the homestead being on community property. The defendants are S. B. Onyett, executor of the estate of said John, deceased; the said Amy, his widow; and Jenkin Morgan, who claims an interest in the mortgaged premises. The answer of the executor and said Amy sets up several defenses, such as payment, the statute of limitations, etc., and denies that there was ever any legal presentation of either the note or the mortgage to the executor, within the time prescribed by law. The trial court gave judgment for plaintiffs upon both the note and mortgage; and the executor and said Amy appeal from the judgment, upon the judgment roll, with several bills of exceptions. The court

finds, among other things, that the only presentation of plaintiffs' claim that was made to the executor within the time prescribed by law was a presentation of the note alone, without any reference whatever to the mortgage; and that the only affidavit by which said claim was supported was as follows: "Milton J. Green, agent for Perkins & Co., whose foregoing claim is herewith presented to the executor of the estate of said deceased, being duly sworn, says that the amount thereof, to-wit, the sum of six thousand five hundred and fifty dollars and interest, is justly due to claimant; that no payments have been made thereon which are not credited; and that there are no offsets to the same, to the knowledge of said claimant." This was signed by Green, and sworn to before a notary public, and was properly certified. As there was no presentation of the mortgage, that part of the judgment which forecloses it is clearly erroneous. Even if all recourse against other property had been waived in the complaint, (which was not done,) still the judgment could not be maintained, because a mortgage of a homestead on community property must be presented. Section 1475, Code Civil Proc.; *Camp v. Grider*, 62 Cal. 20; *Bollinger v. Manning*, 79 Cal. 7, 21 Pac. Rep. 375.

It is contended, however, that the mortgage, having been defeated through failure to present it, might be considered as valueless; and that, therefore, an action, under a properly amended complaint, might be maintained against the estate upon the note alone. But it is useless to consider that question, because the presentation of the note itself was fatally defective. Section 1494 of the Code of Civil Procedure, after providing that every claim presented to the executor or administrator "must be supported by the affidavit of the claimant, or some one in his behalf," further provides that, "when the affidavit is made by a person other than the claimant, he must set forth in the affidavit the reason why it is not made by the claimant." No attempt to comply with this last requirement in presenting the note in the case at bar was made. See affidavit of Green, above quoted. The section also provides that the affidavit must state that there are no credits, offsets, etc., "to the knowledge of affiant," which the affidavit in this case does not state. It is contended that *Estate of Swain*, 67 Cal. 637, 8 Pac. Rep. 497, is authority to the point that such defect in the affidavit is not material. But that case does not support this contention. The *Estate of Swain* was not a case where a claim had been rejected by the administrator. The claims there had been approved and allowed by the administrator and the probate judge, and had been filed among the approved claims against the estate. Such allowance established, *prima facie*, their validity. Afterwards, upon the settlement of the final account of the administrator, the heirs contested the claims; and upon that issue, the court said: "In law, the allowance of the claims, although made upon defective verifications, was not void. It was a judicial act, which entitled the

claims to rank as acknowledged debts of the estate, to be paid in due course of administration; but, as a judicial act in their favor, it was not binding and conclusive against the heirs, because they were not parties to it. They had, therefore, the right to question the allowance at the settlement of the estate." That was a very different case from one where, as in the case at bar, a person seeks judgment against an estate upon a rejected claim, when the "judicial act" has been against him. In such a case the plaintiff must show at least a substantial compliance with each requirement of the statute on the subject of the presentation of claims; and as, in the case at bar, the respondents made no attempt at complying with the provision above quoted relating to the affidavit by which a claim must be supported, they cannot maintain an action against the estate upon the promissory note set forth in the complaint. And this view makes it unnecessary to discuss other points which are made in the case.

The judgment is reversed.

86 Cal. 192

GRIFFITHS v. GALINDO. (No. 12,960.)

(*Supreme Court of California*. Oct. 23, 1890.)

#### DEDICATION—HIGHWAYS.

Where the owner of an entire tract has it surveyed and laid off into lots and streets, and a map made of the survey, and then sells the lots at auction before the map is filed for record, but does not deliver the deeds until after it is recorded, there is a complete dedication to the public of the streets designated on the map, and a purchaser at the auction sale at which the map was used to inform purchasers of the location of the lots and streets cannot close the street, though his deed includes the land to its center, for that is simply a conveyance of the legal title subject to the public easement.

Department 1. Appeal from superior court, Contra Costa county; Jos. P. JONES, Judge.

G. W. Bowie, for appellant. W. S. Tinsling, for respondent.

WORKS, J. This is an action for damages for an alleged trespass upon lands in entering upon the lands of the plaintiff, and tearing down a fence situate thereon. The defendant, in his answer, justified on the ground that the land where the fence was situate was a public street, and the fence an obstruction thereof; that he was road overseer of the district, and under an order of the board of supervisors of the county removed said fence as an obstruction to the street. The whole question in the case is whether the land in controversy had been dedicated to and accepted by the proper authorities, or by user, as a public highway. The owner of an entire tract of land, including the property owned by the plaintiff at the time this action was commenced, caused the same to be surveyed and laid off into lots and streets, and a map to be made thereof. He subsequently sold some of the property at public auction, and the plaintiff became the purchaser of three of these lots. At the time the sale was made, the map had not been filed in the recorder's office, but it was so filed before deeds were made to the purchasers, and the lots purchased

by the plaintiff were described as "those certain lots, pieces, and subdivisions of land, being portions of the government or Gwin ranch, in said Contra Costa county, as subdivided, laid out, and surveyed for J. Rosenthal and G. Bates, in September, 1884, by T. A. McMahon, county surveyor, and as per map and survey thereof filed in the office of the county recorder of said county on the 8th day of November, 1884, and which said lots and subdivisions of land are known and therein designated as lot No. forty-six, (46,) as lot No. forty-seven, (47,) and lot No. forty-nine, (49.)" The deed also described each of these lots separately, by metes and bounds, running to the centers of the streets designated on the map, and designating them as such streets. While, as we have said, this map was not filed in the recorder's office at the time of the sale, it was on the ground at the time, and the attention of all purchasers was called to it, and they were notified that when they purchased the lots designated on the map they purchased and paid for the lands to the centers of the streets designated on the map as bordering on such lots. A number of other persons, besides the plaintiff, became purchasers at the same sale and under like circumstances. The street bordering on the plaintiff's land was used by the public as a street, but not exclusively, or by a great number of people. The plaintiff, claiming that he had bought the land to the center of the street, constructed a fence in the center thereof, and cultivated one-half of the street. The board of supervisors ordered the street to be opened, and all obstructions removed. The defendant, as road overseer of the district, and acting under this order, took down plaintiff's fence and removed it from the street; and this is the alleged trespass complained of. The court below found that the land had been dedicated for and accepted as a public street, and found for the defendant. A new trial was denied, and the plaintiff appeals.

The contention of the appellant is that the map was not filed at the time of the sale, that the streets themselves were sold, the land sold on each side extending to the center of the street on each side, showing that at that time there was no intention to dedicate the property, or any part of it, for street purposes, and that, by conveying the property including the streets, the owner withdrew his offer of dedication, if one was made. But, as has been said many times, the question of dedication is one of intention, to be determined from the acts of the owner. *Harding v. Jasper*, 14 Cal. 647; *People v. Reed*, 81 Cal. 70, 22 Pac. Rep. 474. In this case the acts of the owner show a clear intention to dedicate this and other streets designated on the map. He had the land surveyed, and a map made designating the streets. He made the sales at public auction with reference to the map, and before the deeds were made, and while he was still the owner of the land, caused the map to be filed in the recorder's office, and the descriptions in the deeds referred to such map. The case differs materially from *People v. Reed*, *supra*, and other cases cit-

ed by the appellant. There was in this case a complete offer of dedication by the owner of the land. No act on his part withdrawing the offer is shown. The public authorities accepted the offer of dedication by entering an order designating the street as a public highway, and ordering it to be opened and obstructions removed. The fact that the specific description of the lots purchased by the plaintiff carried the plaintiff's exterior lines to the centers of the streets does not affect the question. Conceding that the streets existed, he was entitled to a deed to the center of the street, and thereby became the owner of the legal title to one-half of the street, subject, however, to the right of the public to use it as a public highway. This was the legal effect of the description of the property by reference to the numbers of the lots. The lots extended to the centers of the streets. Therefore the description by metes and bounds was precisely the same in legal effect as the general description. This is not like the cases referred to and relied upon by the appellant, to the effect that a conveyance of the whole tract included in the map, without reference to such map, may amount to a withdrawal of the offer to dedicate. Here the land was not sold in a body, but in separate lots, according to and with reference to the map, and that such sales were not intended to withdraw the offer to dedicate is conclusively shown by the fact that the owner, before conveying the property, made his offer complete and effective by placing the map on file, and making the conveyances with reference to it as such recorded map. Judgment and order affirmed.

We concur: PATERSON, J.; FOX, J.

(86 Cal. 191)

DE FLORES v. SANTA CRUZ. (No 13,658.)  
(*Supreme Court of California.* Oct. 23, 1890.)

APPEAL—OBJECTIONS NOT MADE BELOW.

Where, in an action to set aside a deed on the ground that it was procured by duress, a demurrer to the complaint is overruled by consent, and defendant answers admitting the execution of the deed, but denying that it was obtained by duress, it cannot be objected on appeal for the first time that the complaint is insufficient because it fails to aver directly that plaintiff executed the deed.

Department 1. Appeal from superior court, Los Angeles county; W. P. WADE, Judge.

W. T. Williams, for appellant. M. J. Waldheimer and Frederic Hall, for respondent.

WORKS, J. This is an action to set aside a deed on the ground that it had been procured by duress. There was a judgment for the plaintiff. A motion for a new trial was overruled, and the defendant appeals. It is contended that the complaint is insufficient because it does not directly allege the execution of the deed by the plaintiff. We think the complaint is sufficient in this respect, but if it were not the record shows that the demurrer to the complaint was overruled by consent, and the defect in the complaint is cured by the an-

swer, which alleges the execution of the deed, but denies that it was procured by duress. As there was an allegation of such a conveyance in the complaint, which is made certain by the answer, the appellant cannot be allowed to attack the complaint in this court, for the first time, on this ground. The findings support the judgment, and they are sustained by the evidence. The judgment and order are affirmed.

We concur: FOX, J.; PATERSON, J.

(86 Cal. xxi)

PEOPLE v. WING. (No. 20,790.)

(*Supreme Court of California.* Oct. 17, 1890.)

DEGREES OF CRIME—FINDING BY JURY.

Under Pen. Code Cal. § 1157, providing that, "whenever a crime is distinguished into degrees, the jury, if they convict the defendant, shall find the degree of the crime of which he is guilty," the judgment will be set aside when, upon conviction, the jury fails to find such degree.

Department 1. Appeal from superior court, city and county of San Francisco; J. McM. SHAFER, Judge.

John Flournoy, for appellant. Atty. Gen. George A. Johnson, for the People.

PER CURIAM. The only question in this case is the same as that decided in the case of *People v. Travers*, 73 Cal. 590, 15 Pac. Rep. 293; and, on the authority of that case, the judgment appealed from must be reversed. So ordered.

(8 Cal. Unrep. 300)

WILLAMETTE STEAM MILL & LUMBER CO.  
v. KREMER et al. (No. 13,690.)

(*Supreme Court of California.* Oct. 23, 1890.)

MECHANIC'S LIEN—NOTICE—SUFFICIENCY OF DESCRIPTION.

Where a mechanic's lien notice describes the property as a dwelling-house, situate upon a certain lot, and it turns out to be situated partly on that lot and partly on another, the lien cannot be enforced, as there is no lien on that part of the house not situated on the lot named, and it would work great injury to the owner to allow the lien to be enforced against a part only of the house.

Department 1. Appeal from superior court, Los Angeles county; W. P. WADE, Judge.

Wells, Guthrie & Lee, for appellants. Johnston & Borden and Barclay, Wilson & Carpenter, for respondents.

WORKS, J. This is an action to foreclose mechanics' liens. There were three claimants, and their actions were consolidated together. The notice of two of the liens described the property as situate on lot 6 of a certain addition to the city of Los Angeles. The other described the property as "that certain dwelling-house now upon that certain lot or parcel of land situate in the city and county of Los Angeles, state of California, at the north-east corner of Eighth and Hope streets." This notice did not give the description of the lot by number or reference to the addition or map of it, but it described the corner lot, and, as the property was subdivided into lots and blocks, this description must, if sufficient

at all,—which we very much doubt,—be held to mean the corner lot as thus subdivided, and no more; so that all of these descriptions, conceding this one to be sufficient, are in legal effect the same. At the trial the court found that the house was situated partly upon lot 6, which was the corner lot, and partly upon the adjoining lot, 7. Upon this finding the court rendered a decree foreclosing the lien on lot 6 only, which took all of the house but about 10 feet.

It seems to be too clear for argument that a lien cannot be enforced against a part of a house. Counsel for respondents say that the appellants are not injured by their taking only a part of the property that might have been included in their lien. Ordinarily, no doubt, this would be so, but it is not so in this case. To attempt to sell a part of the appellants' house would necessarily be to sacrifice the property. No one would pay a reasonable price for a part of a house, and the 10 feet, or less, remaining to the appellants would be almost, if not entirely, worthless. Such a sale would therefore work great injury, and cannot be allowed. For these reasons the liens in this case cannot be upheld. There are other errors assigned by the appellants and urged in their briefs, but as the one mentioned is fatal to the liens the others need not be considered. The judgment and order are reversed.

We concur: PATERSON, J.; FOX, J.

86 Cal. 246

MIX v. SAN DIEGO & C. RY. CO. (No. 13, 857.)

(Supreme Court of California. Oct. 27, 1890.)

APPEAL—PRACTICE—RECORD.

1. When the statement of the case copied in the transcript on appeal was not filed in the court below after it was settled, it is no part of the record, and error predicated on the evidence cannot be reviewed.

2. Where the statement was not used on motion for a new trial, it cannot be the basis of an appeal.

Department 1. Appeal from superior court, San Diego county; W. L. PIEKCE, Judge.

Cassins Carter, S. C. McCormick, and Leovy & Humes, for appellant. Hunsaker, Britt & Goodrich, for respondent.

WORKS, J. This is an appeal from a judgment of nonsuit. A statement of the case is copied into the transcript, but it does not appear to have been filed in the court below after it was settled. This being so, it is no part of the record, and cannot be looked to in aid of this appeal; and, as the only ruling complained of depends upon the evidence given at the trial, the position taken by the appellant has nothing to support it. *Mills v. Dearborn*, 82 Cal. 51, 55, 22 Pac. Rep. 1114. Besides, it does not appear that the statement was used on motion for a new trial, and for that reason it cannot be the basis of an appeal from the judgment. *Jue Fook Sam v. Lord*, 83 Cal. 160, 23 Pac. Rep. 225.

Judgment affirmed.

We concur: FOX, J.; PATERSON, J.

86 Cal. 246

SAN FRANCISCO & N. P. R. CO. v. TAYLOR.  
(No. 12,067.)

(Supreme Court of California. Nov. 1, 1890.)

CONDEMNATION PROCEEDINGS—VALUE OF LAND—IMPROVEMENTS.

In condemnation proceedings by a railway company, commenced after the construction of the road, the land-owner is not entitled to recover the value of the improvements placed upon the land, but simply the value of the land.

In bank. Appeal from superior court, Marin county; E. B. MAHON, Judge.

D. H. Whittemore and W. H. Sears, for appellant. Charles F. Hanlon, for respondent.

BELCHER, C. C. This is an action to condemn a right of way for a railroad across a piece of swamp and overflowed land owned by the defendant. Judgment of condemnation was entered in the court below, from which, and from an order denying a new trial, the defendant appeals. The only question involved in the case relates to the measure of compensation which the defendant was entitled to claim and receive for the strip of land taken. The facts affecting this question are as follows: In the year 1860 one Blatchley made application to purchase from the state a tract of swamp and overflowed land situate in Marin county, and known as "Survey No. 55." He paid 20 per cent. of the purchase price, and one year's interest on the remaining 80 per cent thereof, and, in April, 1861, received a certificate of purchase. He never made any further payments of interest or principal. In July, 1882, he assigned his certificate of purchase to the defendant, and in January, 1883, the latter obtained from the state a patent for the land. In 1876, the Sonoma & Marin Railroad Company, the grantor of the plaintiff, constructed a road-bed across the said land, and in 1878 laid its track thereon. Since 1876 the said company and the plaintiff, its successor in interest, have been continuously in possession of the strip so taken, and using it for the purposes of a railroad. Whether Blatchley knew of the construction of the railroad across this land, or whether he consented or objected to its construction thereon, does not appear. It would seem, however, that he must have known of it between the years 1876 and 1882, unless he had abandoned his intention to complete the purchase, or was more than ordinarily careless in regard to his own affairs. Shortly after obtaining his patent, the defendant commenced an action to eject the plaintiff from the possession of the said strip, and before that case was brought to trial, this proceeding was instituted. At the trial of this case the defendant claimed that he was entitled to have the value of all improvements placed on the land by the plaintiff and its predecessor in interest included in the compensation which should be awarded to him. The court allowed him the value of the land, but not of the improvements, and hence this appeal. The case is not materially different from that of *Railroad Co. v. Heiser*, 84 Cal. 435, ante, 288. In that case it was held, on the authority of *Railroad Co. v. Armstrong*, 46 Cal. 85, and other cases cited, that the defendant was not

entitled to be paid the value of improvements placed upon the land by the company before the commencement of the condemnation proceedings; and the rule there declared seems to be in accord with the weight of authority. We think that case decisive of this, and therefore advise that the judgment and order be affirmed.

We concur: FOOTE, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

86 Cal. 265

*In re WHITCOMB'S ESTATE.* (No. 13,882.

[*Supreme Court of California.* Nov. 3, 1890.]

WILLS—CONSTRUCTION—PRECATORY WORDS.

A will provided, "I give to my nephew \* \* \* and to his son all my interest, either real, personal, or mixed, in the 'Jimeno Ranch.' \* \* \* And I recommend to my said nephew to leave his portion thereof, after his own death and the death of his wife," to his son and his children or descendants, and in default of such, to Harvard College. Testator was a lawyer, had created trusts in the will by appropriate words, and had also devised property with a "recommendation" as to the disposal of it, when there was no question that he intended to give it absolutely. *Held*, the word "recommend" was intended only as advice, and not as a limitation of the estate, and no trust was created in favor of Harvard College.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; J. V. COFFEY, Judge.

*Smith & Pomeroy*, for appellant. *Edward J. Pringle* and *Jerome B. Lincoln*, for respondent.

FOOTE, C. This action was instituted for the purpose of construing a will. The appellant's contention is that the word "recommend" used in the sixth provision thereof "is obligatory, and that its effect is to limit A. D. Tuttle's interest to a life-estate, and to dispose of the remainder by his will, in accordance with the wishes of the testator." The court below disagreed with this desired construction, and from its decree in the premises, so far as the same affected the property mentioned in the sixth clause of the will, this appeal is taken.

That decree, among other matters, distributed the property in dispute "to the said Adolphus Darwin Tuttle and his son Charles Whitcomb Tuttle of Hancock, New Hampshire, in fee-simple absolute," and further ordered that George Hagar, who held the legal title of the property in trust, should make conveyance of the same to them. The testator, A. C. Whitcomb, was a lawyer who had acquired a large property in California. He left the state in 1867, and spent the last 20 years of his life in Paris, adding while there a good deal to his fortune. He died in 1888, leaving an estate which was inventoried at over \$4,000,000. A part of it consists of an equitable 31-48 parts, undivided, in the Jimeno rancho, originally a Spanish grant extending for some miles along the Sacramento river, in Colusa and Yolo counties. It contains about 18,500 acres

of land, of which 10,000 acres are in a swamp-land district, a large portion of it at times covered with water. The whole interest in this land, including appurtenances and personal property, was appraised at \$350,000. About \$25,000 of this value consists in town lots in the town of Colusa. The taxes upon the rancho were large, and the income proportionately small. It was improved only so far as was necessary to raise crops of hay and grain. Being not profitable, it was thought best to subdivide and sell it, and to that end George Hagar was invested with Whitcomb's title, he (Hagar) holding and owning the other 17-48 parts. This mere legal estate, held in trust for Whitcomb and his devisees, Hagar admitted in open court, and was willing to abide by the decree thereof ordering a conveyance to the Tutties. The real party contesting here against the decree is Harvard College. Whitcomb had been brought up by A. D. Tuttle's mother, was much attached to Tuttle, and frequently aided him by gifts of money, and in the education of C. W. Tuttle, the son of A. D. Tuttle, whom Whitcomb wished to be prepared for the sphere in life intended for him, which would come by virtue of a large amount of property which Whitcomb had declared he should leave to him. Whitcomb removed to Paris, as before stated, was there married, and left surviving him two small children, who with his wife were his heirs at law. C. W. Tuttle was about 25 years of age at the date of this will. So much of the will as is necessary to this controversy is as follows: "I, Adolphus Carter Whitcomb, of the city and county of San Francisco, state of California, United States of America, but temporarily stopping in Paris, France, do make this my last olographic will and testament: (1) I give the San Francisco Protestant Orphan Asylum and to the Ladies' Protection and Relief Society, both of said San Francisco, each the sum of five thousand dollars, making in all the sum of ten thousand dollars. (2) I give to Mrs. Sarah Brazier Berry, now or formerly of Washington city, D. C., the sum of five thousand dollars; and, in addition, I release her from all indebtedness to me or my estate, for his kindness to my brother and myself after the May fire of 1861, at said San Francisco. (3) I give to Adolphus Darwin Tuttle, of Hancock, New Hampshire, and to Henry Foster Whitcomb, of Boston, Massachusetts, or to the survivor of them, one hundred thousand dollars of my Chesapeake & Ohio Railroad bonds, to be held by them in trust, nevertheless, to pay over semi-annually to my cousin Love Maria Whitcomb Willis, now or lately of Glenora, Yates county, New York, and to her daughter Edith, now or lately married, or to the survivor of them, during their natural lives, the income therefrom for their own separate use and behoof, free from the debts, charge, or control of their husbands, with the remainder or remainders thereof to their children or grandchildren *'per stirpes'* if any be alive at the time of their death; and if none be alive then the said remainder shall go to my heirs at law. (4) I

give to my wife, Louise Palmyre Vion Whitcomb, two hundred thousand dollars (\$200,000) of my Chesapeake & Ohio Railroad bonds, and I recommend her not to dispose of them or to convert them without the distinct advice of my friend Mr. Bruce. (5) I give to the town of Hancock, New Hampshire, for the maintaining of a free public and unsectarian library, ten thousand dollars of my Chesapeake & Ohio Railroad bonds; and also to the said town the further sum of ten thousand dollars of said bonds,—one-half thereof, or such part of the said one-half as may be considered necessary, for the reclamation and embellishment of the 'common,' so called, in the village of said Hancock; and the rest of said ten thousand dollars as a fund, of which the income shall be used for the increase and maintenance of said reclamation and embellishment. (6) I give to my nephew, the said Adolphus Darwin Tuttle, and to his son, Charles Whitcomb Tuttle, both of said Hancock, all my interest, either real, personal, or mixed, in the 'Jimeno Rancho,' so called, wholly or partially in the counties of Colusa and Sutter, in said California, and all mortgages, contracts, debts, or dues arising therefrom; and I recommend to my said nephew to leave his portion thereof, after his own death and the death of his wife, in trust for the said Charles Whitcomb Tuttle, and to his children or descendants, if any be alive at the time of the death of his said son, and, if there be none so alive, to Harvard College, Cambridge, Massachusetts,—one-half of the income thereof to be used by said college for the assistance of students of said college to complete their regular course therein; and the other half of the income thereof for the general uses of the college, apart, however, from any participation therein by the divinity school. (7) I give to my herein-after named executor, Jerome Lincoln, of said San Francisco, all the rest of my property, real, personal, or mixed, except what I may have in France, of every kind and nature, and not hereinbefore disposed of, after the payment of my debts, in trust, nevertheless, to pay over to my said wife, Louise Palmyre Vion Whitcomb, one-third part of the interest thereof, or income therefrom, for and during her natural life, and the other two-thirds parts to my two children, born of her,—one, Adolphe, born on or about the 23d day of February, 1880, and the other, Charlotte Andree, born on or about the 4th day of December, 1882,—with the reversion or remainder of the whole three-third parts to the descendants '*per stirpes*' of the said two children, if any be alive at the time of the death of the said two children; and, if none be alive at that time, to Harvard College, in conformity with the provisions named or indicated in section six (6) of this will having reference to said Harvard College. The said Lincoln is hereby authorized to pay out of said two-third parts only such portion as he may deem meet, fit, and proper for the education and maintenance of said two children until they shall have arrived respectively at the age of twenty-one years, after which they will be entitled to receive their

portion of the yearly income or interest. And the said Lincoln is hereby authorized to appoint his successor or successors in this trust."

It is said in *Colton v. Colton*, 127 U. S. 309, 8 Sup. Ct. Rep. 1164, a case on appeal from the United States circuit court for California, as the rule on the subject laid down by Chief Justice MARSHALL: "The first and great rule in the exposition of wills, to which all other rules must bend, is that the intention of the testator expressed in his will shall prevail, provided it be consistent with the rules of law." Mr. Whitcomb was a lawyer, and understood fully what was necessary in order to vest a trust estate. If he had intended that the property thus willed to Adolphus Tuttle and his son should finally go to Harvard College, as is contended for by the appellant, it was very easy for the former to have said so in unequivocal language. As to the other property mentioned in the seventh clause of his will, he expressly left it in trust to Jerome Lincoln to pay over to his testator's wife one-third of the income thereof during her natural life, and the other two-thirds to his two children born of her, with the reversion or remainder of the whole to their descendants "*per stirpes*" if any were alive at the death of the children; and if no descendants of them were alive at their death, the property to go to Harvard College, in conformity with the provisions named or indicated in section 6 of the will having reference to that college. If he had intended to create a trust in the sixth section, he would have said so in as plain language as he used in the seventh section. Again, when in the fourth section he leaves his wife \$200,000 of his Chesapeake & Ohio Railroad bonds, he further recommends that she do not dispose of them or convert them without the distinct advice of his friend Mr. Bruce. There it is plain that the solicitude of the husband for the wife's welfare induces him to say to her in effect: "It is my advice that you consult Mr. Bruce, and be governed by his judgment in your action as to the sale or conversion of these bonds." Even to the wife, to whom, from her close alliance to him, such a word as "recommend" might be intended to have more binding force than to a man like Mr. Tuttle, he does not use that word in a sense to convey any particular injunction or command, disobedience to which would affect her title to the property in any way, or by means of which Mr. Bruce acquired any interest in the property. And in the third section, where he recognizes the business capacity of, and his confidence in, A. D. Tuttle and Henry Foster Whitcomb by making them trustees for two persons, he uses apt and unambiguous language. In fact, the whole will taken together shows that the testator fully understood what he desired done with his property, and that when he intended trusts to exist he said so in plain language. And when he gave persons property, and recommended them to do so and so with it, he meant to leave them free to act upon his advice or not as they saw fit, but did not intend in any way to limit the estates he had bequeathed them



in the first part of the sections of the will giving the property. Such being the plain intent of the testator, it is clear that the trial court gave proper construction to the section of the will in controversy, and we advise that the judgment appealed from be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

86 Cal. 212

WHITE v. WHITE. (No. 12,890.)

(Supreme Court of California. Oct. 23, 1890.)

APPEALABLE ORDERS—DIVORCE—ALLOWANCE FOR ATTORNEY'S FEES—CONTINGENT FEES.

1. An order denying alimony for counsel fees *pendente lite* is an appealable order.

2. In an action for divorce, it was proper to refuse alimony *pendente lite* for counsel fees to an attorney who had agreed to give his services for a percentage of the property recovered as a result of the suit.

3. The existence of such contract does not preclude the granting of alimony for fees to other counsel not interested in the contract, whose services were necessary.

4. It appearing that \$2,400 had already been allowed for attorney's fees, and that this sum was more than had been paid by the husband to his attorneys, and more than half the amount that they were to receive in the suit, it was not an abuse of discretion to refuse a further allowance for that purpose to the wife.

Department 1. Appeal from superior court, city and county of San Francisco; T. K. WILSON, Judge.

H. C. McPike and J. A. Cooper, for appellant. E. D. Wheeler and Barclay Henley, for respondent.

BEATTY, C. J. This is a suit for divorce commenced by the husband. The wife filed a cross-complaint, and the decision of the court was announced in her favor. Pending the preparation of findings, she moved for an allowance of alimony to enable her to pay counsel fees. Her motion was denied, "without prejudice," and she appeals from that order.

Respondent contends that the order is not appealable, but we think it must be held otherwise, on the authority of *Sharon v. Sharon*, 67 Cal. 185, 7 Pac. Rep. 456, 635, and 8 Pac. Rep. 709. With respect to the right of appeal, there would seem to be no distinction on principle between an order denying and an order granting alimony *pendente lite*. As to the merits of the case, it appears that the defendant has been represented by three attorneys, Mr. Highton, Mr. Cooper, and Mr. McPike, all of whom participated in the trial of the case and in the preliminary preparations. There was evidence that the services of Mr. Highton were worth from ten to fifteen thousand dollars, and those of the other two gentlemen from eight to ten thousand dollars; but it was shown that, about the time the litigation commenced, Mr. Highton and the defendant entered into a contract by which she agreed, in consideration of his services as her attorney, to pay him a certain percentage on the value of the property secured by her as a

result of the litigation. In other words, his compensation was made entirely contingent on success. The existence of this agreement was a sufficient reason for refusing any allowance to pay Mr. Highton for his services as attorney. *Sharon v. Sharon*, 75 Cal. 39-43, 16 Pac. Rep. 345. The contract with Mr. Highton, it is true, differs in important particulars from the Tyler contract in the *Sharon* Case, but there is no ground of distinction so far as concerns the right of defendant to receive an allowance from respondent for the purpose of paying Mr. Highton's fees. By the terms of his agreement, he was bound to perform all the services he did perform as appellant's attorney, and therefore she had no need of other means to secure their performance.

But as to Messrs. Cooper and McPike, who were employed before the making of the Highton contract, and who had no knowledge of its existence until after the trial, if their services in addition to those of Mr. Highton were necessary to the appellant to enable her properly to defend the action commenced by her husband, or to present the merits of her cross-action, the fact that Mr. Highton had contracted for a contingent fee was not in itself a sufficient ground for denying a reasonable allowance to pay them. We do not understand it to have been decided in the *Sharon* Case that the existence of the Tyler contract precluded an allowance to the plaintiff of a reasonable amount for the compensation of other attorneys whose employment was necessary. The order in that case was reversed, because it was a judgment, or several judgments, in favor of persons not parties to the action, i. e., the several attorneys for plaintiff, including the Tylers. 75 Cal. 38, 39, 16 Pac. Rep. 362. This, we say, was the ground of reversal. It is also true that the order was criticised, and would undoubtedly have been modified on other grounds. As to the Tylers, who were allowed \$20,000, it would have been wholly set aside because their services were secured by the contract for a contingent reward. But as to the other attorneys, who had been allowed \$35,000, it was merely said that there appeared to have been no necessity for such an array of counsel, and that the amount allowed was excessive and beyond the discretion of the court. 75 Cal. 39-40, 16 Pac. Rep. 362, 363. The principle decided, and the principle which runs through all the cases, seems to be that the wife in a divorce case is entitled to such allowance out of the community estate as may be necessary to enable her to maintain her rights. Her husband, who has control of the community estate, is presumed to be using it in the litigation so far as his necessities require, and she is entitled to an equal privilege. Therefore, if she needs money to enable her to secure legal advice and assistance, she should have a suitable allowance; but, if she does not need it,—that is, if she has secured attorneys by an agreement for a contingent fee,—then no allowance should be made. If she has bargained with one attorney for a contingent fee, but has need of the services of another attorney, no allowance will be made on account of the

services of the former, but for the latter she will be allowed a reasonable sum. The question, therefore, for the superior court to decide in this case, was whether the services of Messrs. Cooper and McPike, in addition to those of Mr. Highton, were necessary; and, if so, what was a proper sum to be allowed for their payment. Upon this question there was but slight, if any, conflict in the evidence. The preponderance of the proof certainly was that the services of these gentlemen were not only important, but essential, and that Mr. Highton could not have conducted the case without the assistance of one or both of them. The respondent was represented throughout the proceedings by two able attorneys, and a part of the time by three, and it does not seem unreasonable to suppose that the appellant had need of more than one. If, therefore, the appellant had been applying for the first time for an allowance to pay counsel fees, we should feel constrained to hold that the order of the superior court was erroneous.

But there is evidence in the record that the respondent had, prior to this application, already paid to the appellant the sum of \$2,450 to enable her to pay counsel, and that this was more than he had paid his own counsel, and more than half of all they were to be paid. Upon this evidence the superior court would have been justified in concluding that the defendant had received all that was necessary for the compensation of her attorneys other than Mr. Highton, or at least all that was necessary to secure such additional counsel as she needed. At all events, in view of this testimony, we cannot say that the superior court abused its discretion in denying the motion. It may be true, as contended by counsel, that the decision of the superior court was in fact based upon the erroneous idea that the existence of the Highton contract was in itself an insuperable bar to any allowance for the services of other attorneys, however necessary; but this does not appear, and cannot be assumed. We find in the record matter which sustains the order, and we presume that it was made upon that ground. Moreover, as the motion was denied without prejudice, there is perhaps nothing to prevent its renewal hereafter, at which time it can be considered unembarrassed by this question. Order affirmed.

We concur: MCFARLAND, J. PATERSON, J.; FOX, J.; THORNTON, J.; WORKS, J.

36 Cal. 218

WHITE v. WHITE. (No. 18,948.)

(Supreme Court of California. Oct. 21, 1890.)

DIVORCE—ALLOWANCE FOR COUNSEL FEES—CONTINGENT FEES.

The fact that one of the wife's attorneys in a divorce suit has made a contract for a contingent fee, does not prevent an allowance *pendente lite* out of the community property for fees to other counsel who have no such agreements, and whose services are necessary to the wife's case.

In bank. Appeal from superior court, city and county of San Francisco; T. K. WILSON, Judge.

H. C. McPike and J. A. Cooper, for appellant. E. D. Wheeler and Barclay Henley, for respondent.

MCFARLAND, J. This is an appeal by defendant from that part of the judgment of the superior court which refuses to require plaintiff to pay defendant a reasonable sum of money for her attorneys' fees. The court finds that defendant made a certain contract with one of her attorneys, (Henry E. Highton,) and further finds upon the subject as follows: "By reason of the contract aforesaid between said Henry E. Highton and the defendant, the defendant is estopped and disentitled to any further allowance for counsel fees in this cause, and such allowance, for this reason, and for this reason alone, is refused. Irrespective of the said contract, the defendant would be entitled to a further allowance for counsel fees down to the date of this finding as follows, to-wit, \$12,500; and the defendant, for any further and additional services they may render, would be entitled to a further and additional allowance for counsel fees as might be determined by the court." And in the judgment the court decrees "that, by reason of the contract between Henry E. Highton, one of her attorneys, and the defendant, \* \* \* the defendant cannot recover against the plaintiff for counsel fees in this cause; and for this reason alone no allowance is made to her for counsel fees, the reasonable value of which, beyond the payments already made, and apart from any services, if any, to be hereafter rendered, is \$12,500." In another appeal in this same action, (White v. White, ante, 1030, No. 12,890, this day decided,) we held that the said contract between defendant and Highton did not preclude the court from making an allowance to defendant for the payment of the services of attorneys employed by her other than said Highton, provided the services of such other attorneys were necessary, and sufficient allowances to pay them had not already been made; but in that appeal there was nothing in the record to show the ground upon which the court refused to make the allowance asked by defendant, and therefore the order appealed from was affirmed. On the present appeal, however, it appears that the part of the judgment appealed from was based on the supposition that the contract with Highton precluded any allowance to other attorneys. On that subject we adopt the views expressed in the appeal No. 12,890. But, while the court finds that \$12,500 would be a proper further allowance for counsel fees to the date of the judgment, it does not find what part of that amount, if any, defendant should have to pay for the services of her attorneys other than Highton, —viz., Cooper and McPike. No further allowance should be made to defendant on account of said Highton; but whatever further amount, if any, she should have been allowed for Cooper and McPike, under the said views expressed in the appeal No. 12,890, should have been included in the judgment. That part of the judgment here appealed from relating to allowance for counsel fees is reversed; and the

superior court is directed to award to defendant such further allowance as is necessary—if any such further allowance be necessary—to enable defendant to remunerate her attorneys Cooper and McPike for their services, in accordance with the views here and in said appeal No. 12,890 expressed.

We concur: BEATTY, C. J.; PATERSON, J.; FOX, J.; THORNTON, J.; WORKS, J.

86 Cal. 279

SOUTHERN PAC. CO. v. BURR. (No. 13,339.)  
(Supreme Court of California. Nov. 4, 1890.)

PUBLIC LANDS—GRANT OF RAILROAD RIGHT OF WAY—EJECTMENT.

1. Congress has the power to grant a right of way over the public lands of the United States, and it is immaterial that such lands have long been occupied by one who is a qualified pre-emptor, but who has taken no steps to procure a title.

2. Act Cong. July 1, 1862, granting to the Central Pacific Railroad Company a right of way 200 feet wide on each side of its road, was a conclusive legislative determination that so much land was necessary to the use of the road, and gave an exclusive right of possession to the full width, and the company can maintain ejectment therefor against one who occupied without title before the grant.

3. The fact that the company offered to lease to such person for a nominal rent the land occupied by him does not affect its right of recovery.

Appeal from superior court, Placer county; B. F. MYRES, Judge.

*Hale & Craig*, for appellant. *Wallace & Prewett*, for respondent.

WORKS, J. The following opinion was prepared by BELCHER, C. C., when this case was pending in department 1:

"This is an action to recover possession of about five acres of land, situate in Placer county. The case was tried before the court, without a jury, and judgment was given for defendant. The plaintiff moved for a new trial, and, the motion being denied, appealed from the judgment and order. The land in controversy is situated within and forms a part of the right of way granted to the Central Pacific Railroad Company of California by act of congress passed July 1, 1862, entitled 'An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the government the use of the same for postal, military, and other purposes.' Section 2 of the act provides 'that the right of way through the public lands be and the same is hereby granted to said company for the construction of said railroad and telegraph line; \* \* \* said right of way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad where it may pass over the public lands.' The plaintiff is the successor in interest of the original grantee, and as such claims a right to the possession of the disputed premises. The defendant is the successor in interest of one Skillinger, to whom a patent for a quarter section of land, embracing the disputed premises, was issued by the United States in December, 1880, and as such he claims title in fee. The defendant had the

land inclosed, and the plaintiff offered to allow him to maintain his inclosure and use the land, on condition that he would accept a lease thereof, and pay a nominal rent therefor. He accepted a lease for a year, but, at the expiration of the term, refused to renew it, saying that he owned the land, and 'he wouldn't pay a cent.' At the trial, the defendant was permitted, against the objections of the plaintiff, to prove that the quarter section patented to Skillinger was agricultural land, and that it was occupied as early as 1853, and continuously thereafter; that one Mitchell lived on it from 1860 till after the railroad was constructed across it, and was a qualified pre-emptor; that Mitchell was succeeded by one Summers, who was a citizen of the United States, and, with his family, resided on the land for a time, and then sold it to one Fuller; that Fuller sold it to a Mrs. Warren, who filed on it, and then sold it to Skillinger, who afterwards filed on it himself. We are unable to see that this testimony was relevant or material for any purpose. When the act of 1862 was passed, and until after the railroad was constructed, the quarter section was public land of the United States, and congress had full power to withdraw it from sale, or to sell or grant it as it pleased. *Railroad Co. v. Tevis*, 41 Cal. 489; *Farley v. Irrigating Co.*, 58 Cal. 142.

"The principal question discussed by counsel is, did the plaintiff have any such interest in the land as would enable it to maintain an action of ejectment? The theory of respondent is that it had not; that the act of 1862 granted only an easement for the construction and operation of a railroad and telegraph line across the land, and that, subject to this easement, the legal title passed to Skillinger under the patent of 1880; that having only an easement the plaintiff had, and can have, no right to use the land for any other purpose, and no cause of complaint until it is disturbed or obstructed in the enjoyment of the easement; and that, if disturbed or obstructed, its only remedy is by an action known under the old system as an 'action on the case,' or by 'bill in equity.' This theory is rested mainly upon the authority of *Wood v. Turnpike Co.*, 24 Cal. 474. In that case the plaintiffs purchased at sheriff's sale, under execution, 'all the right, title, interest, claim, and property of the Truckee Turnpike Company in and to the Truckee Turnpike Road, a highway,' and, having obtained the sheriff's deed, commenced an action of ejectment to recover possession of the property so purchased. It was held that the plaintiffs could not maintain the action because—(1) The franchises of the defendant did not pass by the sheriff's deed. (2) A road or right of way is an incorporeal hereditament, and ejectment is maintainable only for corporeal hereditaments. (3) The lands traversed by the road were public lands of the United States, and the plaintiffs by their purchase acquired no title and no possessory interest therein. (4) 'The way levied upon and sold as the property of the company did not belong to it by any proprietary right. The way was *publici juris*. Its uses were not only

public, but it belonged to the public by title.' The road involved in that case was an ordinary toll-road, constructed on public lands without any special grant of a right of way. Since the decision was rendered, the law has in some respects been changed. The Code now provides that, 'for the satisfaction of any judgment against a corporation authorized to receive tolls, its franchise and all the rights and privileges thereof may be levied upon and sold under execution in the same manner, and with like effect, as any other property.' Civil Code, § 388. And it has lately been held that the right of way for such a road is private property, though held for a public use, and is incident and necessary to the privilege of collecting tolls thereon, and constitutes an interest in the land on which the road rests. *Welch v. County of Plumas*, 80 Cal. 338, 22 Pac. Rep. 254. We think that case plainly distinguishable from this. Here there was a special grant of a right of way 200 feet in width on each side of the road. This grant is a conclusive legislative determination of the reasonable and necessary quantity of land to be dedicated to this public use, and it necessarily involves a right of possession in the grantee, and is inconsistent with any adverse possession of any part of the land embraced within the grant. It is true the strip of land now actually occupied by the road-bed and telegraph line may be only a small part of the 400 feet granted, but this fact is of no consequence. The company may at some time want to use more land for side tracks, or other purposes, and it is entitled to have the land clear and unobstructed whenever it shall have occasion to do so.

"It is said that the plaintiff had no right to use the land for any purposes other than its railroad and telegraph line, and this may be conceded. But, under the law of this state, railroad companies are required to fence in their roads. (Civil Code, § 485.) and the plaintiff could undoubtedly have included within its fences the whole 400 feet. It is also said that, when the plaintiff offered to lease to the defendant the parcel in dispute, on payment of a small rent, it was attempting to use the land for an unauthorized and unlawful purpose. But the defendant had no right to inclose and occupy the land at all without the plaintiff's permission. The demand, therefore, that he accept a lease cannot affect the right of recovery. Besides, the demand may have been intended only as a recognition of the plaintiff's right to take and use the land for its legitimate purposes whenever it might wish to do so. The exact point involved here was before the United States circuit court for the district of Nevada in *Railroad Co. v. Benity*, 5 Sawy. 118, and it was held that the plaintiff could recover possession of the land in an action of ejectment. The court said: 'It may be admitted that for the obstruction of a mere easement the recovery of the possession of the land itself would not be the proper remedy; but, in order that the plaintiff in the case at bar may make such use of the land as the grantor intended it should under

the grant of a right of way, it becomes necessary to take and keep an actual possession of the land. It must also be a possession exclusive of all other persons. This is obvious enough as to all the land upon which a track, a depot, or other superstructure is placed, and we think the same is true of the whole two hundred feet on each side of the track. The grant is a right of way to the extent of two hundred feet on each side of the track, and the plaintiff is entitled to possess and use the whole quantity. \* \* \* The right of the plaintiff to possess the land in dispute springs not from an actual necessity for its use at any given point of time, but from the grant of the right of way to the extent of two hundred feet on each side of the track, a grant which, as we view it, carries with it necessarily a right to the possession of all the land within the limits named. Moreover, it might materially interfere with the plaintiff's enjoyment of the right granted if obliged to permit third persons to occupy all such portions of its right of way as it was not at the moment using. Whenever needed, the delay necessary for ejecting an occupant might cause inconvenience.' In *City of Visalia v. Jacob*, 65 Cal. 434, 4 Pac. Rep. 433, the action was ejectment to recover a portion of a public street, and it was held that the action would lie. The court said: 'It is true an action of ejectment may be maintained by a municipal corporation for the recovery of the possession of a street wrongfully possessed by an individual, whether the corporation owns the fee, or the adjoining proprietor retains it.' So in *City of Winona v. Huff*, 11 Minn. 119, (Gil. 75,) the action was ejectment to recover possession of a public square. The land had been owned by the defendant, and dedicated to the public for a public square. Subsequently, he entered upon, inclosed, and held possession of the square, claiming title to it. It was held that the action could be maintained, and the court said, (page 136:) 'For a mere easement, perhaps the action would not lie; but wherever a right of entry exists, and the interest is tangible, so that possession can be delivered, an action of ejectment will lie.' We think the law correctly stated in the above-cited cases, and that under it the plaintiff in this case could maintain its action of ejectment. We therefore advise that the judgment and order appealed from be reversed, and the cause remanded for a new trial."

We are satisfied with this opinion, and for the reasons therein stated the judgment and order appealed from are reversed, and the cause remanded for a new trial.

WE CONCUR: BEATTY, C. J.; MCFARLAND, J.; FOX, J.; PATERSON, J.; SHARPESTEIN, J.; THORNTON, J.

SOUTHERN PAC. CO. v. MEYER. (No. 13,340.)  
(*Supreme Court of California*. Nov. 4, 1890.)

In bank. Appeal from superior court, Placer county; B. F. MYRES, Judge.  
*Hule & Craig*, for appellant. *Wallace & Prewett*, for respondent.

**WORKS, J.** This case is in all material respects the same as *Southern Pac. Co. v. Burr*, ante, 1032, (No. 13,339, just decided,) and, upon the authority of that case, the judgment and order appealed from are reversed, and the cause remanded for a new trial.

**We concur; BEATTY, C. J.; McFARLAND, J.; FOX, J.; PATERSON, J.; SHARPSTEIN, J.; THORNTON, J.**

80 Cal. 306

*In re* ORTIZ'S ESTATE. (No. 13,625.)

(*Supreme Court of California*. Nov. 6, 1890.)

EXECUTORS AND ADMINISTRATORS—FOREIGN ASSETS.

It is the duty of a domiciliary executor to collect foreign assets so far as he is able; and he should be charged in his accounting with such assets when they were under his control, and might easily have been transferred to the domestic jurisdiction, before the filing of the account.

**Commissioners' decision.** Department 1. *Thomas I. Bergin and Sullivan & Sullivan*, for appellant. *Smith, Wright & Pomeroy*, for respondents.

**VANCLIEF, C.** This is an appeal by the executor of said estate, Vicente Cagigal Pezuela, from an order of the superior court of the city and county of San Francisco, settling his final accounts. The deceased, a native of Spain, died in Spain on the 5th day of April, 1887, leaving a will executed in Spain according to the laws of that kingdom, and also in compliance with the laws of this state. At the time of his death, he was a resident of the city and county of San Francisco, in this state, where he left property of the value of about \$97,800. He also left personal property in Spain of the value of about \$15,000, and one-half of a house and lot; and also left property in Mexico. The will disposed of all his property to his seven children, and four grandchildren, and appointed the appellant (who was his son-in-law, and a native and resident of Spain) executor without bond or other security for the performance of the trust. There was no evidence of the laws of Spain except the testimony of the appellant, who said he was not a Spanish lawyer, but testified that no other letters testamentary than a duly authenticated copy of the will were required by the laws of Spain to authorize him to administer the Spanish assets of the estate, although he would be required to render a final account to a Spanish tribunal in order to be discharged from his trust. The will authorizes the executor to take possession of all kinds of property, credits, claims, and shares; to liquidate all accounts, and to approve them or not, as he sees fit; to claim, receive, collect, or pay whatsoever shall be owing the estate, or due by the same, of any nature whatsoever, wheresoever situated, giving and signing therefor the proper vouchers; to compound or settle differences which may arise, or submit them to friendly arbitration; to sell or exchange what may be deemed absolutely necessary, receiving the consideration therefor; and, when exchanging, to make up any difference. In all matters in which the executor cannot personally act, he may give power of at-

torney, general or special, "with power of revocation and appointment of new attorneys in fact, and to the formation of an inventory, appraisement, accounts, and partition, carrying out said changes by themselves, without submitting or reporting the same to any tribunal of justice, this being expressly prohibited;" basing said prohibition on his confidence that his executor will do nothing but what is just. The appellant accepted the trust; and, having received from the proper officers of Spain duly authenticated copies of the will, and a proper certificate of the death of the testator, he proceeded immediately to collect and take possession of all that part of the assets of the estate which were then in Spain, and converted all the personal property into money. He then, with his family, removed to this state, for the purpose of residing here while administering the California assets. He arrived in California in June, 1887; and, on the 22d day of that month, filed in the office of the clerk of the superior court of the city and county of San Francisco an authenticated copy of the will, which was afterwards admitted to probate by that court, and the appellant was appointed executor, and he qualified to act as such on the 26th day of September, 1887. Thus he became the domiciliary executor of the will, and at the same time was invested with the character of ancillary executor of the assets in Spain. On October 17, 1887, in obedience to section 1443 of the Code of Civil Procedure, he filed an inventory of all the property of the estate, including that situated in Spain. On February 13, 1889, the appellant filed his final account, in which he failed to charge himself with the assets in Spain, and prayed that the account be settled and allowed, and that the residue of the estate be distributed. In due time, two of the devisees and legatees named in the will filed objections to the account, on several grounds, but principally on the ground that the executor had failed to charge himself with the assets of which he, in his character of ancillary administrator, took possession in Spain. It appears that all the devisees resided in California and Mexico, and that all were represented in the proceedings in the superior court. After hearing the contest, the court charged the executor with \$9,847.29, which it found to be the residuum of the Spanish assets after deducting all proper demands and charges against the estate in Spain. The court also disallowed three small charges of the executor for traveling expenses from San Francisco to the city of Hermosillo, in Mexico, amounting to \$315.

1. Counsel for appellant contended that the court erred in charging the executor with the residuum of the Spanish assets, for the alleged reason that the administration of those assets had not been closed in Spain. This presents the principal question, and the only question of any difficulty to be decided. The evidence of the facts upon which the court acted, consists of the will, petitions, and inventories filed by the executor, and his testimony at the trial, and on a former occasion. The executor was examined and cross-ex-

amined at great length, and it is impracticable to epitomize his testimony by stating the mere substance of it so as to show its full effect and bearing upon his motives and intention. I think, however, that his testimony, in connection with the documentary evidence, substantially tends to prove, and is sufficient to justify findings of, the following facts: *First*, That the residuum of the assets in Spain had been under his active control, and at his disposal, as the domiciliary executor, during the term of at least six months before he filed his final account, though not actually separated from that part of such assets which may have been necessary to discharge the demands against the estate in Spain, and the expenses of administration there, which, however, could not have exceeded the value of the assets left in his hands, in his character of ancillary executor, for the purpose of paying such demands and expenses; *second*, that he could have had the residuum with which he was charged transferred to him in this state at any time within six months before the filing of his final account by simply drawing for it upon his brother, whom he had authorized to act for him in all matters pertaining to the estate in Spain, and who had on deposit, in a bank there, subject to appellant's order, proceeds of the estate in Spain, amounting to \$15,000; *third*, that with ordinary diligence in the discharge of the duties of his trust, the appellant might have had the administration of the estate in Spain closed, and the residuum thereof transferred to him in this state, before he filed his final account, but that he willfully refused to have this done, intending not to account for or to distribute that residuum in this state, but to account for and distribute it, if at all, in Spain. It is strenuously contended that the lower court assumed jurisdiction over the appellant and dealt with him in his character of ancillary executor on the estate in Spain, and not merely as domiciliary executor; but I think this is a mistake. The court dealt with him only as the principal domiciliary executor, and only held him responsible for what he should have charged himself with in his final account here. Upon the facts which the court was justified in finding, the case against him appears to be quite as strong as it would have been if his brother had been the ancillary executor of the estate in Spain, and he had willfully refused or neglected to procure a transfer of the residuum from his brother, as such foreign executor, to himself, knowing that with ordinary diligence, or by mere demand, he could do so. There is no complaint that he was charged with more than what would necessarily be the residuum after satisfying all lawful demands in Spain; nor is any reason suggested why, upon the settlement of his final account in Spain, the Spanish tribunal will not credit him with all that he has been required to account for and distribute in this state. There is no question here as to the estate in Mexico. For aught that appears, that portion of the estate has been administered and distributed to the satisfaction of all concerned. I think the law applicable to the

facts is correctly stated by Prof. Schouler, in his late treatise on Executors and Administrators, (2d Ed. 1889, § 175,) as follows: "The earlier rule frequently asserted in England, in one loose form or another, is that assets in any part of the world shall be assets for which the domestic executor or administrator is chargeable; the practical effect being to enjoin upon the principal personal representative the duty of procuring, so far as foreign law and the peculiar circumstances will permit, personal assets wherever situated, realizing the bulk of the estate of his decedent as best he may, gathering in the property as one who represents the whole fortune, and, having gathered it, account to those interested accordingly. Some of the judicial expressions on this point, to be sure, import too onerous a responsibility on the representative's part; and Mr. Justice STONY has pointed out the fallacy of holding a domestic executor or administrator answerable for foreign property which it is admitted that he can neither collect nor sue upon, nor compel its payment or delivery to himself by virtue of his domestic appointment,—foreign property, we may add, of whose existence, or of the grant of foreign administration for realizing it as assets, he may be quite unaware. And yet, to let external assets knowingly escape his control, and be lost to the estate, when with reasonable diligence they might have been procured, seems a plain dereliction of duty in the principal or domiciliary representative, whose function, as rightly understood, is to grasp the whole fortune, as the decedent did during his life, save so far as the obstructive law of foreign *situs*, or the limitations of his own appointment, may restrain him. If, therefore, assets cannot be collected and realized for the benefit of the estate without a foreign ancillary appointment, the executor or administrator of the decedent's last domicile ought, so far as may be consistent with his information, the means of the estate at his disposal, and the exercise of a sound discretion, to see that foreign letters are taken out, and that those assets are collected and realized, and the surplus transmitted to him. If, as frequently happens, the domestic representative may collect and realize such property in the domestic jurisdiction, as by selling negotiable bonds, bills, notes, or other securities, payable abroad, or by delivering bills of lading or other documents of title, (indorsing or assigning by acts of his own which would be recognized in conferring the substantial title in such foreign jurisdiction,) or, otherwise, by effectually transferring property of a chattel nature situated or payable elsewhere, which is capable, nevertheless, of being transferred by acts done in the domestic jurisdiction, he should be held accountable for due diligence as to such net assets; and so, too, he may enforce the demand against the debtor without resort to the foreign jurisdiction. If, however, foreign letters and an ancillary appointment at the *situs* be needful or prudent in order to make title, and to collect and realize such assets, the principal representative should perform the ancillary trust,

or have another perform it, observing due diligence and fidelity, according as the laws of the foreign jurisdiction may permit of such a course; and if, in accordance with those foreign laws, a surplus be transmitted to the principal and domiciliary representative, or otherwise transferred, so as to be held by him in such capacity for payment and distribution, he will become liable for it accordingly. Whether, then, the principal or domiciliary representative be required *pro forma*, or not, to include in his inventory assets which come to his knowledge, either situated in the state or county of principal and domiciliary jurisdiction, or out of it, his liability as to assets of the latter sort depends somewhat upon his means of procuring them, and the fact of an ancillary administration in the *situs* of such assets. In any case he is bound to take reasonable means, under the circumstances, for collecting and realizing the assets out of his jurisdiction; nor is his liability a fixed, absolute one, but dependent upon his conduct, and it is getting the foreign assets into his active control that makes a domestic representative chargeable as for the property or its proceeds, rather than upon the duty of pursuing and recovering such assets. If assets situated in another jurisdiction come into the possession of the executor or administrator in the domiciliary jurisdiction, by a voluntary payment or delivery to him, without administration there, it follows that he should account for them in the domiciliary jurisdiction whose letters were the recognized credentials in the case. And it is held in several American cases, consistently with this rule, that, no conflicting grant of authority appearing, the domiciliary appointee of another state may take charge of and control personal property of the deceased in the state of its *situs*." See, also, *Wilkins v. Ellett*, 9 Wall. 741, and *Van Bokkelen v. Cook*, 5 Sawy. 549. The authorities cited by appellant's counsel seem not inconsistent with the above extract from Prof. Schouler's work. None of them denies the duty of the domiciliary executor to gather in, and account for, the foreign assets to the extent of his conscious ability to do so, nor the consequent and corresponding authority of the court of the domicile to compel him to account for willful neglect to perform such duty. All the authorities agree that the residuum of the foreign assets must finally be collected and distributed by the domiciliary executor.

2. As to the disallowance of the three items of traveling expenses, it is to be observed that, as they pertained solely to the administration of the estate in Mexico, they should be paid from that part of the estate, and not from the estate in California. If those charged may be allowed here, why may not all the expenses of administration, both in Mexico and Spain, be charged to the California estate? I think the order appealed from should be affirmed.

We concur: GIBSON, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is affirmed.

**CASPARY *et al.* v. CITY OF PORTLAND.**  
(*Supreme Court of Oregon.* Oct. 27, 1890.)  
**PLEADINGS—EXHIBITS—LIABILITY OF CITY—WRONGFUL ACT OF OFFICER.**

1. An exhibit may be made a part of a pleading by marking it so that it may be identified, and reciting in the pleading itself that such exhibit is so marked and made a part of it. *Aliter*, though filed with the pleading and numbered as Schedule 1.

2. A municipal corporation is not generally liable for the wrongful act of an officer, and, in the few cases where it may be liable, it must be made to appear that such officer was not an independent public officer, and that the wrong complained of was done by such officer while in the legitimate exercise of some duty of a corporate nature, which was devolved upon him by law, or by the direction of the corporation.

(*Syllabus by the Court.*)

Appel! from circuit court, Multnomah county; E. D. SHATTUCK, Judge.

The only question presented on this appeal is the sufficiency of the plaintiffs' complaint, which is as follows: "Johanna Caspary and J. Octavia Caspary, Plaintiffs, vs. the City of Portland, Defendant. Johanna Caspary and J. Octavia Caspary, the plaintiffs in this action, complain of the defendant herein, and for cause of action allege that the defendant, the city of Portland, is a municipal corporation created by and existing under a law of the state of Oregon, entitled 'An act to incorporate the city of Portland,' approved October 24, 1882, and acts amendatory thereof; that during all the times hereinafter mentioned the plaintiffs were and now are the owners of, and entitled to the possession, in their own right, of all the personal property described in the following schedule, No. 1, and that the same was of the value stated therein; that at all times herein mentioned the plaintiffs were and now are entitled to the possession of the personal property described in the following schedule, No. 2, as bailees for one Joseph Windle and that it was all of the value stated in said schedule, No. 2; that the defendant, the city of Portland, on or about the 1st day of November, 1888, unlawfully took and carried away all of the above mentioned and described property, and unlawfully converted and disposed of the same to its own use, to the damage of plaintiffs in the sum of \$2,069.85. Wherefore plaintiffs demand judgment against defendant for \$2,069.85, and for their costs and disbursements herein." The name of the court, verification, and signatures are omitted. A demurrer was interposed, which was sustained, and final judgment rendered thereon, from which the plaintiffs have appealed.

H. T. Bingham, for appellants. W. H. Adams, for respondent.

STRAHAN, C. J., (*after stating facts as above.*) To sustain the ruling of the court below, counsel for the respondent has argued two propositions in this court: First, that the schedules mentioned constitute no part of the complaint, and that, therefore, the complaint contains no description of the property alleged to have been converted, or statement of value; and, second, that the defendant being a municipal corporation, and necessarily



acting through its officers, it ought to appear that at the time of the alleged wrongful acts the officers were engaged in the performance of some corporate act, or that the officer doing the act was not an independent public officer. These questions will be examined in the order stated.

1. The facts constituting the plaintiff's cause of action must be alleged in the complaint. The appellants' counsel insists that, taking the complaint and schedules referred to together, they do contain every allegation necessary. We think that must depend on whether or not the schedules constitute a part of the complaint. The schedules contain various items of personal property, and opposite each item are figures showing the value thereof; but they are in no way identified or marked as exhibits, nor is it stated in the pleading that they are attached or made a part of it. If these schedules had been marked so that they could be identified with certainty and then annexed to the complaint as a part thereof, and these matters had appeared in the complaint, we think, according to the constant practice in this state, they would constitute a part of the pleading, not for the purpose of supplying necessary allegations therein, but for the purposes of description and itemizing the values. It is true, some of the authorities cited by respondent's counsel hold that exhibits cannot be made a part of the pleading, but, for the purposes above indicated, the practice in this state has been otherwise, since the adoption of the Code, and we are unwilling to disturb it. But, to make an exhibit a part of the record, it must be attached and identified as in *Morrison v. Crawford*, 7 Or. 473. It is true, in that case the exhibits were attached to a bill of exceptions, but as much certainty ought to be observed in the preparation of a pleading; and we can perceive no reason for a different rule. Counsel for appellant referred to Hill's Code, § 83, but I fail to see that that section has any application to the question presented by this record.

2. Numerous authorities are cited by counsel on the other question, but none of them seem to be identical with the question presented by this record. The complaint alleges the conversion of chattels by the defendant. Now, it is manifest that the defendant could only do the act, if at all, through some of its officers or agents. An individual is liable to a person injured for any wrongful act causing injury, but a municipal corporation is not liable for the torts of its officers or agents, except under circumstances and conditions not necessarily applicable to an individual. In fact, the liability of such corporation for the acts of its officers or servants is somewhat exceptional. 2 Dill. Mun. Corp. § 949 et seq. No general rule has been formulated on the subject, and it is said by some of the authorities that all the courts can safely do is to determine each case as it arises. Under the allegations contained in this complaint, the court is unable to say whether the maxim of *respondent superior* applies to this case or not. The pleader has not seen proper to develop the facts of his case far enough to enable the court

to determine that question. The plaintiff's allegations assume it, without averring a single fact upon which the assumption could properly rest. The best and latest authority on the subject says, in substance, that, if the officers or servants are elected or appointed by the corporation in obedience to the statute to perform a public service, not peculiarly local or corporate, but because this mode of selection has been deemed expedient by the legislature in the distribution of the powers of government, if they are independent of the corporation as to the tenure of their office, and the manner of discharging their duties, they are not to be regarded as the servants or agents of the corporation for whose acts or negligence it is impliedly liable, but as public or state officers with such powers and duties as the statute confers upon them, and the doctrine of *respondent superior* is not applicable. It will thus be seen that, on general principles, it is necessary, in order to make a municipal corporation impliedly liable on the maxim of *respondent superior* for the wrongful acts or negligence of an officer, that it be shown that the officer was its officer, either generally or as respects the particular wrong complained of, and not an independent public officer; and also that the wrong was done by such officer while in the legitimate exercise of some duty of a corporate nature, which was devolved on him by law, or by the direction or authority of the corporation. 2 Dill. Mun. Corp. § 974. A brief reference to some of the cases will further illustrate this proposition. In *Morrison v. City of Lawrence*, 98 Mass. 219, it was held that a city or town could not be held liable in damages for the act of a person, unless it appeared that the injury was inflicted by a servant or agent of the city or town, while engaged in the legitimate exercise of the service or business for which he was employed. So, in *Mitchell v. Rockland*, 52 Me. 118, it was held that neither the relation of master and servant nor of principal and agent exists between a town and its health or police officers; nor was the town liable for their unlawful or negligent acts. So, in *Brown v. Inhabitants of Vinalhaven*, 65 Me. 402, it was held that one who suffered damage by reason of the neglect or unskillfulness of the selectmen of the town, or the physician employed by them, in the performance of the duties imposed on town officers, by Rev. St. c. 14, in relation to the small-pox, had no remedy against the town therefor. And the same principle is announced by many other cases. *Grumbine v. Mayor, etc.*, 2 MacArthur, 578; *Anthony v. Inhabitants of Adams*, 1 Metc. (Mass.) 284; *Buttrick v. City of Lowell*, 1 Allen, 172; *Cushing v. Inhabitants of Bedford*, 125 Mass. 526; *Pollock v. Louisville*, 13 Bush, 221; *Everson v. City of Syracuse*, 100 N. Y. 577, 3 N. E. Rep. 784; *Hiladorf v. St. Louis*, 45 Mo. 94; *City of Richmond v. Long's Adm'r's*, 17 Grat. 375; *Ogg v. City of Lansing*, 35 Iowa, 495; *Dargan v. Mayor, etc.*, 31 Ala. 469; *Alcorn v. City of Philadelphia*, 44 Pa. St. 348; *Bennett v. City of New Orleans*, 14 La. Ann. 120; *Stewart v. City of New Orleans*, 9 La. Ann. 461. These are only a

few of the cases that might be cited, holding that a municipal corporation is not liable for the torts of its officers under the various conditions stated. Whether they would apply to the real facts in this case, we are not permitted to know, for the reason the plaintiff's complaint does not disclose the facts upon which they seek a recovery. The foregoing citations abundantly show that there is no general liability, on the part of a municipal corporation, for the acts of its officers or servants, and that, if such liability exist in any instance, it is because of the particular facts of the case. We think the better rule of pleading, in such actions, is to allege in the complaint the facts upon which the pleader relies for a recovery,—in other words, to plead specifically. In any event, enough must be alleged to show that the city was not acting in its governmental capacity, as one of the agencies of the state, in enforcing the necessary health and police regulations within its limits, and that the wrong complained of was done by an officer of the city, while in the legitimate exercise of some duty of a corporate nature, which was devolved on him by law or by the direction or authority of the corporation. We do not hold that these elements would be sufficient, but they necessarily enter into the question of the city's liability, and must, in some manner, appear before the city is liable. This must be so on principle. Why should the tax-payers of the city of Portland be mulcted in damages when they have done no wrong, and, it may be, had no agency in the transaction complained of further than to carry into effect some positive requirement of the charter by means of their municipal government? We think the court did not err in sustaining the demurrer, and its judgment is affirmed.

(19 Or. 512)

**CHEMIN v. CITY OF EAST PORTLAND.***(Supreme Court of Oregon. Oct. 28, 1890.)***APPEAL—JUSTIFICATION OF SURETIES.**

The court below had no power to shorten the time allowed by law for the justification of sureties on appeal, and, when the transcript was filed in this court before the time fixed by law for such justification, the same must be stricken from the docket.

*(Syllabus by the Court.)*

Appeal from circuit court, Multnomah county; L. B. STEARNS, Judge.

The final decree in this case was rendered on the 30th day of September, 1890. On the same day, the appellant served his notice of appeal, and filed his undertaking on appeal. On the 6th day of October, 1890, the respondent excepted to the sufficiency of the sureties, and served notice thereof upon appellant's counsel, who thereupon gave notice that the sureties would appear at once to justify. On the same day, the appellant and respondent appeared in open court, and, after hearing the appellant's application, the court made an order shortening the time for the justification of the sureties from 10 days to 2 hours. At the time fixed by the court for such justification, being October 6, 1890, at the hour of 3:30 P. M. of said day,

the appellant produced his sureties in open court, and respondent's counsel, though present, declined to examine as to their qualifications, and thereupon the court adjudged them sufficient. On October 7, 1890, the transcript was filed in this court.

*R. & E. B. Williams*, for appellant. *Sears & Beach* and *Hall & Showers*, for respondent.

**STRAHAN, C. J.** The respondent has filed a motion to dismiss the appeal, and also to strike the case from the docket. The only question material to be considered is whether or not the case should be stricken from the docket; and that depends on the effect of the order of the court below shortening the time within which the sureties were required to justify. Section 524, Hill's Code, authorizes the court, when notice of a motion is necessary, to prescribe a shorter time than 10 days, by an order indorsed on the notice; but the Code does not empower the court to shorten the time fixed by law for the justification of the sureties on appeal. In this case the appeal was not perfected when the transcript was filed in this court, and the motion to strike the case from the docket must be allowed. *Callahan v. Railroad Co.*, 17 Or. 556, 21 Pac. Rep. 870. The appellant may have leave to withdraw his transcript

(19 Or. 503)

**In re BECK'S ESTATE.***(Supreme Court of Oregon. Oct. 27, 1890.)***DEATH OF PARTNER—ACCOUNTING.**

1. A firm occupied a store owned by one of them, under an agreement that it should be without rent. *Held*, that the death of the other partner terminated the contract, and that the partnership estate was properly charged with the rent thereafter accruing.

2. Services rendered in ascertaining the condition of the accounts of the partners after the death of one of them being for the mutual benefit of decedent's estate and the partnership, the compensation therefor should be paid equally by each estate.

Appeal from circuit court, Multnomah county; E. D. SHATTUCK, Judge.

*R. & E. B. Williams* and *Mr. Carey*, for appellant. *Gilbert & Snow*, for respondent.

**PER CURIAM.** This is an appeal from the allowance of the account of J. A. Strowbridge, as administrator of the partnership estate of Wm. Beck & Son.

The first objection is that the amount of commissions allowed Strowbridge for his services are too much for the reason (1) that he agreed to perform such services without pay; and (2) that the amount allowed is too much. We are unable, from the evidence presented and the record before us, to concur in this objection upon either of the grounds stated, but think he is entitled to allowance made, and that the same is reasonable for the services performed.

The next objection is that the amount allowed for rent was unauthorized, because, by an agreement between the deceased and his son, the store was to be occupied without rent. The record discloses that the same was done for several years, and that the rent charged is rent which has accrued since his death, and

which the court below held, upon the facts, terminated the contract. In this we cannot say there was error.

The next objection is that the amount allowed A. H. Morgan and G. S. Nicholson for their services in taking the inventory, and ascertaining the interests of the parties in the partnership, was exorbitant. We think the evidence shows otherwise. The evidence shows that the partnership business was large and complicated, and that the services rendered were of the full value allowed; but, as it appears that the service of Nicholson was rendered in ascertaining the conditions of the accounts of the partners, and was for the mutual benefit of the estate of William Beck and the partnership of Wm. Beck & Son, we think the compensation of Nicholson should be paid in equal parts by both estates, and in this respect the decree below is modified, and in all other respects affirmed.

*AIKEN et al. v. PASCALL et al.*

(Supreme Court of Oregon. Oct. 21, 1890.)

CHATTEL MORTGAGES—RIGHT OF MORTGAGOR TO SELL.

When it appears either on the face of a chattel mortgage, or by parol evidence, that the mortgagee of personal property has given to the mortgagor power to dispose of the property mortgaged, and to apply the proceeds to his own use, the mortgage is void as to attaching creditors.

(*Syllabus by the Court.*)

Appeal from circuit court, Multnomah county; E. D. SHATTUCK, Judge.

X. N. Steeves, for appellants. *Sander-son Reed*, for respondents.

LORD, J. This is a suit for an injunction to restrain the defendant Kelly, as sheriff of Multnomah county, from foreclosing two chattel mortgages, one of which was made and executed by the defendant Chizzoski to the defendant Comminsky, and the other to the defendant Pascall, and also for the purpose of having said chattel mortgages decreed void as to the plaintiffs in this suit. The facts show that the defendant Chizzoski was a retail shoe-dealer, and had bought goods of the plaintiffs, and, by means of certain representations, had procured a credit for their payment; that subsequently he executed contemporaneously the two chattel mortgages aforesaid for the sums, respectively, of \$1,500 and \$1,000, covering his stock of goods. As soon as the fact of these mortgages became known to his creditors, these plaintiffs attached the stock, when the defendants Comminsky and Pascall placed their chattel mortgage in the hands of the sheriff to be foreclosed. The plaintiffs then instituted the present suit to have these mortgages annulled and set aside as fraudulent and void, and, among other things, upon the ground of a conspiracy between the defendant Chizzoski and the defendants Pascall and Comminsky, to cheat and defraud the plaintiffs out of the debts due them, etc. After the injunction was obtained, a receiver was appointed to sell the goods, etc., and a supplemental complaint was filed. It seems that the defendant Chizzoski absconded

the county immediately on the service of the summons upon him, and Comminsky soon after disappeared, and made fault, and a decree was entered setting aside his mortgage. It is conceded that the defendants Chizzoski and Comminsky have acted dishonestly and fraudulently in regard to the transaction, but it is claimed for the defendant Pascall that he took his chattel mortgage in good faith, and for money loaned the defendant Chizzoski. The contention for the plaintiff is (1) that the two mortgages were fraudulent in fact, and without any consideration, and were prepared and designed to defraud the creditors of the defendant Chizzoski; and (2) that the mortgages were void in law, for the reason that the defendant Chizzoski was allowed to remain in possession of the stock of goods, with power to dispose of the same, and to apply the proceeds to his own use. While we do not intend to review these facts to any great extent, the result of their consideration as a whole has impressed us with the conviction that the circumstances in which these two mortgages originated and were executed, are permeated with fraud. It is impossible under the circumstances as detailed that the defendant Pascall should not have known that the purpose of these mortgages was to forestall and defeat the creditors of the mortgagor; and his narration of the circumstances as to his own connection, leaving out of view some of its contradictory and improbable aspects, tends to confirm that impression. But aside from this, we are satisfied that the defendant Chizzoski was left in possession of the stock of goods, with the power to sell them, and receive the proceeds to his own use, with the full knowledge and consent of the defendant Pascall. It is true that he testifies that he had an oral agreement with the defendant Chizzoski that he should not sell any of the stock, and that he kept some sort of a watch on the store to see that it should be observed. But the evidence shows that the defendant Chizzoski not only remained in the possession of the stock, and in the use and enjoyment thereof, but that the store was open, with the goods exposed for sale, as other stores doing business, and as he had carried on this business before, customers coming and going, and some of the goods actually sold and delivered. If he did as he testified, it is not possible for him not to have had some knowledge of these circumstances, and that the agreement was not kept; and as he makes no protest, but still permits his mortgagor to go on doing business as before, the inference is that he did it with his consent, and that it was understood that the mortgagor should treat the goods as owner, and sell them and receive the proceeds to his own use. Besides, the circumstances of his own statement show that he had little or no confidence in his mortgagor; and it is difficult to understand how in such a case he could have been induced to make the loan. To say the least, it shows that he distrusted him, if he did not in fact regard him as a rascal, as the evidence shows and his counsel freely admitted that his mortgagor was. This circumstance is only referred to as

illustrative of his testimony, and to show its inherent unreliability. The taking of those mortgages at the time and under the circumstances of their execution, the conduct of the parties then and subsequently, and the facts as disclosed by the defendant Pascall, satisfy us that the object of those mortgages was fraudulent, and that it was understood that the defendant Chizzoski was to treat the goods as the owner, and to sell and to appropriate the proceeds to his own use. In *Orton v. Orton*, 7 Or. 479, it was held that when it appears either on the face of a chattel mortgage or by parol evidence that the mortgagee of personal property has given to the mortgagor the power to dispose of the mortgaged property, and to apply the proceeds to his own use, the mortgage is void as to attaching creditors. It is enough to say there was no error, and the decree of the court below must be affirmed; and it is so ordered.

#### MALONE v. McCULLOUGH.

(*Supreme Court of Colorado*. Oct. 3, 1890.)

##### SPECIFIC PERFORMANCE—CONTRACT—AUTHORITY OF AGENT.

One D., meeting in the street defendant, for whom he, as broker, had formerly made sales and purchases of land, after telling defendant that he was again going into the brokerage business, and asking him for something to sell, inquired what prices defendant would take for various lots of land owned by the latter; and, on being told the price of certain lots, asked if he might have a certain commission thereon, which defendant refused, saying he would give a regular commission. *Held*, that this did not authorize D. to execute, on behalf of defendant, a contract to convey such lots, for the price stated, by warranty deed, clear and unincumbered; and that such contract would not be specifically enforced at the suit of the party contracting to purchase, no equities in favor of such party being shown.

Commissioners' decision. Appeal from superior court of Denver.

The appellant, Mrs. Mary C. Malone, filed her bill against the defendant, George McCullough, and sought the reformation and specific enforcement of the following agreement: "Denver, Colorado, March 3d, 1886. Received \$200 of Mary C. Malone as part payment of \$16,000 for lots 1, 2, 3, and 4, block 241, East Denver; balance of \$15,800 to be paid on delivery of warranty deed, to be clear and unincumbered. If the title to same is not furnished, the \$200 is to be refunded. GEORGE McCULLOUGH. By DARROW & HOWARD, Agents." The execution of this paper was averred, but it was alleged in the bill that the true block number was 244, and that there was no block 241 in East Denver containing either these lots or lots of those numbers which were owned by McCullough, and that the mistake occurred because the map which was referred to at the time of the making of the contract was either defaced or defective, and the numbers were not accurately deciphered. There was very little controversy upon this proposition, and the court found that the mistake was a mutual one, and that the wrong number was really put in by mistake, and decreed the reformation of the

contract, and the insertion of the figure 4 in the place of the figure 1. The whole controversy turns upon the employment of the agent, Darrow, by the defendant, McCullough. The only two witnesses who testify concerning the original transaction are Mr. Darrow, the agent, and Mr. McCullough, the defendant. McCullough's testimony is specific, and is as follows: "Personally, I think, I only mentioned this property to him, or rather he asked me about it, on one occasion. It is my impression that that was in December last. That conversation occurred on the corner of Arapahoe and 16th streets. We were standing on the edge of the corner, at the junction of the streets, right in front of the Union Bank, about 75 feet from my office. Have occupied that office, and the adjoining room, between 3 and 4 years. In January I was engaged in the real-estate business. The conversation was this: I was going up from Lawrence street towards Arapahoe. Darrow was coming across Arapahoe street. Just before I turned, he called to me, and said he wanted to speak to me. Stated he had just formed a partnership with a man named Howard, that had some money; that he was going to quit politics, and attend to business, and rustle around, and wanted to know if I couldn't help him; that I had helped him a good deal in the past. I asked him what I could do. He said, 'Give me something to sell.' I asked him what he wanted. He first inquired about some lots out on Stout street, then in regard to some lots in Schinner's addition, asking me in different places, and among others asked me: 'What will you take for your lots up 16th street?' In fact, all his questions were in the same way. When he came to this property on 16th I told him I would take \$16,000. 'Well,' he says, 'I suppose there is about a thousand dollars' commission in that; that amounts to a good deal.' And I told him 'No; that I would treat him as I had always done; that I was always ready to divide. That portion of it was all done in a laughing way, and that was the sum and substance of the conversation. He said he was going into the brokerage business,—his old business. He either told me they had opened an office or would in a few days open an office in the next square. The point he designated was fully 400 feet from my office. Some years previous, before he was alderman, he had made sales and purchases for me. Never had any other or further conversation with Darrow respecting this matter prior to the time when he came to my office, and Berger and Kountze were present. I suppose I had given this piece of property to twenty." Darrow's testimony is very brief, and, insofar as it bears upon the question of his authority to sell, is in these words. "McCullough had previously told me to sell the lots at \$16,000, and I said: 'I suppose at \$16,000 you will give me a thousand commission.' He said: 'Not by a darn sight. I will give you a regular commission.'" There is other testimony given in the case which is to a greater or less extent confirmatory of the proof that McCullough had previously authorized Darrow to sell the property; but

there is nothing which bears directly upon the power of the agent to do that which he undertook. That part of the consideration or purchase price which was paid at the time of the execution of the contract, and its delivery to Mrs. Malone, was paid to Darrow & Co. by a check to their order, and so far as the record discloses it never came to the defendant. The court rendered a decree reforming the contract according to the prayer, and dismissing the rest of the bill. From this decree the plaintiff appealed.

*Steele & Malone*, for appellant. *Benedict & Phelps* and *A. E. Pattison*, for appellee.

**BISSELL, C.**, (after stating the facts as above.) Most of the difficulties which usually embarrass actions brought to enforce the specific performance of contracts are without the limits of this controversy. Whether the court below exercised a proper judicial discretion according to the rule laid down by the best authorities, or whether the power was broad enough to cover all the conditions expressed in the contract, need not be adjudicated. The agreement is in writing, upon apparently ample consideration. It bears the signature of the defendant by procuration. Whether the defendant can be held evidently depends on the authority of the agent who signed his name. This authority is denied. If the proofs showed no such grant of power to the agent as gave him authority to execute a contract which obligated the defendant to convey, the court rightly refused to decree a performance. That the authority was a delegation by parol makes no difference. Under statutes like those of Colorado, that has always been held sufficient. That the legislature has wisely changed the rules so as to require the authority to be expressed in writing cannot affect the judgment to be rendered. As the law was when the contract was signed, the signature is good, if only the authority be sufficient. The leading cases both in England and in this country agree upon this proposition. This in no wise lessens the burden put on the plaintiff, who sues upon a contract thus executed, to show that the person who signed as agent was authorized not only to negotiate the sale, but also to conclude in writing a binding contract with the terms, conditions, and limitations expressed in the one sued on. Thus far there is no discrepancy in the cases. But whether an "authority to sell" necessarily carries with it the power to do whatever may be necessary to execute a binding contract to convey is a difficult inquiry. A conclusion upon this question is not essential to the decision of this case. No power to sell, such as the cases require where it is held to include the power to execute a contract, was given to the agent here. In most of the cases, whether decided one way or the other, it was apparent that the agent was given specific authority to do either the general business of his principal or the particular thing which he did, and which was the subject of the litigation. In no sense can that be said to be true here. Darrow was neither the general agent of McCullough,

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with full powers, nor was he constituted a special agent for a specific purpose, unless he might be said to have been given the right to find a purchaser, and earn a commission. Such an agent must strictly pursue his authority; and any person dealing with him is bound at his peril to learn the extent of that authority. If he fails to observe that duty, he voluntarily puts himself in a position to suffer loss, and must bear the consequences. There is no pretense that there was any other delegation of authority to Darrow than what can be said to result from the conversation on the street. Darrow wanted something to sell, and he asked the price of numerous properties belonging to the defendant. These were given. There is no conflict of proofs,—no assertion of agency on one side, denied on the other. The court is simply required to decide whether in the terms of this conversation, in view of the circumstances under which it was held, there can be found what will amount to a delegation of authority authorizing the agent to make a binding contract to convey with covenants of warranty, and against incumbrances. There is no pretense of express authority, unless it was there delegated. In terms none was conferred. There was nothing in the language which warranted the agent in believing that it was granted to him, or which would justify another in so concluding, had the whole conversation been repeated to him. It simply constituted Darrow a broker, with the right to hunt a purchaser willing to buy at the price named. No other reasonable construction can be put upon the language employed, even with the use of all possible intendment of construction against the owner. It is equally true that there is nothing in the circumstances from which greater authority could be fairly or reasonably implied. There are no equities to be urged in favor of the contracting purchaser. Seller, buyer, and agent are all residents of the same city, and have offices within a few hundred feet of each other. The authority of the agent was the subject of easy inquiry and settlement. The representative of the buyer was a lawyer fully cognizant of the danger of dealing with unauthorized agents. In hunting the agent to make that contract, he passes within less than a block of the owner's office, but makes no effort to satisfy himself upon this vital proposition. Under such circumstances, no forced or strained construction will be put upon language in order to clothe the agent with authority. It is apparent that there was no intention to constitute Darrow an agent with authority to contract. No such agency was necessarily created; nor are there any equitable considerations from which such an agency ought to be inferred. When the authority rests in parol, it must be clearly expressed, and satisfactorily established. There is ample authority in well-considered cases for these principles. *Lauer v. Bandow*, 43 Wis. 563; *Milne v. Kleb*, 44 N. J. Eq. 378, 14 Atl. Rep. 646; *Morris v. Ruddy*, 20 N. J. Eq. 236; *Duffy v. Hobson*, 40 Cal. 240; *Ruttenberg v. Main*, 47 Cal. 219; *Fry, Spec. Perf.* § 353.

With this view of the case, it is wholly unnecessary to determine whether an agent to sell, specifically appointed for the purpose, or clothed with general powers, would have power to make a contract containing the conditions expressed in this one. This much is true: when it is sought to hold a principal bound to convey, and bound to convey with covenants, an incumbered piece of property, by virtue of the contract of an agent, the plaintiff should be held to strict and full proof of ample power. This plain duty was not met by the proofs in this case. This is an insurmountable obstacle to the plaintiff's recovery. As is apparent from the preceding discussion, the decision is placed on the broad ground of the want of authority in the agent to execute the contract on which the suit was brought. It is a sound and reasonable conclusion, fairly deducible from the record. The court below, according to its decision which is found in the record, preferred to rest its conclusion upon the want of that fairness and equity of circumstance which must exist to warrant the court in decreeing specific performance. It would be unprofitable to enter into an extended discussion to sustain or overthrow that conclusion. There are no findings of fact upon which the judgment is predicated, nor is it manifest what particular testimony the court relied on to support his decision. The result in no manner conflicts with this determination of the case. It involves no necessary conflict with the reasons assigned for the judgment of this court, nor can it be seen that the trial court entertained any different ideas concerning the agent's authority. The judgment might readily be supported upon either hypothesis. In whatever aspect the cause is viewed, the plaintiff is not entitled to any greater relief than that which was granted her. The judgment should be affirmed.

RICHMOND and REED, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment is affirmed.

#### MOUAT V. HILDEBRAND.

(Supreme Court of Colorado. Oct. 3, 1890.

LANDLORD AND TENANT—LEASES—APPEAL—REVIEW—TRIAL—RECEPTION OF EVIDENCE.

1. By a lease of lands for the purpose of operating a saw-mill, the lessee was to inclose a part of the land with a fence, to pay a certain rent, and, at the expiration of the lease, to clear away all *débris* on moving away his mill, and restore the ground to its former condition. He entered into possession with his mill, but afterwards transferred the lease to a lumber company. The lessor, subsequently, in writing acknowledged the receipt from such company of payment "in full of all indebtedness and demands to this date, also for rent" to a later date, "provided that the above-mentioned company will and does fix their fences as agreed upon in the lease within three days," etc. In an action by the lessor against the lessee for a breach of the agreement to remove *débris*, it appeared that at the date of the receipt the mill was on the ground. Held, that the receipt did not operate as a release from liability under the clause providing for removal of *débris*, no breach having occurred at the time.

2. A judgment on findings by the court, on conflicting evidence, will not be reversed on appeal.

3. The rejection of testimony, offered in rebuttal, to prove facts testified to in chief by witnesses for the same party, is not error.

Commissioners' decision. Appeal from county court, Jefferson county.

Action by Minna Hildebrand against John Mouat for breach of an agreement in a lease. From a judgment for plaintiff, defendant appeals.

W. B. Mills, for appellant. Coe & Freeman, for appellee.

RICHMOND, C. On the 1st day of September, 1884, appellee herein (plaintiff below) leased to John Mouat a certain portion of her ranch in the county of Jefferson, for the purpose of operating a saw-mill, upon certain conditions: *First*. That the appellant should inclose that portion of the ranch leased, including a log road, with a fence, and keep the same in repair; the fence to become the property of the lessor in the event of said log road becoming a county road. *Second*. That he should pay \$25 monthly in advance. *Third*. That at the expiration of the lease the lessee should clear away all *débris* and trash immediately upon moving away his mill, and restore the ground to the condition it was in before occupied by the lessee. In pursuance of this written lease, the defendant entered upon the possession of the land with his mill. By this action, the plaintiff seeks to recover for breach of that part of the lease which provided for clearing away the *débris* and trash, and for restoration of the ground to the condition it was in before occupation by the defendant. Prior to the termination of the lease the appellant herein transferred all his right, title, and interest in and to the lease to the John Mouat Lumber Company. Appellant contends that this transfer and assignment of the lease was made with the consent of the appellee with the distinct and positive understanding that appellee was to look to the company for the performance of all of the conditions of the lease. This appellee disputes. It also appears that January 11, 1886, prior to the removal of the mill, appellee gave the following receipt: "Denver, Colo., Jan. 11, 1886. Received of the John Mouat Lumber Company the sum of \$57.98 in full of all indebtedness and demands to this date; also, for rent to February 1st, 1886: provided, that the above-mentioned company will and does fix their fences as agreed upon in the lease within three days. This does not include the fencing up the gulch north of the mill." Appellant claims that this receipt embraces a complete discharge of that portion of the lease referring to the removal of the *débris*, and the restoration of the land. In addition to this it is claimed by appellant that a certain amount of lumber had been delivered to the appellee upon the express understanding that it should be in satisfaction of the obligation on the part of the appellant to remove the *débris*, and to restore the land to its former condition. It will thus be seen that the following issues were presented and tried: (1) Was the transfer

and assignment of the lease by the appellant to the John Mouat Lumber Company with the consent of the appellee, and did she agree to look to the company for the fulfillment of the conditions of the lease? (2) Was the receipt in full of all demands, including a waiver of the performance of the provisions of the lease concerning the removal of the *débris* and the restoration of the land to its former condition? (3) Did appellant receive the lumber in lieu of the performance of the last above mentioned condition? The action was commenced before a justice of the peace of Jefferson county, and from thence appealed to the county court, where a jury was waived. The court found the issues in favor of the plaintiff below, and assessed her damages at the sum of \$132, upon which finding judgment was entered. To reverse this judgment, this appeal is prosecuted.

The testimony as detailed in the printed abstract is very conflicting, but sufficient appears, in our judgment, to warrant us in following the rule of this court, to the effect that where the judgment is not manifestly against the weight of the evidence it will not be disturbed. Upon the first issue the evidence on the part of appellant, who was defendant below, does not satisfactorily establish a release of the defendant from the obligation of the lease, and the acceptance of the lumber company instead; while the evidence on the part of the plaintiff is to the effect that it was a matter of indifference to appellee, who operated the mill upon the premises, whether the appellant or the company named after him, so long as the conditions of the lease were fulfilled. The claim that the receipt recited was a release from all liability under the clause providing for the removal of the *débris* and trash immediately upon moving away the mill, and restoring the ground to the condition it was in before its occupation by the lessee, is untenable. At the date of the receipt, the mill was evidently on the ground, as the testimony on the part of appellant shows that the possession was not surrendered until February, 1886. No cause of action had accrued to appellant, no breach of this provision of the lease having occurred at the time. To exonerate the lessee in advance from the duty imposed by this provision of the contract would have required mention and a release. This alone would justify the court in finding that the receipt had no bearing on the question in controversy, in the absence of a specific contract between the parties. The testimony amounts to a positive assertion on the part of appellant, and denial on the part of appellee, and the court determined this issue in favor of the plaintiff. The same result followed in the third issue, relating to the receipt of the lumber.

It is insisted that the court erred in rejecting testimony on the part of the defendant in rebuttal. This claim, we think, is unfounded, for the reason that the very facts which appellant offered to prove in rebuttal had already been testified to in chief by witnesses of appellant, and rebutted by testimony on the part of appellee.

A careful examination of the record in this case has resulted in the conclusion, on our part, that the cause was fairly tried, and that no error occurred at the trial which warrants the reversal of the judgment. The judgment should be affirmed.

REED and BISSELL, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment is affirmed.

# CALVERT v. CALVERT.

(Supreme Court of Colorado. Oct. 3, 1890.)

## DIVORCE—PLEADING—WRITS—SERVICE—PUBLICATION.

1. The complaint in divorce, by husband against wife, alleged residence of plaintiff in the state for 13 months preceding the action; defendant's desertion; that, for more than one year, and up to action brought, defendant had continuously absented herself from home, and refused to live with plaintiff, and still did, without any fault on his part; and that said act of desertion became completed while plaintiff was a resident of the state. Held sufficient, as it clearly fixed the time of desertion, and its continuance for a period of one year prior to the commencement of the action.

2. An order for service of summons by publication directed that the summons be published in a certain newspaper, describing it as a weekly newspaper published regularly in the state. Held a sufficient compliance with the provision of Code Civil Proc. Colo. 1877, § 42, that such publication should be in a paper most likely to give notice to the defendant, although the order did not designate such paper as the one most likely to give such notice; it appearing of record that the paper was a public newspaper, published at the county-seat of the county in which the suit was brought.

3. An order for service of summons by publication directed a copy of the summons to be deposited in the post-office addressed to defendant at her last place of residence. Held a sufficient compliance with the provision of Code Civil Proc. Colo. 1877, § 42, that such order should direct the copy of the summons "to be forthwith deposited in the post-office," etc.; the omission of the word "forthwith" was not an irregularity such as would warrant disturbing a judgment by default thereon, it appearing that the copy required was so deposited on the day the order was entered.

4. The provision of Code Civil Proc. Colo. 1877, § 42, for service of summons by publishing it "once a week for four successive weeks," does not mean four weeks of seven days each. The publication is completed on the day on which the summons is published in the fourth successive week, although less than 28 days have elapsed since it was first published.

5. As an affidavit to obtain an order for service of a summons by publication, under Code Civil Proc. Colo. 1877, § 41, is to be acted upon exclusively by the clerk of the court, it need not specifically set forth the cause of action. An averment that a cause of action exists is sufficient in that respect.

Commissioners' decision. Error to Bent county court.

Action by William J. Calvert for divorce from his wife, Mary Jane Calvert. On defendant's failure to appear and answer after service of summons by publication, a final decree of divorce was entered against her by default. To review this decree, defendant brought writ of error.

Ufford & Van Buren, Reddin & Alphin, and Doud & Fowler, for plaintiff in error.



*Markham & Dillon, Wm. E. Beck, and E. A. Clark, for defendant in error.*

RICHMOND, C. The writ of error in this case is prosecuted to review a certain judgment rendered by the county court of Bent county. From the original, additional, and supplemental transcripts of the records of said county court filed in this proceeding, it appears that, on December 19, 1884, William J. Calvert commenced suit against his wife, Mary J. Calvert, for divorce by filing his complaint in said county court, and causing summons to be issued thereon. The complaint alleged, in substance, the marriage of the parties November 20, 1859; the residence of the plaintiff in Colorado for a period of 12 months preceding the commencement of the action; that the amount involved does not exceed the sum of \$2,000; and that defendant has been guilty of extreme and repeated acts of cruelty towards him, and, at divers days and times since their said marriage, has struck, beaten, bit, and otherwise cruelly abused and ill treated the plaintiff, and has used vile, abusive, and opprobrious language towards him, so that his life has been rendered miserable; that defendant willfully, and without any reasonable or just cause therefor, deserted and abandoned the plaintiff, and had refused to live and cohabit with him any longer; and that for more than the space of one year, and up to the commencement of this action, has continually absented herself from home, and refused to return and live with him, and still does, without any fault on the part of plaintiff; and that said act of desertion became completed while plaintiff was a resident of the state of Colorado. The records further show that, on the day of filing said complaint, an affidavit by the plaintiff was filed in the cause to the effect that he is the plaintiff in the action; that he has good grounds of action against the defendant, as he is informed and verily believes; that defendant is not a resident of Colorado; and that her last known place of residence was Ann Arbor, Mich.; and therefore plaintiff asks that service herein may be made by publication. The records show that, upon the day of filing said complaint and affidavit, the judge of said court, acting as the clerk thereof, entered an order that service of summons in said action be made by publication, as required by the Code of Civil Procedure of 1877, and that John A. Murphy, publisher of the *Las Animas Leader*, or his foreman, A. J. Patrick, deposit a copy of the summons in the post-office at West Las Animas, Bent county, Colo., addressed to the defendant at her last known place of residence. The records also show proof of service of said summons by the affidavit of said A. J. Patrick to the effect that he was the foreman of the *Las Animas Leader*, a public newspaper printed and published weekly at West Las Animas, in the county of Bent, in the state of Colorado, and that the summons in said cause had been regularly published in four numbers of said paper, for four weeks successively; the first insertion thereof being in the paper dated December 19, 1884, the last in the paper

dated January 9, 1885; and that, on said December 19, 1884, he deposited a copy of the summons in the said post-office at West Las Animas, addressed to the defendant named, at Ann Arbor, Mich.; and that the postage was prepaid thereon. By the records it further appears that on March 2, 1885, the court found and adjudged that said defendant had been regularly served with process by publication of the summons heretofore ordered; that, defendant having failed to appear and answer, default was duly entered against her; and, further, that the cause coming on for hearing before the court upon testimony, the material allegations of the complaint were found to be true, and a final decree of divorce was granted. To reverse this decree this writ of error is prosecuted.

The first assignment of error is that the complaint does not state facts sufficient to constitute a cause of action. The complaint mentions two statutory grounds for divorce,—willful desertion without any reasonable cause for the space of one year, and extreme cruelty. Even if it be admitted that the charge of extreme cruelty is technically insufficient, still the charge of willful desertion fixes clearly the time of desertion, and its continuation for a period of one year prior and up to the commencement of the action; so we think the complaint sufficient in substance. In passing upon this question it is enough to say that, if the court can gather from the complaint requisite facts sufficient to constitute a cause of action, the complaint will be held sufficient. *Bliss, Code Pl. § 425; Marix v. Stevens, 10 Colo. 261, 15 Pac. Rep. 350.*

The second error assigned, to the effect that the affidavit of non-residence of the defendant is not upon the positive oath of the party making it, is met by the supplemental record, whereby it appears that the party positively avers upon oath that the defendant is a non-resident.

The third error assigned is that the order for publication does not designate the paper in which the summons is directed to be published, as the one most likely to give notice to the defendant, as the Code provides. The order was to the effect that service of summons in the above action be made by publishing the same once a week for four successive weeks in the *Las Animas Leader*, a weekly paper published regularly in this state, and that a copy of said summons be deposited in the post-office at West Las Animas, addressed to the defendant at her last-known place of residence. In the absence of anything to the contrary, we are warranted in assuming that the *Las Animas Leader* was designated because it was a paper most likely to give the notice to the person to be served; and as the supplemental record discloses the fact to be that the *Las Animas Leader* was a public newspaper published in Bent county, in the town of Las Animas, the county-seat of said county, we think there was sufficient compliance with the statute.

The fourth assignment, that the order of publication does not direct that a copy of the summons be forthwith deposited in the post-office, addressed to the defendant

at her place of residence, is without force. We cannot think it necessary that the order should contain this direction *in hæc verba*. The language of the Code is: "In case of publication, where the residence of a non-resident or absent defendant is known, the clerk thereof shall also direct a copy of the summons to be forthwith deposited in the post-office, directed to the person to be served, at his place of residence." It is a general rule that where anything is required to be done without specifying the time, the law implies that it is to be done presently, not instantly, perhaps, but within a reasonable time, according to the nature of the thing to be done. In this view, the omission of the word "forthwith" from the order of publication did not essentially change its legal effect. In their argument against the sufficiency of the order for publication in this case, counsel seem to place great reliance on the case of *O'Rear v. Lazarus*, 8 Colo. 608, 9 Pac. Rep. 621. But the reversal of the judgment in that case was not based upon the insufficiency of the affidavit, or order for publication for the summons, but upon the failure to forward the summons by mail, inasmuch as the affidavit gave sufficient information concerning the actual place of abode of the non-resident defendant. In this case the record satisfactorily shows that the summons, properly addressed, postage prepaid, was deposited in the proper post-office on the very day the order was entered. Hence, the omission of the word "forthwith," in the order of the court, was not such an irregularity as would warrant us in disturbing the judgment of the court. *Moffatt v. Dickson*, 3 Colo. 314; *Brown v. Tucker*, 7 Colo. 30, 1 Pac. Rep. 221; *Mining Co. v. Johnson*, 13 Colo. 263, 22 Pac. Rep. 459.

The fifth error is covered by the affidavit of A. J. Patrick, which appears in the supplemental record, to the effect that he did duly forward the summons by mail, as aforesaid.

The sixth error, that the order directing the publication of the summons is not in the alternative,—does not direct that the summons be served by publication or by personal service out of the state,—is not seriously insisted upon in the argument by the plaintiff in error. Suffice it to say that the Code does not require the order to be made in the alternative.

The seventh error, to the effect that the record does not disclose entry of default against the defendant, is covered by the additional transcript, which clearly shows that default was entered of record in proper form.

As to the eighth error complained of, to the effect that the period for the defendant to appear and answer did not expire until the 7th day of March, 1885, instead of on the 2d day of March, 1885, raises one question. Must the language, "once a week for four successive weeks," be construed to mean four weeks of seven days each, to wit, 28 days? This we are inclined to answer in the negative. In *Brown v. Tucker*, 7 Colo. 30, 1 Pac. Rep. 221, the method of computation shows that the last publication was October 6th, and that default was entered October 18th, clearly indicat-

ing that the 10 days which completed the service on the defendant began to run from the last publication,—October 6th,—and this case holds decisively that, at the expiration of the 10 days, the court had jurisdiction of the defendant. In *Skiles v. Baker*, 6 Colo. 295, the first publication was November 13th, the last December 4th; judgment by default on December 15th. In this case *ELBERT, C. J.*, says: The defendant had forty days from December 14th in which to answer. The publication ran only twenty-two days; adding the statutory ten days and forty days gives seventy-two days as the period which must elapse from the first publication to date of default. *Haywood v. Russell*, 44 Mo. 253. This method of computing the time is sufficient in our judgment to warrant us in saying that the publication in this case ended on the 9th day of January; that service on the defendant was completed January 19th; and that thereafter the defendant had 40 days in which to answer, which would have expired one day prior to the day that the judgment of default and final judgment was entered. *Swett v. Sprague*, 55 Me. 190.

Under the last assignment of error, defendant in error raises the question of jurisdiction, because the affidavit for publication does not specifically set forth the cause of action; and, in support of this view, he cites many California authorities. If the provisions of the Code of California were similar to ours, we should feel strongly inclined to follow those authorities, but they are dissimilar. Under the California Code the affidavit of publication is addressed to the court or judge. Under ours, the affidavit is merely clerical, and is acted upon exclusively by the clerk of the court. Under the California practice, non-residence, the cause of action, and the fact that the defendant is a necessary party, is required to be made to the satisfaction of the court or judge, and is construed by the supreme court of that state to demand such legal proofs as will support a judicial decision. Can it be said that such was the purpose of the legislature in the adoption of the provisions of our Code? To say so, it occurs to us, would be absurd, for, in effect, it would be asking that the clerk of the court must be sufficiently learned in the law to be able to determine, from the language used in the affidavit, that such a cause of action is stated as would sustain a judicial decision. To require of a clerk such an exercise of judgment, without any knowledge of the law,—without any legal attainment upon which he could possibly base a conclusion,—would be simply saying to the clerk that he should judicially determine that question. There can be no certainty in such a case, and, if the effort was made to state a cause of action, (if the objection here raised is tenable,) then the failure to fully and completely state a cause of action, such as would sustain a judicial decision, in the affidavit, would be equally tenable, and could be urged at any time as a ground for ousting the jurisdiction of a court, which, in all other respects, had obtained jurisdiction of the person. The complaint was on file, and the affidavit of

non-residence followed. The assertion of a cause of action therein, coupled with the subsequent action of the court in obtaining the jurisdiction by publication, should, in our judgment, be sufficient for our saying that to use the language of the statute in the affidavit, so worded as ours is, is a complete and full compliance therewith. The affidavit becomes no part of the summons which is mailed,—no part of the summons which is published. Publication makes no reference to the affidavit, save and except that it appears in the affidavit that the defendant is a non-resident. The cause of action, the ground of the complaint to which the defendant is expected to object by answer, is fully set forth in the summons mailed to the defendant, as well as in the summons in the paper. Setting out a copy of the complaint in the affidavit does not in any way contribute to the enlightenment of the defendant in the action, and certainly it does not contribute to the enlightenment of the court; for, with the affidavit, the court has nothing whatsoever to do, nor would it help the clerk. It goes to the clerk, and the clerk acts upon it, and in his custody, and under his control, is the complaint, which, if he were capable of reading understandingly, and judicially determining, he might possibly consult for the purpose of ascertaining whether or not the plaintiff had a good cause of action against the defendant,—whether or not the defendant was a necessary party to the proceedings. To say in this case that more is required by the statute than is sufficient to inform the clerk that the defendant is a non-resident, that the plaintiff has a cause of action, and that the defendant is a necessary party to the action, is, in our judgment, extending the operation of the Code beyond its legitimate purpose, and works out a conclusion utterly at variance with its spirit and letter. In this case the complaint is filed, the summons is issued, the affidavit of non-residence and that a cause of action exists, and that the defendant is a necessary party follows. This seems to be a full satisfaction of the directory provisions of the statute. We are inclined to think that the Code of Kansas and Nebraska is more analogous to that of Colorado than California, and that the view above expressed is supported in the case of *Bogle v. Gordon*, 39 Kan. 32, 17 Pac. Rep. 857; and *Fluton v. Levy*, 21 Neb. 473, 32 N. W. Rep. 307. The judgment should be affirmed.

I concur: REED, C.

I dissent: BISSELL, C.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is affirmed.

(15 Colo. 452)

**BUGH v. ROMINGER et al.**

(Supreme Court of Colorado. Oct. 3, 1890.)

APPEAL—REVIEW.

An action involving the rights of the several parties thereto, to the waters of a certain creek, was heard upon testimony taken at a previous trial of the case, or of some branch of the same controversy, and also upon oral testimony

taken at the trial. *Held*, that the appellate court should not find a judgment for itself upon the testimony, but should affirm the judgment below, on finding it, upon the whole record, sustained by the evidence.

Commissioners' decision. Appeal from district court, Saguache county.

*E. F. & C. A. Allen*, for appellant.

**BISSELL, C.** This is one of several actions brought in the district court of Saguache county to settle rights to the waters of San Luis creek. The suits were consolidated and tried, and resulted in a judgment which ascertained and declared the priorities of all the parties. The whole controversy grew out of the construction of what are known in the litigation, and probably in that country, as the "Saalfelt and Wittmayer Ditches." There seems to be no question as to the time of the construction of those two ditches, for, according to all the testimony, their construction was commenced in the fall of 1870, and they were completed for practical use some time during the year 1871. Later, and in 1874, by reason of some changes in the condition of the San Luis creek, the parties deemed it expedient to dig another ditch better adapted to secure the full flow of the water. When it was finished, it was connected with the ditches which had been previously constructed, and, at the same time, the Saalfelt and Wittmayer ditches were apparently dis severed in their connection from the main stream, and their supplies received from the newly constructed ditch which had its head some distance further up the creek. The whole controversy turned upon the user and actual appropriation of the water by the parties who constructed the ditches in 1870, 1871, and 1874. The court found, as a matter of fact, that Luengen, Saalfelt, Wittmayer, and Zelbig were the original appropriators of the water, and that they or their grantees were first entitled to the use of whatever might flow in the stream to a certain specified amount; that subsequent appropriators had acquired the right to use a designated quantity of the remainder of the stream, if any, and that a portion of this right had by grant passed to the appellant, Bugh, and that the rights of his grantors had their inception some time in the year 1874. In effect, this subrogated him to the rights of the original appropriators or their grantees to a certain number of inches of water. A decree was entered in accordance with these findings. It is this action of the court which is complained of, and made the basis of the appeal.

There is no appearance for the appellees, and the case has been presented by the appellant on the theory that the court committed error in its determination of the rights of the parties upon the testimony which was introduced at the time of the trial. The circumstances of the case, and the method of its trial below, do not warrant this court in finding a judgment for itself upon the testimony which is before it. The case was not tried wholly before a referee or master, nor upon testimony which was taken in a similar manner, but it was heard upon the testimony which had been taken upon a prior

trial of the case, or a trial of some branch of the same controversy, and likewise upon parol testimony introduced at the hearing. It is clear, therefore, that the case does not come within the principle announced in *Sieher v. Frink*, 7 Colo. 152, 2 Pac. Rep. 901, wherein it is declared to be the duty of the appellate court to sift and weigh all the evidence with a view to a just determination of the controversy, but rather within the general principle which has been repeatedly announced that this court will neither disturb the verdict of the jury nor the finding of a trial court, unless it is well satisfied that the judgment or the verdict is so unsupported by the evidence as to be against its manifest weight, or the record compels the conclusion that the verdict or judgment was the result of those influences, motives, or considerations which the law does not permit to control the findings of either court or jury. *Barker v. Hawley*, 4 Colo. 327; *Machette v. Wanless*, 2 Colo. 170; *Green v. Taney*, 7 Colo. 278, 8 Pac. Rep. 423.

The evidence presented in the abstract, which is claimed by the appellant to establish the inaccuracy of the court's decision, has been subjected to a careful examination, and the record itself, and the testimony of witnesses as given therein, have been sifted and weighed, and upon the whole record it is clear that the judgment of the court below was well sustained by the evidence, and did substantial justice as between the parties. The judgment should be affirmed.

RICHMOND and REED, CC., concur.

**PER CURIAM.** For the reasons stated in the foregoing opinion, the judgment is affirmed.

HAYT, J., having presided at the trial below, did not participate in this decision.

(15 Colo. 447)

HUNT v. OHNERTZ.

(Supreme Court of Colorado. Oct. 2, 1890.)

APPEAL—REVIEW.

In an action by a principal against his agent for moneys collected, an order of reference for an accounting was made; the remaining issue, as to the amount of defendant's compensation as agent, was submitted to a jury. The referee's report found a balance due to plaintiff, and by the verdict of the jury a sum larger than such balance was found due from plaintiff to defendant for services. The judgment rendered was for defendant for costs. The record did not show the basis of such judgment, but it appeared that a motion had been filed by plaintiff attacking the referee's report. *Held* that, on appeal from the judgment, it must be inferred that the court surcharged the account so as to counterbalance the difference between his report and the verdict; and that, as the record did not show the testimony on which the court acted, the judgment would not be disturbed.

Commissioners' decision. Appeal from district court, Chaffee county.

Action by Alexander C. Hunt to recover from Millie C. Ohnertz moneys received by her as his agent from sales and rents of his property. From a judgment for defendant for costs, plaintiff appealed.

L. B. France, G. K. Hartensteln, and P. J. Craton, for appellant. Clinton Reed and Rogers & McCord, for appellee.

BISSELL, C. The record in this case was brought up under the act of 1885, and is to be heard upon the abstract which has been prepared and filed by the appellant. It is barren of the material which is absolutely indispensable to the determination of many questions which are sought to be raised by the counsel for the appellant in their brief. The action was commenced in March, 1885, and therein the plaintiff sought to recover from the defendant the sum of \$7,000, for a failure on her part to turn over to him moneys which she had realized upon the sale of sundry interests which he owned in Salida, and from rents which she had received from the occupancy of buildings which belonged to him. The answer set up various defenses by way of denial, and a further defense by way of the assertion of a claim on her part against the plaintiff for services which she had rendered to him in the discharge of her duties as agent. The particular question which has been discussed, and which is decided by this opinion, grows out of what is claimed to be the error of the court in rendering judgment for the defendant upon the testimony as it appeared in the case. The case seems to have been tried in two sections,—one of them before a referee upon an issue referred to him to be heard and reported on, and the other by a jury impaneled for the purpose. This action of the court was undoubtedly proper, when the character of the suit, the form of action which the plaintiff instituted, and the defense interposed, are considered. It appeared from the complaint and answer that there was a long and very considerable account outstanding between plaintiff and defendant, who bore to each other the relation of principal and agent, which could be more accurately and conveniently investigated by a referee appointed for the purpose. The order of reference was made without objection, so far as the abstract shows, and was simply a reference to take and state the account. The referee was given no power to hear and determine. Upon the incoming of the report of the referee, the remaining issue in the case, which was as to the employment of the defendant by the plaintiff, and the compensation which she was to receive for the services which she was to render under the contract, was submitted to the jury for determination. The plaintiff claimed that the hiring was a specific and definite one, for a sum certain, payable monthly. The defendant, on the other hand, contended that there was no agreement as to compensation, and that she was entitled to deduct from the account, and receive from the plaintiff, whatever her services were reasonably worth. This value she placed at \$250 per month. The jury, by their verdict, found that she was employed for a period of three years, less a few days; that there was no contract fixing the compensation which she should receive; and that her services were of the reasonable value of \$125 per month. The report of the referee, after finding the several sums which had been received by the defendant, and those which she had paid over to the plaintiff, and the sums which she had expended on his behalf, found that there was due

from the defendant to the plaintiff \$2,811.29. It thus appears that if the report of the referee is accepted, and the verdict of the jury is permitted to stand, the defendant will be entitled to a judgment as against the plaintiff. The judgment actually rendered, however, was one simply for the defendant for costs. Upon just what basis the court proceeded, it is impossible from the abstract to determine. When the report of the referee came in, a motion was filed attacking his report upon sundry and divers grounds. This motion evidently came before the court for consideration, together with the motion for a new trial, which was filed by the plaintiff. Whether the court took any action upon the motion to set aside the referee's report, and, if so, what, is only inferable from the fact that the judgment appears not to have been rendered upon the basis of the report of the referee, and the finding of the jury upon their verdict. It is very evident that the court must have modified the report, and found the account as it existed between the parties to be wholly different from the account stated, for, otherwise, it would have been impossible for the court simply to render a judgment on behalf of the defendant in disregard of the verdict of the jury. Taking the report of the referee and the verdict of the jury together, and they would entitle the defendant to a money judgment in her favor.

It will not be presumed that the court attempted to disregard the verdict of the jury upon an issue properly tried by it, and arising in an action at law, without a formal order setting it aside, for his power in the premises would be limited to such particular action. It must, therefore, be taken as true that upon the testimony heard before the referee, and the account as stated by him, the court, in the exercise of the power which the law gives to him in such case, found the facts and the account to be otherwise than as stated, and surcharged the account rendered to such an extent as to counterbalance the difference between the original report of the referee and the verdict. This he had full power to do. Whether he was justified in so doing, under the testimony, is a matter which will not herein be determined. It would be an unwarranted assumption, on the part of the appellate tribunal, to interfere with the action of the court below upon the hypothesis that the testimony did not warrant the judgment rendered, when the abstract fails to show what the testimony was upon which the court acted in the premises. In order to justify the court in taking any action whatsoever upon the hypothesis that the judgment is not warranted by the evidence, that evidence must be presented to the appellate tribunal with complete accuracy and perfect fullness. Without an opportunity to review the testimony in its entirety, no court should attempt to disturb a judgment upon the basis of its insufficiency.

If it is contended that the act in force at the time the appeal was taken permits the appellant to present his case by an abstract in which the appeal is to be determined, it still remains true that the obliga-

tion is with him to present a record from which it can be demonstrated that under the testimony the judgment is erroneous. If the want of such basis be the error on which he insists. In this case, the abstract neither purports to set forth the testimony taken before the referee nor that introduced before the jury. It simply contains fragmentary statements of the evidence given. It is impossible for the court upon these fragments to determine whether the report of the referee was justified by the proof which was introduced before him, or whether the action of the court in modifying the report should be maintained; nor can it be seen that the verdict of the jury was wholly unsupported. It is impossible upon this record to reach the conclusion that the court erred in its estimate of the weight, or the value, of the testimony. The judgment finds ample support in the record as it is presented. It cannot be said that it is either manifestly against the weight of evidence or that the results were arrived at in any other way than that which the law directs and approves. Under these circumstances, the judgment cannot be disturbed.

This determination is in full accord with the adjudications of this court upon similar propositions in cases where the evidence has been so fully reported that the court has been enabled to act intelligently in the premises. The judgment of the trial court, and the verdict of the jury, upon questions of fact, are never disturbed unless the case be clearly within the rule, as it has been declared and applied in such cases. *Barker v. Hawley*, 4 Colo. 327; *Machette v. Wanless*, 2 Colo. 170; *Green v. Taney*, 7 Colo. 278, 3 Pac. Rep. 423; *Kinney v. Wood*, 10 Colo. 270, 15 Pac. Rep. 402. The judgment of the court below should be affirmed.

RICHMOND and REED, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment is affirmed.

MORGANTHAU v. KING *et al.*

(Supreme Court of Colorado. Oct. 3, 1890.)

APPEAL—REVIEW—PARTNERSHIP—SET-OFF AND COUNTER-CLAIM.

1. On appeal upon questions of fact, findings of the jury, warranted by sufficient evidence, will not be disturbed.

2. The individual indebtedness of a partner cannot be set off against a debt to the firm except by special contract, or consent of all the partners.

Commissioners' decision. Appeal from district court, Clear Creek county.

In the spring of 1885, Eugene Morgenthau, appellant, made a verbal contract with Samuel A. King and Amasa J. Chaffee, appellees, whereby appellees agreed to make the necessary excavation, put in the foundation, put up the walls of a stone building to be used as a store by appellant, and plaster the same, for a fixed price per day for excavations, etc., per perch for stone in wall, and per yard for plastering. After the work was under

way, some changes were made in the plans, increasing the aggregate cost, and requiring more time for the building than was contemplated under the original contract. The work was completed by appellees about the 1st of October, and amounted to \$2,900. Appellees were joint contractors and equal partners. Prior to entering into the contract, appellee Chaffee was indebted to one Strousse, brother-in-law of appellant, for which indebtedness he had made his note, which, with interest, amounted to \$240 at the time of the completion of the contract. During the time the work was in progress, Strousse assigned this note to appellant. At the completion of the contract, the work was accepted by appellant, and a full, complete, and satisfactory settlement made between the parties as to the amount of work done, the amount paid during the progress of the work, and the balance remaining unpaid to the appellees fixed at \$387. In regard to the payment of the balance due, a controversy arose, appellant insisting that appellees should take the individual note of Chaffee assigned by Strousse of \$240 in payment *pro tanto*, and the balance in money. The appellees declined and refused to take the note in payment. The conference resulted in the payment by appellant of the balance, \$637, and his refusal to pay the remaining \$240 except with the note, and the refusal of appellees to accept the note. Suit was brought; trial had to a jury, resulting in a verdict and judgment against the appellant for \$240, from which this appeal was taken.

*W. T. Hughes and L. C. Rockwell*, for appellant. *Morrison & Fillins*, for appellees.

REED, C., (after stating the facts as above.) The record shows this case to have been tried very carefully. Many exceptions were saved on the introduction of evidence, several quite technical and unimportant, but perhaps no more technical than warranted by close practice. The number of instructions given and refused is rather phenomenal, in a case involving so few questions; 7 having been given on the part of the plaintiffs, and on the part of defendant 12 were given, and 5 refused. A large number of supposed errors were assigned. In the admission and rejection of evidence, no serious errors are found to the prejudice of the appellant. Practically, only three questions were involved and necessary to be discussed in this opinion.

The first was whether there was a contract for the completion of the work at a specified time, and for a penalty in case of failure, which appellant could set off against the money due appellees. The testimony was somewhat conflicting. There was some evidence of such a contract in the first instance, but no satisfactory evidence of one when the plan of the building was changed, and the contract modified; nor does the testimony show that, at the time of the settlement, appellant claimed and insisted upon it, except in the way of a threat, if appellees refused to allow the Strousse note. The instructions given upon this point on the part of defendant are very elaborate and full, and are fully as

favorable as the court was warranted in giving. The jury were warranted in finding from the evidence that no penalty for failure should be allowed.

Second, (which was also a question of fact for the jury,) whether or not an agreement was made with appellees whereby they agreed to accept the individual note of Chaffee in payment of the joint demand against appellant. On this the testimony was conflicting, but was sufficient to warrant the jury in finding that there was no such agreement, and such finding should not be disturbed.

The third and only remaining question to be determined was a question of law,—whether or not, in the absence of a special contract or consent of all the partners, the individual indebtedness of one could be legally pleaded and allowed as a set-off against a partnership claim due to the firm. That it cannot be done has been so often held, and is so elementary, that authorities in its support are unnecessary.

We find no error of any importance prejudicial to appellant. The rulings and instructions were fully as favorable to him as could be justified under the evidence and the law. We advise that the judgment be affirmed.

RICHMOND and BISSELL, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is affirmed.

BASSICK MIN. CO. v. SCHOOLFIELD *et al.*  
(Supreme Court of Colorado. Oct. 8, 1890.)

ACCOUNTING BY RECEIVERS.

In proceedings to enforce statutory liens, in which a receiver had been appointed *pendente lite*, a decree was made establishing the various liens, ordering a sale of the property by the sheriff, and directing the distribution of the proceeds. After such sale, the amounts due the respective creditors, costs, and all claims of the receiver to the date of the sale, were fully paid; and the receiver reported his accounts to that date, and they were passed and were reported by him paid. Held, that it was error, at the next term of the court, to which the receiver's reports had been continued for consideration by stipulation of the parties, to enter a decree making claims of the receiver for money expended after the sale a lien on the property antedating the decree under which it was sold, as there was no longer any suit pending in which a receiver could be appointed or continued.

Commissioners' decision. Appeal from district court, Custer county.

In statutory proceedings to secure liens on the property of the Bassick Mining Company, brought by W. D. Schoolfield and others claiming liens, James W. Kurtz was appointed receiver of the property of the company *pendente lite*. After sale of the property, under decree of the court, and payment out of the proceeds of all claims of the receiver to the date of sale, and at a subsequent term of the court, on his submitting a further account for money expended after the sale, a decree was entered in favor of the receiver for such further sum, and it was declared to be a first lien as of a date prior to the date of the sale. From this decree the Bassick Mining Company appeals.

*A. J. Rising and Patterson & Thomas, for appellant. J. R. Smith, for appellees.*

REED, C. The appellant was a mining corporation, engaged in mining in the year 1885, and had been prior to that time; was the owner of several lodes, buildings, etc.; and was indebted in different amounts to various contractors, employes, and material-men, who, in June of that year, instituted statutory proceedings to secure liens upon the property of appellant, Schoolfield being one, among others, of the lien claimants. On the 19th day of June, 1885, decrees were entered for the various claims, amounting in the aggregate to about \$35,000, making such claims liens upon the property of the company, and ordering the same to be sold according to law for their satisfaction. At the time of bringing the suits, the different lien claimants united in representing to the court the necessity of operating the pumps and keeping the mine clear of water to prevent irremediable damage, and in asking that a receiver be appointed, and put in charge of the property, "to preserve said mine, and keep it security for such claims," representing that the property if protected was ample security for the debts; otherwise not. Appellee Kurtz was appointed, qualified, and entered upon the discharge of his duties. In the decree of the court, after ordering the sale of the property to satisfy claims, it provided for the application of the money received, "first, to the payment of all the costs of this proceeding, including whatever balance may be due the receiver, James W. Kurtz, for the care and preservation of the property up to and including the day of sale." The record does not show that the appointment of a receiver was resisted by the appellant in any manner, or that it in any way participated. It appears to have been done *ex parte*, on the application of plaintiffs. The circumstances and conditions shown to have existed were such as to make the appointment of a receiver proper, and necessary for the preservation of the property, and security of the claimants. The record contains no return of the sheriff whatever. There is nothing in the record, abstract, or arguments of counsel to in any way inform the court who became the purchaser of the property at the sale, and what amount was realized from the sale. The record not disclosing the fact who became the purchaser, and the attention of counsel having been called to it, a stipulation was filed in this court, in substance, that the property was bought at the sale by James Staples for about \$38,000. The only evidence found in the record of a sale of the property under the decree is contained in a report of the receiver filed July 31, 1885, in which it is stated that on July 11th the sheriff had made a sale of the property, and had received the moneys due under the decree, "and has paid over to said receiver the balance of costs due for care of the property as set down in the receiver's report, filed herein on July 11, 1885, —to-wit, \$2,250.45,—and said receiver has since paid the same out to the parties entitled thereto." It appears from the re-

port of the receiver that on the 11th day of July, which was the day of the sale, Receiver Kurtz presented his report and account to that date, in which he shows the total expenses to have been from the date of appointment to that date \$4,145.27, and that the amount he had received from the mine and other sources amounted to \$1,894.82, leaving the balance due him on that date \$2,250.45, being the same amount which he reports to have received from the sheriff, as shown above. Hence it clearly appears from the record that the entire accounts of the receiver were passed and paid off up to and including the date the property was sold by the sheriff. On the 20th day of July, the receiver applied to the court to be discharged, and on the same day a petition was filed by Armstrong, one of the creditors, setting up that he had received his money, and asking that the receiver be discharged, and he be released as surety on his bond. Again, on the 27th of July, a petition was filed by the receiver asking to be discharged, and there was also filed a stipulation of parties that he should be discharged, "and that the reports of said receiver now on file in said court, together with his final report to the date of his discharge, may stand for consideration at the next term of said court." And on the 29th of July an order was entered by the court discharging the receiver, in accordance with the terms of the stipulation, notwithstanding the decree of the court in which, as above stated, Receiver Kurtz was to receive from the sheriff "all moneys due him up to and including the day of sale," and the further fact, as above shown, that at the date of sale he passed his full account to that date, and received payment as he himself reports, under the order of the court, and the stipulation of parties continuing the accounting and settlement of the receiver to the next term. At the term in January, 1886, he submitted a further account for money expended after the date of the sale of the property, claiming to be due him the sum of \$2,820.97. The appellant objected to the report of the receiver as shown by the record, and the objections were overruled by the court, (what the objections were nowhere appears;) and the court decreed the further sum, as above stated, to be due and owing the receiver, and made the following order: "And it is further considered, adjudged, and decreed by this court that the aforesaid sum of \$2,820.97, due the receiver, James W. Kurtz, be, and the same hereby is, declared a first, prior, and superior lien, as of date the 13th day of June, A. D. 1885, on the property so taken care of and preserved by the said receiver," and proceeds to designate the property. The receiver having been appointed *pendente lite* to preserve the property, and protect the creditors in their security, and a final decree having been entered establishing the various statutory liens, and ordering a sale by the sheriff, and directing the distribution of the moneys received, and the decree having been followed by the sale, and a sufficient amount of money realized, the amounts due the respective creditors, costs, and all claims of the receiver for



services and disbursements to that date, having been fully paid and discharged, the adjudication as far as that court was concerned must be held to have been final and conclusive, and its jurisdiction over the subject-matter of the controversy ended. See *Freem. Judgm.*, § 96 et seq.; *Ram, Judgm. c. 14*; *Fischli v. Fischli*, 1 Blackf. 360; *Cooley, Const. Lim. 47*; *Parsons v. Bedford*, 3 Pet. 443; *Weston v. City of Charleston*, 2 Pet. 449; *Samuel v. Judin*, 6 East, 333.

It is true that appellant in this case brought the proceedings of the district court to this court for review by writ of error, and that the decree of the court under which the sale was made was held erroneous in one respect, and the cause remanded. See *Mining Co. v. Schoolfield*, 10 Colo. 46, 14 Pac. Rep. 65. In that case no question in regard to the receiver, or presented in this appeal, was involved or considered. After the cause was remanded, the irregularity for which the decree was reversed was settled and adjusted amicably by the parties in interest, and no further proceedings had in the district court. Consequently those matters can have no influence in the determination of this case. The creditors having been paid in full, there was, after the 11th day of July, no suit pending in that court in which Schoolfield and others were parties in which a receiver could either be appointed or continued by an order of court. Having been appointed to preserve the property and security of plaintiffs pending litigation, his functions as receiver ended with the sale and payment of the full claims of the creditors, as decreed by the court. Staples became the owner of the legal title, which might be divested by redemption by the appellant. There was no suit pending after the sale to give the court jurisdiction of the property of Staples or appellant, to appoint a receiver, or to continue one who had acted in that capacity in a former suit, which had been ended. At the date of the sale, the receiver reported his entire accounts to that date, and they were passed, and, as he reported, fully paid; and, in our view of it, his position as an officer of the court as receiver *pendente lite* ended. We do not wish to be understood as saying that in a case where accounts had not been passed, and the claims of receiver paid in full, the settlement and adjustment of the receiver's accounts might not be continued to the next term, and then be legally adjusted; but, in a case like the one under consideration, the authority of the court could only be rightfully exercised for the purposes of passing and adjusting the receiver's accounts up to the date of sale, while the receiver's duties and official control of the property must of necessity have ceased at the time of such sale, it not being such a sale as required confirmation by the court. In this case, the accounts having been passed and paid to the time of the sale, there was nothing to continue to the term. A receiver is an officer of the court. The office is in many respects analogous to that of sheriff. He is not a party to nor litigant in any suit in which he is appointed; nor

can he be made a party on motion, nor obtain a decree or get judgment for service or disbursements in such suit. See *High, Rec. § 796*, where it is said: "A receiver cannot recover judgment for his services against the parties to the original suit in which he was appointed by a motion made in that suit; and it is error to so enter judgment against them, there being no action pending in which such a judgment is proper." A receiver may pay himself the amount allowed by the court out of assets in his hands, and, if not sufficient, it may be taxed and collected as costs in the case. *Berry v. Jones*, 11 Heisk. 206; *Hutchinson v. Hampton*, 1 Mont. 39. In this case the receiver was fully paid by the sheriff to the date of sale. It was error to enter a decree in his favor at the January term—*First*. For the reason that the amount allowed was for services and disbursements made after the term of office had expired by the conclusion of the litigation and sale of the property, and also by the terms of the order or decree by which he was appointed. If, by the request or consent of the appellant and Staples, the purchaser, he was continued in charge of the property after sale, he must be regarded as their agent, to be paid by them, and their liability must depend upon such consent and acquiescence or request; and, on their failure to pay, his remedy is by suit instituted by himself against them, as in any other case of employment. *Second*. It is obvious that at the January term, when the decree was rendered, there was no such suit as the one in which the decree was entered, pending. That suit had been concluded at the preceding term, and Schoolfield and others fully paid and finally disposed of.

It is unnecessary to discuss the other supposed errors relied upon by counsel. It is apparent that it was error to enter any decree in that case in favor of the receiver, and of necessity erroneous to enter a decree making subsequent claims of the receiver a lien upon the property to ante-date the decree of the court under which the property was sold. We conclude that the decree appealed from should be reversed, and the cause remanded, and so recommend.

RICHMOND and BISSELL, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is reversed.

REPUBLICAN PUB. CO. v. MOSMAN.

(Supreme Court of Colorado. Oct. 3, 1890.)

**LIBEL AND SLANDER—WHAT ACTIONABLE—EVIDENCE—DAMAGES.**

1. An article published in a newspaper charged plaintiff, in sensational style, under the headings "Inhuman," and "A case of cruelty," with abusing his wife by taking away her young child, and declaring that she should never see it again; with not providing sufficient fuel to keep her warm; with telling her that he had fixed her friends so that they would have nothing more to do with her; and with attempting to make it appear that she was insane, so that her complaints

against him should not be noticed. *Held*, that the publication, if false, was libelous *per se*, as calculated to bring plaintiff into contempt and excite hatred against him, although the words used did not expressly impute any crime liable to punishment.

2. Where compensatory damages only can be recovered, evidence on behalf of defendant of absence of actual malice in causing the publication is not admissible.

3. Although special damages are not alleged or proved, the defamatory matter being libelous *per se*, mental suffering of plaintiff occasioned by the false publication may be considered in awarding general compensatory damages.

4. The answer alleged that the supposed defamatory matters were current report and rumor before the publication by defendant, and were published by defendant in good faith, relying on such rumor; on which allegation plaintiff joined issue, and evidence relating thereto was admitted at the trial. *Held* that, compensatory damages only being recoverable, defendant was entitled to have such evidence submitted in mitigation, even if the plea of justification failed, and even if the publication were, in fact, false.

Appeal from district court, Larimer county. On rehearing.

The facts necessary to an understanding of the opinion are as follows: In December, 1885, appellee, Frank J. Mosman, plaintiff below, was engaged in mercantile business, in the city of Ft. Collins, Larimer county, Colo., and appellant, the Republican Publishing Company, defendant below, was a corporation, and the owner, proprietor, and publisher of a certain newspaper having a circulation in said city of Ft. Collins. On December 29, 1885, the defendant published in its said newspaper the following article of and concerning the plaintiff: "Inhuman, if true. A case of cruelty which should be carefully investigated. Special to the Tribune-Republican. Fort Collins, Colorado, December 28. Last fall, F. J. Mosman and family, consisting of a wife and one child, came to Fort Collins from some place near Buffalo, New York. Mr. Mosman was troubled with weak lungs, and by the advice of relatives he selected Colorado as the place where his disease would in a measure be cured. His wife, a beautiful young woman but 20 years old, cheerfully left the home of her childhood and relatives, and came with him, because she was told that his lung trouble would be relieved by the change. Shortly after their arrival a second child was born, and all was supposed to be cheerful in the household by those with whom an acquaintance had been formed, until within a few days past, since which time it has developed that the husband is in the habit of abusing his young wife. Mosman, shortly after coming here, bought out a shoe dealer on Linden street, and has since conducted the business, receiving a fair share of the trade. The first that was known of the mistreatment of his wife was a few days since. She called on a near neighbor and endeavored to sell a portion of the furniture out of her house, saying that 'Fred [her husband] failed to keep enough fuel at home to keep her warm.' The neighbor declined to buy, as she had no room for more furniture, and asked her how the babe was getting along. The in-

quiry brought the tears to the eyes of the young wife, who said, 'Jud took the babe away three days since, and has not returned it yet. He took it down to his mother's, and when he went away he said he would never come back again, nor ever let me see the babe again.' She was completely overcome with grief, and nearly crazy at the condition in which she was placed; and all this time her husband was at his store in a happy frame of mind over the game which he was playing on his poor, defenseless wife at home, who dared not leave the house, as he thought, she being a stranger in the locality in which she lived. As soon as the husband found that some of the neighbors had become interested in his wife's condition, he made overtures towards a reconciliation, which was effected, the poor wife being nearly frantic over the loss of her child, and willing to make any concessions in order to have it with her again. But the reconciliation was only a sham, for he immediately called upon those to whom his wife had told her pitiful tale, and made all efforts to impress upon their minds that his wife is crazy, and her ravings are not to be noticed. But his efforts in that direction were not crowned with success, and he received but little sympathy and considerable condemnation from all to whom he appealed. Nothing daunted, and with a zeal worthy of a better cause, he returned to his home, telling his wife, 'I have just been to call upon our friends, and have fixed them so that they will have nothing more to do with you,' after which he employed a prominent physician to visit his wife and examine her with a view of having her incarcerated in the insane asylum, as being of unsound mind, and unfit to have charge of her children. The physician made the visit, and declares that the poor woman's mind is in an unsettled condition, and that he doubts not that incarceration in an insane asylum would be a great relief and a benefit to her." The plaintiff brought suit against defendants for publishing said article, alleging damages generally in the sum of \$10,000. The cause was tried by a jury, who returned a verdict in favor of the plaintiff for the sum of \$775. Motions for a new trial and in arrest of judgment were overruled, and judgment was entered on the verdict in favor of the plaintiff. Defendant brings this appeal.

*L. B. France*, for appellant. *Clark & Davidson, T. M. Robinson*, and *E. A. Ballard*, for appellee.

*ELLIOTT, J.*, (after stating the facts as above.) The publication by defendant of the article complained of at the time and place alleged in the complaint not being denied, proof of such publication was, by a familiar rule of practice, unnecessary at the trial. The statement in the answer that defendant did not wickedly, etc., intending to injure, etc., publish the supposed defamatory libel, is not a denial of the publication, but merely a denial of malicious intent in publishing. The answer, however, not only denies that defendant was actuated by malice in pub-

lishing, but denies that the article was either scandalous or libelous. The answer also alleges that the matters published of and concerning the plaintiff were of current and common report before the publication thereof by defendant, and that said matters were and are true. The reply denies that such reports and rumors were current, etc., and denies that the same, or any of them, are or ever were true. The assignments of error cover a wide range, and raise important questions upon the law of defamation. The argument of counsel in support thereof is original and comprehensive, and, in some instances, most radical views are expressed. That some changes have been made in the law relating to libel and slander by modern legislation, notably in matters of pleading and practice, is well understood, and that much light has been gained from modern decisions and authors evincing growth in this as in other branches of our jurisprudence, will be readily conceded. But on this appeal, as in other cases, it is the province of this court simply to ascertain and announce the law as we find it, so far only as the same is applicable to the questions properly presented by the record. At the outset it is contended by counsel for appellant that the article complained of is not libelous *per se*, and not actionable, unless its publication has occasioned special damages to plaintiff, and that such special damages must be alleged and proved to warrant a recovery; that, inasmuch as special damages are not alleged, the complaint does not state facts sufficient to constitute a cause of action; and that defendant is entitled to judgment thereon in its favor in any event. If the premises thus stated by counsel for appellant be granted, the logic of his argument would seem to be unanswerable, and the conclusions inevitable. To render a publication libelous *per se*, appellant's counsel in his brief claims the common-law rule to be: "The words must contain an express imputation of some crime liable to punishment,—some capital offense or other infamous crime or misdemeanor." It is conceded that the Criminal Code (Rev. St. 1868, c. 22, § 121) gives a definition of libel as a crime or misdemeanor different from the foregoing; but it is insisted that, for the purpose of a civil action, defamatory words, either oral or written, to be libelous *per se*, must fall within the limits of the common-law rule, as above stated. As the rule thus contended for lies at the foundation of appellant's first assignment of error, let us test it by the authorities of the common law, and the light of reason and experience.

The cases relied on by counsel for appellant to support the view that defamatory words are not actionable *per se*, unless they contain an express imputation of some crime liable to punishment, are cases of mere oral slander, and do not sustain the theory that oral and written defamation are subject to the same rules in determining what words are or are not actionable *per se*. The case of *Onslow v. Horne*, 3 Wils. 188, decided in 1771, in which Lord Chief Justice De Grey laid down the

rule above quoted from appellant's brief, was an action for words spoken, and no allusion is made to a case of written slander. The same is true of the case of *Brooker v. Coffin*, 5 Johns. 188, a case much relied on by appellant. It is worthy of special note that in the case of *Steele v. Southwick*, 9 Johns. 214, a case of libel, the same court draw the distinction between oral and written slander. It is true, an occasional text-writer has given some countenance to the theory of appellant, above stated, as being reasonable and logical, but none have been bold enough to declare the same to be the law. The following quotations from standard authors show clearly what the law is upon the subject. Chancellor Kent, in his *Commentaries*, (volume 2, p. 16,) speaks as follows: "As a part of the right of personal security, the preservation of every person's good name from the vile arts of detraction is justly included. The laws of the ancients, no less than those of modern nations, made private reputation one of the objects of their protection. The Roman law took a just distinction between slander spoken and written; and the same distinction prevails in our law." In *Starkie on Slander and Libel*, (page 39,) it is said: "The law \* \* \* makes that to be actionable without special damage, when it is written or printed, which would not have been deemed actionable had it been merely spoken." And, again: "Whatever tends to lower and degrade a man's moral character in society, or to expose him to contempt and ridicule, is criminal, if it be published in writing, although the very same matter, if spoken only, would have constituted no offense." In *Townshend on Slander and Libel*, (section 18,) it is said: "To language in writing is attributed, in most cases, a greater capacity for injury than is attributed to language spoken, or speech, so that language which, if spoken, gives no right to redress, may, if reduced to writing, give a cause of action." In *Odgers on Libel and Slander*, an English work published in 1881, (1st Amer. Ed. p. 3,) we find the following: "The presumption that words are defamatory arises much more easily in cases of libel than in cases of slander. Many words which, if printed and published, would be presumed to have injured the plaintiff's reputation, will not be actionable *per se*, if merely spoken. The reasons for this distinction are obvious: *Vox emissæ volat,—littera scripta manet*. The written or printed matter is permanent, and no one can tell into whose hands it may come. Every one now can read. The circulation of a newspaper is enormous, especially if it be known to contain libelous matter. \* \* \* Whereas a slander only reaches the immediate bystanders, who can observe the manner and note the tone of the speaker, who have heard the antecedent conversation which may greatly qualify his assertion, who probably are acquainted with the speaker, and know what value is to be attached to any charge made by him, the mischief is thus much less in extent, and the publicity less durable." The author concludes with

the observation that "the distinction between oral and written slander has been recognized in numerous cases, and is far too well established to be ever shaken." Mr. Justice Cooley, in his treatise on the Law of Torts, (page 239,) speaking of the difference between slander and libel, says: "There is, however, a difference in the substance of what shall constitute an actionable charge. It is perfectly reasonable to allow greater liberty of vocal speech than of writing or printing, for two very plain reasons: (1) Vocal utterance does not imply the same degree of deliberation; it is more likely to be the expression of momentary passion or excitement, and is not so open to the implication of settled malice. \* \* \* Therefore, to such oral expressions, little importance is generally attached. On the other hand, the same words deliberately written or printed, and afterwards placed before the public, usually justify an inference that they are the expression of settled conviction, and they affect the public mind accordingly. (2) An oral charge is merely heard, and the agency of the wrong-doer in inflicting injury is at an end when the utterance has died upon the ear. But the written or printed charge may pass from hand to hand indefinitely and for many years. It is an ever continuous defamation so long as that by means of which it is communicated remains in existence. These reasons are taken notice of in the law, and some charges are held to be *prima facie* actionable as libel that are not actionable as oral slander, unless there be averment and proof that actual injury has resulted. In other words, injury is presumed to follow the apparently deliberate act of putting the charge in writing or print, or of suggesting it by means of picture or effigy, where a mere vocal utterance to the same effect might be disregarded as probably harmless."

Let us see further what kind or class of written publications are regarded as libelous *per se* according to the rules of the common law. Again we quote from standard authors. In Cooley on Torts (side p. 206,) the rule is stated thus: "Any false and malicious writing published of another is libelous *per se*, when its tendency is to render him contemptible or ridiculous in public estimation, or expose him to public hatred or contempt, or hinder virtuous men from associating with him." In 2 Add. Torts, § 1089, it is said: "All publications in writing or in print, imputing to another disgraceful, or fraudulent, or dishonest conduct, or which are injurious to the private character or credit of another, or tend to render a man ridiculous or contemptible in the relations of private life, are libelous, and an action for damages is maintainable against the writer and publisher, unless the publication ranges within that class of communications which are termed 'privileged communications,' presently mentioned, or unless the libeler can prove the truth of the libel." In a note to the foregoing section from Addison, it is pertinently said: "The law recognizes the value of personal character, and throws around it all safeguards es-

sential for its preservation or vindication, and whoever, by writing, signs, pictures, effigies, or other physical means, does that which tends to defame another by bringing him into contempt, ridicule, or disrepute, socially or morally, with his fellows, or which injures him in his office, trade, profession, or business, does an unlawful and unwarrantable act, unless he can vindicate his act by showing that it did not in fact defame such person, because of its truth or fitness as applied to the individual affected thereby." Kent and Townshend, Starkle and Odgers, and other eminent common-law writers, together with a multitude of judicial decisions, ancient and modern, substantially agree with the foregoing views. In Bac. Abr. (volume 6, p. 337,) "libel" is defined to be, "A malicious defamation, expressed either in printing or writing, or by signs, pictures, etc., tending either to blacken the memory of one who is dead, or the reputation of one who is alive, and thereby exposing him to public hatred, contempt, or ridicule." "Libel" thus defined, was, according to Bacon, actionable, at common law, either civilly or criminally. Considering how closely the foregoing definition has been followed by our law-makers, we are led to the conclusion that libel, as defined in the Criminal Code, (section 121, supra,) is substantially declaratory of the common law, and applicable to civil as well as criminal cases, except where the same has been modified by constitutional or legislative authority. The publication in this case was in no sense privileged. The plaintiff was in private life. The article concerned his domestic affairs; and no duty devolved upon defendant to give publicity to plaintiff's supposed conduct through the medium of the public press. Hence, in doing so, defendant must be held to have acted at its peril; and the publication, if false, must be considered as libelous *per se*, or otherwise, according to the uniform rules of law, as above declared. A brief analysis of the article will reveal its character. The very first word characterizes the supposed conduct of plaintiff as "inhuman;" the next line denominates it as a case of "cruelty;" then follows, in sensational style, an account of plaintiff's supposed conduct. He is charged with abusing his young wife by taking away her young babe, and declaring that she shall never see it again; with not providing sufficient fuel to keep her warm; with telling her that he had fixed her friends so that they would have nothing more to do with her; also, with attempting to make it appear that his wife was insane, so that her complaints against him shall not be noticed. In this enliterated age and country it is scarcely necessary to say that such charges printed and published are well calculated to bring the accused into contempt, to excite hatred against him, and to cause all good people to refrain from associating with him. Hence, if false, the article is libelous *per se*. It was not error to admit the same in evidence, and to overrule the motion for a nonsuit without evidence of special damages.

The remaining assignments of error to

be considered relate to the rulings of the court upon the evidence and instructions. Notwithstanding evidence of the printing and publishing by defendant was properly admitted on behalf of plaintiff, defendant was entitled to give evidence to show that the matter charged against plaintiff was true as published. If the truth of the published matter could be established by evidence, it was a complete justification and defense. The defendant was also entitled to give in evidence any circumstances properly in mitigation of said publication, for the purpose of reducing the amount of damages, even if the publication was, in fact, false. Const. art. 2, § 10; Code Civil Proc. § 69. Evidence was offered for the purpose of showing that the agents of defendant were not actuated by malice in causing the publication complained of. The offer was objected to, and the evidence was refused. Such ruling is assigned for error. Much has been written, and much learning and logic displayed, in endeavoring to determine whether or not malice is an essential element of libel. In this case, however, we do not find it necessary to enter into any considerable discussion of the question, for reasons which may be briefly stated. In jurisdictions where exemplary damages are allowable, the malice of the defendant in publishing the libel is proper to be considered as an aggravation of the damages,—in other words, for the purpose of obtaining exemplary or punitive damages; and, in such case, the defendant is undoubtedly entitled to show the absence of actual malice in causing the publication in order to be relieved from such exemplary or punitive damages. But at the time this action arose, and when the same was tried, the law in this state did not allow exemplary damages in cases of this kind; and the trial court expressly instructed the jury that “compensatory damages only can be allowed.” Hence, it was not error to exclude the evidence offered by defendant to show absence of malice on its part. This has been expressly decided by this court, and it is unnecessary to restate the reasoning of those decisions. *Murphy v. Hobbs*, 7 Colo. 541, 5 Pac. Rep. 119; *Publishing Co. v. Miner*, 12 Colo. 77, 20 Pac. Rep. 345; *Odgers, Sland. & Lib.* 302. The jury were instructed to the effect that if their finding should be in favor of the plaintiff, they should award such damages as he may have sustained in his feelings, reputation, and character by reason of the publication; but that, for such purpose, plaintiff was not to be considered as a person of more than ordinary sensibilities. Whatever may be the rule as to the elements constituting special damages, in cases where the words are not actionable *per se*, and where special damages must be alleged and proved to warrant a recovery, we are satisfied that, in cases of written slander where the defamatory matter is libelous *per se*, the mental suffering of the plaintiff, occasioned by the false publication, may be taken into consideration, in awarding general compensatory damages. Hence, the instruction as given cannot be considered erroneous. *Odgers, Sland. & Lib.* 318; 3 *Suth. Dam.* 643 et seq.; *Field, Dam.* § 691; *Murphy*

*v. Hobbs*, supra, 548; *Wadsworth v. Treat*, 43 Me. 163. The jury were charged in substance that, to justify the publication so as to relieve defendant from the payment of compensatory damages, the evidence introduced must prove the truth of every material part of the defamatory matter contained in the publication. Considering the state of the pleadings and proof at the time, this instruction was substantially correct; but when considered in connection with instructions prayed by defendant relating to evidence in mitigation of damages, we find it difficult to say that the cause was properly submitted to the jury. Compensatory damages, under the circumstances of the case, are such as are commensurate with the loss or injury sustained by plaintiff, in consequence of the publication complained of. Under the law, as it stood at the time of the publication, and at the time of the trial, as we have seen, neither actual malice nor any other aggravating circumstance would warrant the jury in awarding exemplary or punitive damages. On the other hand, if the publication was wholly false, then neither the absence of malice nor ignorant mistake on the part of the publisher would take away plaintiff's right to full compensatory damages.

But there is still another view of the case to be considered. The defendant alleged in its answer that the matters contained in the supposed defamatory publication were current and common report and rumor at and before the publication thereof by defendant, as aforesaid; and that such matters were so published by defendant in good faith relying upon such rumor. Plaintiff joined issue on these allegations; and evidence pertaining thereto was admitted at the trial. Under such circumstances defendant was entitled to have such evidence as mitigating circumstances properly submitted to the jury, for the purpose of reducing the amount of the damages, even if it failed in its plea of justification, and even if the publication were, in fact, false. Compensatory damages, under the circumstances, were only such as were occasioned by the false defamatory matter contained in the publication, less whatever of damage, if any, had already been occasioned to plaintiff by common current report of the same false defamatory matter circulated without the agency of defendant before the publication thereof by the defendant. In other words, to determine how much plaintiff's reputation had been injured by the publication of the defamatory matters by defendant, it was proper to ascertain the *status* of his character or reputation, in relation to such matters, prior to such publication. The evidence tended to show that the defamatory matters, as published, or portions thereof, had been more or less circulated in the community where plaintiff lived before the same were published by defendant. Hence, the publication of them in defendant's newspaper, though perhaps greatly augmenting the injury to plaintiff's good name, might not have been so prejudicial to him as if the same had never been thus previously circulated to his discredit. This view of the case, in substance,

the defendant asked to have submitted to the jury. The refusal of the court to give an appropriate charge or instruction upon this point may have been prejudicial to the substantial rights of the defendant, and was, therefore, error. *Odgers, Sland. & Lib.* 305, and notes; *Wetherbee v. Marsh*, 20 N. H. 561; *Case v. Marks*, 20 Conn. 248; *Bridgman v. Hopkins*, 34 Vt. 532; *Willover v. Hill*, 72 N. Y. 36; *Proctor v. Houghtaling*, 37 Mich. 41; *Hatfield v. Lasher*, 17 Hun, 23. We must not be understood as indicating that mere rumor, mere disparaging remarks, or discommendatory statements, sometimes called "gossip," should be considered as mitigating circumstances of any very great weight as against the deliberate publication of such matters in the public press. "For," in the language of Mr. Starkie, "if the report may be spread over the world, by means of the press, the malignant falsehoods of the vilest of mankind, which would not receive the least credit where the author is known, would make an impression which it would require much time and trouble to erase, and which it might be difficult, if not impossible, ever completely to remove. He who prints and publishes what was given to him in manuscript, has to answer for by far the greatest part of the mischief that the statement has occasioned." We are aware that this question has been fruitful of much legal controversy, and of considerable conflict of judicial opinions; but the tendency of modern decisions, as well as modern legislation, is in the direction of giving larger scope to the introduction of mitigating circumstances, in favor of defendants in actions for libel or slander. Giving our statute (Code, § 69, *supra*) a liberal construction, and especially considering how the pleadings in this action are framed, we are of the opinion that common reports and rumors, to the same effect as the defamatory publication complained of, if circulated before such publication, and without the agency of the defendant, were proper to be admitted in evidence, and should have been submitted to the jury by an appropriate and well-guarded instruction, not, in any sense, as a justification of the publication, but as matter tending in some degree, perhaps, to show that the plaintiff had suffered less damages than he might otherwise have sustained by reason of the publication. It must be observed that even where the publication purports to contain only an account of current reports or rumors, in order to a complete justification and defense, the publisher must not only prove it to be true that there were such rumors but must also prove that such rumors were true. The publication of libelous matter cannot be justified on the ground that it is a mere repetition and republished as such. *Starkie, Sland. & Lib.* § 322; *Odgers, Sland. & Lib.* 305; *Townsh. Sland. & Lib.* § 112 et seq., also 210, and notes; *Moak, Underh. Torts*, §§ 143-145. The former opinion in this case is withdrawn; but the former decision of this court, reversing the judgment of the district court, and remanding the cause for a new trial, is adhered to, for the reasons stated in this opinion. Reversed.

BLUMENTHAL. v. ASAY.<sup>1</sup>

(Supreme Court of Utah. Feb. 10, 1877.)

## TRIAL BY COURT—FAILURE TO FILE FINDINGS.

Where a jury is waived, and the cause is tried by the court, which fails to file any findings as it is required to do by Prac. Act Utah, § 180, and this is affirmatively shown by the record on appeal, the judgment will be reversed as having nothing to support it.

## Appeal from second district court.

*Presly Denny*, for appellant. *W. C. Hall*, for respondent.

EMERSON, J. A jury having been waived, the case was tried by the court, but the court failed to file any findings, as required by section 180 of the practice act. This is assigned as error. The record in this case affirmatively shows that no findings were filed. When a jury is waived, and a cause is tried by the judge alone, the record must disclose a finding by him of the facts, and a statement of his conclusions of law. If this is not done, there is nothing to support the judgment, and it will be reversed on appeal. Other points in the case are not brought into the record by a statement on appeal, and are therefore not considered by the court. The judgment of the court below is reversed, and the case remanded for a new trial, the appellant to recover the costs on this appeal.

SCHAEFFER, C. J., and BOREMAN, J., concurred.

CRANE BROS. MANUF'G CO. v. REED *et al.*<sup>2</sup>

(Supreme Court of Utah. 1875.)

## PLEADING—VERIFICATION—DEMURRER—CAPACITY TO SUE.

1. A complaint is not ambiguous or evasive because it alleges plaintiff's partnership or corporate capacity, among other things, on information and belief, where it is verified by plaintiff's attorney as is contemplated by the Code of Utah, plaintiffs being non-residents, and out of the county.

2. Under Code Utah, § 40, which allows a demurrer, where it appears on the face of the complaint that plaintiff has not legal capacity to sue, such a demurrer cannot be sustained where, in the title of the case, plaintiff is designated as a corporation, and the complaint avers that "the plaintiff is, and was at the date hereinafter stated, a corporation."

## Appeal from third district court.

The following is the opinion of LOWE, C. J., in the case of *Thackera v. Reid*, referred to in the opinion in this case: "The action was upon an account stated. The alleged errors arise upon the overruling of the defendants' demurrer to the complaint. The complaint commences in the words: 'Plaintiffs, complaining of the defendants, upon their information and belief, allege,'—following which are appropriate averments of the partnership capacity of the plaintiffs and defendants, and the neces-

<sup>1</sup> This case, filed February 10, 1877, is now published by request, with 16 others, in order that the Pacific Reporter may cover all cases in volume 3, Utah Reports.

<sup>2</sup> This case, filed in 1875, is now published by request, with 16 others, in order that the Pacific Reporter may cover all cases in volume 3, Utah Reports.

sary facts to show a good cause of action. The demurrer is upon two alleged grounds: (1) That the complaint does not state facts sufficient to constitute a cause of action; and (2) that the complaint is ambiguous and uncertain in this, that all the allegations appear to be made upon information and belief, which is claimed to be evasive. The first ground of demurrer is obviously not well taken, as all the averments that go to make up the cause of action are fully stated. Reliance is principally had upon the second ground, and it is insisted, among other things, that, as the fact of plaintiffs' partnership capacity is a fact which from its nature must be within the knowledge of the plaintiffs, it should be positively alleged, and that omitting to do so is evasive. The complaint is verified by an attorney of the plaintiffs, and is in form and substance such as is prescribed by section 55 of the practice act, and shows that the plaintiffs were non-residents of and without the county. The Code evidently contemplates that under such circumstances the verification of a pleading may be made by the attorney of the party. But, if the attorney is not personally cognizant of the facts alleged, he can only verify upon information and belief. The pleading must run in the name of the party, and must appear to be the allegation of the party to the suit. The attorney cannot plead in his own name for the party. It does not seem to be doubted but that a party who verifies his own complaint may distinguish between facts in the pleading alleged on knowledge, and those alleged on information and belief, and there seems to be no reason, when the complaint is to be verified by the attorney, why the pleading may not also distinguish on its face the facts as being on knowledge, or on information and belief. The pleading itself must be in the name of the party, but may be in such form as to be truthfully verified by the attorney within the limits and under the circumstances provided by the statute. Nor is the suggestion that in such a pleading the affiant, verifying the complaint upon information and belief, merely swears that he believes what the party is supposed to believe well founded. The legal as well as the natural construction and effect of the oath is that the affiant believes those matters to be true which, in the complaint, are alleged upon information and belief to be true. If these views are correct, it is no ground of objection that the partnership capacity of the plaintiffs is alleged upon information and belief. It was a fact not presumably within the personal knowledge of the affiant. When a party verifying his own complaint shall state upon information and belief what is plainly to be presumed to be within his actual knowledge, it will be time enough to consider the effect of such pleading, and the proper corrective. A complaint is not ambiguous or evasive by reason of the single fact that allegations are made upon information and belief. It is a common mode of averment to meet the actual state of knowledge of the party, under the system of pleading and verification in use in New York, California,

and our own territory. The seventh cause of demurrer under the fortieth section of the Code, 'that the complaint is ambiguous, unintelligible, and uncertain,' has no reference to the mode of allegation under consideration, but is directed to that want of precision, completeness, and directness of statement which creates doubt and uncertainty as to the real matters alleged or intended to be relied upon as the substantive ground of action. Doubtless a complaint in the ordinary narrative form of positive statement, and verified by the attorney (where the necessary statutory conditions exist) in the usual form, would be good, and perhaps more logically consistent, but there is no error by reason of the mode pursued in this case. The judgment is affirmed."

LOWE, C. J. The same questions are raised in this case as in that of *Thackera v. Reid*, (just decided,) and as to those questions no further observation is requisite. The additional ground, however, is presented by demurrer that the plaintiffs have not legal capacity to sue. By the fortieth section of the Code, it is provided that the defendant may demur when it appears on the face of the complaint "that the plaintiff has not legal capacity to sue." Such is not the fact in the present case. In the title of the case the plaintiff is designated as a corporation, and in the complaint itself it is averred that "the plaintiff is, and was at the date hereinafter stated, a corporation." The legal capacity to sue is an ordinary incident of a corporation. No defect of such capacity appears upon the face of the complaint. If, in fact, any such defect exists, or if the plaintiff is not a corporation, the objection may be taken by answer under section 44 of the practice act. The objection may be taken by demurrer when it is apparent on the face of the complaint. If authority is necessary on this proposition, the case of *Bank v. Donnell*, 40 N.Y. 410, is directly in point. The judgment is affirmed.

#### JACKS v. JOHNSTON. (No. 12,247.)

(*Supreme Court of California*. Nov. 12, 1890.)

##### EXECUTION—TIME OF ISSUANCE.

The general rule under Code Civil Proc. Cal. § 681, is that execution cannot issue after five years. Section 685, however, provides that "in all cases other than for the recovery of money the judgment may be enforced or carried into execution after the lapse of five years from the date of its entry, by leave of court, upon motion." *Held*, that a judgment foreclosing a mortgage given to secure a note, though not a personal judgment, was a judgment for the recovery of money within the five years' limitation. *THORNTON, J.*, dissenting.

In bank. Appeal from superior court, Monterey county; JOHN K. ALEXANDER, Judge.

*Gell & Morehouse*, (T. I. Bergin, of counsel,) for appellant. R. M. F. Soto, (Hermann & Soto, of counsel,) for respondent.

McFARLAND, J. In this case an action was brought upon a promissory note for \$1,300, and interest, and a mortgage given to secure it. Judgment in the usual form



was rendered for plaintiff on March 29, 1879, except that, by stipulation, the decree provided that no judgment should be docketed for any deficiency if the proceeds of the sale should fail to satisfy the amount found due. On April 11, 1887, more than eight years after the entry of the judgment, plaintiff moved the court in due form to direct the clerk to issue a writ of execution for the sale of the mortgaged premises. The court denied the motion, and from the order denying the motion, plaintiff appeals. The only question presented is, can an execution issue on a judgment foreclosing a mortgage given to secure the payment of money after five years from the date of the rendition of the judgment? The general rule, under section 681 of the Code, is admitted to be that an execution cannot issue after five years; but it is contended by appellant that under section 685, Code Civil Proc., which provides that "in all cases other than for the recovery of money the judgment may be enforced or carried into execution after the lapse of five years from the date of its entry, by leave of court, upon motion," the court should have ordered an execution in the case at bar. This contention, however, was substantially determined against appellant by this court in *Dorland v. Hanson*, 22 Pac. Rep. 552. That was the case of a decree foreclosing a street assessment, and the court decided that "section 681 must be held to apply to a judgment, the object, purpose, and effect of which is to enforce the payment of money, whether the same be a personal judgment against the party indebted, or a decree foreclosing a lien for the amount due." This rule applies even more strongly to the case of a note and mortgage, where the latter is given to secure an express personal promise to pay money. With respect to the sections of the Code in question, the mortgage is a mere incident to the debt. The cause of action could have been removed at any time before suit by the payment of the amount of money due; and the judgment could have been satisfied in the same manner. We are asked to overrule *Dorland v. Hanson*, which we decline to do. The court properly refused to order the execution. Order appealed from affirmed.

We concur: BEATTY, C. J.; FOX, J.; PATERSON, J.; WORKS, J.; SHARPSTEIN, J.

I dissent: THORNTON, J.

3 Cal. Unrep. 304

HERBERGER v. HUSMANN. (No. 14,012.)

(Supreme Court of California. Nov. 7, 1890.)

VENDOR AND VENDEE—CONSTRUCTION OF CONTRACT—DISAFFIRMANCE BY VENDEE.

1. Where a contract for the sale of land provides that the vendee may disaffirm the sale at the end of a year, in which event he is to be repaid his purchase money, with 10 per cent. interest, on giving 30 days' notice of his intention to disaffirm, the vendor cannot complain that the vendee gave more than 30 days' notice of his intention, as this is to the vendor's advantage.

2. A further provision in the contract of sale that on its disaffirmance the vendee should surrender the title acquired by him thereunder is sufficiently complied with by an offer, in the notice of disaffirmance, to surrender his claim to

the land on the repayment to him of the purchase money; and, on the vendor's refusal to make such repayment, the vendee may maintain an action therefor without tendering a release of his rights under the contract, Code Civil Proc. Cal. § 2074, providing that an offer in writing to deliver a written instrument is, if not accepted, equivalent to a tender of the instrument.

Department 1. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, Judge.

R. L. Horton, for appellant. Allen & Miller, for respondent.

WORKS, J. The parties to this action entered into a contract for the sale by the appellant to the respondent of certain real estate, \$1,500 of the purchase money to be paid at the time the contract was executed, and \$1,000, the balance of the purchase money, at the end of one year, at which time a deed for the property was to be executed. The contract was in the usual form of such agreements, except that it contained this clause: "And it is further agreed by and between the parties hereto that, should the party of the second part become dissatisfied with the purchase of said lots at the end of one year from date hereof, then, and in that event, should the said party of the second part so desire, the said party of the first part hereby agrees to return to said party of the second part the amount of money this day paid on said lots by the party of the second part, with interest thereon at the rate of 10 per cent. per annum, provided said party of the second part gives said party of the first part 30 days' notice, and a surrender to said party of the first part of the title to said lots; but, should the party of the second part not notify the party of the first part, as agreed, then this agreement to hold good." The contract stipulated that times should be the essence thereof. The contract was executed, and the \$1,500 paid on the 30th day of November, 1887. On the 12th day of September, 1888, the respondent served upon the appellant the following written notice: "You are hereby notified that, as per agreement in a certain article of agreement heretofore entered into by and between H. Husmann, the party of the first part, and Theobald Herberger, the party of the second part, wherein in said agreement said H. Husmann agreed to convey to said Theobald Herberger lots 4, 5, 6, 7, and 8, in block F, of the Park tract, East Los Angeles, one year from date thereof, which said agreement was dated November 30, 1887, and recorded in Book 338, at page 292, of Deeds, Los Angeles County Records; and whereas, in said agreement it was agreed by and between the parties thereto that, should the said Theobald Herberger become dissatisfied with the purchase of said lots therein mentioned, the said party of the first part, H. Husmann, therein agreed to refund to said Herberger the amount of money which said Herberger had advanced, with interest thereon at the rate of 10 per cent. per annum, provided said Herberger gave to said Husmann 30 days' notice: Now, therefore, this is hereby to notify you, the said H. Husmann, that I, Theobald Herberger, am dissatisfied with

said purchase, and, as agreed upon in said article of agreement, request and demand that you return to me the amount of money so advanced to you, to-wit: Fifteen hundred dollars, with interest thereon at the rate of 10 per cent. per annum, then, and thereupon, I will surrender to you the title to said lots you by your article of agreement conveyed to me." The appellant failed to repay the \$1,500, and the respondent brought this action against him for its recovery. In addition to the facts above stated, it was alleged in the complaint: "That after the expiration of thirty days from the giving of said notice, to-wit, at the end of one year from the date of said agreement, plaintiff was dissatisfied with said purchase, and notified defendant of his dissatisfaction with said purchase, and offered to return and release all rights thereunder, and then, and at subsequent times, each more than thirty days thereafter, plaintiff demanded of defendant a return of said \$1,500, with interest, as provided in said agreement, and offered, upon receipt thereof, to surrender to defendant all title to said lots, and rights conveyed to plaintiff therein by said agreement, and to release defendant therefrom; but defendant, in violation of said agreement with plaintiff, neglected, and still neglects, to return said \$1,500, with interest as aforesaid, to plaintiff, and accept from him the said release." The defendant answered, admitting the execution of the contract, and the giving of the notice, but denied the allegations of the complaint, above set out, and denied that "the plaintiff ever offered or tendered any instrument to the defendant purporting to convey title to said property, or any part thereof, or to release the defendant from the obligation resting upon him by virtue of said contract of sale, except on the 12th day of September, 1888." The defendant also filed a counter-claim, the specific performance of the contract, to which the plaintiff answered by alleging the facts set up in his complaint. The court found the facts substantially as alleged in the complaint, and, in addition, that the defendant had consented to a rescission of the contract and promised and agreed to repay the \$1,500, and interest. Judgment was rendered for the plaintiff for the amount claimed by him. A new trial was denied, and the defendant appeals.

The appellant contends that the notice of the election of the respondent to rescind the contract, and his demand for the repayment of the amount paid by him, was not effective because it was, as he claims, prematurely given. The point made is that the notice must, by the terms of the contract, have been given at the end of the year, and could not properly be given before that time. We do not so understand the agreement. The appellant was entitled to 30 days' notice of the respondent's election not to complete the purchase, and this notice must necessarily have been given at least 30 days before the expiration of the year, at which time the respondent was entitled to a return of his money. The notice was given more than 30 days before the end of the year, but the appellant certainly has no reason to com-

plain of this fact. It was to his advantage that more time than the agreement required was given him within which to raise the money, if necessary, to meet his obligation to repay the \$1,500.

Again, it is contended that the respondent failed to make out his case because it was not shown that he, at any time, tendered a reconveyance of the title to the appellant, or offered to do any act that would relieve the latter from the effect of the contract, upon his title, or to place him *in statu quo*. No conveyance of the property by the respondent to the appellant was necessary, because the title had never passed to the respondent. There was an agreement to convey to him, and nothing more. It would probably have been sufficient for him to deliver up his contract, or, if recorded, to give, in addition, a release of his claims under it, but it is unnecessary to determine what act was necessary on his part to put the appellant *in statu quo*. This case is fairly within section 2074 of the Code of Civil Procedure. Under that section, the offer to surrender up the title to the property was equivalent to an actual tender of an instrument which would have had that effect. If the appellant had any objection to the tender, it was his duty to make it known. Code Civil Proc. § 2076; *Ward v. Flood*, 48 Cal. 46; *Bank v. Applegarth*, 67 Cal. 86, 7 Pac. Rep. 139, 476. No such objection was made. On the contrary, the evidence tends strongly to show, and the court below found, that the appellant consented to the rescission. A demand was made upon him for the money at the end of the year, and afterwards, when he stated according to the testimony of some of the witnesses, that a certain party, referred to by him, had promised to and would raise the money for him. Of course, if the appellant had been in a condition to pay the money, and was willing to do so, he could, as a condition of such payment, have required the respondent to place him *in statu quo* by such a conveyance or surrender of his rights as were necessary for that purpose. Not having done so, the written offer was sufficient as a basis for this action. It is perfectly evident, from the reading of the evidence, that the only reason that the appellant had for not complying with his contract was that he was unable to raise the funds necessary to meet his obligation. The evidence sustains the findings, and the findings support the judgment. Judgment and order affirmed.

We concur: FOX, J.; PATERSON, J.

86 Cal. 353

HYDE v. BOYLE. (No. 13,876.)

(Supreme Court of California. Nov. 7, 1890.)

BILL OF EXCEPTIONS—SETTLEMENT—POWER OF SUPREME COURT.

The only authority the supreme court has to interfere with a bill of exceptions is granted by Code Civil Proc. Cal. § 652, which provides that, where the judge has "refused to allow an exception," a petition will lie to the supreme court to prove such exception, and, under this provision, the supreme court has no power to remodel a bill of exceptions by striking out matters therein contained.

In bank. Petition to settle bill of exceptions.

*George H. Buck and Edward F. Fitzpatrick*, for petitioner. *T. M. Osment*, for respondent.

PER CURIAM. The petition in this case purports to be one for leave to prove an exception, under section 652 of the Code of Civil Procedure; but it is really a petition to remodel a bill of exceptions, settled and signed by the judge of the trial court, by striking out certain things therein contained. The power of this court in the premises is discussed in *Landers v. Landers*, 82 Cal. 480, 23 Pac. Rep. 126, and other cases. The duty and power of settling statements and bills of exceptions rest generally and properly in the judge of the trial court. This court can interfere with such statement or bill only in the cases provided by statute; and the only case thus provided is found in said section 652. But that section refers only to a case where the judge has "refused to allow an exception." It does not give this court jurisdiction to remodel a bill of exceptions generally by striking matter out of it, etc., as is prayed for in this petition. The power of this court must be confined within the limits prescribed by the Code. The petition is denied.

PATERSON, J. I concur in the order denying the petition.

THORNTON and WORKS, JJ., did not participate in the decision.

3 Cal. Unrep. 309

HYDE v. BOYLE *et al.* (No. 13,849.)  
(Supreme Court of California. Nov. 9, 1890.)

APPEAL—DISMISSAL—FAILURE TO FILE TRANSCRIPT.

A motion to dismiss appeal on the ground that the transcript was not filed in time will be denied, where it appears that the question of the settlement of the bill of exceptions in the cause was not determined until the day of the motion.

In bank. Motion to dismiss appeal.

*George H. Buck and Edward F. Fitzpatrick*, for petitioner. *T. M. Osment*, for respondent.

PER CURIAM. This is a motion to dismiss appeal on the ground that the transcript was not filed in time. It appearing that the question of the settlement of the bill of exceptions in the cause was not determined until this day, the motion is denied.

86 Cal. 232

*Ex parte* BOSWELL. (No. 20,751.)  
(Supreme Court of California. Oct. 23, 1890.)

VISITING GAMBLING-HOUSES.

Order No. 1587, § 33, as amended by Order No. 1955, of the board of supervisors of San Francisco, making it a misdemeanor to visit any gambling-house, is valid, and not in conflict with the general law in the Penal Code declaring it to be a misdemeanor to carry on or bet at a gambling game, as the latter law does not include the offense of visiting the game.

In bank. *Habeas corpus.*

*Alfred Clarke*, for petitioner. *J. D. Page*, Dist. Atty., for respondent. *Crittenden Thornton*, *amicus curiæ*.

Fox, J. The petitioner is arrested and held under a warrant issued out of the police court of the city and county of San Francisco, upon a complaint charging him with misdemeanor, in that he willfully and unlawfully became and was a visitor to a certain house and place for the practice of gambling, thereby violating the provisions of sections 1 and 33 of Order No. 1587 of the board of supervisors, as the same was amended by Order No. 1955 of said board.

1. It is claimed that said order is in conflict with the general law, and therefore void. The Penal Code makes it a misdemeanor, punishable by fine not exceeding \$500, or imprisonment not exceeding six months, or both, to keep or carry on a gambling game, or to bet at such game; but there is no provision of the general law making it a crime for being a visitor at a house or place for the practice of gambling. It may be said that one cannot well bet at a gambling game unless he is a visitor thereat, but he may be a visitor, and not bet at the game; and the intention of the order is to make visiting such a place a crime, whether the visitor bets at the game or not. But it is urged, as against the validity of the order, that the act of visiting is necessarily included in the act of betting at the game; and that, if made a separate offense, it should be of a lesser grade, and one for which a lesser punishment should be prescribed; and that, while the Code imposes a fine of \$500, or imprisonment of six months, as the maximum punishment for betting, the order prescribes a fine not exceeding \$1,000, or imprisonment not exceeding six months, as the maximum of punishment for the lesser offense of visiting. Order No. 1587 consists of a large number of sections; is itself a sort of municipal Penal Code, covering a multitude of offenses. The first section of the order provides that any person violating any of the provisions of the order shall be deemed guilty of misdemeanor, and be punished by fine not exceeding \$1,000, or imprisonment not exceeding six months, or by both such fine and imprisonment. No minimum is prescribed in this section, and, unless otherwise restricted, the court could make the punishment as low as it pleased. Section 33 of the order, as amended by Order No. 1955, is the one relating to this particular offense; and in that it is prescribed that the punishment shall not be less than \$20 fine, or imprisonment for not less than 10 days, no authority being given to impose both fine and imprisonment. This may be regarded as a legislative expression of opinion as to what ought ordinarily to be the measure of punishment for this particular offense. It does not in terms, and perhaps not by implication, deprive the court of the power to impose the higher penalty named in section 1, but until a penalty has been imposed by the court, in excess of that prescribed by the Code for the higher offense, within which this lesser one is included, it is unnecessary for us to pass upon the question of the validity of this section 1, as bearing upon this offense. It is sufficient now to say that the order making the act of becoming a visitor at a gambling-house a misdemeanor is not in conflict with the Code, and does not trench

upon ground covered by the general law; and that in this order there is nothing which requires the court upon conviction to impose any penalty in excess of that authorized by general law for like offenses.

2. It is claimed that Orders Nos. 1587 and 1955 have been repealed by the provisions of Order 2191, subsequently passed. The former orders are general, applicable to all parts of the municipality; the latter one special, applicable to only a small part of the municipality. We are not at this time called upon to pass upon the validity of the latter order. The petitioner is not arrested or held under it. It does not, either expressly or by implication, repeal either of the former orders. These not being in conflict with general law, the authorities cited on behalf of petitioner are not in point. Writ discharged, and prisoner remanded.

We concur: SHARPSTEIN, J.; PATERSON, J.; MCFARLAND, J.

36 Cal. 171

BLANCKENBURG *et al.* v. JORDAN *et al.*  
(No. 12,971.)

(Supreme Court of California. Oct. 17, 1890.)

TRUSTEES—COMPENSATION.

The management of a wife's one-third interest in property, conferred on her husband by a decree of divorce, is a personal trust, which he can neither transfer nor perpetuate; and the trustees under his will, which did not even assume to make any disposition of such trust, are not entitled to any fees and commissions under the will for their management of the wife's one-third interest after the husband's death.

Department 1. Appeal from superior court, city and county of San Francisco; WILLIAM T. WALLACE, Judge.

Charles F. Hanlon, (*Otto Tum Suden*, of counsel,) for appellants. *Selden S.* and *Geo. T. Wright*, for respondents.

Fox, J. This is a bill in equity to secure a decree construing a will. The will is simple and easy of comprehension, and had been correctly construed by the probate court in its decree of final distribution more than eight years before the commencement of this action. The appeal, and even the case itself, is so destitute of merit, that we do not feel justified in devoting much space to its discussion, though we have devoted some time to its examination. John Berghauser and Margarethe Berghauser were husband and wife. The wife brought an action against her husband for a divorce, alimony, and a division of community property. Pending the trial, an agreement was made as to the division of property, in case the court should decree a divorce, under which, upon decree being entered, it was adjudged and decreed that the defendant (husband) should convey to the wife (plaintiff) certain real property in her own right, and a life-estate, with remainder to their six children, or their heirs, in an undivided one-third of three other parcels of real estate, situate in the city and county of San Francisco, the principal one of which was that known as the "Prescott House." These three properties were all improved, and at the time bringing in an aggregate

rental of something over \$1,900 per month. It was agreed and decreed that the husband, who remained an owner, as tenant in common, of the undivided two-thirds thereof, should "manage the aforesaid property, in which defendant and plaintiff are jointly interested; and all proper expenses on the property, including insurance, taxes, street assessments, repairs and further litigation, if any, are to be borne by plaintiff and defendant in proportion to their respective interests, monthly accounts to be rendered by defendant to plaintiff, as to all the property in which plaintiff and defendant are jointly interested, and monthly payments to be made by defendant to plaintiff, or her agent, of her share of the rents, income, and profits thereof." Presumably deeds were made to conform to the decree, although they are not given in the record. This decree was made in 1873, and thereafter, during the life-time of John Berghauser, the property was managed as therein provided. In February, 1878, Berghauser died, leaving a will by which he devised his estate to the plaintiffs in this action, in trust, to manage and control the same until the youngest of his children should reach a certain age; then the same to be conveyed to them, share and share alike. The will being admitted to probate, the trustees, as executors, continued to manage the property as before, and in 1879, administration being closed, the property was distributed to the trustees, as such, the court in and by its decree of distribution specifically describing each piece of real and personal property so distributed, and correctly describing the interest of the estate which was so distributed in the three parcels of property here under consideration as the undivided two-thirds thereof. The trustees thereafter continued to manage the property and account to Mrs. Berghauser, as before, until 1888, when this action was brought, the plaintiffs claiming that their trust covered the whole, not simply the two-thirds, of this property, and that they were entitled to fees and commissions for administering the whole, one-third thereof to be taken out of the one-third interest of Mrs. Berghauser in the rents and profits; or, if that could not be done, then the fees and commissions for administering the whole to be taken out of the two-thirds interest of the children. Such a claim seems to us to be entirely without foundation. From the date of the entry and recording of that decree of divorce John Berghauser never had any power of testamentary or other disposition of this one-third interest in that property. It had passed out of him forever, with no chance of its ever coming back, except it might have been by purchase or descent, and of that there is no pretense in the case. Even the management and control which was accorded to him was a personal trust, which he could neither transfer nor perpetuate. There is nothing in the will to indicate that he attempted or intended to make testamentary disposition thereof, or to create any testamentary trust over the property. The probate court so understood it, and distributed the estate accordingly. If the

trustees ever had any control over this one-third interest, it was by the permission or agreement of Mrs. Berghauser, and not by virtue of any power under the will. The court below so held, and expressly refused to find whether or not they were entitled to any compensation for their services in caring for her interest in the property, because that was not a proper matter to be determined in this action, and was not a matter involved under the pleadings herein. All that could be determined here was whether they were entitled to commissions and fees, under the will, for their management and care of this one-third interest, and, if so, against what interest were the commissions and fees to be charged. The court correctly found that they were entitled to no such fees or commissions under the will; and that was the end of this case. Judgment and order affirmed.

We concur: WORKS, J.; PATERSON, J.

86 Cal. 316

BERGHAUSER V. BLANCKENBURG *et al.*  
(No. 12,972.)

(Supreme Court of California. Nov. 6, 1890.)

#### COMPENSATION OF TRUSTEES.

Defendants, as trustees under a will, claimed commissions of plaintiff for caring for and collecting thereof certain property. They also claimed on the ground of a special agreement, and a *quantum meruit* for services rendered. One of them testified that, as trustees, they collected the rents, paid the running expenses, "and paid B. [the plaintiff] her one-third of the net rental therefrom, and made no charge against her therefor, either by way of compensation, or as trustees or executors, for commissions. \* \* \* We never told her we intended charging anything for our services, because we never had any conversation on the subject." The other testified: "We considered that we were trustees for B. on the same terms and conditions from the time that Mr. B. died up to the present time." Held sufficient to sustain a finding that there was no agreement for compensation, and no valid claim upon a *quantum meruit*.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; T. K. WILSON, Judge.

Charles F. Hunlon, (Otto Tum Suden, of counsel,) for appellants. Selden S. & Geo. T. Wright, for respondent.

FOOTE, C. This action was brought by the plaintiff to recover a certain sum of money from the defendants, which they had received for her, and which they refused to pay over, claiming—*First*, that it was due them for commissions as trustees of her husband's will; *second*, that, if their demand in this respect was not just, they were entitled to it under a contract with her; and, *third*, if not so entitled, that it was due and payable to them on a *quantum meruit* for services performed for her, at her instance. In a cause lately adjudicated in department 1 of this court, entitled *Blanckenburg v. Jordan*, ante, 1061, (No. 12,971,) which was to construe the trust in the will of the plaintiff's husband, by virtue of which the first contention of the defendants in this action is here sought to be maintained,

it was said: "John Berghauser and Margarethe Berghauser were husband and wife. The wife brought an action against her husband for a divorce, alimony, and a division of community property. Pending the trial, an agreement was made as to the division of property, in case the court should decree a divorce, under which, upon decree being entered, it was adjudged and decreed that the defendant [husband] should convey to the wife [plaintiff] certain real property in her own right, and a life-estate, with remainder to their six children, or their heirs, in an undivided one-third of three other parcels of real estate situate in the city and county of San Francisco, the principal one of which was that known as the 'Prescott House.' These three properties were all improved, and at the time bringing in an aggregate rental of something over \$1,900 per month. It was agreed and decreed that the husband, who remained an owner, as tenant in common of the undivided two-thirds thereof, should 'manage the aforesaid property, in which defendant and plaintiff are jointly interested; and all proper expenses on the property, including insurance, taxes, street assessments, repairs, and further litigation, if any, are to be borne by plaintiff and defendant in proportion to their respective interests, monthly accounts to be rendered by defendant to plaintiff, as to all the property in which plaintiff and defendant are jointly interested, and monthly payments to be made by defendant to plaintiff, or her agent, of her share of the rents, income, and profits thereof.' Presumably deeds were made to conform to the decree, although they are not given in the record. This decree was made in 1873, and thereafter, during the life-time of John Berghauser, the property was managed as therein provided. In February, 1878, Berghauser died, leaving a will, by which he devised his estate to the plaintiffs in this action, in trust, to manage and control the same until the youngest of his children should reach a certain age; then the same to be conveyed to them, share and share alike. The will being admitted to probate, the trustees, as executors, continued to manage the property as before, and in 1879, administration being closed, the property was distributed to the trustees, as such, the court in and by its decree of distribution specifically describing each piece of real and personal property so distributed, and correctly describing the interest of the estate which was so distributed in the three parcels of property here under consideration as the undivided two-thirds thereof. The trustees thereafter continued to manage the property and account to Mrs. Berghauser, as before, until 1888, when this action was brought, the plaintiffs claiming that their trust covered the whole, not simply the two-thirds, of this property, and that they were entitled to fees and commissions for administering the whole, one-third thereof to be taken out of the one-third interest of Mrs. Berghauser in the rents and profits; or, if that could not be done, then the fees and commissions for administering the whole to be taken out of the

two-thirds interest of the children. Such a claim seems to us to be certainly without foundation. From the date of the entry and recording of that decree of divorce John Berghauser never had any power of testamentary or other disposition of this one-third interest in that property. It had passed out of him forever, with no chance of its ever coming back, except it might have been by purchase or descent, and of that there is no pretense in the case. Even the management and control which was accorded to him was a personal trust, which he could neither transfer nor perpetuate. There is nothing in the will to indicate that he attempted or intended to make testamentary disposition thereof, or to create any testamentary trust over the property. The probate court so understood it, and distributed the estate accordingly. If the trustees ever had any control over this one-third interest, it was by the permission or agreement of Mrs. Berghauser, and not by virtue of any power under the will. The court below so held, and expressly refused to find whether or not they were entitled to any compensation for their services in caring for her interest in the property, because that was not a proper matter to be determined in this action, and was not a matter involved under the pleadings herein. All that could be determined here was whether they were entitled to commissions and fees, under the will, for their management and care of this one-third interest, and, if so, against what interest, were the commissions and fees to be charged. The court correctly found that they were entitled to no such fees or commissions under the will; and that was the end of this case." Thus it will be seen the contention of the appellants here is very plainly disposed of against them, upon all questions except as to whether Mrs. Berghauser employed them to care for her interest, and collect the rents, etc.; or, if she did not do that by agreement, whether they are entitled to retain her money upon the principle that, as she permitted them to do the work and got the benefit of it, she is under a legal obligation to pay them for it. The court below found against them upon all their contentions, gave judgment for the plaintiff, and refused a new trial, from which, as we have seen, they have appealed.

The two points now to be considered, therefore, are, whether or not the evidence fails to sustain findings 4 and 5 of the trial court. They are as follows: "(4) That it was never mutually understood or agreed between plaintiff and defendants that said defendants should hold or care for plaintiff's interest in all or any of said properties, in trust for her, or for her use or benefit, or should manage or control the same to the extent or on the same terms as they were managing or controlling the property in trust for the devisees and heirs of John Berghauser, deceased, or on the same terms or conditions or in the same way, or for the same period. (5) That, at the time of the commencement of this action, plaintiff was not indebted to the defendants in the sum of three thou-

sand dollars, or in any other sum, for services rendered for her, at her special instance and request, or otherwise, in the state of California; and that, at the time of the commencement of this action, defendants had rendered no services for plaintiff, at her request, or otherwise." In his testimony upon these matters, one of the defendants says: "Mr. Blanckenburg [as the witness was Theodore Blanckenburg, it is evident that when he said Blanckenburg he meant to say Medeau] and myself were the executors of the will of John Berghauser, deceased, and, as such, collected the entire rents of the Prescott House, Broadway and Green street properties, and paid the running expenses, and paid Mrs. Berghauser her one-third of the net rental therefrom, and made no charge against Mrs. Berghauser therefor, either by way of compensation or as trustees' or executors' commissions. \* \* \* We never told Mrs. Berghauser we intended charging anything for our services, because we never had any conversation on the subject." It is manifest from all the evidence of this witness and John P. Medeau, his co-defendant, that they thought that they had a claim on Mrs. Berghauser's interest, perhaps as trustees under the will; but that they never pretended or acted under any belief that they had any agreement with her to be her agents, and to receive any compensation therefor, or that they had any claim against her for services rendered upon a *quantum meruit*, outside of their claim as trustees under John Berghauser's will. Medeau says: "We considered that we were trustees for Mrs. Berghauser, on the same terms and conditions, from the time that Mr. Berghauser died up to the present time, and are yet." It is clear, then, that this pretended agreement of Mrs. Berghauser to pay them and the *quantum meruit* obligation set up were after-thoughts, and were never contemplated at the time the services were rendered. We think the evidence sustains the findings, and that the judgment and order should be affirmed; and so advise.

We concur: GIBSON, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

86 Cal. 211

FLASHNER v. WALDRON. (No. 13,733.)

(Supreme Court of California. Oct. 23, 1890.)

APPEAL—EXCEPTIONS—NONSUIT.

An order granting a nonsuit is not an order "finally determining the rights of the parties," and "deemed to have been excepted to" within Code Civil Proc. Cal. § 647; but error in granting a nonsuit is an error in law, and must be excepted to.

Department 1. Appeal from superior court, Los Angeles county; W. P. WADE, Judge.

Graff & Creighton, for appellant. Smith, Winder & Smith, for respondent.

PATERSON, J. The court below granted a motion for nonsuit, and judgment fol-

lowed for the defendant. The plaintiff took no exception to the ruling. It is claimed that no exception was necessary, but it has been several times decided that an error in granting a nonsuit is an error in law, and must be excepted to. It is unnecessary, therefore, for us to consider the argument for counsel of appellant in support of his contention that the order granting a nonsuit is an order "finally determining the rights of the parties," and "deemed to have been excepted to" under section 647, Code Civil Proc. Judgment affirmed.

We concur: WORKS, J.; Fox, J.

85 Cal. 342

BURKELSON v. NORTHWESTERN MUT. LIFE INS. CO. (No. 12,924.)

(Supreme Court of California. Nov. 7, 1890.)

CONTRACTS—CONSTRUCTION.

1. The contract of an insurance agent, with the company, specified the duration of the agency, and the commissions to be received on premiums, and that the agent should receive a certain commission on renewal premiums "while he retained the agency, and no longer," and that the agency might be terminated by the company at any time for his failure to account for moneys collected. Before the expiration of the agency, the parties entered into another contract, in which it was agreed that the agent should give up part of his original territory, but should receive a certain per cent. on all renewal premiums collected during the continuance of the original contract. This right to the percentage on the renewal premiums the agent assigned to plaintiff, and shortly afterwards his agency was terminated by the company, because of a shortage in his accounts. *Held*, in an action by plaintiff to recover the renewal premiums stipulated for in the second contract, that it was simply a modification of the original, and that no renewal premiums were payable under it after the termination of the agency under the original.

2. But the commissions on the premiums earned and actually due before the termination of the agency are recoverable, subject to set-off of the agent's indebtedness to the company.

Department 1. Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

C. E. K. Royce, for appellant. T. L. Bergin, for respondent.

WORKS, J. On the 3rd day of March, 1885, the respondent, an insurance company, entered into a contract with one Abbott, by which it appointed said Abbott its agent in the state of California, and agreed to pay him certain commissions on premiums collected on insurance business done by him, and 7½ per cent. commissions on renewal premiums, obtained under a certain contract of the respondent, and certain other agents, and under the contract with Abbott. This commission on renewal premiums was to be paid "while he retained the agency, and no longer." In consideration of the payment of these commissions, the agent stipulated to "devote his entire time, energy, and ability to soliciting applications, collecting premiums, and otherwise promoting the interests of the company," and bound himself to make reports, each month, of the business, and pay to the respondent all moneys by him collected up

to the time of making such report, less his commissions. The contract provided that it should terminate on the 1st day of June, 1892, unless sooner terminated by the company, through its proper officers, for a failure or neglect of the agent to keep and perform any of the stipulations therein, and also contained this clause: "A failure or neglect to make reports or pay over moneys belonging to the said company, according to the conditions of this contract, shall be considered good and sufficient reason for closing this agency at any time, without notice, anything in this contract to the contrary notwithstanding." It was also stipulated: "And it is further understood and agreed that, upon the discontinuance of this contract in any way, all interest of said agent in this contract in commission on premiums shall revert back to the company, except as above mentioned, and upon the deferred semi-annual and quarterly premiums on new business, unless it is otherwise specially agreed." On the 15th day of April, 1886, the same parties entered into another contract as follows: "For value received, and in consideration of retaining the remainder of any contract with the Northwestern Mutual Life Insurance Company, under date of March 3, 1885, I hereby release and relinquish to the said company all of my right, title, and interest in and to so much of the territory mentioned in the said contract as is described as follows, to-wit: All that portion of the state of California that is north of and includes the counties of Monterey, Tulare, and Inyo, so that the field hereafter covered by my said contract shall comprise and consist only of such portion of the state of California as is south of said counties; and I hereby consent and agree that such of the seven and one-half per cent. (7½ per cent.) renewals as are mentioned in said contract, and are situated in the territory hereby released and relinquished, may hereafter, during the continuance of my said contract, be collected by the said company, in such manner as it may elect, making to me quarterly statements of said collections so made, and paying me or to my order five and one-half per cent. (5½ per cent.) on the same, during the continuance of the said contract." On the 23d day of April, 1886, Abbott assigned to the plaintiff in this action his right to receive the 5½ per cent. commissions provided for in this last contract, and this action is to recover said commissions, and for an accounting. The defendant answered by setting up the two contracts above mentioned, and alleging that, previous to the month of September, 1886, Abbott became a defaulter in his accounts with the defendant, and failed, on request, to pay over large sums of money collected by him as such agent, under said contracts, and that on the 16th day of September, 1886, the defendant, by reason of such failure, default, and neglect, terminated said agency, and that Abbott had never since that time acted as such agent. It is further averred in the answer that on the 1st day of September, 1886, Abbott was indebted to the defendant, on account of collections made by him, as such agent, and not paid over, in



the sum of \$2,253.70; that the whole amount of renewal premiums collected by the defendant under said contracts since the 15th of April, 1886, was \$10,770, and a percentage of 5½ per cent. thereon amounted to \$592. The court below found the facts substantially as alleged in the answer, and rendered judgment for the defendant. The plaintiff appeals on the judgment roll.

The whole question as to the right of the plaintiff to recover depends upon the construction and legal effect to be given to the two contracts above mentioned. The appellant contends that the contract of April 15, 1886, by which Abbott was to receive 5½ per cent. commissions on renewal premiums, collected by the defendant, in territory thereby surrendered by Abbott, was a separate and distinct contract; that it gave Abbott the commissions provided for, absolutely; that such right was not in any way affected by the terms of the original contract, or the default or neglect of Abbott to comply with its requirements, or the termination of his agency thereunder; and that the plaintiff took the same absolute right to such commissions by the assignment of Abbott to him. On the other hand, the respondent takes the ground that the second contract was only a modification of the original contract, by which the territory over which Abbott was to act as agent was limited, and his commissions on renewal business were reduced, in consideration of the fact that the defendants were to collect the same; that the two contracts must be taken and construed as one; that so construed, all right of Abbott to commissions was cut off and forbidden by his violation of the original contract, and the consequent termination of his agency. We do not entirely agree with the contention of either of the parties; but it is quite clear to our minds that these two contracts must be taken and construed together. The last contract did not supersede the first, but only modified it in certain particulars. Under the first contract, Abbott became the agent of the defendant for the whole of the state of California, and, as to the commissions here in controversy, he was to receive 7½ per cent. By the new contract, the territory of his agency was limited to a part of the state. He could take no new insurance in the territory excluded from his agency. But his right to commissions on renewal premiums was preserved, but reduced to 5½ per cent., in consideration of the fact that collections thereof were to be made by the company. In all other respects the original contract, so far as it affects this case, remained in full force. Therefore, as the original contract limited the right of Abbott to receive commissions to the time he should continue to be the agent of the defendant thereunder, the right to receive the reduced commission, under the modification of the contract, was limited in like manner. When the original contract of agency terminated, the right to receive these commissions terminated also; and it appearing that the agent had become a defaulter, and by reason of his defalcation was indebted to the defendant in a sum

greater than the amount due him for commissions, he could not have recovered. If he could not have recovered the commissions, certainly the plaintiff could not recover as his assignee. His rights were no better than the rights of his assignor, where they were expressly defined, and limited by the terms of the contract under which the commissions were earned. So far we agree with the contention of the respondent, but we find no warrant in the contract for the position taken by the respondent that, by the termination of the original contract, all right of Abbott or the plaintiff, as his assignee, to commissions was forfeited. Undoubtedly, this was the case as to any and all business done after the termination of the contract, but we think it was not so as to business already done, and where commissions had been earned before the contract ceased to exist. Therefore, as to any renewal premiums upon which Abbott would have been entitled to his 5½ per cent. commissions before and at the time the contract was terminated, or rather, at the time of any violation of the terms of the contract which authorized, and for and on account of which it was terminated, Abbott would have been entitled to recover, subject, however, to any indebtedness on his part to the defendant, growing out of his agency under the contract, and its subsequent modification. Therefore, if the amount of Abbott's indebtedness had not equalled, or exceeded, the amount of the commissions actually due before the defalcation for which the contract was terminated occurred, plaintiff would have been entitled to judgment. As it was, however, he was not entitled to recover, and the judgment of the court below was right. After the cause was at issue, but before trial, the plaintiff filed a supplemental complaint setting up that the defendant, since the commencement of the action, collected renewal premiums to the amount of \$25,000, upon which the plaintiff was entitled to 5½ per cent. commissions. A demurrer to this complaint was sustained, and this, it is contended, was error. But, as we construe the contracts above set out, the commissions claimed in this complaint were collected by the defendant after the termination of the original contract, and neither Abbott nor the plaintiff were entitled to any commissions thereon. Therefore the demurrer was properly sustained. Judgment affirmed.

We concur: PATERSON, J.; FOX, J.

36 Cal. 333

STRATTON v. CALIFORNIA LAND & TIMBER Co. et al. (No. 13,568.)

(Supreme Court of California. Nov. 7, 1890.)

IMPLIED TRUSTS—RIGHTS OF VENDOR UNDER LAND CONTRACT.

1. A vendee under a land contract, who had in fact obtained the contract as agent for a land company, assigned it to the company's manager, and also executed a subcontract in which he agreed to convey the land to the company. The vendee paid one installment of the purchase price, and the company's manager paid the second,—both with the company's funds. *Held*, that these facts did not raise an implied trust in the

land in favor of the company, as against the vendor, who had dealt with the vendee and the manager in their individual capacities only, without knowledge either of their relation to the company or of the fact that the money paid on the contract belonged to the company, and who had, in good faith and for value, obtained from them a release of all their rights to the land after a default in the payment of the third installment.

2. The mere fact that the vendor had knowledge of the existence of the subcontract in which the vendee agreed to reconvey to the company was not sufficient to put the vendor on inquiry, so as to charge him with knowledge of the company's rights when he procured the release from the vendee and the company's manager.

3. After the default in the third installment the vendor tendered to both the vendee and the manager of the company a sufficient deed of the land, and demanded of each of them the balance due him, which they neglected and refused to pay. Subsequently, the company was adjudicated insolvent, and an assignee appointed. Afterwards, on proceedings to foreclose a trust-deed, a receiver of its property was also appointed. Neither the company nor any of its representatives in these proceedings ever tendered the unpaid purchase money, or offered to perform the contract of sale. *Held*, that the vendor was justified in treating the contract as abandoned, and that he was entitled to a decree quieting his title to the land as against the company and its representatives, without the repayment of any of the purchase money received by him under the contract.

Commissioners' decision. In bank. Appeal from superior court, Plumas county; G. G. CLOUGH, Judge.

*Craig & Meredith and Pillsbury & Blanding*, for appellants. *Frederick S. Stratton*, for respondent.

GIBSON, C. The plaintiff brought this action to quiet his title to 4,000 acres of land situate in Plumas county. All the defendants defaulted except Jacob Goldberg, Charles M. Fry, A. F. Higgins, Hugh Craig, and Charles Kohler. Of the latter, Goldberg filed a disclaimer, and the others filed answers and cross-complaints, to which the plaintiff answered, putting in issue the new matter set up in each. Fry and Higgins, in their cross-complaint, claimed under a deed of trust executed to themselves, and one Charles Kohler, by the California Land & Timber Company, to secure certain amounts and obligations due from the company to various persons and corporations, and also to secure a loan not exceeding \$100,000, that the company was at the time negotiating for. Craig, in his cross-complaint, claimed as receiver in an action brought by Fry and Higgins, as such trustees, in the United States circuit court of the ninth judicial district, and Kohler, in his cross-complaint, claimed as assignee in insolvency of the California Land & Timber Company. Judgment passed for the plaintiff against all of the defendants, and those of the defendants who filed answers and cross-complaints bring this appeal from the judgment against them, and an order denying them a new trial.

On March 15, 1886, an agreement, which is referred to in the record as Exhibit A, was made between the plaintiff and one W. C. Roberts, whereby the plaintiff agreed to sell and Roberts to buy the land in controversy for \$3 per acre, payable in the following installments: 25 cents per acre

upon signing the agreement; \$1.25 per acre on or before April 1, 1886; and the remaining \$1.50 per acre one year from the date of the agreement, with interest on the last installment, at the rate of 6 per cent. per annum: provided, however, that the last installment should not be payable until plaintiff should be able to convey to Roberts, or his assignees, a clear title to the land based upon patents from the United States, or this state, which he was to acquire within two years from the date of the contract; and provided also that, in case of non-payment by said Roberts of any of the purchase money, according to the terms of the agreement, the party in default should not be liable to the other party in damages for such default, and the remedy of the party injured should consist only of the right to cancel the agreement, and refund, with interest, or retain all the moneys paid under the agreement, as the case might be. This contract was entered into by Roberts at the request of A. T. Nation, who at the time was the manager and also a director of the California Land & Timber Company, and immediately after it was executed Roberts made a separate and independent contract with the California Land & Timber Company to sell to it the same land for \$5 per acre, \$3 per acre payable in three several installments, upon the payment of which Roberts was to convey the land to the company, and the latter in return was to give to Roberts its notes secured by mortgage on the same land for the remaining sum of \$2 per acre, payable three years from the date of the contract, with interest thereon from the said date at 8 per cent. per annum, payable semi-annually, all subject, however, to Roberts' ability to acquire clear title to the land, based upon patents from the United States or this state. This contract is referred to in the record as Exhibit B. Upon the execution of Exhibit B, Roberts, at the request of A. T. Nation, assigned to him Exhibit A, subject to Exhibit B, and assigned the latter to him also, and, thereafter, on the 20th September, 1887, A. T. Nation, in consideration of \$1, assigned to his brother, G. M. Nation, all the rights and benefits he acquired by his assignments from Roberts. Roberts, in making Exhibit A, and in assigning the same to A. T. Nation, it appears, acted solely for and at the request of the latter. Of this the plaintiff had no notice, but dealt with Roberts in his individual capacity alone, and had no reason to believe that Roberts was acting otherwise. The first installment under Exhibit A, was paid by Roberts, and the second by A. T. Nation. Both installments were in fact paid with the moneys of the California Land & Timber Company, but plaintiff did not have either notice or knowledge of the fact. Nor did he have either notice or knowledge or any reason to believe that A. T. Nation acted for any one but himself. On January 31, 1887, the California Land & Timber Company executed the deed of trust above mentioned, by which it conveyed all its property to the defendants Fry and Higgins and another, who accepted the trust; and the sum of \$25,000 was advanced to the company by Fry and Higgins pursuant to the

trust. In July, 1887, the plaintiff procured state patents to the land in question; and, not having either notice or knowledge of the interest of any one else in the land, he in the same month notified Roberts and A. T. Nation that he had procured patents to the land, and at the same time tendered them a sufficient deed thereto and demanded of each the balance due under Exhibit A, which demand they each neglected and refused to comply with. Said Nation, though, notified the company and its principal stockholders of the demand, and endeavored to procure the amount due plaintiff under said exhibit, and was assured, from time to time, by persons connected with the company that the money would be paid. These assurances Nation repeated to the plaintiff, without, however, notifying or suggesting to him that the company claimed or had any interest under Exhibit A. Fry and Higgins were also notified by A. T. Nation of the demand of plaintiff, but they never notified plaintiff that they or the company claimed or had any interest under the said exhibit. In November of the same year the company was, by the superior court of the city and county of San Francisco, adjudged to be insolvent, and the defendant Kohler was appointed, and he duly qualified as assignee of all the estate of the insolvent company. Thereafter, on or about January 4, 1888, in an action brought in the United States circuit court, in and for the ninth judicial district, by Fry and Higgins, as trustees, against the company, the defendant Craig was appointed, and he duly qualified as receiver of all the property of the company. February 28, 1888, plaintiff procured from Roberts, in consideration of \$50 paid to him, a release and quitclaim of all his interest in the premises in question, and a cancellation of Exhibit A; and, on March the 20th of the same year, he procured from A. T. Nation, in consideration of \$750 paid to him, a similar release and quitclaim of all his interest in the said premises. The several positions of the appellants are that Fry and Higgins are the owners under the trust-deed of whatever interest the company acquired in the land; that Craig, as receiver, is entitled to the possession of the land; and that Kohler, as assignee, is entitled to all that may remain of the property or the proceeds thereof, after the objects of the trust-deed are satisfied. And they contend that, as Exhibit A was entered into by Roberts at the request of A. T. Nation, who was at the time the general manager of the California Land & Timber Company, and as the money paid under such contract was the money of the company, a resulting trust arose in favor of the company, and Roberts thereby became the trustee of the company; but as plaintiff, in making Exhibit A with Roberts, and in receiving the first installment of money thereunder from him, and in receiving the second installment of money under the same contract from A. T. Nation, dealt with them in their individual capacities only, and had no knowledge of their relations to each other or to the company, or that the money paid by them to him belonged to the company, it is clear that,

whatever implied trust may have been created in favor of the company as against Roberts and Nation, it could not affect the plaintiff. When Exhibit A was executed, and the first two payments made under it, the plaintiff, it seems, had no knowledge of the existence of the company, and there appears to have been some grave reason, according to the testimony of A. T. Nation, for concealing the fact that the company was to receive the land ultimately. Whatever the reason was, it seems that plaintiff never knew or was notified of the interest of the company in the land until the cross-complaint of defendant Craig as receiver was filed, which, of course, was subsequent to the time he had procured the releases from Roberts and A. T. Nation. The plaintiff, as we have seen, upon obtaining title from the state, notified Roberts and A. T. Nation of the fact, and tendered them a deed, and demanded from each of them the balance due him under Exhibit A, but they did not act upon it. The same demand upon the same parties was several times repeated, but without effect; and, although A. T. Nation reported these demands to the company and its principal stockholders, neither the company nor any one for it ever notified the plaintiff that it claimed any interest in the land under Exhibit A. In view of all the foregoing facts, we think the plaintiff acted in good faith in obtaining, for valuable considerations, the releases from Roberts and A. T. Nation. He certainly did not have notice or knowledge of the circumstances that may have created an implied trust in favor of the company against Roberts and A. T. Nation. The releases so obtained, extinguished the equitable interest in the land which Roberts acquired by virtue of Exhibit A, and the plaintiff, having retained the legal title, thereby became the legal and equitable owner of the lands as completely as though Exhibit A had never been executed and partly performed. *Winton v. Spring*, 18 Cal. 452; *Jennisons v. Leonard*, 21 Wall. 309.

It is further contended that, assuming plaintiff had neither notice nor knowledge of the capacities in which Roberts and A. T. Nation acted in relation to Exhibit A, still, as plaintiff did have knowledge of the execution of Exhibit B by Roberts to the company before he acquired the release of all rights and interests under Exhibit A from Roberts and his assignee, G. M. Nation, such fact was sufficient to put him upon inquiry, which, if pursued, would have disclosed the company's interest under Exhibit A; and, as he did not pursue it, he is chargeable with notice of the company's interest, and cannot, in consequence, be regarded as an innocent purchaser of the interest acquired by the release from Roberts and A. T. Nation. The plaintiff only had knowledge of the execution of the subcontract, Exhibit B. He knew nothing beyond its terms. It was a separate and independent contract between Roberts and a third person, without any reference therein to Exhibit A, and he was not required to take any notice of it. Roberts, as his vendee, could make any contract for the sale of the land to any third person that he might desire,

but Roberts, as such vendee, could not, by contracting to sell the same land to another, create a privity of contract or estate between such subvendee and the original vendor, without assigning his interest in whole or in part under the original contract. His vendor would, without such an assignment and notice of it to him, be entitled to stand upon his contract with his vendee, regardless of any subcontract the latter might make. *Willard v. Taylor*, 8 Wall. 571. This being so, how could the bare knowledge of the contract, Exhibit B, made by Roberts, put the plaintiff upon inquiry, as to the true relation of Roberts to the company? Of course it would be different if Roberts had, as already remarked, assigned Exhibit A to the company, and such assignment had been brought to the knowledge of the plaintiff; but that is not the case here. There was, as found by the court, no assignment of Exhibit A to the company.

Appellants, however, claim that Roberts' subcontract, Exhibit B, operated as an assignment to the company of all the interest he acquired by Exhibit A. This may have been so, as far as Roberts and A. T. Nation were concerned, in view of the circumstances under which they acted, and the ownership of the money used by them, but certainly not as to the plaintiff, who appears to have acted all through the matter in entire ignorance of those facts. Since this was the case, Exhibit B could no more operate as an assignment of Exhibit A than any mere subcontract by a vendee to sell the same premises; for an agreement for the subsale of the same premises will not make the subvendee assignee of the original contract. *Willard v. Taylor*, *supra*; 2 Dart, Vend. (4th Ed.) 925.

It is also argued for the appellants that when a vendee is in default, so that the vendor may elect to rescind the contract, he must, in order to effect a rescission of it in an action like the present one, restore to the vendee all that he has paid upon the contract. This is undoubtedly the rule regarding the rescission of contracts. Civil Code, § 1691; *Miller v. Steen*, 30 Cal. 403; *Bohall v. Diller*, 41 Cal. 532; *Henderson v. Hicks*, 58 Cal. 364; *Wilson v. Sturgis*, 71 Cal. 226, 16 Pac. Rep. 772. But this action was not brought for the rescission of a contract, which means the annulling or abrogation of it, and the placing of the parties to it *in statu quo*. The object of the action was to quiet plaintiff's title to the land, under section 738 of the Code of Civil Procedure. He alleged in his complaint all that was required under that section,—his right, and the invasion of it, viz., his ownership of the land, and the defendant's unfounded adverse claims respecting it. It was not incumbent upon him to go further and disclose the nature of the defendants' several claims. That was for them to do, or be precluded from asserting them in any other form of action. *People v. Center*, 66 Cal. 551, 5 Pac. Rep. 263, and 6 Pac. Rep. 481. The appellants, however, elected to set up their respective claims in their cross-complaints. Neither of the cross-complaints, though, alleged facts which, if proved, would have

warranted a decree compelling the plaintiff to specifically perform Exhibit A. There is no allegation in either of them of a tender of the balance of the purchase price, under Exhibit A, by the California Land & Timber Company, or any of the appellants. Kohler, the assignee of the insolvent corporation last named, alleged, as a reason for not tendering the remainder of the purchase money, that plaintiff had not obtained patents from either the United States or this state, although often requested so to do, and was therefore unable to perform Exhibit A upon his part; and that he had never offered to return the money paid him under said exhibit to A. T. Nation, Roberts, or G. M. Nation, and prayed that plaintiff's interest in the lands be foreclosed, and the latter sold, and the proceeds applied, first, to the payment of the last installment due under Exhibit A, and the remainder delivered to the said assignee. Craig's (the receiver's) cross-complaint was based upon the same theory as that of the assignee's, except that he asked for no affirmative relief. Fry and Higgins, the trustees, who base their claim of title to or interest in the land solely upon the assignment of Exhibit A to the company, which was in fact not made, alleged in their cross-complaint that plaintiff had not furnished to Roberts, the California Land & Timber Company, or themselves, a clear title to the lands based on patents from the United States or the state of California; that they (the last-named defendants) were ready and willing, as soon as such patents should be obtained, to pay to plaintiff the third installment due under Exhibit A, together with interest thereon; and that the United States and this state were ready and willing to patent the land to plaintiff; and prayed that they be decreed the owners of the premises against the other defendants, and also the plaintiff, subject, however, to the latter's right to the payment of the third installment under the contract, before making a conveyance of the land to them. Thus it should appear that the claims of the assignee of the insolvent company and the receiver were, by their respective pleadings, made to depend upon the truth of their allegations, to the effect that the plaintiff never notified any of the defendants of his ability to perform, nor made any offer to perform, the contract upon his part; and that the claim of the trustees Fry and Higgins was made, in like manner, to depend upon their allegation of the plaintiff's inability to perform the contract, on account of his failure and refusal to obtain the title stipulated for in the contract, upon the obtaining of which they (the trustees) were ready and willing to pay the remainder of the purchase price. Now, according to the agreement, (Exhibit A,) plaintiff had two years from March 15, 1886, the date thereof, within which to perfect his title to the land by procuring patents from either the United States or the state of California. This the court found he did do, in July, 1887, which was within the time limited; and, during the same month, notified Roberts and A. T. Nation of the fact, and at the same time tendered

them a sufficient deed to the land and demanded of each of them the balance due him under Exhibit A, which they refused and neglected to pay. Appellants do not attack this finding. Indeed, in view of the evidence, it could not be successfully assailed. This finding, then, negatives and disposes of the positions assumed by Kohler, as assignee, and Craig, as receiver, and upon which they seem to have been willing that the case should turn as to them. It also, in addition to the further finding,—which is likewise unassailed and unassailable,—that Fry and Higgins never, for themselves or any one else, demanded a deed to the land, or offered, or were ready or willing, to pay the remainder due under Exhibit A, as effectually negatives and disposes of the main position assumed by Fry and Higgins as trustees. They, in their attempt to show their derivative right or title to the land, by virtue of the assignment of Exhibit A to the company, completely failed, and also in their attempt to show that the plaintiff was in default. They, therefore, failed to prove any title or interest in the land under Exhibit A. All that Craig, the receiver, could, in any event, recover in the action was the possession of the land. This appears to be conceded. There was no stipulation in the contract, Exhibit A, surrendering the possession of the property to the vendee; and, unless there is such a stipulation in a contract like the one mentioned, it may be considered as settled in this state that the vendor retains the possession until the legal title passes to his vendee. *Gaven v. Hagen*, 15 Cal. 203; *Gates v. McLean*, 70 Cal. 49, 11 Pac. Rep. 489. Hence, it was necessary for Craig to show, as such receiver, a performance of, or offer to perform, the contract by the vendee, or his assigns, or himself, for the benefit of the parties whom he represented, as receiver, so that the court might have compelled the plaintiff to convey the legal title to the proper party, which would have carried the right of possession. As no such state of facts was shown to exist, we think he failed to establish any interest in the premises. Kohler, as assignee, in addition to showing his alleged interest in the land, was required to prove that the plaintiff was in default before he could demand that the latter's interest in it should be foreclosed, and the land sold, and the surplus of the proceeds, over the amount of the last installment due plaintiff, under Exhibit A, paid over to him. Having, like his co-defendants, failed to show any interest in the land, and that the plaintiff was in default, the relief he sought was properly denied. If the several cross-complaints had alleged the facts, as they were disclosed by the evidence, they would have been insufficient to have entitled the appellants to any relief. *Hicks v. Lovell*, 64 Cal. 20, and cases there cited; *Gates v. McLean*, supra; *Pennie v. Hildreth*, 81 Cal. 127, 22 Pac. Rep. 398. It is true that, in an action by a vendor against a vendee to foreclose the latter's interest under the contract, when the vendee is merely in default,—as was said in *Hansbrough v. Peck*, 5 Wall. 506,—“the court will usually give

him a day, if he desires it, to raise money; longer or shorter depending upon the peculiar circumstances of the case.” But, as we have seen, the appellants here, though they might have had such an advantage, did not frame their pleading so as to avail themselves of it; but, on the contrary, the trustees framed theirs so as simply to defeat the plaintiff's action, and not to obtain affirmative relief for themselves, while the receiver and assignee pleaded their own inability to complete the purchase. This state of the pleadings, considered in connection with the evidence, which shows that, even if the plaintiff had been cognizant of all the facts which appellants' claim made the company the real vendee under, or assignee of Exhibit A, the company, as well as all the appellants, were in default under that contract, and refused to fulfill it upon their part, while the plaintiff, on his part, was not in default, but ready, able, and willing to comply with it. Therefore, we think it plain that there was no rescission of the contract pleaded or shown by the appellants under which they could claim a return of the portion of the purchase price paid, but that there was a voluntary abandonment upon the part of appellants of whatever interest they may have been entitled to under Exhibit A. The contract having been thus abandoned by them, they cannot complain that it results in the retention by the plaintiff of the amount paid under Exhibit A; for, as was said respecting a contract for the sale of land in *Ketchum v. Evertson*, 13 Johns. 359, “it may be asserted with confidence that a party who has advanced money, or done an act in part performance of an agreement, and then stops short and refuses to proceed to the ultimate conclusion of the agreement, the other party, being ready and willing to proceed and fulfill all his stipulations according to the contract, has never been suffered to recover for what has been thus advanced or done.” See, also, *Hansbrough v. Peck*, 5 Wall. 506, which is to the same effect. Under the circumstances of the present case, the following remarks of the supreme court of Texas, in *Estes v. Browning*, 11 Tex. 237, are applicable: “It is to be regretted that the defendants did not, in the original suit, proffer payment of the balance due, and demand title of the plaintiff. This is the only relief to which they are entitled, and the only condition upon which they can be extricated from the embarrassment occasioned by their own default; and it is further to be regretted that they did not, in this suit, by their plea in reconvention, avail themselves of the opportunity to tender performance and demand title. Their refusal and neglect are diminishing the chance of any relief, and, if persisted in, must terminate in entire defeat.” But it is evident to us in this case that the appellants do not desire any further opportunity to comply with the contract, Exhibit A, upon their part, for they urge in their closing brief that, in the event of a reversal, the plaintiff's complaint cannot be so amended as to change the action to quiet title into one of foreclosure, and therefore the said complaint should be dismissed. None of

the appellants were parties to or assignees of Exhibit A. They assumed no obligations under it towards the plaintiff so as to bring themselves in privity with him. This being so, they acquired no rights under said contract, and, having no rights, consequently there was nothing to forfeit. Their claims, however, operated as a cloud upon the title of plaintiff, which he was entitled to have removed in this form of action. We therefore advise that the judgment and order be affirmed.

We concur: BELCHER, C. C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

85 Cal. 538

PAULSEN v. SCHULTZ *et al.* (No. 12,804.)  
(Supreme Court of California. Sept. 10, 1890.)  
ASSUMPSIT—SERVICES RENDERED—REDUCTION OF COMPENSATION.

1. Plaintiff sued for a certain amount for services rendered defendants as partners, and for a certain amount as assignee of a claim against them. It was admitted that the amount claimed as assignee was due, but it was denied that defendants were indebted to plaintiff for services in the amount claimed, but only for a certain part of it; and it was alleged that between certain dates, while plaintiff was working for defendants at \$100 a month, he overdraw a certain amount, which defendants claimed should be allowed as an offset to plaintiff's claim. The only issue was whether plaintiff's salary had been reduced from \$150 per month to \$100 per month. Plaintiff had for a number of years worked for defendants for \$150 per month. Although defendants may have contemplated reducing his salary, nothing was said to plaintiff about it, and when he left their employment he presented his account to one of the partners showing a claim at the rate of \$150 a month, amounting to the sum claimed in the complaint. The partner to whom it was presented said it was correct, and referred him to the other partner for the money. When presented to the latter, all he said was that he had no money to pay it. There was no evidence that plaintiff had overdrawn. *Held*, that a verdict for the amount only admitted by defendants to be due plaintiff for his personal services was not sustained by the evidence.

2. In the absence of evidence that it had been intimated to plaintiff that his salary would be reduced, evidence of the amount of sales, and the embarrassed condition of defendants' business, during the time it was claimed his salary was \$100 per month, was incompetent to show such reduction.

Department 2. Appeal from superior court, city and county of San Francisco; T. H. REARDEN, Judge.

*Ben T. Rawlins* and *T. M. Osment*, for appellant. *T. C. Van Ness*, for respondents.

THORNTON, J. Plaintiff brought this action to recover for services rendered to the defendants as copartners, under the style of Schultz & Von Bargen, upon three separate causes of action. The first was for \$393.45, for services rendered by himself to the defendants; and the other two were for \$160, respectively, for services rendered to the defendants by one Frudenberg and one Knell, which demands they respectively assigned to the plaintiff. The defendants in their answer denied that

they were indebted to plaintiff for services rendered by him personally to any greater extent than \$76.45, and averred that between January 1, 1884, and April 18, 1885, the plaintiff had, while employed by them, at the rate of \$100 a month, as a book-keeper, overdrawn the sum of \$780, which should be allowed them as an offset to his claim. A verdict for \$76.45 in favor of plaintiff was rendered, and a judgment thereon rendered. Plaintiff, being dissatisfied with the judgment, appeals therefrom, and also from an order denying him a new trial, for the reasons that the evidence is insufficient to sustain the verdict, and that certain prejudicial errors of law were committed. At the trial it was conceded that the amounts plaintiff sued for as assignee were due, and that the only issue in the case was as to whether the salary of the plaintiff, as book-keeper for the defendants, had been reduced from \$150 per month to \$100 per month, and, if so reduced, when the reduction was made. The evidence shows, without conflict, that the plaintiff worked for the defendants for a number of years as book-keeper, for an agreed salary of \$150 per month; and that, while the defendants may have contemplated reducing it to the sum of \$100 per month on and from January 1, 1884, to April 18, 1885, which would make a difference to the extent of the amount they claim he overdraw his salary, no such reduction was in fact made, or intimation of it given to the plaintiff. When he left their service, and submitted a statement of his account to one of the partners, which showed a claim of wages at the rate of \$150 per month from January 1, 1885, to April 18th of the same year, with a credit of \$146.50, and a balance of \$397.45 due him, it was pronounced correct, and, when subsequently brought to the attention of the other defendant for payment, was not disputed. There is no evidence that he overdraw his account; but, on the contrary, there is abundant evidence, which must, because not contradicted, be regarded as conclusive, showing that the defendants were indebted to him to the extent of his claim for personal services, from which it resulted that he is also entitled to recover as assignee the full amount of the other two demands which were not disputed. Since this is so, it is apparent that the verdict is not sustained by the evidence.

The court, against the objection of plaintiff that it was irrelevant and incompetent, admitted evidence of the amount of sales, and the embarrassed condition of the business of defendants during the last three or four months that plaintiff was employed by them. The evidence that plaintiff had been employed by defendants for a number of years at a salary of \$150 per month, and that during such period the above salary had been paid him, was clear, distinct, and uncontradicted. There is no evidence that there had ever been any intimation that this salary would be reduced, made to plaintiff by defendants. Under such circumstances, we cannot perceive that the evidence above referred to was relevant to any issues in the cause. Such evidence may have shown

that there was a necessity for reducing, or that it was highly expedient to reduce, the expenses of conducting the business of defendants and the plaintiff's salary as one item of expense; but, in the absence of some evidence tending to show an agreement between the parties for a reduction of the salary, we cannot see in what way the necessity or expediency of reducing the salary would tend to show that there was a reduction. The court erred in admitting the evidence just above mentioned. Taking the whole charge of the court as to the presumption that the defendants knew what was contained in the entries in their books, we cannot say that the court erred.

The only error we discover in the charge to the jury is where the jury were told that the evidence was conflicting as to whether defendants objected to the statement of the plaintiff's account with them, which he submitted to them at the time he left their employment. The evidence was not conflicting on this point, as already stated. The defendant Von Bargaen, to whom the statement was first given, said it was correct, and referred it to his partner, the defendant Schultz, for the money due upon it. When it was presented to the latter for this purpose, all he said was that he had no money to pay it. Upon this state of facts, the accuracy of the items of the account was established *prima facie*, and it had the effect of an account stated. Judgment and order reversed, and cause remanded for a new trial.

**We concur: SHARPSTEIN, J.; MCFARLAND, J.**

(85 Cal. 619)

**HUTCHINSON v. McNALLY et al. (No. 12,579.)**

(Supreme Court of California. Sept. 12, 1890.)

**EJECTMENT—HOMESTEAD—RIGHTS OF DEVISEE.**

1. A complaint in ejectment alleged that the land was devised to plaintiff; that it was the homestead of decedent and his wife, and was selected from the separate property of decedent without his consent; that, after decedent's death, an order was made setting off said homestead to decedent's widow, and that she continued in possession until after her death. By Civil Code Cal. § 1265, a homestead in the separate property of the husband can be set apart to the widow for a limited period, not longer than during her life. *Held*, that the complaint was not demurrable on the ground that it did not show that the homestead to which plaintiff's estate was subject had ceased to exist at the time the action was brought, as it would not be presumed against plaintiff that the court set apart the homestead for a longer time than that allowed by law.

2. The complaint having alleged that the homestead was set apart to the widow, and it being further alleged that plaintiff, as devisee under decedent's will, and as owner of the land, became and was entitled to possession on her death, the possibility that the homestead was set off to the family for a time extending beyond the widow's death will be *held* on demurrer to be precluded.

Reversing 28 Pac. Rep. 182.

In bank. On rehearing. For former report, see 28 Pac. Rep. 182.

*T. M. Osment*, for appellant. *Chas. F. Hanlon*, for respondents.

**WORKS, J. Ejectment.** Judgment for defendants upon demurrer to the complaint. Plaintiff appeals. The complaint alleges: "(1) That one Charles C. Hutchinson, late of the city of Oakland, county of Alameda, state of California, was, at and before his death, the owner, and seised in fee and possessed, of that certain piece and parcel of land, situate, lying, and being in the said city of Oakland, county of Alameda, state of California, described as follows, viz. \* \* \* (2) That on or about the 2d day of June, 1878, the said Charles C. Hutchinson died, having by his last will and testament devised to the plaintiff the said land and premises; that said will was, by an order duly given and made on the 29th day of June, 1878, by the late probate court of the county of Alameda, admitted to probate. (3) That said property was, prior to and at the time of his death, the homestead of the said Charles C. Hutchinson, deceased, and Esther C. C. Hutchinson, his wife, and was selected from these separate property of the decedent without his consent; that the declaration of homestead was duly recorded in the office of the county recorder of said county of Alameda, on or about the 10th day of May, 1878. (4) That, thereafter, certain proceedings were had in the superior court of said county of Alameda, whereby on the 20th day of April, 1880, an order was duly made and entered, setting off said homestead to said Esther C. C. Hutchinson, surviving widow of the said decedent; that said Esther C. C. Hutchinson was, at the date last aforesaid, in possession of the said homestead property, and continued in possession thereof until the time of her death, viz., on or about the 31st day of January, 1881. (5) That upon the day and year last aforesaid, the plaintiff herein, as devisee under the said will of Charles C. Hutchinson, deceased, and as the owner of the land and premises hereinbefore described, became and was entitled to the possession of said land and premises, and every part thereof." The objection made to the complaint is that it does not allege for what length of time the homestead was set off to the widow, and therefore does not show that the homestead, to which the plaintiff's claim of ownership was subject, had ceased to exist at the time she brought her suit, and for that reason does not show either title or right to possession in her. The objection is not well taken. The complaint shows that the homestead was of the separate property of the deceased, selected without his consent, and that the widow, to whom it was set apart, was dead at the time the suit was brought. The homestead being of separate property, could only be set apart to the widow for a limited time, certainly not longer than during her life. Civil Code, § 1265; Code Civil Proc. § 1474. It will not be presumed against the pleader that the court set apart the homestead for a longer time than that allowed by law. It is contended, however, that there might have been children of the deceased, and the homestead might have been set off to the family for a time extending beyond the life of the widow. But the allegation of the com-



plaint is that it was set apart to the widow, which disposes of that objection. Besides, the complaint alleges in general terms, after stating the facts, that plaintiff, "as devisee under the said will of Charles C. Hutchinson, deceased, and as the owner of the land and premises hereinbefore described, became and was entitled to the possession of said land and premises, and every part thereof." Of course this general allegation would not have been sufficient standing alone, but the objection made to the complaint being that it was uncertain, as above stated, the general allegation assisted to make the complaint certain in the particular mentioned. The judgment is reversed, with instructions to the court below to overrule the demurrer to the complaint.

We concur: BEATTY, C. J.; SHARPSTEIN, J.; McFARLAND, J.; FOX, J.; PATERSON, J.; THORNTON, J.

86 Cal. 367

GARDNER v. DONNELLY *et al.* (No. 12,993.)  
(Supreme Court of California. Nov. 12, 1890.)

ATTACHMENT—BOND FOR RELEASE—NOTICE OF  
DEFAULT—PLEADING.

1. It is no defense in an action on an undertaking executed in consideration of the release of an attachment, and stipulating for the payment by defendant on demand of whatever judgment should be recovered by plaintiff in the attachment suit, that, after the court ordered the attachment discharged and the property released, the sheriff refused to deliver up the goods, and retained possession thereof.

2. The undertaking having been executed and the attachment released it became binding as a common-law obligation and cannot be repudiated, though it be more onerous than the statutory undertakings.

3. The undertaking being for defendant's payment of the judgment on demand, and the sureties being, by Civil Code, § 2807, liable immediately on default of their principal, and without demand or notice, plaintiff could institute and maintain his action against the sureties without waiting for the expiration of the day on which payment was demanded of and refused by defendant.

4. An averment in an action on an undertaking that defendants, and each of them, "wholly neglected and refused, and still neglect and refuse, to pay," is a sufficient allegation of non-payment.

Commissioners' decision. Department 2. Appeal from city and county of San Francisco; JOHN HUNT, Judge.

Edward S. Salomon, O'Brien, Morrison & Daingerfield, for appellants. Geo. D. Collins and R. B. Mitchell, for respondent.

BELCHER, C. C. This is an action upon an undertaking given to procure the release of an attachment levied on the property of the defendant Donnelly. The court below gave judgment for the plaintiff on the pleadings, and the defendants appeal. It is alleged in the complaint that the plaintiff commenced an action against Donnelly to recover the sum of \$630, with interest; that a writ of attachment was duly issued in the action and levied by the sheriff upon certain personal property of the said defendant; that four days thereafter Donnelly, as principal, and the other defendants, as sureties, executed a writ-

ten undertaking, which after reciting the commencement of the action and the issuance and levy of the attachment, proceeds as follows: "And whereas, the said defendant J. W. Donnelly is desirous of having said property released from said attachment, now, therefore, we, the undersigned residents and freeholders in the city and county of San Francisco, in consideration of the premises, and also in consideration of the release from said attachment of the property attached, as above mentioned, do hereby jointly and severally undertake, in the sum of thirteen hundred dollars, and promise that, in case the plaintiff recovers judgment in the action, the defendant will, on demand, pay to plaintiff the amount of whatever judgment may be recovered in said action, together with the percentage, interest, and costs, the same to be paid in United States gold coin, if so required by the terms of the judgment." It is then further alleged that the undertaking was duly approved by the judge of the court, and filed in the action for the use and security of the plaintiff; that thereupon, "in consequence and in consideration of said undertaking on the part of these said defendants, said property so, as aforesaid, attached, and so, as aforesaid, held, by the said sheriff of said city and county, under and by virtue of said writ of attachment issued in said action, was, upon motion of the said defendant J. W. Donnelly, ordered to be released from said attachment, and said attachment was ordered discharged by an order of said superior court, therein duly given and made in the words and figures following," (setting out a copy of the order,) and that "immediately upon filing of said undertaking, and in consideration thereof, the property so attached, as aforesaid, was released from said attachment;" that subsequently, the plaintiff recovered a judgment against Donnelly for \$630, with interest and costs, and that an execution thereon was taken out and placed in the hands of the sheriff, who returned it unsatisfied, except as to the sum of \$60.06, which sum was duly credited on the judgment; that thereafter, and prior to the commencement of this action, demand in writing for the payment of the judgment, together with interest thereon, and costs, was made upon the defendants, but they, and each of them, wholly neglected and refused, and still neglect and refuse, to pay the balance due on the judgment, or any portion thereof. For answer, the defendants admit all the averments of the complaint, except as follows: They allege that the sheriff, upon due demand made upon him by the attorneys of defendant Donnelly, for the release of the attached property, in compliance with the order of the court, refused to release the same from attachment, and never did release the same, and the said property never was restored to said defendant, and that the conditions of the undertaking were therefore never complied with. They further deny that they are indebted to the plaintiff in the sum demanded, or in any other sum, or at all, by reason of the undertaking mentioned in the complaint.

1. In support of the appeal, counsel for

appellants contend that a material issue was raised by the answer, as to the release of the attached property, and that, hence, a judgment on the pleadings could not properly be granted. They say: "The answer admits that an order for release had been made, as set forth in the complaint, but the fact that the sheriff disobeyed said order, and held onto the property, is a defense. The sheriff seized the property at the instigation of plaintiff. The defendants here entered into the bond in suit, on condition that the possession of the property should be restored to the attachment debtor. \* \* \* The sheriff was plaintiff's agent in seizing the property. He was presumptively his agent in refusing to release the property. It was plaintiff's duty to make the sheriff let go, before a right of action on this bond could accrue." Citing *McMillan v. Dana*, 18 Cal. 339. In the case cited, the facts on which the action was based are almost identical with those involved here, and the court, after setting out a copy of the undertaking sued on, proceeds to say: "The complaint avers that, after the execution and approval by the court of this paper, and in consequence and consideration of such undertaking, the said property and moneys so attached were released from said attachment, 'as by the order of said court made by the judge thereof, and filed in said court.' The order of the court is set out, which releases and discharges the property attached from the attachment. The court on the trial granted a nonsuit, upon the ground, it seems, that there was no averment in the complaint that the property attached was actually released and delivered to the defendant. \* \* \* In the present instance, the defendants promise, in consideration of the release of the property from the attachment, that, in the event of a recovery of the judgment by the plaintiff, they will pay the amount of the judgment. The complaint avers that this property was released by order of the judge, and the order of release is set out. The object of giving the undertaking was to procure this release, and this release was had in consequence of the undertaking; and the consideration of the undertaking, therefore, is the release so procured. In consideration of this release, the obligors agree to pay the judgment. Whether the property was redelivered to Vischer or not, was wholly immaterial. The plaintiff in attachment, after the giving of the undertaking and the order of the judge, had no further claim on it. Nor does it matter whether the property was subject to attachment or not. That matter cannot be tried in this collateral way. It is enough that the plaintiff had this property levied on, as subject to his debt, and that these sureties procured its release upon the stipulation that, in consideration of such release, they would pay the amount of the judgment to be recovered by the plaintiff in the attachment suit." In this case the condition of the undertaking was not that the property should be released from the possession of the sheriff, but from the attachment; and when the court ordered the attachment discharged and the prop-

erty released, this was fully accomplished, whether the sheriff still retained possession of it or not. If he did retain the possession, he did so wrongfully, and not for the plaintiff, unless he had some other process in his hands which justified his action. We are unable to see, therefore, why the case above referred to was cited, or how it could be supposed to support the contention of appellants. It seems, on the contrary, to be directly opposed to their theory, and to decide fully, fairly, and correctly the point presented against them.

It is further urged that the undertaking contains conditions not at all like those required by sections 554 and 555 of the Code of Civil Procedure, and that it is more onerous than the statutory undertaking, and therefore void on its face. But, conceding all that is said of the undertaking to be true, still the conclusion does not follow. Section 540 of the same Code also provides that an undertaking may be given when property "has been or is about to be attached," and we think the undertaking in question good under that section. Whether it be so or not, however, is immaterial. It was given for a purpose which was accomplished when the order of the court was obtained, and it then became binding on its makers as a common-law obligation, and cannot now be repudiated by those who asked for and received its benefits.

2. The point is made that the complaint was prematurely filed, as against the sureties, and therefore that it does not state facts sufficient to constitute a cause of action against them. This point is rested upon the fact that the complaint appears, from the indorsement thereon, to have been filed on the same day that demand for the payment of the judgment is alleged to have been made and refused. The argument is, in substance, that the liability of the sureties depended on a demand on Donnelly, and that they could have extinguished the obligation by an offer to perform made within "reasonable hours" thereafter, and, hence, that they were not in default until midnight, or at least until the last "reasonable instant" of the day on which demand was made had expired. Citing section 1490 of the Civil Code. The section cited is in the title relating to the extinction of obligations, and in the chapter headed "Offer of Performance." It reads as follows: "Where an obligation fixes a time for its performance, an offer of performance must be made at that time, within reasonable hours, and not before nor afterwards." Evidently this section has no application to the point in hand. The undertaking was that Donnelly would pay the amount of the judgment on demand; and, when demand for its payment was made and refused, he was in default, and his sureties became immediately liable without demand or notice. Civil Code, § 2807. A cause of action, then, at once accrued against all of the defendants, and the plaintiff could institute and maintain his action, without waiting for the day to expire. *Green v. Robertson*, 64 Cal. 75.

It is also claimed that the alleged demand

was insufficient, because it was "for the payment of said judgment, with interest thereon and costs," and a portion of the judgment had already been paid. There might be something in this point if the defendants had offered or shown a willingness to pay the amount still due, but, as alleged, they, and each of them, neglected and refused "to pay the balance due on said judgment or any portion thereof." We think the allegation of demand and refusal sufficient, certainly in the absence of a special demurrer.

3. Finally, it is urged that the judgment should be reversed, because there was no sufficient averment in the complaint of non-payment; and, in support of this position, counsel cite *Scronfe v. Clay*, 71 Cal. 123, 11 Pac. Rep. 882. In answer to this, it is enough to say that the same point was considered and overruled in *O'Hanlon v. Denvir*, 81 Cal. 60, 22 Pac. Rep. 407; *Rankin v. Sisters of Mercy*, 82 Cal. 88, 22 Pac. Rep. 1134; and *Grant v. Sheerin*, 84 Cal. 197, 23 Pac. Rep. 1094. In our opinion judgment on the pleadings was properly entered, and we, therefore, advise that it be affirmed.

We concur: HAYNE, C.; FOOTE, J.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

86 Cal. 374

TOOMEY V. SOUTHERN PAC. R. CO. (No. 12,202.)

(Supreme Court of California. Nov. 12, 1890.)

RAILROAD COMPANIES—INJURIES TO PERSONS ON TRACK.

Decedent, while walking along a railroad track without license, was run into and killed at a distance of 150 yards from a crossing behind him, from which direction the train was coming. The engine was in a reversed position, and there was no head-light or cow-catcher on the tender. The bell was not rung, nor was the whistle blown at the crossing, though provided for by statute. Had such signals been given, decedent would probably have heard them and escaped injury. He was not seen by the trainmen until after the accident. *Held*, that decedent was a mere trespasser, to whom the company owed no duty, and therefore it was not liable.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; T. K. WILSON, Judge.

W. C. Belcher, for appellant. J. E. McElrath, for respondent.

HAYNE, C. This was an action for damages for the death of the plaintiff's son, alleged to have been caused by the negligence of the defendant. The trial court, sitting without a jury, gave judgment for the plaintiff, and the defendant appeals upon the findings. The facts found are as follows: The plaintiff's son, a lad of 18, was run over and killed while walking at night upon the defendant's track. About 150 yards to the south of the place of the accident was a public crossing, but it does not appear that the deceased had been at this crossing. He was going in an opposite direction towards a neighboring town, which was more than a mile

away. There was no path, road-way, or crossing at the place of the accident, or nearer thereto than the crossing mentioned, and it is expressly found that the deceased had no license to be where he was, and that it was not usual or customary for any one, except employes of the defendant, to be there. The train was an extra, or "special," train. It was going in the same direction as the deceased, and had passed the crossing above referred to. The engine, though running in front of the cars, was in a reversed position, so that the tender was in front. There was no head-light or cow-catcher upon the tender; and the bell was not rung or the whistle blown on approaching the crossing, as required by section 486 of the Civil Code. None of the employes on the train saw the deceased until after he was hurt. What is claimed to constitute negligence is the omission to have a headlight and cow-catcher, and the omission to cause the bell to be rung or the whistle to be blown at the crossing. The central position of the defense is that the deceased was a trespasser upon the track, and it is very clear that he was such. The track was not a highway for pedestrians. The law holds a railroad company to a very high degree of responsibility for the safety of its passengers, and public convenience requires rapid transit. Such being the case, regard for the safety of the passengers, and common justice to the company, require that (except at crossings and similar places) the track should be kept clear. In some countries, this is regarded as of such importance that it is made a penal offense to trespass upon a railroad track; and even at crossings there are gates and gate-keepers to prevent people from crossing when trains are approaching. In this country, there are no such regulations. The matter is left to individual good sense and responsibility, but it is none the less of grave importance that the track should be kept clear. The law does not sanction its use as a path or sidewalk, and if people persist in using it as such, they must be held to be doing an act which is not lawful. This, which seems clear enough on principle, is fully sustained by authority. In *Railroad Co. v. Hummel*, 44 Pa. St. 378, the court, per Strong, J., said: "It is time it should be understood in this state that the use of a railroad track, cutting, or embankment is exclusive of the public everywhere, except where a way crosses it. This has more than once been said, and it must be so held, not only for the protection of property, but, what is far more important, for the preservation of personal security, and even of life. In some other countries, it is a penal offense to go upon a railroad. With us, if it is not that, it is a civil wrong of an aggravated nature, for it endangers not only the trespasser, but all who are passing or transporting along the line. As long ago as 1852, it was said by Judge Gibson, with the concurrence of all the court, that a railway company is a purchaser, in consideration of public accommodation and convenience, of the exclusive possession of the ground paid for to the proprietors of it, and of a license to

use the highest attainable rate of speed, with which neither the person nor property of another may interfere." Similar language was used in *Mulherrin v. Railroad Co.*, 81 Pa. St. 375. In *Railroad Co. v. State*, 62 Md. 487, the court, per IRVING, J., said: "A right of way of a railroad company is the exclusive property of such company, upon which no unauthorized person has the right to be, and any one who travels upon such right of way as a footway, and not for any business with the railroad, is a wrong-doer and a trespasser." In *Palmer v. Railroad Co.*, 112 Ind. 253, 14 N. E. Rep. 70, the court, per ELLIOTT, J., said: "Under the firmly settled rule, the deceased must be regarded as having been a trespasser on the track of the railroad company at the time of his death." And see, also, *Morrissey v. Railroad Co.*, 126 Mass. 380; *Railroad Co. v. Monday*, 49 Ark. 262, 4 S. W. Rep. 782; *Mason v. Railway Co.*, 27 Kan. 83. In all of these cases the person injured was trespassing upon the property of the company, and the proposition stated was directly involved.

The deceased having been a mere trespasser, the defendant did not owe him the duty of doing acts to facilitate his trespass, or to render it safe. It is to be observed here that we are not saying that the fact that he was a trespasser would justify the infliction of a willful or wanton injury upon him. It is well settled that the commission of a trespass does not justify the infliction of an injury by way of punishment or revenge, or out of mere recklessness. Nor are we saying that a railroad company is not bound to use ordinary care after seeing the dangerous position of a trespasser. No such principle is involved in this case. For it appears, not only that the employee on the train did not see the deceased until after the accident, but, by reason of the darkness, could not in all probability have done so. What we say is that the company does not owe to a mere trespasser upon its track the duty of doing acts to facilitate his trespass, or render it safe. In other words, it is not bound to provide any particular kind of machinery or appliances for his benefit, or (when not aware of his presence) to give cautionary signals to notify him of the approach of its trains. And we do not put this upon the ground of contributory negligence, which would imply that the defendant as well as the deceased was guilty of negligence in a legal sense. We put it upon the ground that the defendant owed no duty to the deceased to do the acts whose omission is complained of. What we conceive to be the true rule was clearly stated by MCKEE, J., in *Tennbrook v. Railroad Co.*, 59 Cal. 269, in which the plaintiff was walking upon the defendant's trestle, and was injured while trying to escape from a train which had failed to whistle on approaching the trestle. The other justices of the department, however, "concurred in the judgment," on the ground of contributory negligence. In the subsequent case of *Williams v. Railroad Co.*, 72 Cal. 120, 13 Pac. Rep. 219, the plaintiff was injured while lying drunk near the rails. It was conceded by his counsel that he was a tres-

passer, and that the company did not owe him the duty of looking out for him; and the court adopted this concession, and went on to inquire whether there was a want of ordinary care after seeing him. If these cases could be regarded as decisive of the proposition, it would not be necessary to pursue the subject further. But, as already stated, the opinion of MCKEE, J., was not concurred in by the other justices. And with reference to the *Williams* Case it is insisted for the plaintiff that the concession of counsel does not make the law, and that the proposition is unsound in principle and contrary to previous decisions. In view of these criticisms, we have examined the question without regard to the cases referred to. The proposition that mere omissions do not amount to negligence, in a legal sense, unless there was a legal duty to do the act, is fundamental, and it must necessarily be true; for if there was no duty to do the act,—in other words, if the party was not bound to do it,—he had a right to omit it, and he cannot be held liable for omitting something which he had a right to omit. In this regard the language of Pollock is expressive and apt. "For mere omissions," he says, "a man is not, generally speaking, held answerable. Not that the consequences or the moral gravity of an omission are necessarily less. \* \* \* But, unless he is under some specific duty of action, his omission will not in any case be either an offense or a civil wrong." Pol. Torts, p. 352. See, also, Cooley, Torts, pp. 659, 660; Add. Torts, p. 953; Whart. Neg. § 3; *Railroad Co. v. Bingham*, 29 Ohio St. 369; *Railroad Co. v. Monday*, 49 Ark. 261, 4 S. W. Rep. 782; *Nicholson v. Railroad Co.*, 41 N. Y. 529. If this proposition be true, the question reduces itself to this: Did the defendant owe to the deceased the duty of doing the acts whose omission is complained of? We think not. So far as machinery and appliances are concerned, it seems entirely clear that a mere trespasser cannot claim that a railroad company is bound to furnish them for his benefit. He can no more complain of the want of proper machinery than the tramp who steals a ride upon the trucks can complain that due care was not used in the selection of the wheels. The case is not like that class of cases in which trespassers are injured by spring-guns or the like. The use of such contrivances ordinarily implies an intention to injure, or a recklessness which is its practical equivalent; and, as has been stated, the commission of a trespass does not justify the intentional or reckless infliction of an injury. So far as the omission to give cautionary signals is concerned, it seems equally clear that the defendant had a right to assume that no trespassers were upon its track, and to act upon that assumption in the absence of knowledge to the contrary. A trespasser, of whose presence the defendant was not aware, can no more complain of the omission to give such signals than an idler who strolls unnoticed into a foundry to gratify his curiosity can complain that there was nothing to warn him of the danger he was in. To hold otherwise would be to compel the defendant to

keep giving such signals over the whole length of its route. These general propositions are fully sustained by the cases above cited. The counsel for the plaintiff relies upon the maxim, *sic utere tuo ut alienum non laedas*. But the meaning of this is that a man must so use his own as not to injure the rights of others. The maxim is so interpreted in the Civil Code, § 8514. It does not aid us in ascertaining what the rights of others are, and it certainly does not mean that a person is liable for the damage caused by every accident to which his agency may have contributed, regardless of other considerations.

If, therefore, there had been no crossing in the vicinity, we should say that it was very clear that there was no duty on the part of the defendant to do the acts whose omission is complained of. But it has been suggested that, so far as the ringing of the bell and the blowing of the whistle are concerned, the duty is imposed by statute; that in all probability the deceased could have heard such signals from the place where he was, and that he may have relied upon them. This suggestion assumes that the duty imposed by statute was a duty to all the world, or to some class, of which the deceased was a member. We think, however, that the intention could not have been to facilitate unlawful acts. An illustration will make this clear. Suppose that a train wrecker should wish to destroy a particular train, and should rely upon the whistle or bell at a neighboring crossing for warning in time to make his escape, but should be taken unawares and run over, because no whistle was blown nor bell rung, would he be heard to say that the duty imposed by statute was a duty to him, and that its omission was negligence for which he could recover? We think not. And so here, the trespass upon the track was, as we have shown, an unlawful act, and the provision of the statute was not intended to facilitate it. The duty imposed was for the benefit of those who use the crossing, and who, in consequence, have a right to be on the track. The deceased was not of this class. He was not at the crossing at the time of the accident. He does not appear to have been there at all, but was going in an opposite direction for purposes of his own. The case of *Needham v. Railroad Co.*, 37 Cal. 410, is not in conflict with the foregoing. What is said in that case relates to the facts before the court, which were as follows: The plaintiff's mare escaped from his premises and became fastened in the defendant's trestle. The train stopped, and the trainmen removed her in what was claimed to be a negligent manner. It is plain, therefore, that they saw the animal in time to permit the use of ordinary care; and the proposition laid down was that in such case such care must be used. But, as has been stated, this proposition is not involved in this case, because the trainmen did not see the deceased until after the accident, and by reason of the darkness could not in all probability have done so.

The plaintiff's counsel seems to place some reliance upon the fact that the train was an extra, or special, train. But we

do not think this at all material. It can hardly be contended that a railroad company has no right to run an extra train for a particular occasion. The duty of advertising the time of starting applies only to regular trains. To guard against misapprehension it may be added that in what we have said we have had no reference to cases where the track is in a highway, or to any case where the person injured has a right to be upon the track. Upon the facts found, we think that there was no liability on the part of the defendant, and, as the correctness of the findings of fact is not disputed, we advise that the judgment be reversed, and the cause remanded, with directions to enter judgment for the defendant.

We concur: VANCLIEF, C.; GIBSON, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, and the cause remanded, with directions to enter judgment for the defendant.

#### McFETERS v. PIERSON *et al.*

(Supreme Court of Colorado. Oct. 17, 1890.)

MINING CLAIMS—REAL PROPERTY—OWNER—TRESPASS—PLEADING—APPEAL.

1. A mining claim located on the public domain is real property, and the subject of complete ownership as a claim, and the locator thereof, or his successor in interest, having fully complied with the terms prescribed by congress for acquiring title thereto, is, so long as he continues such compliance, the owner of the claim for all practical purposes.

2. The term "mining claim" means a parcel of mineral land containing precious metals, but is often used, in mining parlance, as synonymous with the term "location," and is applied to mineral lands located upon the public domain according to established rules, as under the act of congress antecedent to the entry for the government patent.

3. The term "owner," when used alone, imports an absolute owner, or one who has complete dominion of the property owned, as the owner in fee of real property; but its meaning is varied according to the connection in which it is used, and is to be understood according to the subject-matter to which it relates.

4. A person having title to occupy a mining claim within any mining district of this state may maintain an ordinary civil action against any one trespassing thereon; and such action lies for injury to the growing timber, as well as to the mineral product of the soil itself. To maintain such action, it is not necessary that the owner of the mining claim should have an actual *pedis possessio* thereof. If he has complied in good faith with the requirements essential to a valid location, he is, so long as he continues such compliance, entitled to the exclusive possession and enjoyment of the claim against the whole world.

5. In a civil action for injuries to a mining claim, an averment by plaintiff that he is the owner, and in the actual possession, of the claim, describing it by name as situate in a certain mining district, county, and state, and that the location certificate thereof is duly recorded in the records of said county, giving book and page, does not necessarily import that plaintiff is the owner in fee of the claim, and he is not bound to prove his title by patent from the United States.

6. In an ordinary civil action for injuries to a mining claim, it is not necessary for the plaintiff in the first instance to allege his citizenship,

and compliance with the act of congress for acquiring title to such claim, but he may make general averment of his title or possession; and this is sufficient in an action against a wrongdoer without right or title.

7. Where instructions to the jury are in the nature of a general charge, assignments of error thereon will not be reviewed in this court, unless the record shows that the objections and exceptions pointing out the particular error or errors were specially made before the trial court.

(*Syllabus by the Court.*)

Error to district court, Ouray county.

This was an action brought by Pierson and others, plaintiffs, against McFeters and others, defendants. The complaint alleges, *inter alia*, "that plaintiffs are, and ever since the 12th day of October, 1886, have been, the owners of, and in the actual occupation and possession of, the John A. Logan lode mining claim, situated in Red Mountain mining district, county of Ouray, and state of Colorado, location certificate whereof is duly recorded in book 29, on page 595, records of said Ouray county; that at divers times between the 20th day of October, 1886, and the 8th day of December, 1886, the defendants willfully and unlawfully entered upon said above-described premises, (the same being then in the possession of plaintiffs, as aforesaid,) and cut down and carried away trees and timber belonging to plaintiffs, standing and growing and being thereon, to the value of six hundred dollars, and converted and disposed of the same to their own use." The answer denies that plaintiffs were the owners of said mining claim, or that they, or either of them, were in the actual occupation and possession thereof as alleged in the complaint. The answer also traversed the entry, trespass, and damages, as alleged. The jury returned a verdict against defendant McFeters, assessing the damages at \$500. Judgment was rendered against McFeters on this verdict. The other defendants were discharged. McFeters brings the case to this court by writ of error.

*Story & Stevens* and *T. J. Collins*, for plaintiff in error. *Stirman & Stewart* and *Pence & Pence*, for defendants in error.

ELLIOTT, J. (*after stating the facts as above.*) On the trial it appeared that no patent from the United States had ever issued for the mining lode claimed by plaintiffs, and that their title was based upon their location certificate, and other evidence tending to show compliance with the laws of the United States relating to the acquisition of mineral lands. Counsel for plaintiff in error contend that such evidence of title, however clear, is not sufficient to support the averments of the complaint; that the complaint avers ownership in the plaintiffs without qualification; and that such averment cannot be sustained, except by proof of a fee-simple title. The argument is that the locator of an unpatented mining-lode claim upon the public domain, not being in actual possession, and having no interest in the soil other than the mineral product, cannot maintain an action for cutting timber on such claim; that, before the issuance of the patent, the title to the soil and the

timber thereon is in the United States; and that the United States alone has the right of action for the cutting and carrying away of such timber. It is true, the term "owner," when used alone, imports an absolute owner, or one who has complete dominion of the property owned, as the owner in fee of real property; but the meaning of a word is often varied according to the connection in which it is used, and is to be understood according to the subject-matter to which it relates. The term "mining claim," meaning a parcel of mineral land containing precious metals, is often used, in mining parlance, as synonymous with the term "location," which means the act of appropriating a mining claim upon the public domain, according to law, or established rules. *Smelting Co. v. Kemp*, 104 U. S. 648.

By Act Cong. May 10, 1872, all valuable mineral deposits in the lands of the United States, and the lands in which they are found, are declared to be open to exploration, occupation, and purchase. The mode of locating such lands is also provided for in general terms, and the locators are granted the exclusive right of possession and enjoyment of the surface included within the lines of their locations. Moreover, the lands thus located are spoken of as "mining claims," and the locators as the "owners" thereof, antecedent to the entry for the government patent. *Rev. St. U. S. 2319 et seq.* In *Gwillim v. Donnellan*, 115 U. S. 49, 5 Sup. Ct. Rep. 1110, a suit brought to determine an adverse claim to mining lands, it is held that "a valid and subsisting location of mineral lands, made and kept up in accordance with the provisions of the statutes of the United States, has the effect of a grant by the United States of the right of present and exclusive possession of the lands located. \* \* \* The location is the plaintiff's title." See, also, *Forbes v. Gracey*, 94 U. S. 767, and *Belk v. Meagher*, 104 U. S. 283, where it is declared that mining claims perfected under the law are "property" in the fullest sense of the term, and that the title thereto passes by descent or purchase the same as other real property. Thus it appears that a mining claim on the public domain is real property, and the subject of complete ownership as a claim, and that the locator thereof, or his successor in interest, having fully complied with the terms prescribed by congress for acquiring title to mineral lands, is, so long as he continues such compliance, the owner of the claim for all practical purposes. He is the owner before as well as after the issuance of the government patent, and is entitled to the exclusive possession and enjoyment against every one, including the United States itself. From the foregoing it follows that when plaintiffs pleaded ownership of the mining claim, describing the same according to the location certificate thereof duly recorded, without alleging that their ownership was in fee, or that the government patent had issued therefor, such averment, being in ordinary language, and appropriate to the subject-matter of the pleading, did not import that they were the owners in fee of the

mining claim, and they were not bound to prove their title by patent from the United States.

It is further contended by counsel that there was a variance between the pleading and the proof, or rather a failure of proof in respect to the kind of possession alleged. It is conceded that the evidence tended to establish plaintiffs' claim to the premises under the mining laws of the United States and of this state, and that they had the qualifications required by law to entitle them to make a mining location; but it is insisted that plaintiffs were bound to prove themselves in the actual possession of the premises, as alleged in their complaint. To maintain an action for injury to a mining claim, it is not necessary that the claimant should reside on the premises, nor that it should be inclosed or cultivated, nor that he should have a *pedis possessio* of the claim, according to the common acceptance of that term. Having made and marked the discovery, and filed his certificate, having performed and kept up the work necessary to perfect his claim, and having otherwise complied in good faith with the requirements essential to a valid and subsisting location, and being in the actual and lawful control of the claim, for the purpose of working or developing the same, he is, while continuing such relations to the property, entitled to the exclusive possession and enjoyment thereof against the whole world. Under such circumstances, his possession must be considered sufficient to enable him to maintain an action against any one trespassing thereon; and such action lies for injury to the growing timber, as well as to the mineral product, of the soil itself. From a very early period, the legislation of this state has expressly given such right of action to any person who may have a title to occupy any mining claim within any mining district of the state. See Rev. St. Colo. 1868, pp. 532, 533; also, Gen. St. 1883, §§ 2681, 2685.

In view of these statutory enactments, the defendants not having pleaded title in themselves to the *locus in quo*, the averment that the possession was actual, though broader than necessary, cannot be justly allowed to work a reversal of the judgment. The term "actual" may be rejected as surplusage, and still the complaint contains every averment essential to the maintenance of plaintiffs' action. We remark, however, that the complaint is not to be commended as a model in cases of this kind. It is entirely immaterial whether or not plaintiffs had the technical possession requisite to the maintenance of trespass *quare clausum fregit* at common law; for since they were entitled to the exclusive possession and enjoyment of the mining claim, and had title to occupy the same, they could maintain a civil action under the Code for any unlawful injury thereto committed by a stranger without right or title. 2 Wat. Tresp. § 918; Bliss, Code Pl. § 227; Darst v. Rush, 14 Cal. 82; Coryell v. Cain, 16 Cal. 567; Armstrong v. Lower, 6 Colo. 393, also 581; Strepey v. Stark, 7 Colo. 614, 5 Pac. Rep. 111; Kendall v. Mining Co., 9 Colo. 357, 12 Pac. Rep. 198; North Noonday Min. Co. v. Orient

Min. Co., 1 Fed. Rep. 522; English v. Johnson, 17 Cal. 116; Halleck v. Mixer, 16 Cal. 574. See 2 Copp, Land-Owner, 114, (November, 1875.)

It is further contended that the complaint is defective for want of necessary averments of citizenship. It is true, in a proceeding to settle adverse claims to mineral lands, the plaintiff must allege and prove that he is a citizen of the United States, or that he has declared his intention to become such, in order to obtain the patent; and, under the amendment of 1881, the defendant must make like averment and proof in order to succeed on his part. The supreme court of Idaho seems to have extended this doctrine to actions of trespass; though it was in a case where the defendants not only denied the title of the plaintiff to the mining claim, but also claimed to have located the same themselves. Bohanon v. Howe, 17 Pac. Rep. 583. But it seems to us there is reason for distinguishing, in the matter of pleadings, between a proceeding to settle adverse claims to mining property and a civil action for cutting and carrying away timber from such property. The former is a statutory proceeding prescribed by act of congress, the very purpose of which is to settle the title between contesting claimants, and thus lay the foundation for the issuance of the government patent. Hence the pleadings must specially conform to that object. The latter, under our procedure, is an ordinary civil action to recover damages from a wrong-doer; injury to the possession is the gist of the action; and a money judgment is the only relief sought. In actions of the latter class, it has always been allowable for the plaintiff to make general averment of his title or possession in the first instance. Besides, the capacity of the plaintiff to sue in an ordinary civil action is generally presumed, and the burden of controverting such authority, if attempted, rests upon the defendant. No such attempt was made in this case. The plaintiffs gave evidence that they, and each of them, were citizens of the United States, and no contradictory evidence was offered on the point. We see no reason to doubt that the evidence was sufficient to satisfy the jury that plaintiffs were citizens of the United States; that they had complied with the requirements essential to the location of a valid mining claim; and that their right thereto was a subsisting one at the time of the injuries complained of. 1 Chit. Pl. 195; 2 Wat. Tresp. § 987 et seq.; Strepey v. Stark, supra, 618; Jackson v. Dines, 13 Colo. 90, 21 Pac. Rep. 918; Thomas v. Chisholm, 13 Colo. 105, 21 Pac. Rep. 1019; Lee Doon v. Tesh, 68 Cal. 50, 6 Pac. Rep. 97, and 8 Pac. Rep. 621; Gwillim v. Donnellan, supra.

It is suggested by counsel in argument that plaintiffs below did not locate their mining claim, in good faith, for the purpose of working and extracting the precious metals therein found, but for the purpose of removing the timber therefrom. To this suggestion, all we can say is that the matter is not presented by the record in such manner as that we can take cognizance of it in this proceeding.

The instructions given by the court to



the jury were in the nature of a general charge. Objections were not made, nor exceptions thereto reserved, before the trial court in such a manner as to be available on this review, according to the well-settled practice of this court, based upon the soundest principles of justice. *Webber v. Emmerson*, 8 Colo. 248; *Railway Co. v. Ward*, 4 Colo. 30; *Coon v. Rigden*, Id. 275; *Keith v. Wells*, 14 Colo. —, 23 Pac. Rep. 991. As counsel in their argument have not pointed out any errors occasioned by the refusal to give instructions prayed by defendant, we shall not undertake to consider them. The judgment of the district court is affirmed.

### MELSHEIMER et al. v. HOMMEL.

(Supreme Court of Colorado. Oct. 17, 1890.)

APPEAL—OBJECTIONS NOT URGED BELOW—PARTNERSHIP—NOTES EXECUTED BY ONE PARTNER.

1. Where no question as to a defect of parties defendant is made in the court below, the point will not be considered on appeal, under Code Colo. §§ 55, 59, 60, providing that such question shall be raised by demurrer or answer, and that, if not so raised, the objection will be deemed to have been waived.

2. Where, in an action on a note executed by one partner in the name of the firm, it appears that the other subsequently recognized it as a firm obligation, and paid interest on it, it is immaterial that the partner executing signed the firm name as "Max Melsheimer & Co.," when in fact it was "Melsheimer & Co."

Appeal from district court, Arapahoe county.

Suit upon promissory note. Appellee, Frank A. Hommel, as plaintiff below, alleges in his complaint that, at the time of the execution and delivery of the note, appellant Max Melsheimer, and one John H. Anderson, constituted and were doing business under the firm name and style of Max Melsheimer & Co.; that as such firm, on August 2, 1881, they made, executed, and delivered to the plaintiff their certain promissory note in words and figures as follows, to-wit: "\$500.00. Denver, August 2d, 1881. Thirty days after date, we promise to pay, to the order of F. Hommel, five hundred and 00-100 dollars at one and one-quarter per cent. per month until paid. Value received. MAX MELSHEIMER & CO. JOHN H. ANDERSON." The plaintiff further alleges that interest upon this note had been paid upon the 2d day of May, 1884, but that nothing had been paid upon the principal sum, and that the same, with interest from May 2, 1884, was due, and unpaid. The first defense may be treated as a specific denial of each allegation of the complaint. In his second defense, appellant admitted that at about the date of the note he was in partnership with the John H. Anderson mentioned in the complaint, under the firm name of Melsheimer & Co.; denies that he signed the note, or authorized Anderson to sign it for him; denies that the note is signed "Max Melsheimer & Co.," and alleges that it was signed "Max Melsheimer;" denies that he received any part of the proceeds of said note, and alleges that the proceeds were not used in the firm business, but that Anderson received and misappropri-

ated the money. Hommel, in the replication, denies the new matter set up in the answer. Upon the issues thus made, a trial was had to a jury, which resulted in a verdict for plaintiff, Hommel. Defendant Melsheimer moved for a new trial on the ground that the verdict was contrary to the evidence, which motion was overruled and judgment entered for the plaintiff, and thereupon the defendant Melsheimer appealed to this court.

Oscar Reuter and Ullery & Morgan, for appellants. Harman & Cover, for appellee.

HAYT, J., (after stating the facts as above.) No question as to a defect of parties defendant was raised in the court below, and consequently this question will not be considered upon appeal. Civil Code 1883, §§ 55, 59, 60; *Great West. Min. Co. v. Woodmas of A. Min. Co.*, 12 Colo. 46, 20 Pac. Rep. 771. The jury seems to have been fully and fairly instructed upon the law of the case. In fact, it is not claimed that the trial court committed any error in this regard. The only errors relied upon relate to the sufficiency of the evidence to support the verdict. The plaintiff, Hommel, is an old man of foreign birth, and unused to our language. He was nearly 80 years of age at the time of the trial, and although in his long examination the answers at times became confused, and even contradictory, this should occasion no surprise, particularly, as several years had elapsed since the occurrence of the events about which he was called upon to testify. The weight to be given to this and other evidence was a matter exclusively for the jury to determine. The salient points in the case were fully covered by other witnesses introduced on behalf of plaintiff.

It is contended by counsel that the note is not a firm obligation, because it is signed "Max Melsheimer & Co.," and not "Melsheimer & Co.," the latter, it is claimed, being the name adopted by the firm, and under which its business was usually transacted. The evidence for the plaintiff is to the effect that the money was advanced upon the credit of the firm; that Anderson, in signing the name Max Melsheimer & Co., intended to bind the firm by so doing, and that this was within the scope of his authority; that the proceeds of the note were used in the firm business; that defendant Melsheimer was informed of the existence of the note soon after it was executed, and with this information he then said to plaintiff, "You needn't be afraid, you get your money;" that afterwards he recognized the note as a valid obligation of the firm, and paid interest upon it 8 or 10 times. Opposed to this evidence is the testimony of the defendant alone. The verdict is for the plaintiff generally. Under the circumstances, it is entirely unimportant as to whether the name of the copartnership was in fact Melsheimer & Co., as claimed by the defendant, or Max Melsheimer & Co., the name appearing upon the note. The evidence is amply sufficient to support the verdict in either event. The judgment must, therefore, be affirmed.

*In re Losasso et al.*

(Supreme Court of Colorado. Oct. 11, 1890.)

## RIGHT TO BAIL AFTER INDICTMENT—HOMICIDE.

Under Bill of Rights Colo. § 19, declaring "that all persons shall be bailable by sufficient sureties, except for capital offenses, when the proof is evident or the presumption great," one charged with murder in the first degree is bailable, even after indictment, if the proof is not evident nor the presumption great, and it is the duty of the judges to hear evidence for the purpose of determining whether or not the prisoner should be bailed.

Original application for *habeas corpus*.

It is alleged, among other things, in the petition that Genaro Losasso and Gaetano Losasso are held in custody by the jailer of Arapahoe county upon a pretended indictment charging them with murder in the first degree; that they "are not guilty of any crime or offense against the laws of this state," and their imprisonment is illegal and unconstitutional. It is also averred that, though considerable time will elapse before trial can be had upon the pretended indictment, the district court refuses to entertain a motion for bail. The present application to the supreme court is made for the purpose of securing a hearing, and favorable action, upon this question.

*Edgar Cayless*, for petitioner. *H. Riddell, amicus curiæ*.

HELM, C. J., (after stating the facts as above.) The question now presented for consideration is whether or not one charged with murder of the first degree, the punishment for which offense is death, may be admitted to bail after indictment and prior to trial. The practice in the different courts of the state with reference to this subject is not uniform. The present judges of the second judicial district, where petitioners are held in custody, are of opinion that the indictment is conclusive against the right to bail, and therefore decline to consider any application therefor. On the other hand, the judges in most, if not all, of the remaining districts frequently entertain such applications, hear evidence thereon, and occasionally admit to bail. In view of these conflicting opinions and inconsistent holdings, it is important that a definite rule should be announced, so that the procedure in the premises may be uniform throughout the state. It is difficult to determine precisely what the common-law rules on the subject of bail were when provisions, such as will be hereafter considered and are now made constitutional, were first adopted in this country. Mr. Blackstone says: "It is agreed that the court of king's bench (or any judge thereof in vacation) may bail for any crime whatsoever, be it treason, murder, or any other offense, according to the circumstances of the case." Book 4, c. 22, p. 299. And he mentions no exception predicated upon the finding of an indictment. But it seems to be well settled that that court, as a matter of course, refused bail in all capital cases after return of a true bill, unless some special circumstance, usually arising subsequent to such action, supervened; also, that in no felony, after

indictment, was bail regarded or allowed as a matter of right. The foregoing practice of the court of king's bench, in relation to capital offenses, has become a fixed rule in California, Louisiana, New York, Iowa, and North Carolina. It is held in those states that after indictment for a capital felony the presumption of guilt is so strong as to be conclusive against admission to bail. *State v. Mills*, 2 Dev. & B. 552; *Hight v. U. S.*, 1 Morris, (Iowa,) \*407; *Territory v. Benoit*, 1 Mart. (La.) 142; *People v. McLeod*, 1 Hill, 377; *People v. Tindler*, 19 Cal. 539. We have only discovered two cases in the federal courts directly upon this question, viz., *U. S. v. Jones*, 3 Wash. C. C. 224, and the celebrated trial of Aaron Burr for treason. In the former case, Jones, one of the defendants, was admitted to bail upon the ground of illness; but as to Reese, another of the defendants, Mr. Justice WASHINGTON disposes of the application, without argument, in the following language: "The bill of indictment being found, we do not feel ourselves at liberty to inquire into the evidence against it." Upon return of the indictment against Aaron Burr, application for bail was made to Chief Justice MARSHALL, who presided throughout the trial. The learned chief justice remarked (see page 94) that he "had never known a case similar to the present when such an examination had taken place." He also insisted "upon the necessity of producing adjudged cases to prove that the court could bail a party against whom an indictment had been found." But on page 95, he is represented as saying: "I have only stated my present impression. This subject is open for argument hereafter." Mr. Burr was thereupon committed to jail, and whether subsequently any authorities were cited or arguments heard upon the question we are not advised. No ruling thereon, or further reference thereto, appears in the volume. It is a significant circumstance that there was at this time (A. D. 1807) in Virginia, where Burr was tried, no such constitutional provision on the subject of bail as now exists in this and other states. In *U. S. v. Stewart*, 2 Dall. 343, (A. D. 1795,) upon this question, language is used which seems to concede the possibility of an examination for admission to bail in such cases, but the point was not necessarily involved, and the decision cannot be considered authority. Precedents from the federal courts upon the subject in hand thus appear to be extremely meager and unsatisfactory; but, so far as the federal cases go, they point to a sanction of the common-law rule. The supreme courts of the following states, however, have promulgated a different doctrine: Alabama, Arkansas, Florida, Illinois, Indiana, Mississippi, Ohio, South Carolina, and Texas. The view adopted in these states is that the indictment, even in capital cases, is simply presumptive evidence of the guilt of the party charged, and that courts should, upon application, hear proofs, and, if the presumption be overcome, admit to bail. *Ex parte Hammock*, 78 Ala. 414; *Ex parte White*, 9 Ark. 222; *Thrasher v. State*, (Fla., 1890,) 7 South. Rep. 847;

Lynch v. People, 38 Ill. 494; Ex parte Kendall, 100 Ind. 599; Street v. State, 43 Miss. 1; State v. Summons, 19 Ohio, 139; State v. Hill, 3 Brev. 89; Yarborough v. State, 2 Tex. 519. Each of the foregoing lists of cases from the state courts might be largely augmented by other decisions of the same tribunals; but, as the opinions referred to express what is believed to be the law at the present time in the states mentioned, additional citations therefrom are deemed unnecessary. Although the above reference to adjudicated cases shows contrariety of judicial opinion on the subject before us, it may fairly be said that the preponderance of authority in this country is against the common-law doctrine. And we think this preponderance of authority is more in harmony with the policy and purposes of modern constitutional and legislative action. It must be borne in mind that the legal penalty for crime is inflicted only upon conviction, and that the object of imprisonment before trial is safe-keeping, not punishment. If the presence of the accused for trial could be otherwise assured, imprisonment would doubtless be entirely dispensed with. So anxious were the framers of the constitutions, state and federal, to guard against abuses in this direction, that they prohibited the exaction of "excessive bail;" i. e., more than will be reasonably sufficient to prevent evasion of the law by flight or concealment. It is likewise to be remembered that trial does not and cannot, as a rule, so speedily follow presentment, in this and other rapidly growing western commonwealths, as in England, where the common-law doctrine under consideration had its origin. Most, if not all, of the state constitutions, now contain provisions substantially similar to section 19 of our bill of rights, which reads as follows: "That all persons shall be bailable by sufficient sureties, except for capital offenses, when the proof is evident, or the presumption great." It will be observed that this constitutional provision is entirely silent as to the *status* of the prosecution. It does not say that upon indictment for a felony, or for a particular kind of felony, the beneficent privilege conferred is withdrawn. On the contrary, its terms are broad enough to include persons accused of any crime whatever, after as well as before indictment. The only exception expressly made has reference to capital offenses, but this exception is wholly inoperative if the proof of guilt be not evident, and the presumption great. Had the framers of the constitution intended to provide that the indictment should be conclusive in capital cases, they would, in all probability, have said so. A simple declaration to this effect would have avoided all doubt and embarrassment. We must look outside of the language employed in the constitution for authority sustaining the position that in any case the indictment alone is conclusive against the prisoner's right to bail. The view affirming such conclusiveness is doubtless drawn by supposed analogy and precedent from the common law. But it is universally conceded that the constitutional provision, in effect, though not in words, changes the

common law so as to confer an absolute right to bail after indictment in all other felonies. Proofs may be required in determining the amount of bail, but the right thereto is no longer a matter of judicial inquiry or discretion. Is it not equally reasonable, and equally in harmony with established rules of construction, to suppose that a change was also intended in the character of the presumption furnished by the indictment in capital cases? If the common-law rule is so relaxed that what was formerly, at most, a matter of judicial discretion is now a matter of absolute right, may it not be that that which formerly constituted a conclusive presumption should now be regarded as *prima facie* proof only? The language of the exception itself would seem to sustain this conclusion. It clearly implies an investigation by some tribunal into the sufficiency of the proofs. Bail as a matter of right is denied; but, when some competent authority ascertains by inquiry that the proof is not evident, and the presumption great, its allowance is imperatively commanded. That the tribunal, or authority possessing the power of admitting to bail, should make this inquiry, is not an unreasonable deduction.

Two principal grounds are mentioned for the view that in capital cases upon return of the bill bail must be denied without investigation. The first, being the one relied on in the English decisions, is thus clearly given by the court in Lord Mohun's Case, 1 Salk. 104: "If a man be found guilty of murder by the coroner's inquest, we sometimes hail him, because the coroner proceeds upon depositions taken in writing, which we may look into; otherwise if a man be found guilty of murder by a grand jury because the court cannot take notice of their evidence, which they, by their oath, are bound to conceal." The second ground is briefly stated in People v. Hyler, 2 Park. Crim. R. 570, as follows: "Because to open the whole question of guilt or innocence to proof in an action to admit to bail would be attended with the most serious inconvenience." Both of these objections are forcible, and would, under different circumstances, doubtless be worthy of grave consideration. The first is based, however, upon the established practice of the English courts of limiting the examination for bail to a review of evidence taken before the committing tribunal. No such practice is required by the constitutional provision under consideration; nor, so far as we are advised, is it generally adhered to by the courts of this country. The second objection is more serious, and, if the courts possessed entire freedom of action in regard to the matter, would be very persuasive. The regular trial is, to a limited extent at least, anticipated. While the guilt or innocence of the accused is not to be determined, the quantity and character of the proofs on this point are, for the special purpose in hand, necessarily considered. Occasionally much time is thus consumed, and the court's attention is correspondingly diverted from other business. But these objections cannot avail against a positive constitutional command; if the

constitution requires the court to determine for itself whether or not the proof is evident or presumption great in a given case, all considerations of expediency or convenience, however potent they might be at the common law, must give way. The English cases, and the American cases adopting the English rule, all concede the right to be heard upon an application for bail after commitment by a coroner's inquest or an examining magistrate. The character and scope of the inquiry are in many instances circumscribed, yet the right to be heard is nevertheless unquestioned. But, under our practice, it would ordinarily accord more nearly with justice to hold the finding of a coroner's inquest or a committing magistrate conclusive as to the clearness of guilt than the report of a grand jury. In the former cases, the accused may appear in person and by counsel. He may be heard in argument, may produce evidence, and make his own statement. But the proceedings of a grand jury are inviolably secret and wholly *ex parte*, evidence for the state being alone received. The accused is not present, and in many instances is ignorant of the fact that charges against him are being considered. He cannot be represented by counsel, or be heard upon the legality or bearing of the evidence adduced. The officer employed by the state to prosecute exercises a large influence in the selection of witnesses to testify; gives the only legal advice, unless the court be called upon; and usually directs to a considerable extent the entire proceeding. The rule that the proof of guilt thus offered and weighed should be *pro forma* treated as "evident," and that the presumption thus arising should in the same manner be pronounced "great," is largely a legal fiction. It finds little support in reason. Moreover, every indictment for murder in the first degree includes several lesser offenses. Under it the accused may be convicted of murder in the second degree, or of voluntary or involuntary manslaughter. In legal effect, therefore, every such indictment charges four crimes, three of which are unquestionably bailable. To deny the latter proposition would as plainly violate the constitutional mandate as to refuse bail where crimes against property are the subject of accusation. Why should the prisoner not be permitted to show, if he can, that his offense belongs to one of the lower grades? The presumption, treated in some cases as conclusive, that the grand jury would not have returned a bill for the higher grade if the evidence pointed more clearly to one of the lesser offenses, does not rest upon a very substantial foundation. It is a fact that prosecuting officers, actuated by motives of policy, generally endeavor to procure indictments for the higher rather than for either of the lesser grades of homicide. An indictment for murder is not, without reason, supposed to render a conviction of manslaughter more certain. On the other hand, under the charge of manslaughter, a conviction for murder would be impossible; yet the evidence adduced at the trial may greatly exceed in strength that upon which the indictment was

found, and fully warrant such conviction. In theory, these considerations should have no weight either with the prosecutor or grand jury; but in practice, we know that they often turn the scales in favor of the graver accusation. As already intimated, certain exceptions to the common-law rule in relation to bail in capital cases are recognized, even where this rule prevails most rigorously. Among these exceptions may be mentioned serious illness of the prisoner; delay by the prosecution in bringing him to trial; consent of the prosecuting attorney to the taking of bail; the existence of public excitement at the time of the finding of the indictment, likely to prejudice the grand jury; the confession of another that he did the killing, and the like. These exceptions are, in the main, prompted by considerations of actual or probable hardship. Courts sometimes exercise a sound judicial discretion, and admit to bail in such cases, even when the proof appears to be evident or presumption great. But it occasionally happens that by means of malicious, or of prejudiced or perjured, testimony, or upon wholly insufficient proofs, indictments are procured charging the crime of murder, and a long period must elapse before a trial can be had. The same promptings of humanity, reinforced by strong considerations of justice, would also sanction the hearing of proofs on the question of bail, where such matters, or some of them, are alleged as a ground of the application. In our judgment, the foregoing considerations warrant the view that the absolute conclusiveness of the indictment as to guilt in capital cases should not be assumed.

Courts must, however, proceed with extreme caution in exercising the power of admitting to bail in this class of offenses. And, whenever bail is allowed, it must be reasonably sufficient to secure the prisoner's presence at the trial. When life is suspended in the balance, the temptation to avoid trial is, in most instances, peculiarly great; and a release upon bail should not be permitted, unless the court feels clear that the constitutional exception does not apply. The indictment creates a strong presumption that the prisoner is guilty of the higher crime and not entitled to bail. The burden of overcoming this presumption is cast upon him. This burden should be so discharged as to satisfy the following test, laid down in *Ex parte McNally*, 53 Ala. 495: "If the evidence is clear and strong, leading a well-guarded and dispassionate judgment to the conclusion that the offense has been committed, that the accused is the guilty agent, and that he would probably be punished capitally if the law is administered, bail is not a matter of right." By the concluding clause the learned judge undoubtedly means that bail should be denied in the absence of some special ground such as those above mentioned, wherein all courts exercise a judicial discretion. The foregoing criterion is not beyond criticism, nor is it possible to frame one that would be; but all things considered, it is more satisfactory than either of the others suggested. Judicial action, under any rule in the pre-

ises, will always be accompanied by embarrassment and perplexity; but with a careful, conservative, and fearless exercise of judgment in weighing the proofs, and of discretion in fixing the amount of bail, it is believed the rights of the prisoner and interest of the public will be sufficiently guarded. It is an invariable rule of this court, in the absence of some extreme emergency, not to entertain proceedings for original relief when such relief may be granted by a subordinate tribunal. The public as well as the private interests confided to our care render the adoption and enforcement of this rule a necessity. The district court of Arapahoe county, where petitioners are imprisoned, possesses such jurisdiction in the present case, and doubtless, in pursuance of the views above announced, will, notwithstanding its former practice, make the desired inquiry. We shall, therefore, for the present, decline to issue the writ of *habeas corpus* or enter into the investigation that would follow.

ROHRIG v. PEARSON.

(Supreme Court of Colorado. Oct. 17, 1890.)

EXAMINATION OF WITNESS—REFERENCE TO MEMORANDA.

A witness may refresh his memory by reference to memoranda of the dates, weights, and prices entered by himself at the times certain sales were made.

Appeal from district court, San Juan county.

*N. E. Slaymaker and J. T. Wentworth*, for appellant. *F. W. Ingersoll*, for appellee.

PER CURIAM. Appellant was the proprietor of a meat market in the town of Silverton, and appellee was a dealer in cattle at or near Durango. Appellant purchased beef for his business from time to time from appellee's duly-authorized agent at Silverton, one Spaulding. Appellant failing to pay for all of the cattle purchased, appellee brought suit in the court below, and recovered a balance of \$1,010.65. There is strong ground for the belief that this appeal from the above-mentioned judgment was taken purely for delay. The alleged error relied on may almost be characterized as frivolous. Counsel for appellant have contented themselves with a legal argument of one paragraph covering less than half a page, and without the citation of a single authority, and they have not complied with the rule of this court in relation to abstracts. Although the evidence introduced at the trial is more than 80 folios in length, and although the objection urged rests entirely upon the evidence, yet that which purports to be an abstract contains but a single paragraph, which merely states the objection relied on by way of argument, and does not contain a word of proof. Under these circumstances, affirmance of the judgment without consideration of the error assigned, and with a pecuniary penalty for trifling with appellee's rights, would be entirely justifiable. However, these matters will be passed this time, and the alleged ground of reversal will be

briefly noticed. By examination of the transcript we find that Spaulding, appellee's agent, while upon the witness stand testifying to the quantity of beef sold and delivered, was permitted to refresh his memory from a memorandum or pass book which he kept, recording the sales to appellant. It is claimed that the court erred in its ruling in this behalf. These entries purported to give the weight of the beef sold, together with the date of each specific sale. The witness testified that they were all in his own handwriting, and were made at or about the times of the particular transactions. In most instances he weighed the beef himself, but in some cases it was weighed by appellant or by appellant's agent in the witness' absence, and the weights given him by one or the other and recorded immediately afterwards. Recourse to *data* or memoranda, written under such circumstances, for the purpose of refreshing the witness' memory, is often had. The rule sanctioning such practice is founded upon excellent reason, and established by ample authority. The judgment of the court below is affirmed.

HAYT, J., took no part in the consideration of this cause.

MELDRUM v. MELDRUM.

(Supreme Court of Colorado. Oct. 17, 1890.)

FRAUD—RELIEF IN EQUITY—HUSBAND AND WIFE—DIVORCE—ALIMONY.

1. Courts have not undertaken to lay down any specific and definite rules in regard to fraud by which in all cases they will be controlled in giving relief.

2. Equitable principles can be applied to every case of fraud as it occurs, however new it may be in its circumstances.

3. The relationship of husband and wife is one of special confidence and trust, requiring the utmost good faith and frankness in their dealings with each other; and where either one is false to the other, and fraudulently or through coercion procures an unjust advantage, chancery may relieve against the transaction.

4. Where the wife, while harboring a determination to abandon her husband and dissolve the marital relation, fraudulently procures from him valuable property as a home for the family, and afterwards institutes proceedings for a divorce, equity may restore the title to the husband after a decree of divorce has been granted upon his cross-complaint.

5. The fact that the husband did not, in such cross-complaint, make claim for the property so conveyed, will not defeat the subsequent action therefor based upon the fraud, the amount involved being beyond the jurisdiction of the court granting the divorce.

6. The wife alone can maintain an action for alimony.

(Syllabus by the Court.)

Appeal from district court, Arapahoe county.

Appellee, Andrew Meldrum, was married to appellant, Mary, upon the 3d day of December, 1884, in the county of Delta. In this state. At the time of the marriage, appellant was possessed of no estate whatever. Appellee, however, was then possessed of both real and personal property, his total resources amounting

to about \$50,000. A ranch in Delta county, and an interest in the Guston mine, situate in Ouray county, constituted the bulk of his property. Plaintiff and defendant lived together as husband and wife about 15 months, during which time plaintiff gave to the defendant a large amount of property and money. The larger of these gifts consisted of a ranch in Delta county, valued at \$7,500, certain Denver property, which cost about \$12,000, and various gifts of money, the last one being \$2,000 in cash. In this action appellee, Andrew Meldrum, after a final decree of divorce from appellant, Mary, seeks to recover from her the real property which he had voluntarily conveyed or caused to be conveyed to her as gifts during the existence of the marital relation, and while they were living together as husband and wife. The grounds of the action, as set forth in the complaint, are undue influence, misrepresentation, deceit, and fraud on the part of appellant in procuring such property to be conveyed to her. Appellant in her answer "admits that on or about the 3d day of October, 1886, plaintiff, moved by the solicitations of the said defendant thereunto, and by defendant's professions and protestations of great affection and regard for plaintiff, and in full confidence in the truth of said professions, and upon consideration solely of plaintiff's affection for the said defendant, and of plaintiff's confidence, belief, and anticipations that defendant would continue to reside and cohabit with plaintiff during their joint lives, and would bear children to plaintiff, and in all things continue to observe and perform her wifely duties, by deed bearing date the day and year last aforesaid, conveyed to defendant the land situated in Delta county aforesaid, with the appurtenances; that the said land, with the improvements thereon, were and are of the value mentioned in said complaint; and that afterwards, and moved by the same considerations, (but denies that the same were false professions of affection and regard,) the plaintiff gave to defendant the sum of two thousand dollars in money, and that on or about the 1st day of February, 1886, plaintiff, with other moneys to him belonging, purchased and procured to be conveyed to said defendant certain premises situate in the city of Denver, as described in plaintiff's complaint, and caused the same to be furnished as alleged." And it is further admitted in this answer that "the defendant did urge and solicit plaintiff to donate to her the moneys, goods, lands, furniture, etc., mentioned in the plaintiff's complaint." All the fraudulent conduct charged against appellant is denied. At the trial, the district court made certain findings of fact. By the second of these it is found that, at the time of the marriage, appellant was not in love with appellee, but that she married him for a home. By the fourth that, at the time of the conveyance from the plaintiff to the defendant of the property in Delta county, the determination by defendant to abandon the plaintiff had not been formed, and, while plaintiff at that time was repug-

nant to her, nevertheless she was willing to continue to live with him as his wife. By the sixth it was determined that, after the said conveyance of the Delta county property, and before the conveyance of the Denver property, in February, 1886, the defendant, moved by her repugnance for the plaintiff, determined to abandon him, and cease her wifely relations to him; and she also determined that, before said abandonment occurred, she would, so far as her opportunities might permit, secure from plaintiff, as gifts, all the property she could obtain from him. By the seventh that she did not, before the conveyance of the Denver property, inform the plaintiff of her secretly formed purpose to abandon him; on the contrary, she permitted him to believe that she loved him; and he had a right to believe, judging from her manner and demeanor, that she loved him, and would continue to live with him as became a dutiful and loving wife. By the eighth, that the conveyance of the Denver property was caused to be made and delivered to her by the plaintiff, moved by his love and affection for defendant; that, had he known of her secretly formed intention to abandon him, he would not have caused the conveyance to be made and delivered to her. By the ninth, that shortly after the said last-mentioned conveyance was made, defendant, upon a slight provocation, but not at all sufficient, carried her intention of abandonment into execution, and she has not since lived with plaintiff as his wife. Exhibits B and C, referred to in the opinion, are as follows:

"Exhibit B. Denver, Colo., March 1st, 1886. Andy: I am going to write a letter which may seem very hard-hearted in the writer, but I must tell you my feelings. Andy, you know that I do not love you as I should, and that I do not treat you right, and I know that I never can. Now, don't you think it is best to give me a divorce, as long as I want one. If you promise to give me one, I will not sell anything you have given me. If, on the other side, you do not, I will sell the house and go away. I have thought the matter over carefully, and have come to the conclusion that we had better part. When you answer this letter, tell me that you will give me a divorce, and then I will not sell the house. If you do not give me one, I shall sell the house, as I have a chance, and go away. POLLY. P. S. If you give me a divorce, in three months after, if you care for me, and I care for you, I will marry you again. I do not care for any one any more than I do for you. The lawyers said that no one need know anything about it unless you wished it."

"Exhibit C. Denver, Colo., March 1st, '86. Andy: I wrote you a letter about three hours ago, but since then my lawyer has called and advised me what to do. He said that the easiest way to do was for you to come here and say, in the presence of Richard, or any one, that you are going to leave the state for good, and bid me good-by. Now, Andy, that is a very easy way to get a divorce, and will not cost much; but, if you do not do that, he will do another way, which will cost you

all the money you have, and all the money I have, and besides that, it will give us both a bad name. Now, I do not want that, but if you do not do what I asked you to do in the commencement of this letter, I shall be compelled to do that; but if you do come, I will not have to sell my house, and I will give you the house and ranch in Delta; and, after we are divorced, if you care for me, and I care for you, we will marry again. Now, Andy, the best thing for you to do is to come to Denver right away, and say those few words. Of course you do not need to leave the state; only tell some one that you are. If you come, it will not cost more than one hundred dollars, (\$100,) and any other way it will cost all we both have, and I am going to get one if it costs all I have. The lawyer says that I can get one a good many ways, but this is the easiest way, and that no one will know anything about it no more than if we were still man and wife. Neither one of us will have to go to court. You have only to say that to Richard, and then go back to Delta. This is very easy, and, as long as I am determined to have one, it is the best to do it in the quietest way, and the cheapest way, also. If you do not come right away, I will enter suit the other way that I told you about. POLLY. [Written on the margin:] Do not say anything about this to pa, or any one else, and then no one will know anything about it. If you give me a divorce, I will promise you that I will marry no one else unless it is you, if you want me, and that I will not sell the house."

By the decree of the district court the title to the property in Delta county, which was conveyed to appellant during the first year of their married life, and before the determination to abandon her husband was shown to have been formed, was confirmed in her, but the title to the property conveyed to her shortly prior to their separation, and after she had determined to abandon him, was restored to the husband.

*Patterson & Thomas*, for appellant.  
*Wells, McNeal & Taylor*, for appellee.

HAYT, J. It standing admitted by the pleadings that appellant did procure a large amount of property from her husband as the result of her solicitation, our review will first be directed to the evidence of her fraud in so doing. It is in testimony that, to at least four people, appellant expressed her intention to get away with appellee's money. The witness William Robinson testified that she told him that she did not want to live where she was; that she was going to marry Meldrum, and get some money out of him. A few months after the marriage, appellant planned a trip to California with her mother, and just prior to starting, the same witness testified to having overheard a conversation between appellant and her mother in which the mother said: "Polly, you will have to be careful about Andy, how you talk to him, and behave nicely to him, and get that \$10,000 out of him,"—to which appellant replied: "O, you leave it to me. I know how to work him. I'll get all I

can out of him, you bet." The same witness, further testifying, said: "On another occasion, I met her [appellant] on the street in Delta, and she told me she was going to get \$10,000 from Andy, and as soon as she got it she was going to skip." Both Frank and Sarah Hepworth testify to appellant's repeated declarations, made just prior to her marriage with appellee, of her love for one Charlie Mitchell, a notorious character, but of her determination to marry Meldrum, for whom she had no affection, in order to get away with his money. The witness Miss Nettie Goldsmith testifies that in the latter part of October, or the 1st of November, appellant paid her a visit at her home in Leadville, and that while there she talked quite freely in reference to her hatred of her husband, and her love for Mitchell; that she was going to leave appellee and not live with him any more. Witness also testifies to a conversation between appellant and her mother, in which Mrs. Meldrum said: "Mamma, I can't stand it to live with him, [appellee.] I can't wait until February." And her mother said: "Try to love him, and wait until the 1st of February, and then he will get his money. Then you can go to Europe or New York, and you can stay away a year, and send him a divorce, and have a good cry, and that will be the last of it." The witness, further testifying, details a conversation that she swears she had with appellant a little later in the year at Delta: "I was coming back from town one day, and met Polly. She said she was going to leave Andy, and not going to stay with him any more. Said she was going to Mrs. Haas' house, and going to Leadville next day. I talked to her awhile, but she would not come back. I went back home. Polly came back that night, and she and Andy made up again. He was going up to the mine the next day, and we walked out to the bars with him. Polly took hold of my arm. She said: 'He has gone up to the mine, and after he gets the money I wish to God he would fall down and break his neck.' She says: 'Nettie, I just hate him. I just shiver when he touches me. If he would bring his money home, honest to God I'd rob him and skip.'"

In February, A. D. 1886, appellee sold his interest in the Guston mine. Soon after this the parties came to Denver, appellant's mother, Mrs. Bond, accompanying her daughter to this city. It was at this time that the home in Denver was purchased. The contract of purchase was made on the 13th day of February, but the deed was not delivered until a few days later. In this deed, Mrs. Meldrum was made the grantee. In reference to this, appellee testifies that "she wanted to get it in her name, and she asked me if I would not deed it to her. I says, you have got one place now, you better let me have this one;" and she said she would give me back the place in Delta, and she wanted this one, and I joked with her, and she thought I was not going to give it to her, and she started to cry about it in the room. Her mother was present, and her mother says, says she: 'What are you crying about, Polly?' 'Well, Andy



don't want to deed me that house,' she says, and her mother says: 'Well, he don't say he won't deed it to you;' yet she cried about it, and wept so hard over it, I said, 'All right, I will give it to you;' and I went up to Mr. Berkey's, and told him to make out the deed in her name." Mrs. Meldrum's version of the transaction is as follows: "We thought we would like to live in Denver; such a beautiful place; and he asked me how I would like it, and I told him I would like it very much. He wanted to know if he should try and buy a home, or should he buy a home, would I like it, should I be contented; and I told him, 'Yes.' We went around and looked at several nice places, and then we decided on this one up here that we have now on Grant avenue, and he asked me how I would like it for that ten thousand dollars that he promised me if he should put the money into the home, and give it to me in my name. Would it make any difference to me. Would I rather have the money. I told him it made no difference; so he bought the home. I didn't know the deeds were put in my name till after he came back. He came home, and called me to one side, and I went to the window, and he said: 'Polly, I have bought the house, and I have had the deeds put in your name,' and he said, 'and recorded.' Now they are in the recorder's office." In another part of her testimony, Mrs. Meldrum admits that, in all their conversations in reference to the purchase of a home, a home for the family was meant. About the time they became settled in the house, and the day after the carpets were laid, and the last of the furniture put in place, appellant, making a pretext of some slight disagreement with appellee about the use of a horse and buggy which he had purchased for her recreation and amusement, drove appellee out of the house, and notified him of her intention to apply for a divorce. After this episode, appellee, at the request of appellant and her mother, departed for Delta. The testimony leaves no doubt that at this time appellee still clung to the hope that his wife would not attempt to carry out her foolish threat of obtaining a divorce, but in this he was soon undeceived by receiving the two communications from his wife, marked "Exhibits B and C." By those letters it appears that, despite all her efforts upon the witness stand to show a valid excuse for applying for a divorce, there did not exist in fact the remotest legal cause in her behalf for a dissolution of the marital vows. One cannot read the evidence without being impressed with the conviction that appellant had long before determined to force a separation from her husband, first receiving from him the largest portion of his estate that he could, by threats, entreaty, and dissimulation, be induced to make over to her. And, in carrying out such determination, she seems to have secured the assistance of a lawyer who had as little regard for the principles that should accrue members of the profession as the conduct of Mrs. Meldrum shows she entertained for her marital vows. It is a matter of justice to state that none of the attorneys of record in this suit were at

that time employed by Mrs. Meldrum. The plot outlined in the letters of March 1st was promptly followed up by the appellant commencing proceedings in the county court for a divorce. In this action she caused a summons to be issued for her husband; and, to procure an order for service upon him by publication, she falsely swore that he had departed from the state with no intention of returning. Appellee, finding that it was useless to hope for a reconciliation with his wife, filed an answer denying the charges contained in appellant's petition, and a cross-complaint, upon which judgment was afterwards entered in his favor, dissolving the bonds of matrimony with appellant.

We cannot review all the testimony set out in the 346 pages of the printed abstract in this case, but have endeavored to quote sufficient therefrom to demonstrate that the findings of the trial court find ample support in the evidence. There can be no doubt, in view of the evidence, that the court was justified in concluding that the conveyance of this property was procured by appellant suppressing from appellee her aversion and determination to abandon him, while simulating an affection that did not exist. Appellant admits upon the stand that the property was conveyed to her as a home for the family. That it was a fraud to procure the conveyance, under the circumstances, at a time when she had determined that she would not live with him, cannot be doubted. Whether it is such a fraud as courts of equity can lay hold of, and relieve the injured party from its result, is a more difficult question. The case is a novel one, but we think it can be determined upon well-settled principles of law. That no parallel case can be found need not necessarily be taken as conclusive against the decree of the trial court. Courts have never yet undertaken to lay down any specific and definite rules in regard to fraud, by which, in all cases, they will be controlled in giving relief, as said by Lord HARDWICKE: "Fraud is infinite, and, were courts of equity once to lay down rules, how far they would go, and no further, in extending the relief against it, or to define strictly the species of evidence of it, the jurisdiction would be cramped and perpetually eluded by new schemes which the fertility of man's invention would contrive." Parkes, Hist. Ch. 508. In commenting upon this language of Lord HARDWICKE, Mr. Perry, in his excellent work upon Trusts, says, at page 197: "Although courts of equity have not made general definitions stating what is fraud and what is not, they have not hesitated to lay down broad and comprehensive principles of remedial justice, and to apply these principles in favor of innocent parties suffering from the fraud of others. These principles, though firm and inflexible, are yet so plastic that they can be applied to every case of fraud as it occurs, however new it may be in its circumstances. In investigating allegations of fraud, courts of equity disregard mere technicalities and artificial rules, and look only at the general characteristics of the case, and go at once to its essential morality and merit."

The dominant influence which a woman may acquire over a man, even before marriage, is well illustrated in the case of *Rockafellow v. Newcomb*, 57 Ill. 186. Rockafellow, while engaged to Miss Newcomb, conveyed to her real estate valued at about \$5,000, and she conveyed to him property worth \$700. The transaction was, however, found not to be an exchange of property, though she claimed that it was. Upon Miss Newcomb's refusal to marry him, Rockafellow brought suit to compel a reconveyance of the property. The supreme court, reversing the judgment of the court below, decided that the contract for marriage was the real consideration for the conveyance, and that such a contract was valid and binding in law. In setting aside the conveyance, the court said: "The party failing to comply has no right either in morals or law to property thus acquired. The contract was sacred, having the sanction of both divine and human law. The party in default should not be allowed to reap benefits from its violation. This would disregard the long-settled principles of equity jurisprudence." It being urged upon the petition for a rehearing that the contract to marry was not the consideration for the deed, the court held that, if this were true, it would not change the result; that the relation between the parties was of the most confidential character, and that the woman took advantage of her power, and exercised an undue influence in procuring the execution of the deed; that, even if there was an exchange of property, the appellant might repudiate the same, because of the influence exercised by Miss Newcomb to her great advantage, and to his great disadvantage. The court based the relief in such cases upon the general principle "which applies to all the variety of relations in which dominion may be exercised by one person over another." This principle has been applied in many cases in rescuing unfortunate wives from the result of conveyances to their husbands, induced by the latter's fraud, and we see no reason, under our statute emancipating married women from the disabilities of coverture, for not applying it to conveyances to the wife procured by her fraud. The relationship of husband and wife is one of special confidence and trust, requiring the utmost good faith and frankness in their dealings with each other. "Where either one is false to the other, and fraudulently or through coercion procures an unjust advantage, chancery will relieve against the transaction." Schouler, *Husb. & Wife*, § 403.

In *Stone v. Wood*, 85 Ill. 603, it was held, at the suit of the husband, that a deed, procured by the fraud of the wife to be made to a third party for her benefit, would be set aside in equity. And the court said: "Where either husband or wife becomes untrue to the other, and by fraud obtains an unjust advantage over the other, a court of equity will as readily afford relief as it will between other persons not occupying that relation." In *Haydock v. Haydock*, 34 N. J. Eq. 570, gifts made by the husband, while sick, to the wife, were set aside at the suit of the exec-

utors of the husband's estate after his death, because of the undue influence exercised by the latter over the former in procuring the same, the court, in the course of the opinion, using this language: "The presumption against the validity of the gift is not limited to those instances where the relation of parent and child, guardian and ward, or husband and wife exists, but in every instance where the relation between donor and donee is one in which the latter has acquired a dominant position. The parent by age may come under the sway of his children. *Highberger v. Stiffier*, 21 Md. 338. And so, as in the present case, the husband may become the dependent of the wife, and their natural position become reversed." Mr. Kerr, in his work on *Fraud and Mistake*, at page 183, says: "The principle on which a court of equity acts in relieving against transactions on the ground of inequality of footing between the parties is not confined to cases where a fiduciary relation can be shown to exist, but extends to all the varieties of relations in which dominion may be exercised by one man over another, and applies to every case where influence is acquired and abused, or where confidence is reposed and betrayed."

The evidence leaves no doubt of the fraud practiced by Mrs. Meldrum upon her husband. After she had determined to abandon him and procure a divorce, with her mind fully bent upon carrying out such purpose, concealing from him her real intention, he was induced by false professions of love and affection to cause the conveyance of the Denver property to be made to her as a home for the family. Appellant's original purpose is made plain by her subsequent conduct. As soon as the deed was recorded, she threw off the mask, ordered her husband out of the newly-purchased home, and proceeded to break up the family. That appellee acted foolishly will not be denied. He, with his strong passion and ardent love, was not able to cope with her. She, with her deceit and false professions of affection, held complete mastery over him, which she did not fail to exercise to her great benefit, and his great disadvantage. He swears that, had he known of her dislike and determination to abandon him, he would not have consented to the title being placed in her name. She was false to her marital vows, and by fraud procured an unjust advantage of her husband. From such a fraud courts of equity will grant relief, either by setting aside the conveyance or by converting the offending party into a trustee of the property for the benefit of the party defrauded. This is nothing in our statute of frauds to prevent this. In fact, the statute expressly provides that trusts may either arise or be extinguished by implication or operation of law. Gen. St. § 1516; *Browne, St. Frauds*, (3d Ed.) § 84; *Perry, Trusts*, c. 6; *Bohm v. Bohm*, 9 Colo. 100, 10 Pac. Rep. 790; *Sears v. Hicklin*, 21 Pac. Rep. 1022; *Von Trotha v. Bamberger*, 15 Colo. —, ante, 893. And appellee is not precluded by the divorce proceedings in the county court from maintaining this action. There is no question of alimony here. The wife alone can maintain such

an action. Under no principle of pleading could the husband, under the circumstances, be required to set up in his cross-complaint in divorce proceedings instituted by his wife the facts heretofore upon as constituting his cause of action. The value of the property alone would have precluded the county court from entertaining jurisdiction in the premises. It is contended that appellee is bound under the principle of ratification. There is no finding by the court below upon this question, and if we go to the evidence we find nothing to indicate that appellee, with a full knowledge of all the facts, intended to ratify and confirm the transfer, or that he did anything at any time, with or without such knowledge, to confirm the same. The evidence relied upon to show ratification shows simply that after she had announced her determination to procure a divorce, or when she was complaining of having no ready money to live upon, the husband, still clinging to the hope of a reconciliation, and, in pursuance of his usual liberal policy manifested towards his wife, gave her the further sum of \$2,000 in cash. Finding no error in the decree of the court below, the judgment will be affirmed.

(44 Kan. 633)

MISSOURI PAC. R. CO. v. H. A. CADY.

(*Supreme Court of Kansas.* Nov. 8, 1890.)

FIRE SET OUT BY RAILROAD COMPANY.

Where a railroad company, by its agents and employees, in burning off its right of way, negligently allows the fire to escape upon the premises of the adjacent land-owner, where it consumes the property of the latter, the injury thus inflicted falls fairly within the scope of chapter 155, Laws 1885, as the result of a fire caused by the operation of said railroad.

(*Syllabus by Strang, C.*)

Commissioners' decision. Error from district court, Wilson county; L. STILLWELL, Judge.

W. A. Johnson, for plaintiff in error. J. B. F. Cates and B. F. Shinn, for defendant in error.

STRANG, C. This action was brought by H. A. Cady against the Missouri Pacific Railroad Company, to recover damages alleged to have been sustained through the negligence of the railway company in permitting fire to escape from its right of way while burning dry grass and other combustible material thereon, and to run and spread over the premises of the plaintiff. In his petition the plaintiff says "that the said defendant, its agents and servants, while operating its said railroad, negligently and carelessly set fire to the dry grass, weeds, and other combustible material along its right of way aforesaid, and negligently and carelessly permitted the said fire to escape over and upon said farm owned by plaintiff, where it continued to burn and consume forty (40) rails, worth four dollars, (\$4,) being the property of said plaintiff on said farm; that it also burned and consumed fifty-three (53) rods of hedge fence, one-half of which was owned by the plaintiff, and of the value of twenty-six dollars and fifty cents, (\$26.50,) being and standing on said land; that it also consumed one hundred and twenty

(120) bushels of corn, of the value of forty-two dollars, (\$42,) said corn being upon the said lands, and the property of plaintiff; that, by reason of the negligence and carelessness of the said defendant as aforesaid, the plaintiff has been damaged in the sum of seventy-two dollars and fifty cents, (\$72.50.) The plaintiff further alleges that he was compelled to procure an attorney to bring and prosecute this suit for him, and that forty dollars (\$40) is a reasonable fee for the plaintiff's attorney for the bringing and prosecuting of this action." The total amount thus claimed by the plaintiff was \$112.50. The railway company denied the negligence attributed to it, and claimed that Cady was guilty of negligence which contributed directly to the injury. The case was tried in the district court February 21, 1888, by a jury, which returned a verdict for Cady assessing his damages at \$62.10, and also finding \$25 to be a reasonable attorney's fee for the prosecution of the case. Judgment was entered upon the verdict, followed by a motion for a new trial, which was overruled.

The company assigns a number of errors based upon the rulings of the trial court. A careful examination of each one of the errors assigned, and a comparison of the same with the questions raised in the case of Railroad Co. v. Merrill, 40 Kan. 404, 19 Pac. Rep. 793, shows that each one and all of the errors assigned herein were considered by this court in that case, and decided against the theory of the plaintiff in this case. It is true that in the case above cited, the fire was alleged to have escaped from the locomotive while in the operation of its railroad, while in this case the allegation is that the railroad company, its agents and servants, while operating its railroad, negligently and carelessly set fire to the dry grass, weeds, and other combustible material along and upon its right of way, and negligently and carelessly permitted the fire to escape over and upon the farm of the plaintiff, where it continued to burn, and did the damage complained of; and it is claimed by the railroad company that the burning off of the right of way of the railroad company is not an act done in connection with the operation of the railroad, and therefore does not fall within the scope of the language of chapter 155 of the Laws of 1885. Upon this subject Justice JOHNSTON, delivering the opinion in the case of Railroad Co. v. Merrill, says: "The statutes prescribe a rule in actions for damages by fire caused by the operation of a railroad, and it is contended that caring for the right of way is not within the terms 'operating a railroad.' The claim is not tenable. The statute applies to all cases where the fire results from the operation of a railroad. It is not even confined to fire escaping from locomotives, but applies to all cases where the damage was caused by fire arising from any step in the operation of the road. The road-way and track of the company are as essential to the operation of the railroad as the locomotive or other equipment, \* \* \* but in our opinion, the care and maintenance of the road-way and track is fairly included as a part

of the operation of a railroad." The burning of dry grass, weeds, and other combustible material which annually accumulates on the right of way, is caring for the road-way and track. It will be seen, therefore, that this question has already been settled by this court, and we believe rightfully and justly settled.

All the other questions raised in this case were ably discussed and fully settled by the court in the case from which we quote, and it is deemed unnecessary to renew the discussion here. It is therefore recommended that this case be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

MISSOURI PAC. R. CO. v. ATWOOD CADY.

(Supreme Court of Kansas. Nov. 8, 1890.)

Error to district court, Wilson county; L. STILLWELL, Judge.

W. A. Johnson, for plaintiff in error. J. B. F. Cates and B. F. Shinn, for defendant in error.

PER CURIAM. Atwood Cady brought this action against the Missouri Pacific Railroad Company to recover damages for an injury caused by fire. The injury in this case was caused by the same fire that is complained of in the case of Railroad Co. v. H. A. Cady, ante, 1088, (just decided.) The errors complained of in this case are identical with the errors complained of in that case. The same briefs are filed in each. It is recommended that this case be affirmed for the reasons given in that case, and in the case of Railroad Co. v. Merrill, 40 Kan. 404, 19 Pac. Rep. 798. The judgment of the district court will be affirmed.

MISSOURI PAC. R. CO. v. LAMAR.

(Supreme Court of Kansas. Nov. 8, 1890.)

Error to district court, Wilson county, L. STILLWELL, Judge.

W. A. Johnson, for plaintiff in error. S. S. Kirkpatrick, for defendant in error.

PER CURIAM. This is an action for damages growing out of the same fire complained of in the case of Railroad Co. v. H. A. Cady, ante, 1088, (just decided.) The questions raised in this case are identical with the questions in that; and the same briefs are filed in each. The questions in this case are also practically the same as the questions raised in the case of Railroad Co. v. Merrill, 40 Kan. 404, 19 Pac. Rep. 798. The judgment of the district court will be affirmed.

REINHART v. LUGO et al. (No. 13,638.)

(Supreme Court of California. Nov. 20, 1890.)

SERVICE OF WRIT—RETURN—VACATING JUDGMENT.

1. A service of summons by a deputy-sheriff, or one acting as such, is void when the return is made in the deputy's name instead of in that of the sheriff.

2. A default judgment, entered on a void service and return, is void, and is not validated by a finding of the court that there was due service, for such finding is not conclusive of the fact under Code Civil Proc. Cal. § 670, subd. 1, requiring the summons, together with proof of service, to be made a part of the judgment roll in case defendant fails to answer.

3. A motion to vacate a default judgment, on the ground that it is void because of lack of proof of service of summons on defendant, is not a collateral but a direct attack.

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4. Where, in a suit for the partition of several distinct parcels of land, plaintiff has judgment, but it is reversed on appeal as to one tract, in which a defendant against whom a default judgment was entered was interested, the whole judgment as to that tract is thereby set aside, and defendant in default can move to vacate the default within a year from the rendition of judgment on the second trial.

Department 1. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, Judge.

Wicks & Ward, for appellant. Howard & Roberts, John D. Bicknell, and Finlayson & Finlayson, for respondents.

Fox, J. This is an appeal from an order setting aside the default and judgment thereon, entered against the defendant Antonio Maria Lugo, and permitting him to answer in the cause. This court will not interfere with the action of the court below in making such an order as that appealed from in this case, where, as here, it appears to have been made upon affidavit of merits, unless it affirmatively appears that the court was without jurisdiction to make, or abused its discretion in making, the order. The action was for partition of several parcels of land, designated, respectively, as "A," "B," "C," "D," and "E." There were several defendants in the first instance, and, by amendment subsequently made, several others were brought in as defendants. Respondent Antonio Maria Lugo was one of the original defendants, and plaintiff in his complaint, which has never been amended in that particular, avers that the respondent claims some segregated interest in that portion of the lands sought to be partitioned, and designated as "Tract A," the exact nature and extent of which is not accurately known to plaintiff; and in another and prior portion of the complaint he alleges that he and the defendants named, of whom the respondent is one, "hold and are in possession, and are the owners and tenants in common, as hereafter set out," of the several tracts of land designated as above stated. A certificate, headed "Office of the Sheriff Los Angeles County, Cal.," and dated May 14, 1885, is indorsed upon the *alias* summons, reciting that the respondent was served, by delivering to him a true copy of said summons, at the county of Los Angeles, on the 14th of April, 1885, and is signed "M. G. Aguirre." This is not made as, and does not purport to be, an affidavit of service. Aguirre was not the sheriff of the county, and if he was deputy-sheriff, or acting as such, as is now claimed, the fact is entirely immaterial. As proof of service, the certificate was and is void. "The act and return of a deputy is a nullity, unless done in the name, and by the authority, of the sheriff." *Joyce v. Joyce*, 5 Cal. 449; *Rowley v. Howard*, 23 Cal. 403. The certificate being a nullity, it was as if no return or proof of service had been made. There was therefore no authority to enter the default of the defendant. The clerk in entering defaults exercises no judicial functions, but acts merely in a ministerial capacity, and unless he confines himself strictly within the statute his acts can have no binding force. *Willson v.*

Cleaveland, 30 Cal. 198, citing *Stearns v. Aguirre*, 7 Cal. 443; *Kelly v. Van Austin*, 17 Cal. 564; *Glidden v. Packard*, 28 Cal. 651. Before default can be regularly taken against a party, there must be positive and sufficient evidence in court of due service, and no substantial defect in that respect can be cured by subsequent knowledge of the fact. *Johnson v. Delbridge*, 35 Mich. 436. If proof of service of summons is not made as required by law, the court acquires no jurisdiction of the persons of defendants, and has no authority to render judgment against them. Any judgment rendered is, therefore, invalid and void. *Lyons v. Cunningham*, 66 Cal. 42, 4 Pac. Rep. 938, and cases there cited.

The default of this respondent was entered by the clerk June 17, 1885, upon no other proof of service than that furnished by this certificate. Subsequently the complaint was amended, but it does not appear that the amended complaint was ever served upon this respondent. Such service is required by section 472, Code Civil Proc., and without it no judgment by default could be entered against him. "The right to answer an amended pleading is one of which a party cannot be deprived, even after entry of default against him on the original pleading; for where a plaintiff amends in matter of substance, (and in an action of partition, the bringing in of new parties, alleging that they have or claim an interest in the subject of partition, is matter of substance,) he in effect opens the default on the original pleading, and must serve his amended pleading upon all the parties, including the defaulting defendant." *Thompson v. Johnson*, 60 Cal. 292. Findings were filed, and decree entered, January 29, 1886. In the findings, the court recites the fact that certain defendants, among them this respondent, had been duly served with summons, and had not appeared, and their defaults had been duly and regularly taken and entered. Appellant claims that by reason of this finding the judgment was not void, but, at most, simply voidable, and that it cannot be attacked collaterally. There would be some force in this argument if a finding of due service was conclusive proof of the fact as against a defendant who had not answered; but, under section 670 of the Code of Civil Procedure, such a finding is not conclusive as against the evidence required to be in, and when found in, the judgment roll. By reference to subdivision 1 of that section, it will be seen that if the complaint be not answered by any defendant, the summons, with the proof of service thereof, must be made a part of the judgment roll. If it be answered, then that fact is sufficient proof of service, or of waiver. In this case, that which was claimed to be proof of service was made a part of the judgment roll, and comes up as such to this court. As we have seen, the proof is a nullity, and furnished no authority for entering the default of the defendant. It follows that the judgment entered thereon was invalid and void. *Lyons v. Cunningham*, supra. Motion to vacate a judgment on the ground that it is void is not a collateral but a direct attack. *Peo-*

*ple v. Mullan*, 65 Cal. 398<sup>1</sup>; *People v. Greene*, 74 Cal. 400, 16 Pac. Rep. 197. But it is claimed that the court has no power to vacate a judgment so entered upon motion, after the lapse of one year. Even if this were true, (but we do not concede that it is, where, as here, the judgment is void on the face of the record, and the authorities cited in support of the proposition do not sustain it,) it would not help the appellant in this case; for an appeal was taken by the plaintiff from the judgment, which we have so far been considering, and the same was reversed, so far as affected the right of plaintiff to have partition of tracts A, D, and E, and affirmed in other respects. *Reinhart v. Lugo*, 75 Cal. 639, 18 Pac. Rep. 112. Tract A is the one in which the complaint admits that this respondent is, or claims to be to some extent, an owner, tenant in common, and in possession. When the judgment as to the plaintiff's rights to partition in this tract was reversed, it vacated and set aside the whole judgment as to the tract, for a judgment in partition cannot be piecemeal; and as to that tract, it was as if no judgment had been entered. The court below correctly so understood it, and when the case was tried again, again passed upon and determined the rights of all parties, including those of this respondent, in the tract. Again it acted, as before, upon the default of this respondent, evidenced and entered as before; and, as a consequence, its judgment, like the first, was, as against this respondent, "invalid and void." This judgment was entered February 12, 1889, and it was the only judgment standing against the respondent in the case, so far as related to tracts A, D, and E. Notice of motion to vacate it was given July 8, 1889, to be heard on the 15th of the same month, and was determined on the 16th of September, 1889; so that even according to appellant's own theory, it was not too late.

But it is claimed that the court ought not to have vacated the judgment, because at the hearing appellant made proof of the fact of service of summons at the time mentioned in the certificate above referred to. That would not justify the court in refusing to vacate the judgment. The default and judgment were void, not because there was no service, but because there was at the time of entering the same no proof of service. This new proof might have been sufficient to have authorized the court, at any time after it was made, if the defendant had not answered, or had leave to answer, to enter a valid default, and thereupon to proceed to a valid judgment, but it would not operate by relation, to make that valid which when entered was void.

In any view we take of the case it does not appear that the court was without jurisdiction to make the order appealed from, and, there being a sufficient affidavit of merits, it does not appear that there was any abuse of discretion. Order affirmed.

We concur: PATERSON, J.; WORKS, J.

<sup>1</sup> 4 Pac. Rep. 348.

86 Cal. 293

## PEOPLE v. NEVCE. (No. 20,671.)

(Supreme Court of California. Nov. 18, 1890.)

## EMBEZZLEMENT—INFORMATION—EVIDENCE.

1. An information for embezzlement which fully states the facts constituting the crime is good though it does not designate the accused as "bailee," "trustee," or "agent," or formally put him in any of the classes named in the statute defining embezzlement.

2. On prosecution for embezzlement, previous acts of embezzlement similar to the one charged, and against the same person, may be shown.

Department 2. Appeal from superior court, Sonoma county: S. K. DOUGHERTY, Judge.

*George Pearce and J. C. Sims*, for appellant. *Geo. A. Johnson*, Atty. Gen., for the State.

MCFARLAND, J. The defendant was convicted of embezzlement, and appeals from the judgment and an order denying a new trial.

1. The objections raised by the demurrer and motion in arrest of judgment, to the sufficiency of the information, are not well taken. The main point here made is that appellant is not called in the information "bailee" "trustee" or "agent," or formally put into any of the classes named in the sections of the Code which define embezzlement. But facts constituting the crime were fully stated, and, that being so, it was not necessary to designate the appellant by any particular name, (*People v. Johnson*, 71 Cal. 389, 12 Pac. Rep. 261; and the information in all other respects was unassailable.

2. The transcript is defective on the points sought to be made about alleged errors in ruling on the admissibility of evidence. The bill of exceptions merely shows that respondent asked certain questions of certain witnesses; that appellant made certain objections to said questions; that the court overruled the objections; and that appellant excepted. But it is not shown whether the answers to the questions were favorable or unfavorable to appellant, or that they were answered at all. It is true that in another part of the transcript the appellant "tenders all the evidence, objections, rulings, exceptions, instructions given and refused, shown in the report of the trial of said action taken down by George Hall, reporter of said court;" but in said report which follows there are no objections, rulings, or exceptions. But if the exceptions stated in one part of the transcript could possibly be applied to evidence stated in another part of the transcript, which was apparently admitted without objection, it would be found that they are pointed to certain testimony which might be construed as tending to prove previous acts of embezzlement similar to the one charged in the information, and against the same person. But it has frequently been held that in a case of embezzlement the admission of such evidence is not erroneous. *People v. Gray*, 86 Cal. 271, 5 Pac. Rep. 240.

3. In the brief of appellant no point is made on the instructions. We have examined them, however, and find in them no material error. Really the only apparent defense which appellant could have

had on the evidence as presented by the record was the technical one that the money which he is charged with embezzling was not the property of McLean, as averred in the information, but of Wightman, to whom it was to have been paid; but there was evidence that appellant was the agent of McLean who gave him the money. That question was submitted to the jury, and we see no error committed with respect to that question. Judgment and order affirmed.

We concur: SHARPSTEIN, J.; THORNTON, J.

86 Cal. 403

## PEOPLE v. LATTIMORE. (No. 20,700.)

(Supreme Court of California. Nov. 20, 1890.)

## ARSON—EVIDENCE—ALIBI.

1. On a trial for arson, witnesses for the state testified to several conversations with defendant before the fire, in which the subject of previous fires on the property of the same person was discussed, and defendant said they were nothing to what would happen, and used expressions indicating an intention to burn out said owner. Held, that these conversations were properly admitted to show defendant's threats as to the future.

2. Evidence tending to show that defendant started the former fire was admissible to prove intent.

3. The defense of *alibi* is not one requiring that the evidence given in support of it should be scrutinized otherwise or differently from that given in support of any other issue in a cause.

Department 1. Appeal from superior court, Los Angeles county; WILLIAM A. CREENEY, Judge.

*Bower & Grant*, for appellant. *Frank P. Kelly*, for the People.

FOX, J. Conviction of arson, motion for new trial denied, and defendant appeals. Only two points are made in the brief of appellant.

1. That it was error to admit certain evidence of other burnings of property on the rancho of Chapman, the place where the fire in this instance occurred. The evidence against the defendant in this case was almost entirely circumstantial. Among other circumstances tending to connect the defendant with the burning, two or three conversations between the defendant and different persons, at different times, were shown, in which the fact of former fires upon the rancho was discussed, and the defendant used expressions to the effect that these were nothing to what would happen in the future, and other like expressions of a threatening character, indicating an intention to burn the Chapmans out. These conversations were not introduced for the purpose of connecting the defendant with the former burnings, but simply to show his threats as to the future. They all occurred before the present fire, and there was no error in their admission. Subsequently two witnesses were called and interrogated as to the circumstances of one of the former fires to which allusion had been made in these conversations, and they gave testimony strongly tending to show that the defendant started the fire to which reference was made. The fire referred to in

this evidence was the burning of another building on the same premises, and belonging to the same person as the one for which the defendant was being prosecuted in this case, and to the same person against whom the threats already proved had been made. Under the rule laid down in *People v. Shainwold*, 51 Cal. 468, the evidence was admissible as further evidence tending to prove intent, although it may have been but cumulative and unnecessary. As said in the case cited: "While perhaps unnecessary, it wrought no such injury to the prisoner at the trial as to entitle him to a reversal of the judgment here."

2. One of the instructions given by the court to the jury was an exact copy of the instruction considered by this court in bank, in the case of *People v. Levine*, ante, 631, (No. 20,572, filed July 21, 1890.) We again repeat that the defense of *alibi* is "not one requiring that the evidence given in support of it should be scrutinized otherwise or differently from that given in support of any other issue in the cause;" and we may add that, if trial courts will cease to give this particular form of instruction, the ends of justice will be equally as well subserved, and the administration of the laws less embarrassed. But in this case, as in the *Levine* Case, the charge of the court, taken as a whole, was so full and fair to the defendant that we cannot conceive that any injury resulted to the defendant from this unnecessary instruction in regard to the scrutinizing of the evidence given in support of the defense of *alibi*.

3. At the oral argument, an additional point was made,—that the evidence was insufficient to justify the verdict. We have carefully read all the evidence in the record, and find no cause for disturbing the verdict upon this ground.

Judgment and order affirmed.

I concur: PATERSON, J

WORKS, J. I think the instruction complained of, relating to the defense of *alibi*, was erroneous, but, as the court in bank held in *People v. Levine* that such an instruction was not cause for reversal, I feel myself bound by that decision.

3 Cal. Unrep. 306

MANNING V. DEN. (No. 13,821.)<sup>1</sup>

(Supreme Court of California. Nov. 19, 1890.)

SPECIAL ASSESSMENTS—HARMLESS ERROR—EVIDENCE.

1. Where plaintiff, in an action to collect a street assessment, has made *prima facie* proof of the regularity of the proceedings, under Act Cal. March 18, 1885, (St. 1885, p. 147,) and thereafter introduces, without objection, certain parol proof, a refusal to strike this out, if error, is without injury, as such proof was unnecessary.

2. An objection to an offer to prove certain negative conclusions is properly sustained where there is no offer of the evidence from which the conclusions are to be drawn.

Department 1. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, Judge.

M. Whaling, for appellant. Herndon, Cain & Garrison, for respondent.

Fox, J. This is an action to recover an amount claimed to be due upon a street assessment levied under proceedings had in pursuance of the provisions of the act of March 18, 1885, (St. 1885, p. 147.) Judgment for plaintiff, motion for new trial made and denied, and defendant appeals.

The principal contention is that the evidence is insufficient to show that the proceedings resulting in the assessment and warrant were such as required by law, and sufficient to entitle the plaintiff to recover; in other words, that there was a failure to show a valid contract upon which to base the assessment and warrant. Section 12 of the act which authorizes the suit provides: "The said warrant, assessment, and diagram, with the affidavit of demand and non-payment, shall be held *prima facie* evidence of the regularity and correctness of the assessment, and of the prior proceedings and acts of the superintendent of streets and city council upon which said warrant, assessment, and diagram are based, and like evidence of the right of the plaintiff to recover in the action." With the policy of this provision, the court has nothing to do, so it is written and adopted by the legislature. The assessment and diagram attached were offered and admitted in evidence without objection. Plaintiff then offered the warrant and affidavit, with the indorsement of record thereon. To this, defendant "made the same objections as those offered to the assessment." As he had offered no objections to the assessment, this objection was correctly overruled. This made out a *prima facie* case for the plaintiff. But, in addition to this, the plaintiff did introduce, without objection, the records of all the preliminary proceedings on the part of the city council prescribed and required by the statute, with the proof of publication, posting, etc., and in addition thereto made, without objection, parol proof of the fact of contract. This last proof the defendant subsequently moved to strike out, but as it was admitted without objection, and was unnecessary, since the warrant and assessment were *prima facie* proof of the same fact, the court denied the motion. We do not think that this ruling was erroneous, but, if it was, it was error without injury.

Plaintiff, having also proved his assignment of the claim to himself, rested, when the defendant moved for a nonsuit, on 10 different grounds, every one of which is based upon a misconception of the effect of the evidence already in, and hereinabove stated. There was no error in denying the motion. Defendant then "offered to prove" several negative conclusions, not facts, but, as he did not offer the evidence from which the conclusions were to be drawn, the court correctly sustained an objection to the offer. He then called the street superintendent, (successor in office to the one under whom the contract, assessment, and warrant were made,) who, at defendant's request, produced two papers, which defendant offered in evidence. These appeared to be a blank form, partially filled out, of contract, and a bond for the same street-work for which this assessment was made. The bond was complete, fully ex-



ecuted, approved, and certified; but the paper offered as a contract was a mere blank, and there was no attempt to prove that it was the contract, or claimed to be the contract, under which the work was done, or on which the assessment was based. Objection to its introduction was properly sustained. The authorities cited by appellant, in view of the statute, the *prima facie* case made by plaintiff, and of the fact that defendant made no showing to overcome that *prima facie* case, though good law, are not in point. Judgment and order affirmed.

We concur: PATERSON, J.; WORKS, J.

86 Cal. 415

BERONIO v. SOUTHERN PAC. R. CO. (No. 13,673.)

(Supreme Court of California. Nov. 21, 1890.)

RES ADJUDICATA—AMENDMENT OF PLEADING.

1. A railway having been constructed along a street on which plaintiff owned two lots, a few hundred feet apart, he obtained judgment for damages to one of them arising from the construction and operation of the road. Held, that this was a bar to a suit for damages to the other lot, accruing prior to the filing of the complaint in the first suit, from the same cause.

2. It is not an abuse of discretion to allow an answer to be amended after a jury is impaneled, where it does not appear that plaintiff was taken by surprise, or suffered any injury therefrom.

Department 1. Appeal from superior court, Ventura county; R. M. DILLARD, Judge.

H. L. Poplin and Barnes & Selby, for appellant. R. B. Canfield and Blackstock & Shepherd, for respondent.

Fox, J. The town of San Buenaventura is a municipal corporation. The legal title to the lands comprising Front street in said town was granted to the then town authorities, October 13, 1869, "as a public street, to be forever kept open and maintained as such, and not to be used for any other purpose, nor be diminished in width." On the 4th of October, 1886, the president and board of trustees of the town, by ordinance, granted to the defendant a right to lay, maintain, and operate a single or double track railroad along and upon said Front street for the whole length thereof, from a point near Kalorama street, etc. The plaintiff owned two lots fronting on the north side of said street, one situate in block 19, and one in block 20, the two being separated by a distance of 260 feet. The railroad was constructed along said Front street prior to September 13, 1888, and on that day plaintiff commenced an action against defendant for damages to his lot situate in block 19 by reason of a cut and fill made in the construction thereof, and on the 26th day of January, 1889, the amount of plaintiff's damages were agreed upon and settled between the parties, and paid by defendant to plaintiff, and thereafter, in pursuance of the agreement between the parties, judgment was entered in the cause in favor of defendant. Afterwards the defendant put in a switch on the south side of the street, opposite said block 19, and

thereupon the plaintiff brought this action, alleging, in the first count of his complaint, damages by reason of the construction and maintenance of said railroad in front of his lot in block 20, and, in the second count, damages to his said lot in block 19, accrued since the former settlement and judgment, by reason of the continuance of said railroad, and the operation thereof, and of the construction of said switch, in front of his said lot in block 19. The defendant denied all the allegations of the complaint other than those of incorporation, pleaded its license from the municipal authorities, and, as a separate defense to the second cause of action, pleaded the former settlement, payment, and judgment in bar. At the trial, after the jury was impaneled, but before the introduction of any evidence, defendant moved the court for leave to amend its answer by pleading the former settlement and judgment as a bar to all the causes of action set out in the complaint. To this the plaintiff objected, on the ground that the amendment did not constitute a defense. After argument, the court overruled the objection, and the amendment was made, the court not imposing terms, to which plaintiff excepted, but plaintiff asked no continuance on account of such amendment. Plaintiff then introduced some evidence tending to show damage to his lot in block 20 by reason of the construction of said railroad, a cut of 18 inches in depth having been made in the street by reason thereof. Defendant then introduced the judgment roll in the former case, which was admitted without objection, and it was admitted by the parties that the parties to that action were the same as to this; that the railroad mentioned in the former complaint was one and the same railroad as that mentioned in this case; that plaintiff at the time owned the same lots as now, and was then the owner of the same cause of action upon which he now claimed under his first count of the present complaint; and that the said two lots were separated by a distance of 260 feet. Plaintiff then proposed to introduce further evidence as to his damage to the lot situate in block 20,—the cause of action mentioned in the first count of his complaint,—but the court ruled the same out, on the ground that his claim for such damage was barred by the said former judgment. Plaintiff admitted that he had no claim for damage to his lot in block 19 caused by the construction of the railroad's main track. The record fails to show the introduction or offer of any evidence of damage by reason of the construction and maintenance of the switch. The plaintiff asked the court to instruct the jury that the former settlement and judgment were not a bar to any claim for damages done to the lot in block 20; that such damages, if any, constituted a separate cause of action from that sued for in the former case, and, if any such were found, the same should be included in a verdict for plaintiff. The court refused to so instruct the jury, and, on the contrary, instructed the jury that, as the case was presented, the only question for their consideration

was the damages, if any, done to the lot in block 19 by reason of the construction and operation of the switch and side track in front of his premises in that block. To all these rulings the plaintiff excepted.

We think there was no error in the rulings or instructions of the court in this behalf so far as relates to any damage accruing to either of plaintiff's lots prior to and up to the time of filing his complaint, or making his settlement in the former action. The elements of his damage up to that time may have been multifarious, but the cause of it was a unit,—the construction and operation of a single railroad, which was complete at the time. The fact that it damaged two lots belonging to the same man at the same time, and by the same means, no more created two causes of action than if two horses belonging to the same man had been killed by a single collision with a locomotive; and this has been held to constitute but a single cause of action. *Brannenburg v. Railroad Co.*, 13 Ind. 103. In cases of tort, the question as to the number of causes of action which the same person may have, turns upon the number of the torts, not upon the number of different pieces of property which may have been injured. Each separate tort gives a separate cause of action, and but a single one. 1 *Suth. Dam.* 183, and cases cited. Whenever by one act a permanent injury is done, the damages are assessed once for all. 3 *Suth. Dam.* 372. This principle is established in *Marble v. Keyes*, 9 Gray, 221, and in very many other cases. There is nothing in the authorities cited by appellant in conflict with this view.

Appellant claims that he was entitled to recover for the damages sustained by the continued operation of the railroad after the settlement and judgment in the former case. This claim conflicts with the authorities already cited, but under *Hopkins v. Railroad Co.*, 50 Cal. 190, and *Ford v. Railroad Co.*, 59 Cal. 290, there might be some force in the argument, if there was anything in the case upon which to base it. But the record shows that plaintiff admitted that he had no claim for damages to the lot in block 19 accruing after the date of the former complaint, and it fails to show any proof of damages to either lot after that date.

Appellant also claims that he was entitled to recover for the damages to his lot in block 19 by reason of the construction and operation of the switch and side track. The court ruled in his favor in that regard, and he proved the fact of the construction and operation of the switch and side track, but his record fails to show that he offered to prove any damages by reason thereof. We cannot therefore disturb the verdict of the jury in that regard.

Appellant also complains of the action of the court in permitting the answer to be amended, after the jury was impaneled, and in denying his subsequent motion to strike out the amendment. This was a matter entirely in the discretion of the court. The plaintiff does not seem to have been taken by surprise, or to have suffered any injury therefrom, and we do not per-

ceive that there was any abuse of discretion. Judgment and order affirmed.

I concur: PATERSON, J.

WORKS, J. I concur in the judgment. Under the circumstances of this case, the lots claimed to have been affected lying near to, if not adjoining, each other, and the road being completed at the time the first action was brought, the settlement of that case was rightly held to be a bar to the second action. But a case might arise where a road being constructed would pass over and affect two tracts of land owned by the same person, the tracts being a long distance apart, and that part of the road affecting one piece of land be constructed long before the part affecting the other piece. In such a case the construction of the whole road could not, with any propriety, be treated as but one act, and the land-owner be compelled to delay his action until the whole road is completed, and join his action for damages to both pieces of land, or bring his action for both, when it may be uncertain whether the last part of the road will ever be completed or not. Under such circumstances, separate actions should be allowed, and, in my judgment, the opinion of Mr. Justice Fox is too broad in its language in this respect.

36 Cal. 405

WOLFSEKILL V. LOS ANGELES COUNTY *et al.*  
(No. 13,728.)

(Supreme Court of California Nov. 21, 1890.)

DEDICATION OF HIGHWAYS—ESTOPPEL TO DENT.

1. Land was sold, with the understanding that, after the first deferred payment, the vendee should subdivide the same, lay out streets, and make and record maps thereof, and make sales according to such maps, and the vendor was to and did join in conveyances in pursuance to that understanding, the lands conveyed being described by lots, blocks, and numbers, and as bounded by streets, as laid down on the maps. The legal title and possession remained in the vendor, as security for the price, but such land as was appropriated to roads or other improvements was expressly excepted from his reservation of possession. The clause of the contract relating to the making of surveys, construction of roads, etc., provided that "the inclosures of the party of the first part shall be left practically unimpaired." About two years after the recording of the maps the county commissioners assumed jurisdiction of a street laid down on said maps, along the entire length of the western boundary of the land. They accepted a deed of a strip of land on the west of it, and, as thus widened, extended it north and south, and changed its name. Said vendor was living on said land, and made no objections until after the street had been graded part way through said land, and the commissioners were proceeding to have the fence removed from the western boundary of said land and replaced on the eastern side of the road. Held, that it was then too late to withdraw the offer of dedication of the street as a public highway.

2. Such chance in the fence was not a practical impairment of the vendor's inclosures.

Department 1. Appeal from superior court, Los Angeles county, J. W. McKINLEY, Judge.

Smith, Winder & Smith, for appellant.  
Houghton, Silent & Campbell, for respondents.

Fox, J. This is an action for the recovery of the sum of \$5,000 damages for trespass *quare clausum fregit*, and praying for an injunction perpetually restraining the defendants from further trespass, and from laying out and opening a public highway on lands claimed by plaintiff. Defendants had judgment, from which, and an order denying plaintiff's motion for new trial, plaintiff appeals.

It seems from the pleadings, findings, and evidence in the cause that the plaintiff was the owner of a tract of land situate in the county of Los Angeles, consisting of 4,387 acres, known as the "Rancho San Jose de Buenos Ayres." On the 27th of May, 1887, he entered into a contract with J. W. Hoyt, for the sale of said tract, for the sum of \$438,700. This was to be paid in installments,—\$1,000 down; \$37,700 on or before July 1, 1887; \$100,000 on or before January 25, 1888; \$150,000 on or before July 25, 1888; and the balance, \$150,000, on or before July 25, 1889, with interest at the rate of 6 per cent. per annum, on deferred payments, from June 25, 1887. It was further provided in the agreement, "for the purpose of enabling the said second party to subdivide and resell said land, the said second party shall have the right, after the payment due July 1, 1887, is made, to enter upon said land for the purpose of making surveys, constructing roads, developing and piping water, and making other improvements, provided that the inclosures of the party of the first part shall be left practically unimpaired." It was further agreed that the plaintiff should execute deeds of conveyance of lots, and subdivisions of the tract, as sales were made, (a minimum price being fixed at which different portions thereof should be sold,) the sales to be made for not less than one-third cash, the balance to be secured by mortgage upon the portion sold, plaintiff to receive the cash and credit the same on his contract, and also to receive the notes and mortgages given by purchasers, and, when they were paid, to also credit the amount on his said contract. As to the payment due July 1, 1887, time was made of the essence of the agreement. It was also "further understood and agreed that the party of the first part shall remain in possession of the said ranch until the full payment of installments of the purchase money to be paid, on or before July 25, 1888, as above stipulated, excepting such portions as may be conveyed to purchasers, as above agreed, or such portions as may be appropriated to roads or other improvements, as above stipulated, and shall receive the rents and profits thereof for his own use and benefit." It is conceded that the payment due July 1, 1887, was made according to contract. On the 28th of that month, Hoyt conveyed all his interest in the land, and in the contract, to the Los Angeles & Santa Monica Land & Water Company, a corporation. This was done with the knowledge and in the presence of the plaintiff, and he thereafter dealt with the company as his contract vendee. Upon receiving this transfer, the company proceeded to carry out the purpose for which the contract was evidently made, and to

exercise the powers conferred by the contract, of subdividing and laying off the land, making improvements, and sales, etc. In the exercise of this power, it made two maps, and placed the same of record,—one of a town-site, situate in about the center of the tract, called "Sunset," and the other of the lands embraced in the tract, and lying outside the town-site, these outside lands being divided into subdivisions, varying in size from 1 acre to 75 acres, and the tract being so intersected into streets and roads that every subdivision had at least one frontage upon some street, road, or avenue. The company also published and distributed a lithograph map, combining the two maps, and showing the entire tract, as subdivided and laid off by and upon the two maps so made matter of record. To what extent, if any, it made other improvements upon the land, does not appear, and is unimportant, for the purposes of this case. It did make a large number of sales of different subdivisions, and the plaintiff, at its request, and in pursuance of the terms of the contract, made conveyances, to the number of 100 or more, receiving the cash payments made thereon, and crediting the same on the contract, and also receiving the notes and mortgages of purchasers, and holding them as collateral to his contract, as therein provided. He also himself became a purchaser from the company of lots to the amount of \$47,000, and accepted the company's deed for the land, crediting the amount upon his contract. All the conveyances so made and united in by him, and that accepted by himself, described the property conveyed by lots, blocks, and numbers, and as bounded by streets, as laid down on the recorded maps above mentioned. He also accepted from the company a conveyance of several parcels of the outside lands of the tract, described according to the said outside map, and gave a declaration and certificate acknowledging and declaring that the same had been conveyed to him in trust; and that he held the same in trust, as security for the payment of \$1,000 agreed to be contributed by the company to the National Soldiers' Home, an institution located on a tract adjoining said rancho, and the payment of which contribution had been guaranteed by him. The payment of \$100,000, due January 25, 1888, with the interest, was duly made; but the company was unable to meet its subsequent payments, as they fell due, and the plaintiff entered into supplemental agreements with it, extending the time of such payments, and subdividing the same, and acknowledged the receipt of divers sums, on account of such subsequent payments. Several roads, streets, and avenues were laid down on the recorded map of said outside lands, or what is called the "Acre Subdivision" of said tract, and, among others, one 60 feet wide along the entire length of the western boundary thereof, from the northern to the southern boundaries, called "Pacific Avenue," and the land fronting on the same was laid off into subdivisions varying from 10 to upwards of 70 acres each, in extent. All the lands fronting

on this avenue were sold and conveyed according to the map, and in the manner above indicated. At the date of the contract, and up until the date of the alleged trespasses of defendants, the entire tract was substantially inclosed, and the defendant living on it, in full view of everything that was being done on the tract. When the plats were made, the land was surveyed and laid off on the ground, as the same was shown on the maps, and stakes set at the corners of the several lots, and along the lines of the several streets and roads. In this condition of affairs, the board of supervisors of the county, in January, or early in February, 1889, assumed jurisdiction over Pacific avenue, as a public highway. On the 8th of February a petition was received by the board concerning the same, and, in due course, was acted upon by the board. They received and accepted a deed of a strip of land 40 feet wide, adjoining it on the west, for the entire length thereof, and with that widened the same to 100 feet, and changed the name thereof to "Military Avenue." They procured the necessary right of way, and extended the same southward some two miles to connect with another road called "National Boulevard," and northward to another road called "Nevada Avenue," running through the Soldiers' Home tract, and they ordered that the whole road, thus widened and extended, be opened and graded, and appointed one of their number, the defendant Davis, a committee to carry the order into effect. Under this order that portion of the road lying south of this rancho was opened and graded, and the graders entered upon the portion thereof on the ancho, and within the then inclosures thereof, and graded about one mile thereof. At this stage, they took down the 60 feet of fence which was within the platted road-way on the south boundary of the rancho, and proceeded to take up the fence along the western boundary of the rancho, and moved the same, and replaced it, in as good order and condition as it was before, 60 feet eastward, and along the eastern line of the avenue as it was surveyed, staked, and platted. During all this time, the plaintiff was living on the rancho, and in full view of the work going on, but made no protest or objection thereto. The supervisor having charge of the work says he heard of no objection on the part of plaintiff until about a mile of the fence had been moved back. This evidence is not contradicted, and oral evidence of all the facts as to the action of the board of supervisors, as herein stated, was received without objection, and no effort was made to contradict it in any particular. It was proved and admitted that up to the time of the removal of the fence no part of the land within the inclosure, and included in Pacific avenue, had in fact been used as a public highway. The matter of opening and grading the highway having progressed thus far, this action was commenced, April 13, 1889. No restraining order was sought or made, *pendente lite*, and whether the work has been prosecuted further does not appear.

To our minds the controlling question in the case is whether or not there had been an offer and acceptance of dedication of Pacific avenue to public use as a public highway. The appellant strenuously insists upon the negative of this proposition, and relies chiefly upon the case of *People v. Reed*, 81 Cal. 79, 22 Pac. Rep. 474, in support of his position. But the case now under consideration is very different from that of *People v. Reed*. In that case the plat or map had never been recorded, and for that reason it was expressly held, (page 78,) "where the right to claim the street by the public rests upon the map alone, there is no offer to be accepted until the same is filed for record." It was further held, and we adhere to that ruling in this case, that the mere sale of lots according to an unrecorded map is not such a dedication as makes the public an interested party. It was further held, in substance, and we again repeat, that even the filing of a map, and the recording of the same, is but an offer of dedication of the streets and highways delineated thereon, and that, "in order to constitute a dedication which can be taken advantage of by the public authorities, \* \* \* the offer of dedication must have been accepted by such authorities, either by user or some formal act of acceptance." Page 79, and cases there cited. And we may make a further addition, which the history of the country now seems to demand, that the acceptance, by user or otherwise, of one or more particular streets or highways shown upon a recorded map, will not operate as an acceptance of all or any other of the streets or highways delineated thereon. "Such acceptance must be within a reasonable time after such offer of dedication, and, if not accepted, the owner may resume the possession of the property, and thereby revoke his offer." Page 80, and cases there cited. That case was decided in bank, and the principles there laid down, and here affirmed, furnish ample protection to this plaintiff, and to all others whose lands have been platted into streets, lots, and blocks, against any claims of the public to streets and highways of which the offer of dedication has not in some form been accepted by the public authorities. But in the *Reed* Case, as before stated, there was never an offer of dedication, for the reason that the map was never recorded. Some time after the map was made, the land in controversy in that case was actually inclosed, and substantial buildings erected thereon, and the same were occupied for more than 20 years before there was any attempt made to accept what was claimed to have been, by reason of the making of the map, an offer of dedication. The court held, not only that there had been no offer of dedication to be accepted, but also that, even if the making of the map, without recording the same, and the sale of lots according to the same, had been an offer of dedication, there had been a withdrawal of the offer more than 20 years before the attempted acceptance. The facts of that case are so unlike those here developed that the case is not in point. Here the land was sold, with the

express understanding, in the beginning, that, upon the making of the first deferred payment, the vendee should have the right to, and intended to, subdivide the same into smaller tracts, with streets and roads upon and through the same, and make and record maps thereof, and make sales according to such maps; and the vendor was to and did join in conveyances made in pursuance with that intention and understanding. The legal title and possession remained in the vendor, as security for the unpaid portion of the purchase money; but, as to possession, he expressly excepted from his reservation thereof such portions of the land as should be appropriated to roads or other improvements. It is true that in the clause of the contract which provided for the making of surveys, construction of roads, etc., there was a provision that "the inclosures of the party of the first part shall be left practically unimpaired;" but it was expressly proved on the trial, and no attempt made to contradict the evidence, that the work of opening and constructing Pacific avenue was so conducted as that it did leave the inclosures of plaintiff "practically unimpaired." His fences were kept intact, and the inclosure of the vast tract complete, with the exception of placing without instead of within the inclosure the strip of land 60 feet wide along the westerly line of the rancho, which had been "appropriated to" the road called "Pacific Avenue." This appropriation was contemplated by the contract, and this change in the fence can hardly be claimed as a "practical impairment" of his inclosure. Here, then, was a clear offer of dedication, made by the equitable owner, under authority from, and with the full knowledge and consent of, the holder of the legal title, and after payment to and receipt by him of the full consideration demanded as a condition precedent to such authority. In the most solemn manner, and by the most solemn acts, he frequently thereafter ratified the offer, and both he and the owner of the equitable title kept the offer open, with no attempt at withdrawal, or intimation of desire to withdraw it, until, a little more than two years after the offer was first made, the public authorities, by their public acts, of which all the world had constructive notice, and of which it is not pretended that plaintiff did not have actual notice, accepted the offer so far as this one avenue or highway is concerned,—accepted the offer, and assumed jurisdiction and control over it, changed its name, acquired the necessary property to widen and extend it, and, by public act, did widen and extend it, and actually entered upon and graded a goodly portion of it, under the very eyes of the plaintiff, all without protest or objection from him. It was and is therefore too late for him to withdraw that offer of dedication so far as this one street or highway is concerned. The public accepted it within a reasonable time, and before any attempt to withdraw it, or to make any use of the property offered other or different from that which was being made when the offer was made matter of public record. Ex-

tracts from the records of the board of supervisors are presented in the record, from which it is argued that no formal resolution of acceptance of the offer was ever passed. We do not regard this fact as material, if it be true. Such a resolution would be but evidence of acceptance, but it is not the only evidence of such an act. Publicly dealing with the property as a public highway, in such manner as this was dealt with, widening, extending, and grading it, changing its name, and the like, are acts tending to prove acceptance, and proof of these acts, and of the fact of acceptance, was made orally, without objection, or attempt at contradiction. We think they were binding upon plaintiff and his vendees, and that they completed the act of dedication to public use. It does not follow that this would affect, and nothing in the record appears affecting, the question of dedication of any other road or street laid down upon said tract. In view of the conclusion here reached, it is unnecessary to consider any of the other questions discussed by counsel. Judgment and order affirmed.

We concur: PATERSON, J.; WORKS, J.

LIMERICK *et al.* v. QUINN.

(Supreme Court of Kansas. Nov. 8, 1890.)

CASE MADE—AUTHENTICATION.

A case made, signed by the trial judge, but not attested by the clerk of the court with his signature, and the seal of the court, will not be reviewed by the supreme court for alleged errors, when challenged for want of proper authentication.

(Syllabus by Strang, C.)

Commissioners decision. Error from district court, Harper county; J. T. HER-  
RICK, Judge.

J. J. Merrick and Quinton & Quinton, for plaintiffs in error. Shepard, Grove & Shepard, for defendant in error.

STRANG, C. This was an action on a promissory note begun before a justice of the peace, and appealed to the district court, and there tried, January 24, 1888, by a jury, who returned a verdict for the defendant for costs. The plaintiffs bring to this court what purports to be a case made, and asks this court to review certain alleged errors therein. The defendant objects to a consideration of the case by the court, because the case made is not properly authenticated. The record as sent here is signed by the judge of the district in which the cause was tried, but it is not attested by the clerk of the court. Paragraph 4649, Gen. St. 1889, provides as follows: "The case and amendments shall be submitted to the judge, who shall settle and sign the same, and cause it to be attested by the clerk, and the seal of the court to be thereto attached." It will be seen that the statute requires the judge to sign the case made, and also cause it to be attested by the clerk, and the seal of the court thereto attached. It is not sufficient that the judge alone signs it. Indeed, its principal authentication is found in the attestation of the clerk, which is

evidenced by the seal of the court. In *Karr v. Hudson*, 19 Kan. 474, Chief Justice HORTON says: "What purports to be a case made in the proceedings before us is signed by the judge, and dated April 13, 1877. But the paper is not attested by the clerk, nor is the seal of the court attached. Hence the same is not authenticated as required by law. \* \* \* We cannot be unmindful of the behests of the law, nor have we any authority to dispense with the statutory provisions of authentication required to a case made." See, also, *Linton v. Frazier*, 29 Kan. 20; *Pierce v. Myers*, 28 Kan. 364. The record brought here is further challenged by the defendant, who says that it does not contain, and does not purport to contain, all the evidence in the case. This court has frequently held that so far as those questions are concerned, which require the preservation and incorporation into the record of all the evidence introduced on the trial of the cause to enable it to review them, the case made must upon its face affirmatively show that it contains all the evidence, or such questions will not be reviewed. *State v. Board*, 23 Pac. Rep. 101; *Eddy v. Weaver*, 37 Kan. 543, 15 Pac. Rep. 492; *Barker v. Barker*, 43 Kan. 91, 22 Pac. Rep. 1000; *Hill v. Bank*, 42 Kan. 364, 22 Pac. Rep. 324; *Insurance Co. v. Hogue*, 41 Kan. 524, 21 Pac. Rep. 641; *Railroad Co. v. Grimes*, 38 Kan. 241, 16 Pac. Rep. 472. There is no statement in the record sent here that it contains all the evidence introduced on the trial of the cause, and it does not otherwise satisfactorily appear that it contains all the evidence. For the reasons above given it is recommended that this case be dismissed.

PER CURIAM. It is so ordered; all the justices concurring.

(44 Kan. 538)

COFFMAN *et al.* v. HILLARD.

(Supreme Court of Kansas. Nov. 8, 1890.)

FAILURE TO SATISFY CHATTEL MORTGAGE—ACTION FOR PENALTY.

Under paragraph 3910 of the General Statutes of 1889, the right to the penalty of \$100 for a failure to satisfy a chattel mortgage follows the ownership of the property, and the purchaser of the mortgaged property, at the time the cause of action accrued, is the proper party to bring a suit to recover such penalty.

(Syllabus by Green, C.)

Commissioners' decision. Error to district court, Marion county; FRANK DOSTER, Judge.

*Keller & Bean*, for plaintiff in error. *C. W. Keller and C. E. Malcolm*, for defendant in error.

GREEN, C. This action was commenced by the plaintiff in the court below to recover the penalty of \$100, under paragraph 3910 of the General Statutes of 1889, for the failure to satisfy a chattel mortgage. The case was tried in the district court of Marion county by the court and jury, and resulted in a verdict and judgment for the plaintiff for \$100, and costs. The plaintiff in error brings the case to this court for review. The chattel mortgage in question

was upon 100 tons of hay in the stack, on section 27, township 17, range 4, in Marion county. The defense was—*First*, that the mortgage was never paid; and, *second*, that no demand for the satisfaction of the mortgage had ever been made upon the mortgagor before the suit was commenced. Upon the conclusion of the testimony, upon the part of the plaintiff, the defendants below demurred to the evidence, assigning as ground for such demurrer that the evidence disclosed the fact that the plaintiff below was not the owner of the mortgaged property, and therefore not entitled to bring the action. The evidence, upon the part of the plaintiff below, disclosed the fact that a portion of the hay included in the mortgage had been sold to Coffman and Mowrer, the plaintiffs in error, before the commencement of this suit; that the plaintiff had delivered all the hay they would accept, and the balance had been sold to another party, the last of September or the first of October, in 1887. This suit was commenced originally before a justice of the peace, on the 1st day of November following. Upon this state of facts, we think the demurrer should have been sustained. The law is settled by this court that the right to the penalty, in cases under this statute, follows the property, and is recoverable by the owner. *Thomas v. Reynolds*, 29 Kan. 304. The property having been sold, the plaintiff below had no further interest in it; and, inasmuch as the protection given by the statute is primarily to the owner of the property, he is the proper party to bring the suit to recover the penalty. We think the court erred in overruling the demurrer to the evidence. The mortgaged property having all been disposed of before the suit was commenced, the mortgagor's rights, under the statute, had gone with the property, and the right to the penalty for a violation of the statute accrued to the purchaser of such mortgaged property. This view of the case renders it unnecessary for us to consider the other errors of which complaint is made. We recommend that the judgment of the court below be reversed.

PER CURIAM. It is so ordered; all the justices concurring.

(44 Kan. 666)

JOHNSON *et al.* v. JOHNSON.

(Supreme Court of Kansas. Nov. 8, 1890.)

ACTION ON ACCOUNT—PLEADING—EVIDENCE.

1. Where a petition in an action on an account is verified, and the defendant does not seek to deny the correctness of the account stated, but alleges in his answer that the account was not due when the suit was brought, it is not error for the court to permit the defendant to introduce evidence to show that the suit was prematurely brought, though the answer was not properly verified, or was not verified at all.

2. In an action in which an order of arrest has been obtained, it is not error for the court to refuse to allow the plaintiff to introduce, as evidence to support his case, his own affidavit, made to procure the order of arrest.

(Syllabus by Strang, C.)

Commissioners' decision. Error from district court, Harper county; J. T. HARRICK, Judge.

*Love & Snelling*, for plaintiffs in error.  
*Shepard, Grove & Shepard* and *George B. Crooker*, for defendant in error.

STRANG, C. This action was begun by the plaintiffs June 16, 1886, in Harper county district court, for the recovery of \$211.47 on an account. The case was tried by a jury, resulting in verdict and judgment for the defendant. Plaintiffs presented a motion for new trial, which was overruled and excepted to, judgment entered, and time to make a case for this court given. The plaintiffs come here with their case made, and ask to be heard on two separate assignments of error. The defendant, however, objects to the consideration of the evidence by this court, for the reason that the case made does not contain, or purport to contain, all of it. This objection seems to be well taken. This court has held that the case made must affirmatively show that it contains all the evidence when it is necessary that the evidence should be preserved to enable this court to consider the error assigned. *State v. Board*, (Kan.) 23 Pac. Rep. 101; *Eddy v. Weaver*, 37 Kan. 548, 15 Pac. Rep. 493; *Insurance Co. v. Hogue*, 41 Kan. 524, 21 Pac. Rep. 641; *Hill v. Bank*, 42 Kan. 364, 22 Pac. Rep. 324; *Barker v. Barker*, 43 Kan. 91, 23 Pac. Rep. 1000; *Deatherage v. Burkdall*, 38 Kan. 732, 17 Pac. Rep. 605. This "case made" fails to show that all the evidence is preserved and incorporated therein; but an examination of the record, for the purpose of ascertaining whether or not it contains all the evidence introduced upon the trial of the cause, satisfies us also that the trial court committed no error so far as the two principal assignments of error—those upon which the plaintiffs seem to rely—are concerned, and therefore we will briefly notice them.

The first assignment of error that is pressed grows out of an objection by the plaintiffs to the introduction of any evidence by the defendant under the pleadings. The action was on an account, and the petition had attached thereto an itemized statement of the account, and was verified. The defendant first filed a general denial, but with leave of court subsequently filed an amended answer, in which, in addition to the general denial, he alleged the goods were purchased on 60 days' time, and that the account sued on was not due when the action was commenced. These answers were verified by the attorney of the defendant. The plaintiffs objected to the evidence being introduced by defendant, upon the ground that there was no issue formed, arguing that the answers were not properly verified, and that therefore, as the petition was verified, the allegations in the petition were to be taken as true under the statute, and the defendant should not be permitted to disprove them. Much the larger portion of the plaintiffs' brief relates to this question. We think the plaintiffs misapprehend the scope and meaning of the statute, (paragraph 4191, Gen. St. 1889,) which reads as follows: "In all actions, allegations of the execution of written instruments and indorsements thereon, of the existence of a corporation or

partnership, or of any appointment or authority, or the correctness of any account duly verified by the affidavit of the party, his agent or attorney, shall be taken as true, unless the denial of the same be verified by the affidavit of the party, his agent or attorney." An examination of the record shows that the defendant did not deny or attempt to deny the correctness of the account sued on, but he claimed the account was not due when the suit was brought. He alleged that in his answer, and thus raised the issue as to whether the action was prematurely brought or not. The paragraph quoted will show that, to raise such a question, an answer need not be verified at all. The correctness of the account was not the issue. The petition alleged the account sued on was due. The answer averred it was not due, and the issue thus formed could as well be raised without as with a verified answer. For instance, if the action had been on a promissory note, instead of on an account, the defendant would not have been permitted to deny the execution of the note on the trial, without his denial of its execution in his answer was under oath. But if the defendant sought to plead a want of consideration, or fraud in obtaining the note, he could do so without verifying his answer. "Only certain allegations are admitted by failure to answer under oath." *Pattie v. Wilson*, 25 Kan. 329; *Washington v. Hobart*, 17 Kan. 277. It follows, therefore, that the court committed no error in overruling the objection of the plaintiffs to the reception of the defendant's evidence upon the question as to whether or not the account sued on was due when the suit was commenced, though the answer was not verified.

The second important error complained of was the refusal to admit in evidence, as a part of the plaintiffs' case, the affidavit of one of the plaintiffs, made for the purpose of obtaining an order of arrest in the case. We do not think such refusal error. The affidavit in question was no more evidence in the trial of the case than any other *ex parte* affidavit of the plaintiff, made in reference to the subject-matter of the case. It is therefore recommended that this case be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

#### STATE v. SUMMERS.

(Supreme Court of Kansas. Nov. 8, 1890.)

##### NEW TRIAL—OVERRULING MOTION PRO FORMA.

It is error for a trial court to overrule a motion for a new trial merely *pro forma*, even if the case is submitted to the court for trial without a jury, by the agreement of the parties.

(Syllabus by the Court.)

Error from district court, Ellis county; S. J. OSBORN, Judge.

L. B. Kellogg, Atty. Gen., Charles Howard, and William L. Aaron, for the State.  
 D. Rathbone and Reeder & Reeder, for defendant in error.

HORTON, C. J. This case was tried before the district judge, a jury having been



waived by the parties. No special findings of fact were made or filed. A general finding was returned by the court in favor of Charles Summers. Thereupon the state filed its motion for a new trial, upon the following grounds: "(1) Irregularities in the proceedings of the court by which the plaintiff was prevented from having a fair trial; (2) that the decision of the court is not sustained by sufficient evidence; (3) that the decision of the court is contrary to law; (4) error of law occurring at the trial, and excepted to at the time by the plaintiff." The trial judge overruled the motion for a new trial *pro forma*. This was erroneous, and sufficiently prejudicial to reverse the judgment. The necessity for filing and presenting a motion for a new trial is fully stated in *Nesbit v. Hines*, 17 Kan. 316, as follows: "Counsel for plaintiff in error would ignore the motion filed in the district court, and ask us to grant a new trial because of the errors on the trial. Can this be done? If it can, the motion for a new trial is a useless ceremony, and might as well be abandoned altogether. A party has no abstract, inherent right to a new trial. He has a right because and so far only as the statute gives it to him. It prescribes the way to obtain it, and that is by motion filed within three days. If he fails to pursue this mode, he loses the benefit of any errors on the trial, and is concluded as to all matters occurring at the trial." See, also, *City of Atchison v. Byrnes*, 22 Kan. 65; *Clark v. Imbrie*, 25 Kan. 424. In *State v. Bridges*, 29 Kan. 138, it is said: "The district judge did not approve of the verdict of the jury as is usually done by trial courts in similar cases when such a motion is overruled, but expressly announced that he overruled the motion *pro forma*, and declined to look into the evidence or pass upon its sufficiency. This was serious and grievous error. It was a refusal on the part of the trial court to perform its bounden duty, alike unjust to this court and the appellant. When a verdict is challenged upon the ground alleged in this case, the judge, who has the same opportunity to hear and see the witnesses as the jury, should declare his approval or disapproval of the verdict, and, if he refuses to do this by overruling the motion *pro forma*, and thereby attempting to transfer the whole question to the supreme court, he trifles with the sacredness of his duty." In *Railroad Co. v. Keeler*, 32 Kan. 163, 4 Pac. Rep. 143, it is stated: "It is error for a trial court to overrule a motion for a new trial merely *pro forma*. Every trial court should exercise its best judgment when such a motion is presented to it, and should rule accordingly." See, also, *Insurance Co. v. Neff*, 43 Kan. 457, 23 Pac. Rep. 606. The state had the same right to have its motion for a new trial fully considered as it had to contest the petition of Summers. If the court could not consider all of the grounds in the motion for a new trial, and pass upon the merits of the motion, it ought to have granted the same. It is better to allow a new trial where the court cannot consider the motion for a new trial on its merits, than to refuse it. There is something

stated in the journal to the effect that the trial judge considered the motion for a new trial, but, as the further statement is made that the court overruled the motion *pro forma*, we cannot assume the court properly considered the various grounds alleged therein; otherwise it would not have been stated that the motion was overruled *pro forma*. The judgment will be reversed, and a new trial granted. All the justices concurring.

#### SOUTHERN KAN. RY. CO. v. BROWN.

(Supreme Court of Kansas. Nov. 8, 1890.)

#### CORRECTION OF JUDGMENT—MISTAKE OF CLERK.

Where one of the parties is improperly designated by the clerk in entering a judgment, it is competent for the court at a subsequent term to correct the entry so that it shall correspond with the name stated in the pleadings, and with the judgment actually rendered.

(Syllabus by the Court.)

Error from district court, Sumner county; J. T. HERRICK, Judge.

*George R. Peck, A. A. Hurd, and Robert Dunlap*, for plaintiff in error. *J. S. Dey and James Lawrence*, for defendant in error.

JOHNSTON, J. The plaintiff in error asks a review and reversal of an order of the district court of Sumner county correcting an entry of judgment in a foreclosure proceeding. James H. Luckey and wife were the owners of a tract of land in Sumner county, and in April, 1878, they gave a mortgage thereon to secure the payment of \$300. In January, 1880, they gave a second mortgage to John D. Brown, to secure the payment of \$203.75. Afterwards, on June 16, 1880, they conveyed a strip of land through the tract to the Southern Kansas & Western Railroad Company for a projected railroad. Default having been made in the payment of the claims secured by the mortgages, foreclosure actions were begun in 1881 by J. K. O. Sherwood, the owner of the first-named mortgage, and by John D. Brown, the owner of the second mortgage. These actions were consolidated, and the Southern Kansas & Western Railroad Company was made one of the defendants, and in its answer it set up the conveyance by Luckey and wife to itself of a right of way across the land, and asked "that if a judgment of foreclosure is made herein in favor of plaintiff, and the sale of the premises covered by the mortgage described in the petition to satisfy such judgment be had, the officer making the same be directed and required by this court to first sell that part of said property not covered by this defendant's deed herein described." On April 12, 1882, a decree of foreclosure was rendered, in which it was found that there was due to Sherwood the sum of \$405.86, which was a first lien upon the land, and to Brown the sum of \$277.60, and the premises were ordered to be sold, excepting so much of the same as was included in the right of way of the railroad company; and that, in case the proceeds were insufficient to satisfy the judgment, the right of way of the railroad company

should be sold. The property was sold in pursuance to the judgment on April 7, 1883, for the sum of \$491, which sale was subsequently confirmed and an order of sale against the right of way of the railroad company was granted to satisfy the balance remaining unpaid upon the judgment. On December 27, 1883, John D. Brown filed a motion for an order correcting the journal entry in the foreclosure proceeding, alleging that there had been a mistake made in entering the name of the railroad company, it having been designated as "The Sumner, Cowley & Western Railroad Company" instead of "The Southern Kansas & Western Railroad Company." The plaintiff in error appeared in opposition to this motion, and the court, after hearing testimony, granted the motion and corrected the entry. The court possessed ample power to correct the entry so that it should correspond with the judgment actually rendered. If the company was improperly designated by the clerk in entering the judgment, it was competent for the court, even at a subsequent term, to make the correction. *Tobie v. Commissioners*, 20 Kan. 14; *Small v. Douthitt*, 1 Kan. 335; *Clevenger v. Hanson*, 44 Kan. —, ante, 61; Civil Code, § 568. The change did not involve the correction of any judicial error, but simply a mistake of the clerk. The corrected name was the one by which the company was designated in the pleading, and the one under which it answered. The name occurs twice in the judgment entry, and even these names are unlike, and neither corresponds with the name stated in the pleadings. In the order of the court confirming the sale, however, the correct designation is given, or at least it corresponds with that mentioned in the pleadings. If there was power in the court, under the pleadings and motions, to make the correction, the plaintiff in error is concluded. The company claims that the evidence given at the hearing did not warrant the action of the court, but, as it cannot be said that the evidence is all preserved in the record, that question is not before us. There is no statement outside of the certificate of the judge, attached to the case made, that it contains all the evidence, and hence the sufficiency of the evidence cannot be considered. *Eddy v. Weaver*, 37 Kan. 540, 15 Pac. Rep. 492; *Hogue v. Mackey*, 44 Kan. —, ante, 477, and cases cited. An examination of that which is preserved satisfies us that the order was rightly made, and that no injustice was done. Judgment affirmed.

All the justices concurring.

# DEWALD v. KANSAS CITY, F. S. & G. R. CO.

(Supreme Court of Kansas. Nov. 8, 1890.)

## DEATH BY WRONGFUL ACT—INJURIES TO PASSENGERS—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

1. Where the facts are disputed, negligence is a question of fact for the jury, but where the facts are undisputed, and only one inference or deduction is to be drawn from them, it presents a question of law for the courts.

2. Where an action is brought under the statute

to recover damages for the benefit of the next of kin of the deceased, and the plaintiff's testimony shows that the negligence of the deceased contributed directly to the injuries resulting in the death of the deceased, the plaintiff has failed to make out a *prima facie* right of recovery, and a demurrer interposed to the evidence should be sustained.

3. A jury may infer ordinary care and diligence on the part of an injured person from the love of life, or the instinct of self-preservation, and the known disposition of men to avoid injury, but this presumption is overthrown when there is direct proof to the contrary.

4. Where a passenger, without looking or listening for approaching trains, leaves his train voluntarily before it is stopped at its station, and before it is time for the train to stop, and the train is running at the rate of six miles an hour when he gets off, and he is then run against by a tender and engine, following his train on a parallel track, and receives injuries resulting in his death, the passenger contributes directly to the injuries causing his death.

(Syllabus by the Court.)

Error from district court, Wyandotte county; O. L. MILLER, Judge.

*Sherry & Hughes*, for plaintiff in error. *Wallace Pratt, Charles W. Blair, and Frank Hagerman*, for defendant in error.

HORTON, C. J. This was an action brought by Mary A. Dewald, as administratrix of the estate of Edward Dewald, deceased, against the Kansas City, Fort Scott & Gulf Railroad Company, to recover damages alleged to have resulted from the negligence of the defendant in wrongfully causing the death of the deceased. The action was brought under the statute to recover damages for the benefit of the next of kin. The petition alleged as negligence that the plaintiff's intestate was a passenger for hire, whom the defendant had, for such hire, agreed to carry from Kansas City to Rosedale; that the car in which plaintiff's intestate rode was stopped at a point in Rosedale for the purpose of letting its passengers alight therefrom; that, while alighting, the deceased was run against and killed by an engine which had been cut from the car, and was following the car on a parallel track. The case came on for trial before the court with a jury. After all the evidence was introduced on the part of the plaintiff, the railroad company interposed a demurrer on the ground that no cause of action had been proved. The demurrer was sustained by the court, and judgment rendered in favor of the company, and against the plaintiff for costs, to which ruling and judgment the plaintiff excepted, and filed a motion for a new trial, which motion was overruled, to which ruling of the court the plaintiff also excepted, and brings the case to this court for review.

The evidence offered by the plaintiff tended to show that the railroad company ran an accommodation train between Kansas City and Rosedale. This train consisted of an engine, tender, and coach. Kansas City was north of Rosedale. At Rosedale there was a depot, located in the southern part of the town, called "Depot Rosedale." When the train came from Kansas City in the evening it would be heading to the south, drawing the tender and coach after it. It would proceed on

its journey till it reached the depot, then designated on the plat as "Depot Rosedale," which was as far south as that train went. It was customary for people residing at Rosedale, in the vicinity of the "coal shed," instead of leaving the train when it reached the south depot, to remain on the coach until it was taken back and set out on the side track near that shed, when they would leave the train, and go to their homes. In this way they would save themselves some distance in walking. For doing so they paid no fare. On the train returning to Kansas City, the engine and tender would be transferred to the north end of the coach, and then would back to Kansas City, drawing the coach after it, so that in making the return trip the tender would come first, the engine next, and then the coach. The through passenger train passed a little before the time this accommodation left for Kansas City, and it became necessary to place the latter on the side track so that the main track would be open for the passage of the through train. There being no turn-table at Rosedale, the work of putting the engine and tender on the north end of the coach, and at the same time placing the train on the side track so as to leave the main track open, was done thus: The engine, after disposing of the business at Rosedale, would back the train from the depot towards the north till it reached the vicinity of the opening of a side track. Here there was a down grade towards the north. The engine and tender would be uncoupled from the coach, and the latter pushed or kicked ahead. The switch being thrown, the coach would pass upon and down the side track, and, after the coach reached the side track, the switch was turned back, and the engine would back towards the north on the main track. The coach would be stopped near the north end of the track, at about the coal shed. The engine would back north on the main track, and, when it had passed the switch at the north end of the side track, near the "cattle-guard," that switch would be opened, and the engine would then go in on the side track and be coupled to the coach, which would be found standing, as stated, near the coal shed. Here the train would stand till the through train passed, and then it would move towards the north to and on the main track to Kansas City. The evidence offered by the plaintiff tended to show further that on the evening of April 7, 1886, Edward Dewald, the deceased, returning from Kansas City upon the accommodation train to Rosedale, did not leave the train when it reached the Rosedale depot, but remained in the car as it was being taken back to be set out on the side track. In this way, he undoubtedly expected to save himself some distance in reaching his home. While the car was in motion, going about six miles an hour, he went to the south end of it, and got off from its west side upon the main track. The car from which he stepped off was about 15 car-lengths from the place where it usually stopped on the side track. In getting off the car he was struck by the tender moving northward, and received injuries

resulting in his death. Upon this state of facts, established by the evidence offered upon the part of the plaintiff, the trial court committed no error in sustaining the demurrer to the evidence, which was interposed by the railroad company.

Where the facts are disputed, negligence is a question of fact for the jury, but where the facts are undisputed, and only one deduction is to be drawn from them, it presents a question of law for the courts. *Railway Co. v. Butts*, 7 Kan. 308; *Railway Co. v. Pointer*, 14 Kan. 37. In this case, the facts are undisputed. The negligence alleged in the petition was not proved. The car had not stopped when Dewald stepped off, and when he stepped off it was not at the Rosedale depot, nor at the place at the north end of the side track, where it was usual for the car to stop when taken back from the depot and set out on the side track. There is no evidence tending to show that the railroad company, or any of its agents, purposely or wantonly injured the deceased. As the car had not stopped when the deceased got off, no negligence can be imputed against the railroad company, or its agents, in running the engine and tender on the track parallel with the one the passenger-car was on, as to the persons in that car, because it could not have been anticipated that any person in the car would be so careless or reckless as to jump off while it was moving quite rapidly, and before it reached its usual stopping place. Again, it appears from the evidence that but for the deceased's own negligence he would not have been injured. He left the car when it was moving quite rapidly, and could not have listened or looked for the approaching engine. Under such circumstances as are disclosed in this case, a passenger cannot voluntarily jump off of a moving car, thereby placing his life and limbs in peril, and then claim to be free from fault. *Parsons v. Railroad Co.*, 37 Hun. 128; *Com. v. Railroad Co.*, 129 Mass. 500; *Weber v. Railway Co.*, 100 Mo. 194, 12 S. W. Rep. 804, and 13 S. W. Rep. 587; *Burrows v. Railroad Co.*, 63 N. Y. 556; 2 *Shear. & R. Neg.* (4th Ed.) note 1, p. 359; *Reibel v. Railroad Co.*, 17 N. E. Rep. 107; *Beach, Contrib. Neg.* p. 156, § 53; *Patt. Ry. Acc. Law*, §§ 22, 24, 259; 2 *Shear. & R. Neg.* (4th Ed.) § 525; *Railway Co. v. Adams*, 33 Kan. 427, 6 Pac. Rep. 529; *Clark v. Railway Co.*, 35 Kan. 350, 11 Pac. Rep. 134; *Railroad Co., v. Townsend*, 39 Kan. 115, 17 Pac. Rep. 804. If the deceased had been directed by the conductor, or any person in charge of the train, to jump off, or if the car had not stopped at the regular station for passengers to alight, many of the questions argued in the briefs would be before us for consideration; but, upon the facts presented, many of the authorities cited by plaintiff are not applicable. It is urged, however, that the case ought not to have been taken from the jury, because the presumption is that the deceased, at the time he was injured, was in the exercise of due care. It is true that a jury may infer ordinary care and diligence on the part of an injured person from the love of life, or the instinct of self-preservation, and the known disposition of men to avoid

injury; but in this case the presumption that the deceased was in the exercise of due care is overcome by proof to the contrary, and this appears without any conflict of evidence from the plaintiff's own case.

Where an action is brought to recover for personal injuries, and the plaintiff's testimony shows that his own negligence contributed directly to the injury, he has failed to make out a *prima facie* right of recovery, and a demurrer interposed to this evidence should be sustained. *Gibson v. City of Wyandotte*, 20 Kan. 158; *Williams v. Railroad Co.*, 22 Kan. 117; *Artman v. Railroad Co.*, Id. 296. A failure to listen or look, when by taking this precaution the injury might have been avoided, is negligence that will bar a recovery, notwithstanding the negligence of the railroad company in failing to give signals contributed to the injury. *Railroad Co. v. Rice*, 10 Kan. 426; *Railroad Co. v. Pointner*, 14 Kan. 37; *Mason v. Railroad Co.*, 27 Kan. 83; *Corlett v. City of Leavenworth*, Id. 673; *Maultby v. City of Leavenworth*, 28 Kan. 748; *Clark v. Railroad Co.*, 35 Kan. 353, 11 Pac. Rep. 194; *Railroad Co. v. Davis*, 37 Kan. 748, 16 Pac. Rep. 78; *Railway Co. v. Adams*, 33 Kan. 427, 6 Pac. Rep. 529.

Upon the oral argument it was insisted by counsel for the plaintiff that the evidence was conflicting as to whether the train was moving or not when the deceased jumped off, and, therefore, the trial court erred in not submitting it to the jury. We have carefully examined the record, but do not so understand the evidence introduced. Two witnesses only were called to prove the alleged negligence of the railroad company. One of these, J. L. Worthy, testified that "the deceased stepped off of the hind end of the coach, at the west side, just as the engine was coming along, and it struck him, and gave him his injuries from which he died." "Question. State whether or not the car you were on was moving at the time you were getting off? Answer. I don't think it was, but I could not positively state. Q. You don't think it was? A. No, sir, I don't think it was moving. I think the car was standing still, although I would not be positive about that. Q. Which side did you get off on? A. I got off on the west side. Q. The same side as Dewald? A. Yes, sir. Q. Did you get off before or after this man? A. After. Q. You said that you could not tell whether this coach was in motion at the time this man got off? A. No, sir. Q. You did not know about that? A. No, sir." This witness did not testify, or intend to testify, that the car was stopped at the time that the deceased stepped off. The other witness, H. D. Trickey, testified: "Question. Were you near him [Dewald] at the time he sustained the injuries of which he died? Answer. Yes, sir. Q. Did you see him on that day? A. I saw him on the train. Q. Did you see Mr. Dewald the evening when he got off the car? A. I did not see him when he got off. Q. Where were you, on the car when you saw him? A. No, sir. Q. I will ask you if you saw him struck by the engine? A. No, sir. I did not. Q.

Where was he when you first saw him off the car? A. He was lying on his face, with his head nearly between two ties, close to the rail, quite close,—six inches, or thereabouts. Q. There wasn't any road-crossing where he was picked up? A. No. Q. How far was it from where he was picked up to where the coach usually stood when the engine was hooked onto it in reversing? A. It must be something in the vicinity of, perhaps, half-way on the switch. Q. Half-way from the north switch? A. I couldn't say exactly, but somewhere in the vicinity of half-way; perhaps a little further north. Q. What I mean is, how far was it from where he was picked up down to where the coach usually stood when it was hitched onto the engine? A. It might be fifteen car-lengths. Q. Then the coach at that time—at the time he was picked up—had not got down to the place where it usually stood? A. No, sir. Q. You had not attempted to get off the coach yet? A. Not quite, when he had. I was getting off here in order to get around the end of the rolling-mill. Q. Had he got down off of the car before you came out on the platform? A. I couldn't say. I didn't notice him on the platform at all. Q. Had the coach yet stopped before you got off? A. No. It hadn't. Q. You got off when it was in motion? A. Yes, sir. Q. And how soon after you got off before you saw Dewald lying there? A. I might have gone somewhere in the vicinity of two rods before I saw him, because I was running with the train. Q. You got off when it was in motion, and was running with it? A. Yes, sir. Q. You say you ran how far? A. Possibly it might have been two rods. I heard some one holler there was a man hurt. Q. How far back did you go to where Dewald was? A. Well, I don't hardly think it was two rods, though it might be. Q. You did not mean to say you were standing on the rear platform, and saw the engine coming towards you, to see how fast it was coming? A. When I jumped off I saw the engine, and the engine was ahead. Q. It was passing the coach there? A. Yes, sir; passing the coach there, judging that I might be traveling at the rate of the car,—six miles an hour. As soon as I struck the ground I commenced to stop." The unavoidable conclusion, from the evidence of Trickey, is that he got off the train while it was in motion; that he got off after, or about the time, Dewald jumped off; and that when he, Trickey, got off, the car was going about six miles an hour. It must have been going six miles an hour when Dewald jumped off. To have sustained the allegations in the petition, the evidence must have shown that the car upon which the deceased was riding had stopped when he jumped or got off; also that the car had stopped at a point in the city of Rosedale for the purpose of letting the passengers thereon alight; and, further, the evidence must have shown that the railroad company, or its agents, carelessly or negligently ran the tender or engine against the deceased. All of this was not established. The judgment of the district court must be affirmed. All the justices concurring.

**CHICAGO, K. & W. R. CO. v. MAKEPEACE,  
Trustee, et al.**

(*Supreme Court of Kansas.* Nov. 8, 1890.)

**MUNICIPAL AID TO RAILROADS—CONDITIONS.**

Where the issuing of township bonds or warrants to a railroad company is dependent upon the condition that the company shall build, or cause to be built and have in operation, with cars running thereon, by lease or otherwise, its railroad from a certain city therein named, at or near the depot of another railroad company in the city, *held*, that the building of its road within 111½ feet of the limits of the city, and an arrangement by it with the other railroad company, whose road it intersects at that point, for the running of its trains over the road from its intersection to its depot within the city, and the operation of the road from the depot in the city, over its entire line, will be regarded as a substantial compliance with the condition.

(*Syllabus by the Court.*)

Original proceeding in *mandamus*.

*George R. Peck, A. A. Hurd, and Robert Dunlap*, for plaintiff. *Johnson, Martin & Keeler and Shinn & Yeager*, for defendants.

**HORTON, C. J.** This is an action in *mandamus* to compel the officers of Augusta township to issue \$15,000 of township warrants, or scrip, voted to aid in the construction of the Chicago, Kansas & Western Railroad Company, in pursuance of a subscription made by the township under the act entitled "An act to enable counties, townships, and cities to aid in the construction of railroads, and to repeal section 8 of chapter 39 of the Laws of 1874," which took effect February 29, 1876, and amendments thereto. In pursuance of an order of the board of county commissioners, subscription was made by the county clerk of Butler county on behalf of the township, upon the 21st day of January, 1887. The condition upon which the warrants were to be issued, as contained in the petition and order, is in the following language: "And when said railroad company shall have built, or caused to be built, and have in operation, with cars running thereon, by lease or otherwise, its said railroad, from the city of Augusta, at or near the present depot of the Florence, El Dorado & Walnut Valley Railroad, to Mulvane, at or near the city of Mulvane, Sumner county, Kan., on or before the 31st day of July, A. D. 1887, it shall be entitled to demand and receive the sum of \$15,000 of the warrants of said Augusta township," etc. To the alternative writ the defendants answered alleging that "the plaintiff never built its road to or from the city of Augusta, nor to or from a point near the depot of the Florence, El Dorado & Walnut Valley Railroad, and that the plaintiff did not complete its road on or before July 31, 1887." The plaintiff claims to have performed the conditions upon which it was to become entitled to the township warrants or scrip under the terms of the petition, order, and subscription. The Chicago, Kansas & Western Railroad joins the track of the Florence, El Dorado & Walnut Valley Railroad 111½ feet south of the city limits of Augusta, and 139½ feet from the intersection of the southern line of the city by the Florence road. There was a mill between the point where the Chicago,

Kansas & Western Railroad joined the Florence road and the city, and there was no practical way of extending the road directly south to the city, except over the ground occupied by the mill. The depot of the Florence Railroad Company is within the city of Augusta, and is used by the Chicago, Kansas & Western Railroad Company for its trains and cars, from where it intersects that road to the depot. The first train of the Chicago, Kansas & Western Railroad Company left Augusta for Mulvane on Saturday, July 30, 1887, and returned the same day. On July 31st, the train ran upon orders from the train dispatcher of the company, and on that day the printed time-card of the road was issued. Since then the road has been in operation for freight and passengers. The principal contention of the defendants is that the railroad company never built any road from the city of Augusta, nor from or near the depot of the Florence Railroad to Mulvane, and therefore never complied with the condition of the subscription made by the township. Nothing was submitted to the voters of Augusta township, by the order of the board of county commissioners, about the building or maintaining a depot or other terminal facilities in Augusta. The subscription was made by the voters to aid in the construction and operation of a railroad from Augusta to Mulvane. The language of the proposition voted upon was that the railroad company "shall have built, or caused to be built and have in operation, with cars running thereon, by lease or otherwise, its railroad from the city of Augusta, at or near the present depot of the Florence, El Dorado & Walnut Valley Railroad to Mulvane." In fact, on July 31, 1887, the Chicago, Kansas & Western Railroad Company had built and in operation, with cars running thereon, by lease or otherwise, its railroad, from the city of Augusta, at or near the depot of the Florence road, to Mulvane.

It would be of no special benefit to the township, or the city of Augusta, or the people of either the township or city, that the Chicago Kansas & Western Railroad should join or intersect the Florence road a few feet further north, or just within the city limits. If the petitioners or voters of the township expected the Chicago, Kansas & Western Railroad Company to build a separate road or track to a point within the city of Augusta, the petition and order should have been more specific upon this point. The Chicago, Kansas & Western Railroad has such an arrangement with the Florence Railroad, which it intersects near the city of Augusta, that the running of its trains into the city for a short distance over that road, fully accommodates the people of its own line, as well as if its track had been extended into the city, at or near the southern limit thereof. We are, therefore, of opinion that the railroad company did not forfeit its right to the township warrants or scrip, merely by the fact that, after it reached within 111½ feet of the city of Augusta, it intersected the Florence Railroad and used its road, by lease or otherwise, into the depot within the city limits. *People v. Holden*, 82 Ill. 93, 103, 104; *State*

v. Town of Clark, 23 Minn. 422, 427, 428; Railroad Co. v. Stockton, 51 Cal. 328; Hodgman v. Railroad Co., 23 Minn. 153. When the road was constructed from Mulvane to within a few feet of the city limits of Augusta, and there joined the Florence road, and ran its trains and cars for a few feet over the track of that road into the depot within the city limits of Augusta, there was a substantial compliance with the proposition submitted. Any railway company, organized under the laws of this state, may lease the road and appurtenances of any other railway company, when the road so leased shall thereby become, in the operation thereof, a continuation and extension of the road of the company accepting the lease. Railroad Co. v. Fletcher, 35 Kan. 236, 10 Pac. Rep. 596. Upon the trial, in support of the allegations of the answer that the road was not built and in operation on July 31, 1887, evidence was offered to show that, upon that day, some of the ties of the road were not spiked to the rails; that some of the culverts and short bridges consisted of cribbing and timbers temporarily piled up to support the track; that the road was not "surfaced" or "ballasted," and that a portion of the bolts, intended to attach the rails to the fish-plates, were not screwed up properly. During the argument, however, the alleged non-completion of the road, on or before the 31st day of July, 1887, was virtually abandoned. Counsel for the defendants, among other things, said: "We are not disposed to take the time, of either ourselves or the court, to analyze or comment on the testimony on this branch of the case. The fact that these things were not done on or before the exact time designated never constituted the real grievance of the township against the plaintiff. If the plaintiff had complied with the conditions of the contract in other and more important respects, the township would have cheerfully overlooked a little delay. The delay to complete that part of the road which the plaintiff actually built, we can forgive. But the undeniable fact that the plaintiff never built any railroad from the city, nor from, at, or near the depot, we insist on as an end to plaintiff's claim." If the alleged non-completion of the road were now insisted upon, it could not be said, upon the evidence produced, that the road was not built and in operation, with cars running thereon, by lease or otherwise, on the 31st of July, 1887. It was not at that date constructed perfectly in every respect, but it had been so far built and in operation that it might be properly and regularly used for the transportation of freight and passengers. Railroad Co. v. Towner, 41 Kan. 72, 21 Pac. Rep. 221; Railroad Co. v. King, 35 N. W. Rep. 705; Railroad Co. v. Schewe, 45 Iowa, 79; Ogden v. Kirby, 79 Ill. 555; Tower v. Railroad Co., 34 Mich. 328; Stowell v. Stowell, 45 Mich. 364, 8 N. W. Rep. 70. We have not referred to the oral promises of the plaintiff which were alleged in the return to the alternative writ and supported, to some extent, by the evidence, because these allegations in the return, upon motion, were stricken out, and it seems to be admitted by all parties that these

oral promises count for nothing. The peremptory writ of *mandamus* as prayed for will be allowed. All the justices concurring.

#### DUFF v. MORRISON.

(*Supreme Court of Kansas. Nov. 8, 1890.*)

VENDOR AND VENDEE—LIABILITY OF VENDOR FOR COSTS OF ABSTRACT—JURISDICTION OF JUSTICE.

Where real estate is sold and conveyed, and everything connected with the sale and conveyance is completed, except that the costs of the abstract of title, the transferring of the title, and the recording of the deed are not paid, and, during the negotiations with reference to the purchase, sale, and conveyance, the grantor agreed to pay such costs, but afterwards failed and refused to do so, and the grantee then paid the same, and afterwards commenced an action against the grantor, before a justice of the peace, to recover the sums thus paid, *held*, that the justice of the peace has jurisdiction to hear and determine the case.

(*Syllabus by the Court.*)

Error from district court, Butler county; A. L. REDDEN, Judge.

John C. McCarty and W. M. Duff, for plaintiff in error. C. A. Leland and Haslett & Harris, for defendant in error.

VALENTINE, J. This was an action brought before a justice of the peace of Butler county by H. W. Morrison against W. M. Duff for the recovery of \$2.45. The plaintiff's bill of particulars, omitting title and signature, reads as follows: "Said plaintiff alleges that, within the last 60 days, he, the said plaintiff, bought a lot of said defendant in the city of Eldorado, Kan.; that by the terms of the sale the said defendant was to furnish an abstract of title, showing a clear title to said property, and pay all necessary expenses up to deed from said defendant to said plaintiff; that, as a part of the purchase money therefor, said plaintiff was to pay off a certain note; that said plaintiff has paid off said note, and in all respects conformed to his part of the agreement of purchase; that said defendant failed and refused to pay for the abstract of title, and also failed and refused to pay for transferring and recording a deed of said property to said defendant, which, by the terms of said agreement, he was bound to do; that the cost of said abstract, and cost of said transferring and recording,—all of which said plaintiff has paid,—amounts to the sum of \$2.45, which said sum has been duly demanded by said plaintiff from said defendant, whereupon said plaintiff demands judgment against said defendant for the sum of two and 45-100 dollars, with interest thereon from the 26th day of March, 1887, at seven per cent., and costs." A trial was had before the justice and a jury, and the verdict and judgment were in favor of the plaintiff and against the defendant for \$2.45. The costs of suit amounted to \$12.80. The defendant, as plaintiff in error, took the case on petition in error to the district court, where the judgment of the justice of the peace was affirmed, and then Duff, as plaintiff in error, brought the case to this court for review. Duff, the plaintiff in error in this court, plaintiff in error in the

district court, and defendant in the justice's court, claims error in the two lower courts, for the reason that no cause of action was stated in the aforesaid bill of particulars, and that the justice of the peace did not have, and could not have, any jurisdiction over the subject-matter of the action. It is claimed that the aforesaid bill of particulars did not state a cause of action, for the reason that section 6 of the statute of frauds and perjuries (Gen. St. 1889, par. 3166) requires that all contracts for the sale of lands shall be in writing, signed by the party to be charged. Upon the facts of this case, however, the claim is not tenable, for the reason, among others, that it is not shown that the contract sued on was not in writing, or that it did not in every particular fulfill all the requirements of the aforesaid section of the statute of frauds and perjuries. It is further claimed that the justice of the peace had no jurisdiction of the subject-matter of the action, and this for the following provision of section 8 of the Justices' Code, (Gen. St. 1889, par. 4854,) which reads as follows: "Justices shall not have cognizance of any action: \* \* \*

*Fourth.* In actions on contracts for real estate." Now is this an action on a contract for real estate? Mr. SWAN, in his treatise for Justices, (page 17,) says that "a contract for real estate is an agreement to sell or convey an interest, title, or estate in lands," and is not an agreement for something to be done upon lands, or for the rent thereof. See, also, *Bridgman v. Wells*, 13 Ohio, 43. Neither can it be an agreement for the payment of the cost of an abstract of title, or for the payment of the cost of transferring the title, or for the payment of the cost of recording a deed. Connected with the cause of action in the present case, there was a contract for the purchase and sale of real estate; but everything connected with such purchase or sale, or incidental thereto, except the mere payment of the cost of the abstract of title, the cost of the transferring of the title, and the cost of the recording of the deed, was executed, completed, fulfilled, terminated, and ended some time before this action was commenced. The abstract of title had already been procured. The consideration for the property had been paid. The deed for the property had been executed. The title to the property had been transferred, and the deed for the property had been recorded; and nothing was left to be done except the mere payment for the abstract of title, the payment for the transferring of the title, and the payment for the recording of the deed. At that time no action for the enforcement of the contract for the purchase or sale of the property, or for the enforcement of anything upon which the purchase or sale or title to the property depended, could have been maintained, for the purchase and sale of the property, and all things upon which the purchase or sale or title depended, had been completed, perfected, and consummated. Nothing concerning the purchase or sale or title was left to be done; but, during the negotiations with regard to the purchase and sale, the defendant, Duff, agreed to pay for the

cost of the abstract of title, the cost of the transferring of the title, and the cost of the recording of the deed, and under this agreement he was under obligation to do so. But he failed and refused to perform his obligation, and because thereof the plaintiff, Morrison, was forced to and did pay for such abstract of title, the transferring of the title, and the recording of the deed; and this action is brought simply for the recovery of the sums of money thus paid by him, and the action is not in any sense an action to enforce a contract for the purchase or sale of real estate. The judgment of the court below will be affirmed. All the justices concurring.

#### LANCK V. MORRISON.

(*Supreme Court of Kansas.* Nov. 8, 1890.)

INDORSEMENT OF NOTE AFTER MATURITY—INDORSER OR JOINT MAKER.

Where the owner and holder of a promissory note after maturity sells and indorses the note, signing his name after that of the original payee, he is an indorser and not a joint maker. (*Syllabus by the Court.*)

Error from district court, Graham county; LOUIS K. PRATT, Judge.

*H. J. Harwi*, for plaintiff in error. *G. W. Jones*, for defendant in error.

HORTON, C. J. This was an action on a promissory note, which reads as follows: "\$75. Whitfield, Kan., May 31st, 1886. Ninety days after date, we promise to pay to the order of R. A. McDanille seventy-five dollars, value received, with interest at 10 per cent. per annum, payable at Logan, Kansas. Mrs. FRED McHURON. JOHN S. MORRISON." Said note is indorsed as follows, to-wit: "R. A. McDANILLE. JOS. F. SHERER. W. R. F. M. HART." Mrs. Fred McHuron executed the note as principal, and John S. Morrison signed the note as surety. The note was given for a patent right to cure meats and vegetables. At one time Joseph F. Sherer owned the note. He gave it to F. M. Hart, because he did not consider it of any value. Hart, while the owner and holder of the note, sold and indorsed it to E. S. Lank, the plaintiff, in the spring of 1887, in a horse trade. The trial court instructed the jury that F. M. Hart was an indorser on the note, and was entitled to a verdict in his behalf. To this, plaintiff excepted. He contends that Hart's liability was that of an original maker. This court has decided otherwise. In *Swartz v. Redfield*, 13 Kan. 550, it is said: "The indorsement of a note after maturity is in effect the drawing of a new bill, payable on demand; and, to hold the indorser, demand and notice of non-payment are essential." In the present case, the indorsement of the note by Hart was after maturity. If he had been a stranger to the consideration of the note, and had indorsed it in blank at the time of its execution, he could be held as a guarantor. *Firman v. Blood*, 2 Kan. 496; *Fuller v. Scott*, 8 Kan. 25. Under other circumstances, he might also be held as a guarantor. See *Withers v. Berry*, 25 Kan. 373. In support of the contention that Hart



was an original maker, *Raymond v. Mc-Neal*, 36 Kan. 471, 13 Pac. Rep. 814, is cited. In that case, the note was made payable to Raymond or bearer, and it was shown that Raymond signed his name under that of the maker, as a joint maker and not as an indorser. That case, therefore, differs widely from this. The judgment of the district court must be affirmed.

All the justices concurring.

#### SHIRACK v. SHIRACK.

(Supreme Court of Kansas. Nov. 8, 1890.)

#### HOMESTEAD—RIGHTS OF INFANT HEIR—ABANDONMENT.

On the claim of a homestead right by a minor child, it appeared that the deceased father, with his child, occupied the premises as a home during his life-time; that he died when the child was about 18 months old, leaving it as his only surviving heir; that a neighbor was then appointed guardian, who took the child to her home, and leased the premises, using the rents for the support of the child, and to pay the taxes on the premises; that about three years afterwards the general creditors of the estate of the deceased sought to have the proceeds arising from the sale of the premises applied to the payment of their claims. But it did not appear that there was a purpose to permanently abandon the homestead, or to waive the homestead right. *Held*, that these facts do not, of themselves, show a relinquishment or forfeiture of the infant's homestead-right.

(Syllabus by the Court.)

Error from district court, Saline county; S. O. HINDS, Judge.

*B. C. Cranston*, for plaintiff in error.  
*Garver & Bond*, for defendant in error.

**JOHNSTON, J.** On November 10, 1884, William H. Pettit, a widower, with one child about one year old, owned and resided upon a quarter section of land in Saline county, and on that day he executed and delivered a mortgage upon the same. He and his child, whose name is Leroy Pettit, resided upon the land until May 20, 1885, when he died intestate, leaving Leroy as his only heir. On November 25, 1885, Annie E. Shirack was duly appointed guardian of the person and estate of the minor, and immediately qualified, and entered upon the performance of her duties as such guardian. The guardian resides with her husband on a farm about five miles distant from the Pettit homestead, and immediately after the death of Pettit she took the minor child to her own home, and since that time she has had control of the homestead, leasing the same, and paying the rents towards the support of the child, and paying the taxes on the land, so far as she could. On September 25, 1887, a judgment of foreclosure of the mortgage was rendered, and, on June 9, 1888, the land was sold to satisfy the judgment, costs, and taxes on the same, for the sum of \$675. The sale was confirmed on June 12, 1888, when it was found that, after the payment of the judgment, taxes, and costs, there remained a surplus of \$390. The estate of William H. Pettit, deceased, is insolvent, and there are judgments and allowances against the same in the probate court of Saline county of more than \$390, and the administrator of the estate

asks that this surplus be paid to him, and applied to the payment of the debts of the estate. A motion was made by the guardian of the minor, asking that the remainder of the proceeds of the sale be paid to her for the benefit of the minor, claiming that the property was a homestead which descended to Leroy, as the only heir, and exempt from the general debts of the estate. The motion was submitted to the court upon an agreed statement of facts; but the court overruled the same, and made an order directing the payment of the surplus to the administrator, to be applied on the debts of the estate. This ruling is assigned as error. If the property was and is impressed with the homestead character, then the child is entitled to the surplus proceeds of the sale, instead of the general creditors of the deceased father. The facts are presented here in the same form as in the district court, and hence we are not concluded by the finding thereon of that court, but we can as fully examine and determine the question of law arising on the agreed statement of facts as can the district court. *Railway Co. v. Butts*, 7 Kan. 308. From the facts presented, there can be no question that the land was impressed with the homestead character during Pettit's life-time, as there was actual personal occupancy by himself and infant child up to the time of his death. Does the fact that the infant was removed to the home of a neighbor for a period of about two years before the action of foreclosure was begun prejudice its statutory right of exemption, and divest the land of its homestead character? The infant was only about 18 months old at the death of its father, and, it being the only remaining member of the family, an uninterrupted and continuous personal occupancy may have been impracticable. Although the little one was removed to the home of a neighbor, there is no statement in the agreed facts that it was either the purpose of the guardian or of the child (if it can be said to have an intention) to make that place its permanent home, or to abandon the Pettit property as a homestead. It is true that continued occupation after the death of the father was necessary, in order to preserve the homestead to the orphan. Gen. St. 1889, par. 2593. The rule requiring actual occupancy, however, "does not apply strictly, in all cases, where the claim is made by the widow or minor children surviving the owner of the property occupied by the owner as a homestead at the time of his death. Although it is necessary that there should have been sufficient occupancy of the premises by the husband or father, prior to his decease, to impress them with the homestead character,—and the object of the law is to preserve the rights of the survivors to the property, in order that they may occupy it,—the courts are much more liberal in construing the provisions of the statute having reference to occupancy by the widow or surviving minor children." *Thomp. Homest. & Ex.* § 242. In *Brinkerhoff v. Everett*, 38 Ill. 265, where both parents were dead, the minor children were taken from the homestead by their guardian and placed in the homes

of their kindred, and the premises were leased by the guardian for the benefit of the children, they having no other means of support. It was held that such a removal did not forfeit the homestead right of the minors; and the fact that the property was rented by the guardian for their benefit did not constitute an abandonment. See, also, *Rhorer v. Brockhage*, 86 Mo. 544; *Johnston v. Turner*, 29 Ark. 280. There was no declaration of a purpose to permanently abandon the homestead, nor do the facts show a design on the part of any one to waive the homestead right. A mere temporary absence, although it may be prolonged for months, or years, is not sufficient to divest the homestead right; and the fact that the premises were rented during the temporary absence is not, of itself, sufficient to destroy the homestead right. *Hixon v. George*, 18 Kan. 253. In view of the extreme youth and helpless condition of the minor, and the liberal construction which should be applied in such cases, we conclude that an absence not shown to be permanent will not constitute a relinquishment or forfeiture of the infant's homestead right. The judgment of the district court must therefore be reversed, and the cause remanded, with instructions to order and award the surplus proceeds of the sale to the guardian, for the benefit of the minor. All the justices concurring.

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**BRIER *et al.* v. BRINKMAN *et al.***

(Supreme Court of Kansas. Nov. 8, 1890.)

**MORTGAGE FORECLOSURE—JUDGMENT—DISPOSITION OF SURPLUS.**

1. The omission, in a judgment foreclosing a real-estate mortgage, of a provision directing what disposition shall be made of any surplus remaining after the costs and liens are paid from the proceeds of the sale will not work a reversal of the judgment. The court may, upon application after judgment, direct the payment of the surplus to any party entitled thereto.

2. The pleadings examined and held to be sufficient to sustain the judgment that was rendered.

(Syllabus by the Court.)

Error from district court, Barton county; ANSEL R. CLARK, Judge.

*J. D. Larimer* and *J. D. McFarland*, for plaintiffs in error. *Diffenbacher & Banta*, for defendants in error.

**JOHNSTON, J.** This was an action to foreclose a real-estate mortgage. *J. V. Brinkman* alleged in his petition that *James* and *Julien Armstrong* executed two notes, which had been assigned to him, and on which there was due the sum of \$656, and that at the same time they executed a mortgage on a quarter-section of land in Barton county, to secure the payment of the amount due on the notes, which mortgage is set out at length. It was alleged that the defendants *John Brier*, *Deborah A. Brier*, *Joseph Raseley*, and *Sarah Raseley* "are the present owners of said real estate, subject, however, to this plaintiff's mortgage lien." The prayer of the plaintiff's petition was that there be found due to him on the notes the sum of \$656, and that that sum be declared a first lien upon

the premises; that said premises be sold to satisfy the lien; and that by such sale the defendants shall be cut off from all right, title, and interest in and to the premises. In the answer of *John Brier*, he admitted that he was the owner of the land, but denied all other allegations in the petition. The other defendants, in their answers, disclaimed any interest in or title to the land, so far as they were concerned. A trial was had by the court, and a decree rendered, in which it was found that *John Brier* had a first lien upon the premises for the sum of \$655.70, and that the plaintiff *J. V. Brinkman* had a lien upon the premises, second only to that of *John Brier*, for the sum of \$683.50. The premises were ordered to be sold, and the proceeds applied—*First*, to the payment of the costs; *second*, to the payment of the lien of *John Brier*; and, *third*, to the payment of the lien of the plaintiff,—and that all the parties be cut off by such sale from all interest in the land. The plaintiffs in error bring the case to this court upon the transcript of the record, and insist that the pleadings do not warrant the judgment that was entered by the court. As no evidence is contained in the record, we may assume that any facts competent under the pleadings, and which would warrant the judgment, were proven. Counsel for *Brinkman* suggest the facts to have been that the *Armstrongs*, who formerly owned the land, executed a note to *Brier*, and secured its payment by a mortgage upon land. Afterwards, the *Armstrongs* executed another note which became the property of *Brinkman*, and secured its payment by a second mortgage on the same land. Subsequently, *Armstrong* and wife made a quitclaim deed of the land to *Brier*, and, when *Brinkman* brought this action to foreclose his mortgage, *Brier* held both mortgage and deed; and hence the allegations concerning his ownership. We think the pleadings warranted proof of *Brier's* mortgage on the land, and that he acquired a title subsequent to the execution of the *Brinkman* mortgage. The fact that the mortgage which he held was declared to be a first lien, instead of having the *Brinkman* mortgage so declared, is certainly not prejudicial to the interests of *Brier*. In this respect *Brinkman* has more reason to complain than the plaintiffs in error. *Brier* is at liberty to discharge the *Brinkman* lien, and to redeem his land, and if he is the present owner, and the land is sold under the decree, he would be entitled to the surplus, if any remains after the costs are paid, and liens discharged. The fact that the decree does not in terms provide for the disposition of the surplus will not work a reversal of the judgment. There is full power in the district court upon proper motion to direct the disposition of the surplus, and it will award it to *Brier* if the fact is as has been supposed. The state of the record brought here is such that we can only examine errors apparent upon its face, and, having done so, we reach the conclusion that the pleadings are sufficient to sustain the judgment that was rendered, and that no prejudicial error appears. The judgment of the district court will be affirmed. All the justices concurring.

## HOWELL et al. v. REDLON.

(Supreme Court of Kansas. Nov. 8, 1890.)

## ESTABLISHMENT OF HIGHWAYS—PETITION.

Where the petition for the laying out of a public highway presented to the board of county commissioners shows upon its face that more than 12 resident householders of the county have signed the same, and the journal of the board of county commissioners shows that the board made the finding "that the law had been substantially complied with," and ordered the road to be laid out in accordance with the petition and report of the viewers, *held*, that it cannot be said, because there is not embraced in the journal of the proceedings of the board any statement that evidence was offered to establish the allegations of the petition, that the board acted without jurisdiction or authority.

(Syllabus by the Court.)

Error from district court, Crawford county; GEORGE CHANDLER, Judge.

*Ed. Van Gundy and B. S. Gaitskill*, for plaintiffs in error. *John T. Voss*, for defendant in error.

HORTON, C. J. On May 3, 1886, B. C. Redlon filed his petition in error in the district court of Crawford county, to vacate an order of the board of county commissioners of that county locating and opening a public highway. The petition in error alleged that the board of county commissioners had no jurisdiction of the matter set forth in the record, and that the petition for the road to the board was wholly insufficient to authorize the establishment of a public highway. Upon the hearing of the case, the district court found error in the proceedings of the board of county commissioners, and reversed the proceedings relating to the location and opening of the highway. The principal petitioner for the road and the board of county commissioners excepted, and bring the case here for review.

It appears from the record that on October 5, 1885, there was filed in the office of the county clerk of Crawford county, addressed to the board of county commissioners of that county, a petition signed by more than 12 resident householders of the county, stating that the public convenience required the locating of a county road. The petition specified the place of beginning and the place of the termination of the road. With the petition a sufficient bond was filed. On the 14th day of October, 1885, the petition was presented and considered by the board of county commissioners. The board approved the bond, and made a finding that "the law had been substantially complied with," and appointed viewers to meet on the 14th day of November, 1885, and proceed to view the road. Notice was served upon B. C. Redlon of the time and place of the meeting of the viewers. At the meeting of the viewers, Redlon presented his application for \$1,000 damages on account of the location of the road through his premises. The viewers assessed the amount of his damages at \$60. Subsequently, the viewers filed their report, showing that the road was practicable, and recommended that it be located and surveyed as called for in the petition. The viewers also reported that, in their opinion, the estab-

lishment of the road was a public necessity. At the meeting of the board of county commissioners, on the 14th day of January, 1886, the favorable report of the viewers was fully considered, and, as it appeared that proper notices and advertisements had been made and filed, and the board being satisfied that the road would be of public utility, they ordered the road to be established and surveyed, and a plat thereof to be recorded. They further ordered that the road should be opened for public travel. They also directed that a county warrant be issued to B. C. Redlon for \$60, being the amount of damages allowed him by the viewers. It is somewhat difficult to determine upon what ground the district court found error in the proceedings of the board of county commissioners. It is claimed, however, on the part of the petitioner in the court below that the board acted without jurisdiction, because it does not appear from the record, in direct terms, that the commissioners found "the petition to be a legal one." The board did make the finding "that the law had been substantially complied with," and also made the finding "that the road would be of public utility." The petition recites that "your petitioners are resident householders of Crawford county." It is signed by 15 persons. The record does not show that any evidence, by affidavit or otherwise, was offered to the board of county commissioners showing that the persons whose names were attached to the petition actually signed the same, or that they were resident householders. We do not think this is necessary. It is not requisite that the record of the board of county commissioners should embrace the evidence offered upon the hearing of petitions for roads or other matters. It is sufficient that the record shows that the commissioners had jurisdiction. The petition alleged that the signers are resident householders, and sufficient names are attached to the petition; therefore we cannot say, in the absence of the evidence, that the board acted without jurisdiction, or that they received no evidence to support the petition presented. It may be that the board of county commissioners were acquainted with all the signers of the petition, and knew that the facts therein alleged were true. Even if the board of county commissioners acted strictly as a court in laying out the road, then the omission of the finding "that the petition was a legal one" would not be sufficient to compel a reversal of their proceedings. *Leavenworth, etc., R. Co. v. Commissioners of Douglas Co.*, 18 Kan. 169. In this case, the record shows that there was a general finding, and that "the law had been substantially complied with." This is sufficient, under the petition presented, as all the other proceedings were regular, upon which to predicate the order laying out the road. This case differs from *Commissioners v. Muhlenbacker*, 18 Kan. 129, because in that case the petition did not show that any of the signers were resident householders, and the record wholly failed to supply the fatal defect. Further, in that case, Muhlenbacker never appeared before the board of county commissioners

or the viewers. In that case, no jurisdiction was shown. In this case, the petition alleges sufficient facts to give the board of county commissioners jurisdiction to lay out and open the road, and therefore its jurisdiction affirmatively appears from the record. We have considered the other objections to the road, but do not perceive that any of them are tenable. The judgment must be reversed, and cause remanded for further proceedings; all the justices concurring.

#### HULING V. CITY OF TOPEKA.

(*Supreme Court of Kansas. Nov. 8, 1890.*)

#### CONSTITUTIONAL LAW—JUDICIAL POWERS—EXTENSION OF CITY LIMITS.

Section 1 of chapter 99 of the Session Laws of 1887 is constitutional and valid. The findings and judgment of the district court, made by virtue of that statute, are of a judicial character, and are the exercise of judicial power.

(*Syllabus by Green, C.*)

Commissioners' decision. Error from district court, Shawnee county; A. H. VANCE, Judge *pro tem*.

Alden S. Huling, *pro se*. S. B. Isenhardt, for defendant in error.

GREEN, C. On the 9th day of December, 1889, the city council of Topeka passed an ordinance annexing a large number of platted and unplatted tracts of land to the city. This ordinance was approved by the mayor on the 10th of December, and duly published, as required by law. On the 15th day of January, 1890, the mayor of the city presented the ordinance, accompanied with the certificate of the city clerk and affidavit of the printer, showing that said ordinance had been passed and published, to the district court of Shawnee county, and asked that the same be approved, in accordance with section 1 of chapter 99 of the Session Laws of 1887. The plaintiff in error appeared in court, and objected to the approval of said ordinance, and assigned, among other grounds, that the court had no jurisdiction to act upon said ordinance. The record discloses the fact that after hearing all of the objections, proofs, and evidence, the court took the matter under advisement until the following day, when the following findings and judgment were made, and entered of record: "Thereupon this cause comes on for decision and approval, it having been heretofore heard and taken under advisement by the court, and the court, being fully advised in the premises, finds: *First*. That a correct copy of the above-described ordinance of said city of Topeka,—to-wit, ordinance No. 1060,—duly certified by the clerk of said city under its seal, also affidavits showing the publication of said ordinance, have all been properly filed with the clerk of said court, as provided by law. *Second*. The court further finds that none of said tracts of unplatted territory described in said ordinance exceed five acres, and that said ordinance was duly passed by the mayor and councilmen of said city, and duly approved by said mayor, and that said ordinance was duly and properly published for the time, and in

the manner, as required by law, and that said ordinance therefore ought to be in all things approved by the court. It is therefore considered, ordered, and adjudged by the court that the said ordinance be and the same is hereby entirely and in all things approved, and each and all of the platted and unplatted territory set out and described in said ordinance is hereby adjudged to be duly and properly taken into and added to the city of Topeka, and to be, in all respects, and for all manner and purposes, a part of said city." No evidence was introduced upon the part of the plaintiff in error. A number of errors are assigned by the plaintiff in error, but we think they are all covered by the one controlling question, and are included in the first proposition of the plaintiff in error,—that the provisions of section 1 of chapter 99 of the Session Laws of 1887 are unconstitutional and void. This question we will consider. We have recently been called upon to pass upon a similar act, (section 1 of chapter 69 of the Session Laws of 1886,) relating to the annexation of territory to cities of the second class, in the case of Callen v. City of Junction City, 43 Kan. 627, 23 Pac. Rep. 652. The law was upheld in the case of cities of the second class. The procedure is almost the same. In the case of cities of the second class, the proposed ordinance is prepared and submitted with a petition to the district judge of the county in which the city is situated, having first been published for three consecutive weeks in some newspaper published in the city. Upon the presentation of such petition, with proof of notice, he shall proceed to hear testimony as to the advisability of making such addition; and upon such hearing, if he shall be satisfied that the adding of such territory to the city will be to its interest, and will cause no manifest injury to the persons owning real estate in the territory sought to be added, he shall so find. In the case of cities of the first class, the ordinance is passed by the council, and within 20 days thereafter published. Upon the completion of the publication, the mayor of the city, at the first regular term of the district court of the county in which the city is situated, commencing 20 days thereafter, shall present to the court a copy of the ordinance, duly certified by the clerk of the city, under seal, and, also, affidavits showing that the ordinance had been published. The law then makes it the duty of the court to determine whether said publication has been made in accordance with the statute, and to consider the ordinance, and, by its judgment, either approve, disapprove, or modify, the same, first hearing all objections, if any, and proofs, if any, offered by the city or persons affected by said ordinance. The statute requires that the ordinance shall be published in the official paper, and, when publication shall have been made, the chief officer of the city shall, within a certain time, present said ordinance to the court, with proof of publication. This publication is to give notice to all persons interested that they may have a hearing upon the question of the annexation of the territory. The statute

confers the power upon the court to first hear all objections offered by the city, or persons affected by the ordinance, and then approve, disapprove, or modify the same. It would seem that this brings this case within the rule established in the case of *Callen v. City of Junction City*, supra. The court said in that case: "The judge has power, after such a hearing, to approve, disapprove, or modify the proposed ordinance, and to make findings which, in effect, control the extension of the limits of the city. It would seem that, by its terms, the section in question does not require the judge to perform any other duty than one purely judicial in its character." In the case of cities of the first class, the court has the power, by its judgment, either to approve, disapprove, or modify the ordinance, after hearing all objections made by persons affected by said ordinance. The legislature has declared how the corporate limits of a city may be extended by the passage and publication of an ordinance. This ordinance, to be operative, must be examined by the court. Objections may be made, proofs heard, and the ordinance may be approved or rejected. We think the authority conferred upon the court is in the nature of judicial power. The case is so nearly analogous to the case of *Callen v. City of Junction City*, supra, that we are constrained to hold, under the authority of that case, that the statute is valid. It is recommended that the judgment be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

ABBEY v. LONG et al.

(Supreme Court of Kansas. Nov. 8, 1890.)

STOCKHOLDER'S LIABILITY FOR CORPORATE DEBTS  
—SET-OFF—COSTS.

1. In a proceeding by a creditor of a corporation against a stockholder thereof, under a statute making the stockholder liable to the creditor for the amount of his stock, in addition to any sum due thereon, said stockholder cannot purchase claims against the corporation at a discount, and then set them off against his liability at their face value. He can only set off such claims, in discharge of his liability, to the amount actually paid by him therefor.

2. In such a proceeding, if the stockholder contest his liability, and the contest is decided against him, it is not error to tax the cost of such proceeding against him.

(Syllabus by Strang, C.)

Commissioners' decision. Error from district court, Republic county; E. HUTCHINSON, Judge.

W. T. Dillon, for plaintiff in error. Caldwell, Ellis & Cook, for defendants in error.

STRANG, C. This proceeding was begun by the defendants in error in the district court of Republic county to obtain an order for an execution against the property of Orrin Abbey, as a stockholder in the Republic County Co-operative Association, a corporation, against which the defendants had a judgment. December 23d the defendants filed in the district court of Republic county, Kan., a motion asking an order directing an execution to issue

against the property of the plaintiff as a stockholder in said corporation, to satisfy a judgment in their favor against said corporation. December 24, 1887, notice of said motion was served upon the plaintiff. June 1, 1888, the motion was heard and allowed by the court, and execution awarded in the sum of \$139.65, and costs of the proceeding taxed at \$2.10. The defendants objected to the allowance of the order, and excepted, and moved the court to set said order aside and grant a new hearing, which motion was overruled, and exception allowed. The plaintiff asks to have the order of the district court allowing execution to issue reversed, because—*First*, the order is contrary to the evidence; *second*, is contrary to law; *third*, court erred in taxing the costs of the proceeding against the plaintiff in error. The undisputed evidence shows that "the Republic County Co-operative Association Patrons of Husbandry was at the time this proceeding was begun a corporation organized for other than railway, religious, or charitable purposes. That the defendants had a judgment against said corporation, upon which there was \$201.80 due and unpaid. That the plaintiff was a stockholder in said corporation, owning stock to the amount of \$250, par value. That execution had issued upon the judgment of the defendants against said corporation, and been returned by the sheriff, with an indorsement thereon that he had made diligent search, and could find no property of any kind belonging to said corporation defendant on which to levy the execution. That the corporation owed other creditors the following sums: C. R. Barnes Milling Company, \$135.97; Samuel Bliss, \$8.20; D. H. Sallinger, \$33.99; Chase Bros., \$35.21; Inglehart, Winning & Co., \$36.46. That each of said claims had in fact been assigned to W. T. Dillon, and that W. T. Dillon had upon the back of each of said assignments receipted to the plaintiff the amount assigned. It is agreed that the claims assigned to Dillon, and by him receipted to the plaintiff, were purchased by Dillon for less than their face value, and that the full sum paid therefor was \$110. It is admitted that there were other responsible stockholders of said corporation from whom the claim of the defendants could be made. The record shows that Dillon was the attorney of the plaintiff in this proceeding, and employed by him to look after his interest as a stockholder in said corporation, at the time that Dillon purchased and took the assignment of the claims receipted by him to the plaintiff.

The disputed question of fact in the case is, was Dillon acting for the plaintiff in purchasing the claims assigned to him, (Dillon,) and therefore took them for the plaintiff, notwithstanding he took the assignments in his own name; or was he acting for himself, without any understanding with the plaintiff, and independent of him? This question the trial court resolved against the plaintiff, holding that Dillon was acting for him, as his agent, in purchasing the claims assigned to Dillon, and by him receipted to the plaintiff. This is the ruling complained of in the first

assignment of error. A careful examination of the evidence of the plaintiff and Mr. Dillon satisfies us that the court below was justified in its conclusion that Dillon acted for the plaintiff in purchasing claims against the corporation. The character of the evidence leads irresistibly to that conclusion. Dillon was plaintiff's attorney, and had advised him in relation to his liability as a stockholder in said corporation before the motion in this proceeding was filed; had talked with plaintiff about the effect of plaintiff's purchase of claims against the corporation at less than their face value. When he purchased the claims, though he took an assignment of them in his own name, he bought them with the plaintiff's money. It is true, he says, he borrowed the money of the plaintiff, but all the evidence taken together upon that subject hardly supports that theory, but, on the contrary, shows that the plaintiff, having been informed by Mr. Dillon that it was at least doubtful whether, if he (the plaintiff) purchased claims against the corporation at a discount, he could claim credit for their face value, arranged with Dillon to furnish him (Dillon) with the money to buy the claims, with the understanding that Dillon should take assignments of the claims to himself, and receipt them to the plaintiff. The trial court heard the evidence, and came to this conclusion, and we are unable to arrive at any different understanding from the evidence as it appears in the record. The plaintiff, therefore, so far as the further consideration of this case is concerned, purchased claims against the corporation of which he was a member, amounting, as per face value, to \$249.70, at a discount, paying therefor the sum of \$110.

The further question in this case, therefore, is, can a stockholder in a corporation like this purchase claims against the corporation at a discount, and then obtain credit for them at their face value, in satisfaction of his liability as a stockholder to creditors of the corporation? We think not. The statute creating a liability on the part of the stockholder guarantees to the creditor of a corporation a trust fund in the hands of the stockholders, liable for the ultimate payment of the corporation debts. The law says: You may combine your capital, create a corporation, relieve yourselves of the common-law liability of copartners, and obtain the many other advantages growing out of corporate existence; but as a protection to the public, in lieu of the partnership liability you escape, you shall be held, not only liable to the corporation and creditors for the full amount of your stock subscribed, but, to guaranty further protection to creditors of the corporation, you shall, if the corporation itself becomes insolvent, be charged with a further liability to such creditors, equal to the amount of your stock in the corporation. This liability may be discharged by payment on execution issued pursuant to the statute, as in this case. The authorities also hold, as a matter of equity, that such liability may be discharged by a voluntary payment by the stockholder in good faith of the just debts of the corporation equal to the amount

of the stock held by him in the corporation. This method of discharge from liability has its origin in, and is based entirely upon, equity. It being held that, as no one creditor has any exclusive right to the fund in the hands of any individual stockholder before execution issues, the voluntary and *bona fide* payment in good faith of a just debt of the corporation equal to the amount of stock held by a stockholder is in equity equivalent to the payment of so much on an execution issued under the statute; but, as this method of discharge depends upon equity for its existence, the voluntary payment, to operate as a discharge, must be a *bona fide* payment of a just debt, and made in good faith. "A stockholder who has voluntarily paid corporate debts to the full extent of his statutory liability is entitled to set up that fact; and, when such a payment was *bona fide*, it is a bar to an action to collect any further amount." Cook, Stocks, §227 (c). "A stockholder who is individually liable to the amount of his stock in favor of creditors of his corporation may discharge such liability by the payment in good faith of the amount of the same to any creditor who is not also a stockholder; but he cannot discharge it by buying up debts owing by the corporation equal in amount to his liability at a discount. In such case, if he retain such indebtedness so purchased by him, he can only claim a discharge for the actual sum paid by him for the same." Thompson v. Meisner, 108 Ill. 359. If any but a *bona fide* payment in good faith by a stockholder were allowed, stockholders of a corporation, who would know of the insolvency of their corporation in advance of creditors, would be able, by a little sharp practice, to rid themselves to a large extent of liability by purchasing claims against the corporation at a discount, and thus rob creditors of a like amount of the protection guaranteed them by statute. This plan of discharge would also be against public policy, as tending to destroy public confidence in corporations. Lingle v. Insurance Co., 45 Mo. 109. "In an action to charge a stockholder with a corporate debt, defendant cannot set up as a defense that he has purchased judgments against the corporation aggregating the amount of his liability, without showing that he paid for the judgments the full amount for which they were recovered." Bulkley v. Whitcomb, 1 N. Y. Supp. 748. "Nor will a shareholder who has employed an agent to buy up claims at a discount, and then confessed judgment in favor of the agent, be permitted to plead such judgment in bar of an action by another creditor." Manville v. Karst, 16 Fed. Rep. 175. "Payment of the judgment at a discount is no exhaustion of the liability, though the judgments at full value would have exhausted it." Kunkelman v. Rentchler, 15 Ill. App. 271. "Neither may a shareholder himself buy any claims at a discount, and set them off at their face value, in an action to enforce his statutory liability to creditors." Gauch v. Harrison, 12 Ill. App. 459; Deven v. Phelps, 34 Barb. 224; Balch v. Wilson, 25 Minn. 299; Smith v. Mosby, 9 Helsk. 501.

The plaintiff complains that the cost of the proceeding in the district court was taxed to him. If, when notice was served on him, he had paid the plaintiff below the amount of his liability, he probably should not have been required to pay any cost. But when he went into the district court, and contested the right of the plaintiff below to recover from him, and the matter was decided against him in that contest, it was proper, we think, to tax the cost of such proceeding against him. For the reasons above given, it is recommended that the judgment of the district court be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

CITY OF LAWRENCE v. MONROE.

(Supreme Court of Kansas. Nov. 8, 1890.)

MUNICIPAL ORDINANCE — REGULATING SALE OF CIDER — CONSTITUTIONAL LAW — INSTRUCTIONS — APPEAL.

1. A city ordinance regulating the sale of cider which is not intoxicating by prohibiting its sale in less quantities than a gallon, and forbidding the drinking of the same at the place of sale, violates no private right, and does not unreasonably restrain trade; and the legislative power given to city councils "to enact and make all such ordinances, by-laws, rules, and regulations not inconsistent with the laws of the state as may be expedient for maintaining the peace, good government, and welfare of the city, and its trade and commerce," is sufficient authority for the enactment of such an ordinance.

2. An instruction authorizing the jury to convict the defendant for a sale made at any time within two years prior to the beginning of the prosecution, when the ordinance had not been in force only about six months prior to that time, was improper; but, as the only evidence given against the defendant was of a sale made subsequent to the passage of the ordinance, the error was immaterial.

3. The objection made upon appeal in the district court that the complaint was verified only upon information and belief was waived by the conduct of the defendant, who pleaded "not guilty," and went to trial in the police court without objection to the complaint or warrant.

(Syllabus by the Court.)

Appeal from district court, Douglas county; A. W. BENSON, Judge.

S. C. Russell, for appellant. W. C. Spangler, for appellee.

JOHNSTON, J. William Monroe was convicted in the police court of the city of Lawrence for selling cider in less quantities than one gallon, contrary to an ordinance of the city. He appealed to the district court, where another trial and conviction followed. The judgment of the court was that he pay a fine of \$50, and the costs of the prosecution, from which judgment he appeals to this court, and insists that the ordinance under which he was prosecuted and convicted is invalid. It provides that "no person shall in this city barter sell, or give away cider in less quantities than one gallon, or permit or allow the same to be drunk at any store, stand, or other place of sale. Any person violating any of the provisions of this ordinance shall be deemed guilty of a misdemeanor, and fined in any sum not less than \$10 nor greater

than \$100." The appellant contends that cider is a harmless and wholesome drink, and that the restriction upon its sale is unreasonable, and unlawful restraint of trade, in contravention of a common right, and is therefore unconstitutional. The ordinance was manifestly not enacted in pursuance of the prohibitory law, nor for the regulation of the sale of intoxicating liquors. The ordinance inferentially permits the sale of cider in quantities of a gallon or more, and the penalty for its violation may be \$10, without imprisonment. These provisions are not consonant with the law prohibiting and punishing the unlawful sale of intoxicating liquors, and hence we must infer that the ordinance was passed for the purpose of controlling the sale and disposition of cider that was not intoxicating. It will be observed that the ordinance regulates rather than prohibits the sale of cider, and the legislative power to regulate the sale of an article or liquid, which in some stages is harmless, and in others hurtful, is no longer open to question. The juice of apples quickly changes from fresh to hard cider, and hard cider is presumptively not only a fermented, but an intoxicating liquor. *State v. Shaefer*, 44 Kan. —, ante, 92. It is difficult to show when the change occurs, and when it reaches such a stage as will produce intoxication. It may have been thought that the drinking of cider might foster a taste for strong liquors, and that, if the unrestricted sale of cider by the glass was permitted, the officers might be easily deceived as to the character of the drinks sold, and that a tipping-shop might be carried on under the guise of a place to sell cider. In the interest of the health of the people, and the peace and good order of the communities, it was deemed wise to regulate the traffic. To sell it by the glass, and allow it to be drunk upon the premises where sold, was deemed to be subversive of good order, and dangerous to the health and morals of the people, and hence they imposed a regulation that it should not be sold in less quantities than one gallon, and should not be drunk at the place of sale. Such a regulation violates no private right, and does not unreasonably or improperly restrain trade. *Powell v. Com.*, 127 U. S. 678, 8 Sup. Ct. Rep. 992, 1257; *Stokes v. City of New York*, 14 Wend. 88; *Mobile v. Yuille*, 3 Ala. 137; *State v. Campbell*, 13 Atl. Rep. 585, and note. The principal contention, however, is that the power to regulate the sale was not conferred on the city council. There is no provision of statute directly authorizing the enactment of such an ordinance, but the legislature, after conferring power to pass ordinances for certain specific purposes, authorizes city councils "to enact and make all such ordinances, by-laws, rules, and regulations not inconsistent with the laws of the state, as may be expedient for maintaining the peace, good government, and welfare of the city, and its trade and commerce." Gen. St. 1889, par. 824. The same section of the statute provides that the ordinances passed in pursuance of this authority shall be enforced by suitable penalties, therein prescribed. The ordinance under consideration is not repugnant to the constitution



or laws of the state, and, as we have seen, the regulation of the same is neither unreasonable nor unjust. Every statute of the state shows the solicitude of the law to protect the health and morals of the people, and preserve the peace and good order of the communities; and it is manifest that the legislature intended that ample authority should be conferred, either by express grant or by virtue of the general powers to carry out this purpose. Instead of specifically defining every regulation which might be necessary to the health, safety, peace, and convenience of the public, the legislature enacted the general welfare clause; and it seems to us that it furnished sufficient authority for the council to pass an ordinance so clearly in the interest of peace, good order, and health as the one in question. The general welfare clause has been held to confer power upon the city council to prohibit the keeping open of stores, shops, and other places of business on Sunday. *City of St. Louis v. Cafferata*, 24 Mo. 94. Under the same general power an ordinance to prevent the keeping of a bawdy-house was held to be valid. *State v. Williams*, 11 S. C. 288. Under a similar power it was held that the council might by ordinance prohibit saloons, restaurants, and other places of public entertainment, to be kept open after 10 o'clock at night. *State v. Freeman*, 38 N. H. 426. The establishment of a by-law, imposing a penalty for mutilating any ornamental tree planted in any of the streets or public places of the city, was held to be within the authority authorizing the passage of such ordinances as "shall be needful to the good order of the city." *State v. Merrill*, 37 Me. 329. It has been held that an incorporated city, having the power to make regulations which may be necessary or expedient for the promotion of health, or the suppression of disease, has the right to require sellers of meats to take out a license. (*Kinsley v. City of Chicago*, 124 Ill. 359, 16 N. E. Rep. 260;) and it has also been held under the general welfare clause that a municipality might fix the time or places of holding public markets for the sale of food. (*Wartman v. City of Philadelphia*, 33 Pa. St. 202.) See, also, upon the same subject, *Williams v. Augusta*, 4 Ga. 509; *In re Yick Wo*, 68 Cal. 294, 9 Pac. Rep. 139; *City of St. Louis v. Schoenbusch*, 25 Mo. 618, 8 S. W. Rep. 791; *Mayor, etc., v. Williams*, 15 N. Y. 502; *State v. Welch*, 36 Conn. 215; *Com. v. McCafferty*, 14 N. E. Rep. 453; *Com. v. Davis*, 4 N. E. Rep. 577; 1 Dill. Mun. Corp. (4th Ed.) §§ 396-407. Both of the objections to the validity of the ordinance must be overruled.

It is next insisted that the court erred in charging the jury that, "in order to find the defendant guilty, you must be satisfied from the evidence beyond reasonable doubt that in the city of Lawrence about the time charged, and within two years next before the 22d day of February, 1890, the defendant sold cider to witness Babbitt in less quantities than a gallon, to-wit, by the glass." The complaint was made on the 22d day of February, 1890, charging that the sale was made on the previous day, but it appears that the ordinance alleged

to have been violated was not enacted until June 8, 1889, and hence the direction of the court permitting a conviction for a sale to Babbitt prior to that time was improper. This inadvertent statement of the court, however, could not have prejudiced the appellant. The only evidence of a sale was that given by Babbitt, who stated that he purchased cider from Monroe within a week prior to the 21st day of February, 1890, and that he came to the city of Lawrence about the 1st of January, 1890. The error was therefore immaterial, and furnishes no ground for a reversal.

It is finally urged that, as the complaint was verified only upon information and belief, it was insufficient to authorize the issuance of a warrant. This objection was not made until the case had reached the district court. He was arrested and taken before the police court, where he entered a plea of "not guilty," which was followed by a trial and a conviction, and no objection upon this ground was made until after the appeal had been taken. Even if it were true that the complaint was verified only upon information and belief, the defendant has waived that defect by the course he has taken. *State v. Allison*, 44 Kan. —, ante, 964. The judgment of the district court will be affirmed. All the justices concurring.

#### DUDLEY V. SHAW *et al.*

(*Supreme Court of Kansas. Nov. 8, 1890.*)

#### CONVEYANCE OF HOMESTEAD.

Joint consent by the husband and wife to the alienation of the homestead need not necessarily be expressed in writing, to fulfill the constitutional requirement. *Filcher v. Railroad Co.*, 38 Kan. 516, 16 Pac. Rep. 945, followed.

(*Syllabus by Green, C.*)

Commissioners' decision. Error from district court, Dickinson county; M. B. NICHOLSON, Judge.

*J. H. Mahan*, for plaintiff in error.  
*Stambaugh, Hurd & Dewey*, for defendants in error.

GREEN, C. The plaintiff below commenced a suit in ejectment to recover the S.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$  of section 22, in township 14 S., range 3 E., in Dickinson county. The defendant Charles M. Shaw filed an answer—*First*, denying the allegation of the petition; *second*, denying that plaintiff had any title to said land; and, for a *third* count, alleged: "Said defendant further answering says that, on and before the 18th day of July, 1885, one James McIntyre and Anna McIntyre were lawfully married to each other, and occupied the premises described in said plaintiff's petition, with their minor children, as a homestead, and so continued to occupy said premises as a homestead until the 1st day of May, 1888, and during all of said time had no other homestead, and no other real estate; that on the said 18th day of July, 1885, said James McIntyre, without the consent or knowledge of his said wife, Anna McIntyre, executed and delivered a quitclaim deed for the said premises, to one Halsey C. Ives, and the said Halsey

C. Ives, on the said 18th day of July, 1885, caused said quitclaim deed to be filed in the office of the register of deeds of said county of Dickinson for record; a copy of which said quitclaim deed is hereunto attached, marked 'Exhibit A,' and made a part of this answer; and thereafter, on the 16th day of September, 1885, the said Anna McIntyre, without the knowledge or consent of her said husband, James McIntyre, executed and delivered to the said Halsey C. Ives a warranty deed for said premises, and the said Halsey C. Ives, on the 17th day of December, A. D. 1885, caused said warranty deed to be filed for record in the office of the register of deeds of said county of Dickinson, a copy of which said warranty deed is hereto attached, marked 'Exhibit B,' and made a part of this answer; and thereafter, on the — day of —, 18—, said Halsey C. Ives, by his deed in writing, pretended to convey said premises to said plaintiff; that said plaintiff, at the time he received said pretended deed of conveyance from said Halsey C. Ives, was well acquainted with all the facts in relation to the said premises having been occupied by the said James McIntyre and Anna McIntyre, with their minor children, as a homestead, as hereinbefore set forth, and the said plaintiff has no further right, title, or interest in or to said premises, or any part thereof. Thereafter, on the 22d day of May, A. D. 1886, said James McIntyre and Anna McIntyre, for a valuable consideration, paid by said defendant Charles M. Shaw, sold, and by their deed in writing duly executed, and acknowledged, and conveyed all the premises in said plaintiff's petition to said defendant Charles M. Shaw, and said defendant, on the 25th day of May, 1886, caused said deed of conveyance to be duly recorded in the office of the register of deeds of said county of Dickinson, state of Kansas, (a copy of which said deed of conveyance is hereto attached marked 'Exhibit C,' and made a part of this answer,) and thereby became, and ever since has been, and now is, the owner in fee-simple of the premises described in plaintiff's petition. Wherefore said defendant Charles M. Shaw prays that the pretended title of said plaintiff to said premises may be adjudged void; that the title of said defendant to said premises may be quieted; and that he may recover his costs herein." Pending the suit, the plaintiff in error obtained possession of the land in controversy and dismissed his petition, without prejudice, and filed the following reply: "Comes now the said plaintiff, and, for reply to the answer of Charles M. Shaw, says he admits the making of the deeds set out in the answer of the said defendant and the filing and record thereof, as shown thereby, but denies that the consideration for the said deed of May 12, 1886, by Anna McIntyre and James McIntyre to said Charles M. Shaw was \$10, as therein expressed, but was \$5 only; and that said land at said date was well worth the sum of \$3,000, which said defendant Shaw then well knew. Plaintiff further admits that said Anna McIntyre and James McIntyre were husband and wife, but avers that, long before the making of any of said

deeds set out in said answer, the said James McIntyre had abandoned his said family, and had left them in occupation of said land as their homestead, and said James McIntyre had abandoned all claim to said homestead, and had fully authorized and empowered his said wife, Anna McIntyre, to sell and convey the same, and that said quitclaim deed of said James McIntyre, dated July 15, 1885, was made for the purpose of expressing to his said wife and said Halsey C. Ives his consent aforesaid to Anna McIntyre to sell and convey said homestead. That at no time thereafter did said James McIntyre ever occupy said land or claim said land as his homestead, nor does he yet claim the same. That at the time of said execution of said deed by Anna McIntyre to the said Halsey C. Ives, on the 16th day of September, 1885, the said Anna McIntyre, with the consent of her said husband, James McIntyre, sold said land to said Halsey C. Ives, and attempted to convey the same by said deed. That her said husband, James McIntyre, at all times consented, and yet consents, thereto, and thereupon the said Anna McIntyre, with the consent of her said husband, James McIntyre, put said Halsey C. Ives in the actual possession of said land, and said Halsey C. Ives thereupon paid said Anna McIntyre a consideration therefor, to her full satisfaction and to the satisfaction of said James McIntyre, and said Anna McIntyre and James McIntyre are yet satisfied therewith, and at all times have been, and yet desire that this plaintiff shall have this land, all of which has been at all times well known to the said defendant Charles M. Shaw, and was so well known to him at the time he took said deed dated May 22, 1886; and at the time said deed was made and delivered, as aforesaid, said Halsey C. Ives was in the actual possession and occupation of said land; and said Charles M. Shaw, well knowing all these facts, by importunity and for a consideration of \$5 only, procured said James McIntyre and Anna McIntyre to execute said quitclaim deed of May 22, 1886, the said Anna McIntyre not knowing the purpose of said Shaw in procuring said deed, and the said Anna McIntyre and James McIntyre then informing said Shaw that they had no title to or interest in said land, and nothing therein to sell, nor did they pretend to convey any title or interest in said land to said Charles M. Shaw by said quitclaim deed. That thereafter, and about the month of April, 1886, the said Halsey C. Ives sold and conveyed said land by warranty deed to this plaintiff, and the plaintiff, thereupon relying upon said title, paid off incumbrances upon said land to the amount of \$800. That said incumbrance was so paid off after the making and delivering of said deed of September 16, 1885, and, after the conveyance of said land to him by said Halsey C. Ives, and for the purpose of enabling him to pay off said incumbrance, he executed to one L. B. West, of the state of New York, a mortgage in the sum of \$800, upon said land. That about the 1st of October, 1886, the said defendant Charles M. Shaw, wrongfully, by threats, entered upon said land and put thereon, as his tenant, the

said defendant William Tomblin, who occupies said land now, and did at the commencement of this suit, as the tenant of said Charles M. Shaw, and he has no other interest in or claim to said land. This plaintiff therefore avers that said Charles M. Shaw took no title to said land by said quitclaim deed of May 22, 1886, and that long prior thereto the plaintiff and said Halsey C. Ives, under whom he claims, had not only the legal title to said lands, but the equitable title thereto, and were in the actual possession and occupation thereof, until wrongfully dispossessed by said defendants about the 1st of October, 1886. Wherefore plaintiff prays judgment as in his petition prayed." And afterwards filed the following amendment to his reply: "Comes the plaintiff, and for further reply, and by way of amendment to his reply herein, says that, at the time the said James McIntyre and his wife, Anna McIntyre, occupied the property in controversy, there arose a difficulty between them, and the said James McIntyre abandoned his said home and family, and a divorce suit was instituted by his said wife, Anna McIntyre, and, in consideration of the dismissal of said suit, the said James McIntyre deeded to his said wife all his interest in said land, and they agreed to live apart, and did live so separate and apart until long after said Anna McIntyre made the deed of said land to Halsey C. Ives, and said Anna McIntyre and her children occupied said land as a homestead until said deed was made to Ives, whereupon she abandoned her home, and put said Halsey C. Ives in possession thereof, and that both said James McIntyre and Anna McIntyre have at all times been, and yet are, satisfied therewith." To this reply and amendment the defendant Shaw demurred, which was sustained by the court below. The plaintiff in error brings the case here for review.

The only question presented for our consideration is the sufficiency of the reply of the plaintiff. We think the reply is sufficient. This court has said: "The constitution of the state does not in express terms require the alienation of the homestead by the joint consent of husband and wife, when that relation exists, to be evidenced by a writing; and hence the consent of the wife to the grant or alienation of an easement in their homestead, for the right of way of a railroad, may be shown by such evidence as is deemed necessary to establish any other material fact." *Pilcher v. Railroad Co.*, 38 Kan. 516, 16 Pac. Rep. 945. It will be noticed by a reference to the reply that it contains the allegation of consent, upon the part of the husband and wife, that the quitclaim deed of July 18, 1885, was made for the purpose of expressing consent, and that the deed made by Anna McIntyre on the 16th of September was made with the consent of her husband, and that the grantee was placed in possession with the consent of the husband and wife. We think the reply stated facts sufficient to show that there was joint consent, upon the part of the husband and wife, to the alienation of this land, and that the court erred in sustaining the demurrer to the reply. It is recom-

mended that the judgment of the court below be reversed.

PER CURIAM. It is so ordered; all the justices concurring.

#### MISSOURI PAC. RY. CO. v. JOHNSON.

(Supreme Court of Kansas. Nov. 8, 1890.)

#### ACCIDENTS AT RAILROAD CROSSINGS—DEMUR- RER TO EVIDENCE—INSTRUCTIONS.

1. Where the testimony of the plaintiff is introduced, and it tends fairly to establish every material fact necessary to be proven under the allegations of the petition, it is not error for the court to overrule a demurrer to the evidence.

2. Objections to the instructions of the trial court, to be available in this court, should be made and the rulings excepted to on the trial; otherwise they are waived. *Gafford v. Hall*, 39 Kan. 166, 17 Pac. Rep. 851, and *Mercantile Co. v. Fullam*, 43 Kan. 181, 23 Pac. Rep. 104, followed.

3. Special instructions asked by the defendant below, of the trial court, considered, and held, that no error was committed in refusing the same.

4. The court is under no obligation to repeat its general charge in the form of special instructions. *Deitz v. Regnier*, 27 Kan. 94, followed.

5. Special instructions should conform to the facts at issue in each particular case.

6. It is not error for the court to refuse to charge the jury that negative testimony of a witness, in regard to sounding the whistle of a locomotive, is entitled to but little weight, as against evidence of one who heard the sounding of the whistle, when the evidence upon the failure to sound the whistle is just as positively stated as the fact that the whistle was sounded. *Railroad Co. v. Lane*, 33 Kan. 702, 7 Pac. Rep. 587, followed.

(Syllabus by Green, C.)

Commissioners' decision. Error from district court, Wilson county; L. STILLWELL, Judge.

W. A. Johnson, for plaintiff in error. S. S. Kirkpatrick, for defendant in error.

GREEN, C. Sarah J. Johnson brought this suit in the district court of Wilson county, against the Missouri Pacific Railway Company, to recover damages for alleged personal injuries she claims to have sustained. She alleged in her petition: "That on the 3d day of April, 1887, the defendant was operating a certain line of railroad through the county of Wilson, and state of Kansas, known as the Verdigris Valley, Independence & Western Railroad, which said railroad, so operated by defendant, runs across a certain highway, which said highway was duly and legally laid out and traveled prior to the construction of said railroad. That where said railroad crossed said public highway, and prior to the construction of said railroad, the ground was smooth and level; in constructing said railroad an embankment, some six feet high, was thrown up by the defendant company, upon which it constructed its said road. That the defendant negligently and carelessly constructed approaches to said crossing which were narrow, steep, and unsafe, and have failed to restore said public highway to its former condition, or to such condition as did not materially impair its usefulness. That the approach to the railroad by the public highway was obstructed by a high

hedge along the north side of the highway, so it was impossible for a person using the highway to observe a train or other object through the hedge. That, where the railroad passes through the hedge fence, an opening was cut for a distance of eighty feet in width; and, aside from this opening, this hedge fence grew upon the north side of the highway a distance of half a mile, and a distance of a quarter of a mile on each side of the railroad track, which rendered said crossing very dangerous, unless a great deal of care was exercised upon the part of the railway company in operating the road. That on the 3d day of April, 1887, the plaintiff was traveling upon said highway in a wagon drawn by two mules, going in an easterly direction; said railroad, by reason of said hedge fence, was entirely obstructed from the view of the plaintiff north of the crossing. That the plaintiff, knowing the dangerous condition of said crossing, approached the same with great care, intending to stop, look, and listen for an approaching train, but, upon approaching said crossing and before she could get a view of said track, said defendant, its agents and servants, ran one of its trains of cars drawn by a locomotive engine down said track in a south-easterly direction, and over said crossing, which said train of cars passed directly in front of the mules driven by plaintiff's husband, and caused them to jump from the narrow approach to said crossing, down an embankment a distance of six feet, carrying with them the wagon in which plaintiff was then sitting. By reason of the premises the plaintiff was thrown out of said wagon, down said embankment, striking a post upon the side of the highway, then dragged by said team a distance of about eighteen feet, and was mangled, bruised, and injured. Plaintiff avers that defendant neglected and failed to sound the whistle of said locomotive engine eighty rods before approaching said crossing, by reason whereof she was not warned of said approaching train until the same passed over the crossing immediately in front of the mules driven by her husband. That, had defendant's agents and servants sounded said whistle, as it was their duty to do, eighty rods before approaching said crossing, she would have heard the same and averted the accident." To this petition the railroad company interposed a general denial, and for a second defense set up contributory negligence upon the part of the plaintiff which directly contributed to the injury. The cause was tried in October, 1887, before a jury, and the plaintiff below recovered a judgment for \$1,700, which was approved by the trial court. A number of errors are assigned upon the rulings of the district court.

1. The first is that the court should have sustained the demurrer of the defendant to the evidence of the plaintiff. The accident occurred on the afternoon of Sunday, April 3, 1887. The plaintiff was returning home with her husband and two children from a neighbor's. They were riding in a wagon drawn by two mules. On the north side of the highway on which they were traveling, there was a tall hedge

fence which obstructed the view of a train passing on the track of the defendant's railroad. This hedge extended for about a half mile east and west of the railroad crossing. The railroad at the crossing was not quite parallel with the hedge, the railroad running from north-west to south-east and more east than south. The plaintiff below testified that, before passing behind the hedge, and while she had a view of the railroad, she looked up the track to see if any train was approaching, and she could see none, although she could see the track for a quarter of a mile or more, possibly a mile; that the mules were brought to a walk, in order that she might see; that while she approached the crossing, she was listening for the train, and that her ears were unobstructed by any wraps. She continued to listen for the train during all the time that her view was obstructed. About the time the wagon got within 75 or 80 feet of the crossing, the mules became frightened and started to run towards the crossing, and just as they came within three or four feet of the track, the train passed directly in front of them. The mules turned suddenly to the right, down an embankment thrown up to make the crossing over the railroad track, and threw the plaintiff out. That the whistle was not sounded before the train approached the crossing; that, if it had been, she would have heard it; that, if the whistle had been blown and given her warning, the accident would have been avoided. Four other witnesses corroborated the statement of the plaintiff that the whistle was not sounded until the train reached the crossing. We think the evidence was sufficient to permit the case to go to the jury. There was testimony tending to support the allegations of the petition, and to establish every necessary fact. *Kiff v. Railroad Co.*, 32 Kan. 263, 4 Pac. Rep. 401; *Wolf v. Washer*, 32 Kan. 533, 4 Pac. Rep. 1036; *Brown v. Railroad Co.*, 31 Kan. 1, 1 Pac. Rep. 605; *Waterson v. Rogers*, 21 Kan. 529; *Jansen v. City of Atchison*, 16 Kan. 358.

2. The second error assigned is that there was no evidence given on the trial of any mental suffering in consequence of injuries, and that the charge of the court which said to the jury that the plaintiff would be entitled to recover in the event they should find for her such sum as would compensate her for physical pain she may have suffered in consequence of such injury, and, also, for mental suffering resulting from such physical pain. It will be unnecessary for us to notice this error, as the defendant did not except to the general charge, or to any portion of it. Alleged errors to the instructions of the court, to be considered by this court, should be excepted to by the party wanting them examined. *Mercantile Co. v. Fullam*, 43 Kan. 181, 23 Pac. Rep. 104; *Gafford v. Hall*, 39 Kan. 166, 17 Pac. Rep. 851.

3. The next complaint the plaintiff in error makes is the refusal of the court to give the 6th and 7th special instructions. The 6th special instruction did not state the law correctly. It was to the effect that the railroad company had a right to precedence in crossing a highway. The

correct rule, as we understand it, is that both the railroad company and the traveler have an equal right to cross, and the law imposes on both parties the duty of using reasonable and prudent precautions to avoid accident and danger. Sackett, Instructions, 406. As to the 7th special instruction, refused, the court had already instructed the jury fully upon the duty of a person approaching a railroad crossing, and this was sufficient. *Deltz v. Regnier*, 27 Kan. 94; *Evans v. Lafayette*, 29 Kan. 736; *State v. Bailey*, 32 Kan. 83, 3 Pac. Rep. 769.

4. Counsel for plaintiff in error insists that the trial court erred in refusing to give the 8th, 15th, and 16th special instructions. We have carefully examined the general charge of the court, and we think all of the matters embodied in these special instructions are fully covered by the instructions given by the court.

5. The next complaint is based upon the refusal of the court to give the 20th special instruction, which was to the effect that the engineer, seeing the plaintiff's team upon the highway, had a right to believe that the plaintiff's team was gentle and in the hands of a competent driver, and that he would not approach so close to the track as to incur danger. This requested instruction assumed a fact which was for the determination of the jury. There was a disputed question as to whether or not the parties approaching the crossing could see the engine or the approaching train, and whether the engineer could see the parties approaching the crossing. We think the instruction was properly refused.

6. The complaint that the trial court erred in its refusal to give the 22d and 24th special instructions is not good. In each it is assumed that the engineer, brakeman, and conductor gave evidence that the whistle was sounded 80 rods before the engine reached the highway crossing. This was not the case. One of the brakemen testified that the whistle was blown about 200 yards from the crossing. The other brakeman said the whistle was sounded about 300 yards before reaching the crossing. The conductor estimated the distance to be about 200 yards, and the engineer fixed the distance about the same. Complaint is made to the ruling of the court in refusing to give the 23d special instruction, in relation to the evidence of the plaintiff and defendant in regard to sounding the whistle, one being of a negative character, and the other positive. In this case the testimony of the plaintiff was quite as positive as that of the defendant, and we do not think it was error for the court to refuse the instruction. This court has stated the rule in regard to negative and positive testimony in the case of *Railroad Co. v. Lane*, 33 Kan. 720, 7 Pac. Rep. 587. Measured by the rule established in that case, it was proper for the court to refuse this instruction.

Upon the final objection that the trial court should have set aside the verdict and special findings in this case, it is sufficient for us to say that an examination of the testimony shows that there was some evidence to support and uphold the verdict

of the jury. We recommend that the judgment be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

#### STATE V. DOUGLASS.

(*Supreme Court of Kansas. Nov. 8, 1890.*)

PLACING OBSTRUCTIONS ON RAILROAD—INSTRUCTIONS—DRUNKENNESS AS DEFENSE—CHARACTER OF ACCUSED.

1. Upon the trial of a person charged with unlawfully placing an obstruction upon a railroad track, it is not error for the court to instruct the jury that if they believe, from the evidence, that another person than the defendant willfully placed the obstruction on the railroad track, and that if they should find, from the evidence, beyond a reasonable doubt, that the defendant was present, and encouraged, consented, aided, or advised such other person to place such obstruction on the track, then the defendant would be equally guilty.

2. Instruction examined, and held sufficient.

3. Voluntary drunkenness is no excuse for crime committed while under its influence.

4. Where, in the trial of a criminal case, the court instructed the jury generally as to the competency of evidence of good character, and said that, in all cases where all the evidence clearly shows guilt beyond a reasonable doubt, then such former good character can be of little value. Held, under the circumstances of the case, not to be erroneous.

(*Syllabus by Green, C.*)

Commissioners' decision. Appeal from district court, Shawnee county; JOHN GUTHRIE, Judge.

*David Overmyer* and *B. C. Mitchner*, for appellant. *L. B. Kellogg*, Atty. Gen., and *R. B. Welch*, for appellee.

GREEN, C. The defendant in this case was charged with unlawfully placing an obstruction upon the rails and track of the Chicago, Kansas & Nebraska Railroad. He was tried and convicted at the January term of the district court of Shawnee county, and now appeals to this court, alleging various errors in the instructions given by the trial court, which we will consider in their order.

1. The first error complained of is the eighth instruction given by the court below, which was as follows: "If you believe from the evidence that another person than the defendant willfully placed the railroad tie on the rails or track of the railroad described in the information on or about October 22d, 1888, in this county,—actually placed the tie or solid piece of timber on the side-rails or track of the said railroad,—and you further find from the evidence, beyond a reasonable doubt, that the defendant was present when the tie or timber was placed on the railroad track, and encouraged, consented to, aided, or advised such other person to place said obstruction on the said railroad track, then the defendant would be equally guilty as if he had willfully placed the obstruction on the track himself, with his own hands." It is claimed by the learned counsel of the appellant that in giving this and other instructions the court impressed upon the jury the idea that if some other person actually placed the obstruction upon the track, yet, if the defendant "consented" to

that act, he was equally guilty as though he had done the act with his own hands. We do not think the instruction is susceptible of the interpretation placed upon it by counsel. The jury were told by the court that if they should find from the evidence, beyond a reasonable doubt, that the defendant was present when the tie or timber was placed upon the railroad track, and encouraged, consented to, aided, or advised such other person to place said obstruction on the railroad track, then the defendant would be equally guilty. Now, it seems to us that the jury would not be impressed, from this language used by the court, that mere passive presence would justify a verdict of guilty. The idea is one of active participation, presence, and encouragement, consenting to, and aiding in, the commission of crime. Under the circumstances surrounding this case, and the nature of the offense charged, the court committed no error in giving the eighth instruction.

2. We have carefully examined the tenth instruction, and think that it conveys the same idea. In the tenth instruction, the court told the jury that if the defendant went with another person who was, or had been, in the employment of the railroad company, and at some time before the obstruction was placed upon the railroad track, as charged in the information, and the defendant had agreed, or had an understanding, that an obstruction should be placed upon the track by either, or both of them, and that they should find from the evidence, beyond a reasonable doubt, that the defendant placed the obstruction on the track, at the time and manner charged in the information, or that such other person placed the obstruction on the railroad track, as charged in the information, with the consent of the defendant, or that the defendant counseled, aided, or abetted such other person in placing the obstruction upon the railroad track, they should find the defendant guilty. In finding the true intent and meaning of this language, we should go back and interpret the instruction as an entirety, and we will see that the idea of consent alone is not all that is expressed in this instruction, but that there must have been an agreement or understanding beforehand that this crime should be committed. The doctrine is well settled that a person may be convicted of a crime, who had aided or encouraged the commission of the same, although not actually present. *Sharp v. State*, 6 Tex. App. 650; *State v. Hamilton*, 13 Nev. 386; *State v. Maloy*, 44 Iowa, 104.

3. The appellant complains of the twelfth instruction, which reads: "If you believe from the evidence that, on the afternoon of October 22, 1888, the defendant was in a state of intoxication, still this would not constitute a defense of the offense charged in the information, if the offense was committed by the defendant, or by his consent, unless the defendant was in such a state of stupefaction as to be unconscious of right or wrong, and then the defendant would not be excusable, if you find from the evidence, beyond a reasonable doubt, that the defendant started from Topeka with the formed plan or design to accomplish the

offense charged in the information, and in pursuance of such a plan or agreement the defendant started from Topeka alone, or with another, and placed the obstruction on the railroad track, as charged, or counseled, aided, abetted, or advised another to place the obstruction on the track of the railroad." The contention of counsel is that the court was not justified in telling the jury that the defendant would not be excusable, although in a state of stupefaction, if he started out with the formed plan of committing the offense charged in the information. We perceive no error in this rule. Voluntary intoxication, or drunkenness, is no excuse for a crime committed under its influence. *State v. Coleman*, 27 La. Ann. 691; *Beasley v. State*, 50 Ala. 149; *State v. Thompson*, 12 Nev. 140; *Fitzpatrick v. People*, 98 Ill. 270; *Colbath v. State*, 2 Tex. App. 391. This court has said that, if a man kills another while in a fit of voluntary intoxication, it is murder, and he must suffer the penalty. *State v. Yarborough*, 39 Kan. 597, 18 Pac. Rep. 474.

4. The final error which we shall notice is the criticism of the appellant to the thirteenth instruction, in which the court said to the jury, with reference to evidence of good character: "There has been evidence offered by the defendant respecting his good character as a peaceable, orderly, law-abiding citizen, and such evidence is competent and proper to be considered by the jury, in connection with other evidence in the case, in determining the guilt or innocence of the defendant of the matters charged against him, and such evidence is particularly important for the defendant in cases where there may be a doubt as to the guilt, and in all such cases the question of character should resolve such doubt, whatever it may be, in favor of the defendant; but in all cases, where all the evidence clearly shows guilt beyond a reasonable doubt, then such former good character can be of little value." The last clause of this instruction, the appellant contends, was erroneous. The language used is very broad and sweeping. The court said to the jury that where all the evidence clearly showed guilt, beyond a reasonable doubt, then such former good character can be of little value. This instruction, taken in connection with what preceded it, could not have prejudiced the rights of the defendant. The court had said to the jury that evidence of good character was competent for them to consider in connection with other evidence in the case. The language used by Chief Justice SHAW in the celebrated trial of Webster, 5 Cush. 325, was much stronger against the defendant than the language of the court in the case at bar. The court said, in that case: "Against facts strongly proved, good character cannot avail." In this case, the court said where all the evidence clearly shows guilt, beyond a reasonable doubt, good character can be of little value. There might be a question as to whether the instruction was strictly applicable in this case; still we fail to see how the defendant could have been prejudiced. If all the evidence clearly showed that the defendant was guilty, good character alone should

not outweigh the positive evidence of witnesses. It is not itself a defense, but may turn the scale in the defendant's favor. *State v. Donovan*, 61 Iowa, 278, 16 N. W. Rep. 130; *State v. Turner*, 19 Iowa, 144; *State v. McMurphy*, 52 Mo. 251; *State v. Levigne*, 17 Nev. 435; *U. S. v. Jackson*, 29 Fed. Rep. 503. The refusal of the court to give the instructions requested by the de-

fendant was not erroneous. There was no evidence to justify the giving of such instructions. We find no errors in the record which justify a reversal of this cause, and therefore recommend an affirmance of the judgment.

PER CURIAM. It is so ordered; all the justices concurring.

END OF VOLUME 24









